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DISTRICT COURT

CLARK COUNTY, NEVADA

LANCE RICHARDS and KURT HAUFFE, on behalf of themselves and all others similarly situated, Plaintiffs, v. FX ENERGY, INC., DENNIS B. GOLDSTEIN, ARNOLD S. GRUNDVIG, JR., H. ALLEN TURNER, DAVID PIERCE, JERZY MACIOLEK, ORLEN UPSTREAM SP. Z O.O., and KIWI ACQUISITION CORP., Defendants. AND ALL CONSOLIDATED CASES.	Case No. A-15-726409-C Dept. No. XI Consolidated with: Case No. A-15-726642-C Case No. A-15-726656-C Case No. A-15-726734-C **DECLARATION OF SEAN J. GRIFFITH IN SUPPORT OF DEFENDANTS FX ENERGY, INC. AND KIWI ACQUISITION CORP.'S OPPOSITION TO MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES**

I, Sean J. Griffith, under penalties as provided by law, declare that the statements set forth in this instrument are true and correct to the best of my knowledge. I am over the age of 21 and have personal knowledge of the facts stated herein.

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I. PRELIMINARY STATEMENT

1. I have been asked to provide an independent opinion relating to the benefits, if any, provided to the stockholders of FX Energy, Inc. ("FX" or the "Company") from the filing and prosecution of the above-referenced litigation. In connection with providing this opinion, I have reviewed litigation documents provided to me by counsel for Kiwi Acquisition Corp. along with certain other publicly available information.

2. As is typical of lawsuits filed in the wake of M&A activity, this litigation resulted in no monetary benefit for the stockholder class but rather resulted in a set of supplemental disclosures. Any benefit from the litigation thus depends upon the two supplemental disclosures that were obtained: (1) financial models providing sensitivity analyses for the five-year "success case" and the five-year "failure case" of the Company (the "Financial Models"), and (2) certain inputs used in the financial advisor's NAV analysis (the "NAV Inputs").

3. A supplemental disclosure benefits stockholders only when the information it provides is material. To be material, omitted information must alter the "total mix" of information available to stockholders. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). This standard is rigorously applied by courts in the context of merger litigation.

4. Neither the Financial Models nor the NAV Inputs are material. The Financial Models are immaterial because they were never intended to be used for valuation purposes and because the information they contained had become stale and unreliable by the time it was provided to shareholders. The resulting disclosures were thus irrelevant at best.

5. The NAV Inputs are immaterial because all of the information underlying the NAV Inputs had been available to shareholders on the Company's website long before it was provided in the form of a supplemental disclosure. Information that is already publicly available does not alter the total mix of information available to shareholders and is therefore immaterial.

6. Because the supplemental disclosures in this case were not material, they provided no benefit to the stockholder class. If anything, the litigation harmed the Company's stockholders by delaying the closing of the tender offer. The manner in which plaintiffs pursued this litigation

resulted in a 13 day delay to the closing of the transaction, which was approved by more than 98% of the shareholders. This delay merely resulted in holding up the payment of funds to the Company's stockholders, thereby depriving them of the time value of money. This is a measurable harm visited upon the stockholder class by plaintiffs, with no offsetting benefit.

7. Plaintiffs' counsel argue that they should receive fees because they provided a benefit to the Company and its stockholders. Because plaintiffs' counsel have not benefitted the Company or its stockholders and have, if anything, harmed them, plaintiffs' counsel are not entitled to any award of fees in this case.

8. The basis of each of these opinions is provided in greater detail below.

II. PERSONAL BACKGROUND AND QUALIFICATIONS

9. I am the T.J. Maloney Professor of Law at the Fordham University School of Law, where I am also the Director of the Corporate Law Center. I have taught at Fordham since 2006 and have also taught at Columbia Law School, New York University School of Law, the University of Connecticut School of Law, and the University of Pennsylvania Law School. Before becoming an academic, I practiced law at Wachtell, Lipton, Rosen & Katz in New York City. A copy of my curriculum vitae is attached hereto as Appendix A.

10. My specialty is corporate law with a particular focus on mergers & acquisitions and shareholder litigation. I am the author of several publications that directly address issues in merger litigation, including, most recently, Jill E. Fisch, Sean J. Griffith, and Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 Texas Law Review 557 (2015); Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 Boston College Law Review 1 (2015); Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 Vanderbilt L. Rev. 1053 (2013).

