Symposium: Confronting New Market Realities: Implications for Stockholders Rights to Vote, Sell and Sue: Objections to Disclosure Settlements: A "How To" Guide"

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OBJECTIONS TO DISCLOSURE SETTLEMENTS: A HOW-TO GUIDE

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Stockholder litigation remains in crisis, with over seventy percent of major mergers and acquisitions subject to litigation. A contributing factor is the breakdown of the adversary process at settlement, when former opponents join hands in favor of a compromise that too often expends corporate resources for no real recovery to the plaintiff class. One obvious corrective is the shareholder's objection to settlement, which restores adversarial character to the settlement process. Shareholders, however, face substantial difficulties in making such objections. In this article, the authors detail the problem and share their experiences in addressing these obstacles, providing a how-to manual for future shareholder objections to class action settlements in merger litigation.

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Introduction

In his classic polemic *Against Settlement*, Owen Fiss attacked the general preference for settlement over adjudication in the civil justice system on four basic grounds.[1] First, consent to settlement is often coerced.[2] Second, settlement bargains are often "struck by someone without authority."[3] Third, judicial involvement after settlement is often difficult.[4] And fourth, "justice may not be done."[5] Settlement, for Fiss, is merely a "capitulation to the conditions of mass society," not a point of pride for any civil justice system.[6]

The settlement of merger litigation exhibits these four characteristics in spades. Stockholders who are rationally indifferent to settlements that offer them no real benefit do not "consent" so much as acquiesce.[7] Despite rules that purport to require class certification as early as practicable,[8] plaintiffs' lawyers frequently appoint themselves and negotiate settlement long before they receive legal authority to represent the class.[9] Approval of a class settlement at least nominally precludes subsequent litigation of the released claims, which are often defined to include any imaginable claim relating in any way to the underlying facts, in any court anywhere in the country.[10] The unjust results of this system can be seen in the flood of claims

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1. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 6-7 (2015); *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.62 (2004) (noting that where "the recovery for each class member is small, the paucity of objections may reflect apathy rather than satisfaction").
8. *See, e.g.*, FED. R. CIV. P. 23; DEL. CH. CT. R. 23.
9. *See* Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 957-62 (2014) (arguing that these actions involve class counsel selling something they don't own); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 900 (1995) (distinguishing settlement class actions from ordinary settlements on the basis of "proxies" for negotiation and the substitution of "judicial fiat" for contractual agreement).
10. Griffith, *supra* note 7, at 16-17.

unleashed by class plaintiffs and the lack of benefit produced for stockholders. Until very recently, more than 90% of all announced mergers over $100 million attracted shareholder litigation, meaning that corporate directors, no matter how loyal and careful, could expect to be sued when they recommended a transaction.[11] The sue-on-every-case nature of the litigation provided very real incentives for lawyers bringing such claims to settle for six-figure fees without seriously investigating the underlying claims, trading potentially valuable shareholder rights for worthless disclosure settlements.[12]

The essential bulwark against the Fissian vision of settlement is the fairness hearing, at which a judge reviews the fairness and reasonableness of the bargain prior to approving the settlement and thereby binding absent class members.[13] At the fairness hearing,

> [i]f class action attorneys sell out their clients, the judge should perceive that the settlement does not live up to the value of the claims and reject it accordingly. Conversely, if class action attorneys file a frivolous case, the judge should perceive that the settlement is merely a nuisance payment, reject it for that reason, and dismiss the case.[14]

As Fiss saw it, a judge compares the outcome at settlement with what he or she imagines the outcome at trial would have been, except that there has been no trial, no cross-examination or impeachment of witnesses, and no opposing argument.[15] Instead, "the judge can no longer count on the thorough presentation promised by the adversary system. The contending parties have struck a bargain, and have every interest in defending the

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11. Matthew D. Cain & Steven Davidoff Solomon, Takeover Litigation in 2015 2-3 (Jan. 14, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2715890; RAVI SINHA, SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES: REVIEW OF 2015 AND 1H 2016 M&A LITIGATION, 1 (2016), https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-2016.pdf.

12. *See* Joel Edan Friedlander, *How* Rural/Metro *Exposed the Systemic Problem of Disclosure Settlements*, 40 DEL. J. CORP. L. 877, 882 (2016) (describing the "disclosure settlement bar" as firms pursuing "a business model of entering into disclosure settlements and thereby collecting risk-free fee awards near the outset of a case. These firms released *Revlon* claims after a purported investigation of their viability, even though they had no demonstrated track record of pursuing *Revlon* claims for significant monetary relief. In an unknown number of cases, these firms released valuable *Revlon* claims.").