11. One of my chief contributions to the field is the empirical finding that the supplemental disclosures provided to stockholders in connection with merger litigation have no

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discernible effect on stockholder voting, a finding now cited by courts in scrutinizing the benefits of supplemental disclosures. *See* Fisch, et al., *Confronting the Peppercorn Settlement* at 585

12. I have analyzed many merger lawsuits. I recently led a law school seminar that tracked developments on a broad portfolio of recently filed merger claims. Moreover, in an effort to apply insights from my research to the actual practice of law, I have intervened as a shareholder objector in two merger settlements and filed expert affidavits or otherwise assisted in six other merger cases. Most notably, I filed a brief as *amicus curiae* in *In re Trulia Inc. Stockholder Litigation ("Trulia")*, the Delaware Court of Chancery opinion that set forth a new standard for scrutinizing supplemental disclosures and thereby changed the nature of merger litigation in Delaware. [1]

III. A BRIEF HISTORY OF JUDICIAL SCRUTINY OF DISCLOSURE-ONLY RESOLUTIONS.

13. In these combined academic and practical pursuits, I have become very familiar with Courts' approaches to determining the materiality of amended or additional disclosures made in the course of litigation challenge proposed mergers.

14. Judicial scrutiny of materiality in the context of supplemental disclosures has increased markedly in recent years. No longer do courts simply defer to the litigants' assertions concerning the materiality of supplemental disclosures. Rather, courts have required that supplemental disclosures be "plainly material." *Trulia*, at 898

15. Enhanced scrutiny of supplemental disclosures arose out of an environment in which merger litigation had become ubiquitous. In recent years over 90% of all public company mergers with deal values greater than $100 million have been the subject of shareholder lawsuits, more than doubling the statistics from a decade ago when a mere 39.3% of such mergers were challenged in litigation. *See* Matthew D. Cain & Steven Davidoff Solomon, *Takeover Litigation in 2015* 2 (Jan

[1] 129 A.3d 884 (Del. Ch. 2016). *See infra* paragraphs 23-24 (discussing *Trulia*). For media accounts of how *Trulia* with changed merger litigation, see generally Steven Davidoff Solomon, *Dealbook: Why the Surge in Merger Litigation Fizzled*, N.Y. TIMES, Jan. 22, 2016, http://www.nytimes.com/2016/01/23/business/dealbook/why-the-surge-in-merger-litigation-fizzled.html; Liz Hoffman, *A 'Nail in the Coffin' for Flimsy M&A Suits*, WALL ST. J., Jan 25, 2016, http://blogs.wsj.com/moneybeat/2016/01/25/a-nail-in-the-coffin-for-flimsy-ma-suits/.

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14, 2016), *available at* http://ssrn.com/abstract=2715890 (hereinafter, "*Takeover Litigation*"). The vast majority of such cases involve no monetary recovery to the class, but result instead in nothing more than supplemental disclosures. *Id.*, at 4 (showing that more than 80% of settlements are disclosure settlements).

16. Recognizing that the engine of this litigation activity was the near-automatic award of fees to plaintiffs' counsel in exchange for producing supplemental disclosures of little or no real value to the shareholder class, courts have recently reaffirmed the longstanding but inconsistently applied rule of materiality. Supplemental disclosures are compensable only if they provide a material benefit to the shareholder class.

17. Although Delaware is often credited with leading in this area, the new era of judicial scrutiny of supplemental disclosures began in New York, where courts refused to approve the settlement of several merger class actions because the supplemental disclosures provided no material benefit to the shareholder class. See, e.g., *Gordon v. Verizon Communications*, 2014 WL 7250212 (N.Y. Sup. Ct. Dec. 19, 2014) (emphasizing that "[e]nhanced or corrected disclosure, in order to support a settlement, must be a material improvement over what had been previously disclosed" and declining to either approve settlement or award fees); *City Trading Fund v. Nye*, 2015 WL 93894, at *19 (N.Y. Sup. Ct. Jan. 7, 2015) (denying approval of a settlement class and finding the proposed settlement was not in the best interests of the class because plaintiffs had not "alleged *material* omissions or settled for *material* supplemental disclosures"); *In re Allied Health Care*, 2015 WL 6499467, at *1 (N.Y. Supr. Oct. 23, 2015) ("Not one of the additional disclosures the defendants included in the supplement to the proxy at class counsels' urging could be characterized as significant nor would the failure to make any of the additional disclosures have resulted in this Court issuing a preliminary injunction to prevent or delay the merger.").

18. The judges in these cases have been forthright in their criticism of the judicial processes that have enabled these outcomes. For instance, Judge Ramos of the Commercial Division of the Supreme Court of the State of New York, emphasized "The willingness to rubber

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stamp class action settlements reflects poorly on the profession and on those courts that, from time to time, have approved these settlements."[2]

19. Delaware followed. In July 2015, Vice Chancellor Laster refused to approve a disclosure-only settlement where plaintiffs settled for "precisely the type of nonsubstantive disclosures that routinely show up in these types of settlements." *Acevedo v. Aeroflex Hldg. Corp.*, C.A. No. 9730–VCL, at 73 (Del. Ch. July 8, 2015) (TRANSCRIPT).

20. A few months later, the same judge denied approval to another settlement, noting that plaintiffs provided inadequate representation to the class by filing litigation when "there wasn't a basis to file in the first place" and then failing to aggressively litigate when discovery turned up potentially valuable information. *In re Aruba Networks, Inc. Stockholder Litigation*, Consol. C. A. No. 10765-VCL, at 73 (Del. Ch. Oct. 9, 2015) (TRANSCRIPT). The *Aruba* plaintiffs found to be inadequate were represented by, among other firms, Rigrodsky & Long, P.A., who are seeking fees for their representation of plaintiff Theodore Roets in this action. *See* Declaration of Marc L. Ackerman ISO Plaintiffs' Motion for an Award of Fees and Expenses (hereinafter "Ackerman Aff."), Ex. 17 (filed May 27, 2016

21. At the same time, another line of Delaware cases pledged to subject future disclosure settlements to more exacting scrutiny. *See, e.g., In re Riverbed Technology, Inc. Stockholders Litigation*, 2015 Del. Ch. LEXIS 241, at **20 (Del. Ch. Sept. 17, 2015) ("If it were not for the reasonable reliance of the parties on formerly settled practice in this Court, … the interests of the Class might merit rejection of a settlement encompassing a release that goes far beyond the claims asserted and the results achieved").

22. Other rulings, meanwhile, slashed the fees requested by plaintiffs' counsel in disclosure cases. *See id.* at *28 (cutting plaintiffs' fee award from the requested $500,000 to $329,881.61); *see also In re Silicon Image, Inc. S'holders Litig.*, C. A. No 10601-VCG, at 55, 58 (Del. Ch. Dec. 9, 2015) (TRANSCRIPT) (approving fee request of $425,000 but noting that "[i]f this were a post-July [2015] case, I suspect strongly my decision here would be different. . . ."); *In*

[2] *In re Allied Health Care*, 2015 WL 6499467, at *3.

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re Intermune, Inc. S'holder Litig., C.A. No. 10086-VCN, at 10, 15 (Dec. 29, 2015) (TRANSCRIPT) (cutting fee award from $ 470,000 to $ 325,000).

23. The Delaware cases culminated in Chancellor Bouchard's decision in *Trulia*. Like the case before this Court, *Trulia* involved a merger claim that started out by challenging the deal price and the negotiation process but then was ultimately resolved for supplemental disclosures and no payment to the plaintiff class. *Trulia*, 129 A.3d at 887 (describing the case as one wherein "[t]he only money that would change hands is the payment of a fee to plaintiffs' counsel").

24. In *Trulia*, Chancellor Bouchard asserted that the long existing standards would henceforth be scrupulously applied:

> [P]ractitioners should expect that disclosure settlements are likely to be met with continued disfavor in the future unless the supplemental disclosures address a ***plainly material misrepresentation or omission***…. In using the term "plainly material," I mean that ***it should not be a close call that the supplemental information is material*** as that term is defined under Delaware law.[3]

25. The clear lesson from these cases is that courts in Delaware and elsewhere must scrutinize supplemental disclosures for materiality. The standard is the same whether the disclosures are the grounds for settlement or the basis of a fee request under the corporate benefit doctrine. In order to provide a benefit, the disclosures must be material.

26. Although plaintiffs acknowledge the materiality standard in their Motion for an Award of Attorney's Fees and Expenses and repeatedly assert that their disclosures are material, they do not mention *Trulia*'s holding that such materiality must be clear and "plainly" so. In fact, in spite of relying extensively on Delaware authority, plaintiffs cite no Delaware case law from 2015 or 2016, when the Delaware Court began to increase their scrutiny. When they do cite authority, it is merely to parrot, out of context, from cases that did result in supplemental disclosures.[4]

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[3] *Id.*, at 898-99 (emphasis added, citations omitted).

[4] *See* Motion for an Award of Attorneys' Fees and Expenses, at 7-8 (citing *In re Countrywide Corp. S'holders Litig.*, 2009 Del. Ch. LEXIS 158 (Del. Ch. 2009), Marie Raymond Revocable Trust v. MAT Five LLC, 980 A.2d 388 (Del. Ch. 2008), *Globis Capital Partners, LP v. Safenet, Inc.*, C.A. No. 2772-VCS (Del. Ch. 2007), *In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353 (Del. Ch. 1999), *In re Triarc Cos., Inc. S'holders Litig.*, 2006 Del. Ch. LEXIS 66

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27. The fact that some disclosures have in the past been found to benefit shareholders obviously does not mean that all disclosures always benefit shareholders. Moreover, the recent cases announcing a heightened standard of materiality for supplemental disclosures casts doubt on the continued viability of the old cases cited by plaintiffs. The law has evolved. Fees are no longer automatically awarded for supplemental disclosures.

IV. THE SUPPLEMENTAL DISCLOSURES ARE IMMATERIAL AND PROVIDE NO BENEFIT TO THE COMPANY OR ITS SHAREHOLDERS

28. Because a disclosure that merely reinforces the view already advocated by the board of directors is immaterial,[5] a rough test of the materiality of supplemental disclosures can be gauged by the merger vote.[6] As emphasized by the Delaware Court of Chancery, "if, after the disclosure, you know, 99 percent of the electorate voted for the merger, it's not clear what informational benefit the plaintiffs have obtained."[7]

29. In this case, the informational benefit claimed by plaintiffs' counsel seems not to have registered with the Company's stockholders at all. The final voting results at the Shareholder Meeting on December 31, 2015 were as follows:

(Del. Ch. 2006), *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162 (Del. 1989)).

[5] *See Abrons v. Maree*, 911 A2d 805, 813 (Del Ch 2006) ("Consistent and redundant facts do not alter the total mix of information, nor are insignificant details and reasonable assumptions material."); *Smith v Curagen Corp.*, CA No. 4670-VCS, at 21 (Del Ch Nov 9, 2009) (TRANSCRIPT) (court "reluctant to… reward settlements simply because there's more information disclosed which gives people a reason to vote in accordance with the board's original recommendation.")

[6] *In re Medicis*, C.A. No. 7857-CS, at 22 (TRANSCRIPT) (court emphasizing that a disclosure achieved by plaintiffs "should be in a way that contradicts, not reinforces, management's recommendation"). The court made the connection between material disclosures and shareholder voting explicit:

> I asked about the vote for a big reason. What we should be awarding fees for – and I have happily awarded big fees for disclosures – is when a disclosure involves the disclosure of facts or other kinds of information that materially changes the informational mix, and it should be in a way that contradicts, not reinforces, management's recommendation. This appears like the number of no votes was a rounding error [45,304,030 in favor (85.44% of votes cast); 50,381 against (0.10% of votes cast); 7,670,716 abstained (14.47% of votes cast)].

Id. at 22 (TRANSCRIPT); Medicis voting results available at http://1.usa.gov/1HwaYCk.

[7] *In re Coventry S'holders Litig.*, C.A. No. 7905-CS, at 51 (Del. Ch. Aug. 29, 2013) (TRANSCRIPT).

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- 37,808,728 votes were cast in respect to the Merger Proposal;
- 37,116,043 votes were cast in favor (98.17% of votes cast);
- 692,685 votes were cast against (1.83% of votes cast);
- 0 votes abstained.[8]

30. The supplemental disclosures in this case fail the rough test of materiality, and they fail under sustained analysis as well. As noted above, in order for supplemental disclosures to be material, they must substantially alter the total mix of information. This means the additional information must be relevant to stockholders in deciding how to vote or, here, whether to tender their shares. It cannot be a close call. Courts now require that supplemental disclosures be "clearly material" in order to serve as a basis for fees. Neither of the supplemental disclosures in this case—neither the Financial Models nor the NAV Inputs—meets the standard of materiality.

A. The Financial Models Are Not Material Disclosures

31. The Financial Models are not valuation projections.[9] They are, instead, sensitivity analyses designed to test the impact of various assumptions on the Company.[10] Different variables are introduced into the model to assess how changes in that variable might affect future performance. As assumptions underlying the variables are altered, the models produce a range of hypothetical future scenarios. Because the information in the Financial Models is at best irrelevant for valuation purposes and at worst potentially misleading, its disclosure benefits no investor while potentially harming investors who may be misled.

32. The board did not rely on the Financial Models for valuation purposes.[11] And Evercore did not rely on the Financial Models in preparing its fairness opinion.[12] As stated in the Amended 14D-9, the Financial Models "were not prepared for valuation purposes nor were they

[8] FX Energy, Inc., Current Report on Form 8-K, filed 12/31/2015, at 4.
[9] Ackerman Aff., Ex. 8, Pierce Tr. at 68:2-5 ("They're not projections…. They're just sensitivities.")
[10] *Id.*, at 68:20-69:2.
[11] *Id.*, at 67:13 ("it wouldn't have an impact on valuation").
[12] FX Energy, Inc., Schedule 14D-9, filed Oct. 27, 2015 (hereinafter the "Original 14D-9"), at 22 and Annex A (listing factors relied upon in financial advisor's fairness analysis). *See also* Ackerman Aff., Ex. 9, Crath Tr., at 58: 18-23.

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intended to reflect management's actual expectations as to the Company's future financial results."[13]

33. The Financial Models were prepared a full five months before the board agreed to the merger and over six months before shareholders were in a position to act definitively on the tender offer. The Financial Models were presented at the May 14, 2015 board meeting, prior to the sales process that ultimately resulted in the merger agreement. The board approved the merger agreement and Evercore delivered its financial opinion on October 12, 2015. The Original 14D-9 was filed on October 27, 2015. The Financial Models were provided to stockholders in the Amended 14D-9 on December 1, 2015. The tender offer ultimately closed on December 8, 2015.

34. Much occurred during the intervening five- to six-month period to render the Financial Models stale and unreliable. For example, two of the core assumptions on which both the "success case" and "failure case" models were built—that is, constant commodity pricing and exchange rates—failed to hold.[14] Oil prices fell from $62.51 per barrel in May 2015 to $46.96 in October 2015 and $43.11 in November 2015, an overall decline of 31%.[15] Natural gas prices declined from $2.85 in May 2015 to $2.09 in November 2015 and $1.93 in December 2015, an overall decline of 32%.[16] Zloty to dollar exchange rates, assumed in the Financial Models to be a constant 3.70, meanwhile fluctuated between 3.66 in May 2015 to 4.02 in November 2015.[17] Also, as noted in the Original 14D-9, "[o]n July 17, 2015, Poland's energy regulator published new gas tariffs, which further reduced the sales price of the Company natural gas by 5.6%."[18]

35. These fluctuations render the Financial Models utterly unreliable as a guide to the future value of the company. More importantly, management did not intend them to be used in that way. Informed investors, understanding the purpose of sensitivity analysis and the volatility of the

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[13] FX Energy, Inc., Schedule 14D-9, Amendment No. 4, filed Dec. 1, 2015 (hereinafter the "Amended 14D-9") at 3.
[14] Ackerman Aff., Ex. 8, Pierce Tr. at 67:16-18. *See also* Amended 14D-9, at 4.
[15] Average crude oil spot price figures from World Bank, Commodity Markets Review, available online at https://ycharts.com/indicators/average_crude_oil_spot_price (accessed June 13, 2016).
[16] Henry Hub Natural Gas Spot Price from U.S. Energy Information Administration, available online at https://www.eia.gov/dnav/ng/hist/rngwhhdm.htm (accessed June 13, 2016)
[17] *See* Bloomberg Markets, http://www.bloomberg.com/quote/USDPLN:CUR (accessed June 13, 2016).
[18] Original 14D-9, at 14.

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underlying assumptions, would not have used them for valuation purposes. But there is the risk that *uninformed* investors, not knowing any better, would attempt to use the Financial Models to predict the future value of the Company. Had they done so, they would have been misled as to the value of the Company and their shares.

36. Finally, none of the three cases plaintiffs cite as support for disclosing the Financial Models—*Netsmart*, *Maric Capital*, and *Cinerama*—supports the materiality of the disclosures.[19] All three cases involve the disclosure of management projections actually used for valuation purposes. *Netsmart* and *Maric Capital* involved failure to disclose management projections that were actually used as inputs in the financial advisor's discounted cash flow analysis. *Cinerama* involved management forecasts used for valuation in the context of an appraisal proceeding. The disclosures in the present case involve hypothetical sensitivity analyses that were not used in valuation by the financial advisor or anyone else. Moreover, none of the three cases support the materiality of stale or dated financial information, such as the five or six month old financial analyses in the present case. In fact, *Netsmart* holds that an earlier set of projections that had become "dated" need not be disclosed.[20] Likewise, *Cinerama* expressly recognizes that valuation projections prepared a significant period of time before the merger may require adjustment to remain current as of the merger date.[21]

37. The cases cited by plaintiffs stand for the broad proposition that management's best estimate of future cash flows may be relevant to stockholders in a cash out merger because they are useful for valuation purposes.[22] However, as expressly stated in the Amended 14D-9, the Financial Models do not represent management's best estimate of future cash flows, nor are they useful for valuation purposes.[23] As a result, the Financial Models are at best irrelevant to shareholders

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[19] *See* Motion for an Award of Attorneys' Fees and Expenses, at 11-12. *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171 (Del. Ch. 2007) (hereinafter "*Netsmart*"); *Maric Capital Master Fund, Ltd. V. Plato Learning, Inc.*, 11 A.3d 1175 (Del. Ch. 2010) (hereinafter "*Maric Capital*"); *Cede & Co. v. Cinerama, Inc.*, C.A. No. 7129, 2003 Del. Ch. LEXIS 146 (Del. Ch. 2003) (hereinafter "*Cinerama*").

[20] *Netsmart*, 924 A.2d at 200-201.

[21] *Cinerama*, 2003 Del. Ch. LEXIS at *26.

[22] *Netsmart*, 924 A.2d at 200; *Maric Capital*, 11 A.3d at 1178.

[23] Amended 14D-9, at 3 (noting that the Financial Models "were not prepared for valuation purposes nor were they intended to reflect management's actual expectations as to the

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considering whether to tender and, at worst, misleading to those shareholders who, in spite of the warnings in the 14D-9, do not understand the purpose of sensitivity analyses. Irrelevant and potentially misleading disclosures do not significantly alter the total mix of information available to shareholders and therefore cannot be viewed as material.

B. The NAV Inputs Are Not Material Disclosures

38. In contrast to the Financial Models, the NAV Inputs disclosed financial information relied upon by the financial advisor in performing its financial analysis. Thus, unlike the Financial Models, the NAV Inputs thus constitute *relevant* financial information. However, the NAV Inputs do not constitute *material* disclosures because the relevant information in the NAV Inputs was already publicly disclosed and widely disseminated.

39. The basis of the information in the NAV Inputs is the report of two independent engineering firms. RPS Energy appraised the value of the Company's assets in Poland, and Hohn Engineering appraised the value of the Company's assets in the United States. Each firm prepared a detailed report (collectively, the "Engineering Reports"). The Engineering Reports were posted to the Company's website in their entirety and were also filed with the SEC.[24] The Engineering Reports were thus publicly disclosed and widely disseminated. Information that is already publicly disclosed and widely disseminated is already a part of the "total mix" of information. [25]

40. All of the relevant information in the NAV Inputs, with only one exception, comes from the Engineering Reports. Most importantly, the production forecasts, which form the basis of the Company's revenue estimates and which are therefore critical in estimating the future value of the Company, come directly from the Engineering Reports. Other inputs, including capital expenditures and expense information, also came from the Engineering Reports.[26]

Company's future financial results…").

[24] *See* Ackerman Aff., Ex. 8, Pierce Tr., at 44: 14-16, 105: 19-20. The reports are still on the Company's website. See also http://www.fxenergy.com/sec.php (webpage linking to the full text of the Engineering Reports).

[25] *United Paperworkers Int'l Union v. Int'l Paper Co.*, 985 F.2d 1190, 1199 (2d Cir. 1993) ("The total mix of information may also include information already in the public domain and facts known or reasonably available to the shareholders.") (internal quotations omitted).

[26] Ackerman Aff., Ex. 8, Pierce Tr., at 105: 17-20.

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41. The only piece of information used in the NAV Inputs that did not come from the Engineering Reports was the line for estimated "G&A" (General and Administrative) costs, which came from management.[27] The G&A estimates for 2016, 2017, and 2018 merely applied the Company's G&A costs for 2015, which was publicly disclosed in the company's financial statements.[28] Moreover, the estimate of $8,100,000 in G&A costs for each of 2016, 2017, and 2018 is also in line with the Company's historic G&A costs for each of the five years disclosed in its most recent 10-K.[29] In sum, while a shareholder would not have known the precise number management provided to the financial advisor for future G&A costs, he or she would have had ample information to estimate the amount based on publicly disclosed information.

42. The financial advisor then applied a series of assumptions and adjustments to the raw input data to arrive at its valuation projection. Many of these assumptions, including the discount rates used by the financial advisor, are stated in the original 14-9.[30] Others are stated in the supplemental disclosures.[31] The addition of further granular information about how the financial advisor performed its analysis does not constitute material disclosure.[32] All that is required is a "fair summary" of the financial advisor's analysis.[33] Shareholders are not entitled to all details necessary to check the financial advisor's math.[34]

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[27] *Id.*, 104: 23-24.
[28] *Id.*, 105: 6-12.
[29] See FX Energy, Inc., Form 10-K for the fiscal year ended December 31, 2014, at 42 (listing $8.5 million in G&A costs for 2014, $8.8 million for 2013, $8.4 million for 2012 and 2011, and $8.0 million for 2010).
[30] Original 14D-9 at 23.
[31] Amended 14D-9 at 8.
[32] *See In re Amylin Pharmaceuticals S'holders Litig.*, C.A. 7673-CS, at 9 (Transcript, February 5, 2013) ("You don't have to disclose details. You have to disclose the material information relevant to understanding the banker's thing."); *In re Theragenics Corp. Stockholders Litigation*, C.A. No. 8790-VCL, tr. ruling, at 22 (Del. Ch. May 5, 2014) (rejecting supplemental disclosures that "add nothing more than further granular detail").
[33] *See Trulia*, 129 A.3d at 900 (emphasizing that "[a] fair summary, however, is a *summary*") (emphasis in original). Chancellor Bouchard explained the importance of not departing from the "fair summary" standard:

> 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

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43. In this case, the Company's shareholders had sufficient information to make an independent determination of fair value based on readily available, publicly disclosed information, including the Engineering Reports and previously disclosed G&A costs. This information was available to shareholders prior to the filing of the Original 14D-9, and nothing in the supplemental disclosures does anything to change it. Indeed, the disclosure of the NAV Inputs merely repeats what shareholders would already have known from the Engineering Reports and reaffirms the estimate of future G&A costs based on historical figures.

44. Disclosures that merely repeat information already in the "total mix" of information do not constitute material disclosures. Nor do disclosures that merely reaffirm elements of the financial advisor's analysis. As a result, the NAV Inputs do not constitute material disclosures.

V. CONCLUSION

45. As a result of the foregoing analysis, I conclude that the supplemental disclosures neither individually nor collectively alter the total mix of information available to a reasonable investor. Because they thus fail to meet the standard of materiality, they provide no legally cognizable benefit to the shareholder class. Plaintiffs' counsel is therefore not entitled to an award of attorneys' fees.

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that it is better for stockholders to have more information rather than less.

Id., at 894.

[34] *In re Plains Exploration & Prod. Co. S'holder Litig.*, 2013 WL 1909124, at *8 (Del. Ch. May 9, 2013) ("The duty to disclose financial information material to [the financial analyst's] decision does not include information that is merely helpful; it also does not require that stockholders have sufficient information to make an independent determination of fair value.") (internal quotations omitted).