13. William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1444 (2006).

14. *Id.*

15. *See* Fiss, *supra* note 1, at 1075, 1082.

settlement and in convincing the judge that it is in accord with the law."[16] Or, as Macey and Miller described the problem, settlement hearings are "pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel."[17]

In the context of disclosure settlements, the lack of an adversarial element requires a judge, acting on his or her own, to conduct a forensic analysis of the proxy statement, seeking to determine whether the supplemental disclosures materially altered the total mix of information available to shareholders.[18] This involves a line-by-line analysis of the supplemental disclosures, weighing the materiality of each in the context of not only other information disclosed in the proxy statement but also all other publicly available information. Regarding financial disclosures, the analysis entails some knowledge of finance and valuation, along with an understanding of how specific variables would or would not affect the overall value of the corporation and its business. Trial judges who do not confront these issues on a regular basis may be unaccustomed to this kind of analysis, and the reality of crowded dockets creates an additional hurdle for judges acting as aggressive settlement "gatekeepers."[19]

Academics have repeatedly insisted that these problems could be solved, or at least mitigated, through a reinvigoration of the adversary process during settlement.[20] The Delaware Court of Chancery recently endorsed this idea in *In re Trulia, Inc. Stockholder Litigation*, suggesting that disclosure claims are best resolved in an adversarial context.[21] Where such

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16. *Id.* at 1082.

17. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 46 (1991).

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

19. *See, e.g.*, Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 388, 402-03 (2011).

20. *See, e.g.*, Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1122 n.309 (2013) (arguing that courts should "appoint an objector as a kind of guardian ad litem for the class" and compiling sources supporting the proposal); Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 128 (2003) (advocating an active adversarial process during fairness hearings as "a kind of trial on the merits of the settlement"); Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1354-64 (2008) (developing an "oversight approach" for the SEC in 10b-5 cases); Rubenstein, *supra* note 13, at 1452-67 (examining various proposals for reducing agency costs at the settlement stage, including use of devil's advocates).

21. 129 A.3d at 896.

context is not available, the court suggested that "it may be appropriate . . . to appoint an *amicus curiae* to assist the court in its evaluation of the alleged benefits of the supplemental disclosures, given the challenges posed by the non-adversarial nature of the typical disclosure settlement hearing."[22] Thus far, however, we are unaware of any court that has appointed such advocates.

But judicial action is not the only means to ensure an adversarial settlement process. Private actors can do the job by objecting to settlements of shareholder class actions. The authors have been involved in several such objections, either as objector or as counsel.[23] Several of these objections have resulted in settlements being dismissed, releases being narrowed to preserve potential claims, or fees to class counsel being reduced.[24] In

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22. *Id.* at 898–99.

23. *See, e.g.*, Brief of Sean J. Griffith as Amicus Curiae, *Trulia*, 129 A.3d 884 (C.A. No. 10020-CB), 2015 WL 6391945 [hereinafter Griffith Amicus Curiae Brief in *Trulia*] (opposing settlement); Objection of Sean J. Griffith to Proposed Settlement and Application for Attorneys' Fees and Expenses, *In re* Riverbed Tech., Inc. Stockholders Litig., C.A. No. 10484-VCG (Del. Ch. Sept. 17, 2015), 2015 WL 4384114 [hereinafter Objection of Sean J. Griffith to Proposed Settlement in *Riverbed*]; Transcript of Proceedings at 44-53, Gordon v. Verizon Commc'ns, Inc. (*Gordon I*), Index No. 653084/13 (N.Y. Sup. Ct. Dec. 19, 2014), 2014 WL 7250212, *rev'd*, Gordon v. Verizon Commc'ns, Inc. (*Gordon II*), 148 A.3d 146 (N.Y. App. Div. 2017) (highlighting the expert testimony provided by Griffith); Statement of Reasons, Vergiev v. Aguero, Docket No.: L-2276-15 (N.J. Super. Ct. Law Div. June 6, 2016) [hereinafter Statement of Reasons in *Vergiev*] (showing the reasons Griffith objected to settlement of merger litigation); Final Order and Judgment, *Vergiev*, Docket No.:L-2276-15 [hereinafter Final Order and Judgment in *Vergiev*]; Entry of Appearance, *In re* PMFG, Inc. Stockholder Litig., C.A. No. 11223-VCS (Del. Ch. filed June 29, 2015) (filing by Griffith for notice of appearance and intent to object to settlement of merger litigation); Bushansky v. Remy Int'l, Inc., ___ F.Supp.3d ___, 2017 WL 3530108 (S.D. Ind. Aug. 16, 2017) (sustaining objection to settlement of merger litigation); Order After Hearing on July 19, 2016, *In re* Pharmacyclics, Inc. Shareholder Litig., Lead Case No. 115-CV-278055 (Cal. Super. Ct.—Santa Clara Cty. July 20, 2016) (overruling Griffith's objection to the proposed settlement of merger litigation); Affidavit of Sean J. Griffith in Support of James C. Snyder's Objection to the Proposed Settlement, Corwin v. British Am. Tobacco PLC, 14-CvS-8130 (N.C. Super. Feb. 17, 2016) (filing of an expert affidavit by Griffith in support of shareholder objection to merger settlement). Griffith also provided expert affidavits in: *Richards v. FX Energy, Inc.*, Case No. A-15-726409-C (Nev. Super.—Clark Cty.) and *In re Compuware Corp. S'holder Litig.*, 14-011437-CB (Mich. Super. Ct.—Wayne Cty.) (filed Oct. 1, 2015).

24. Of the matters listed in *supra* note 23: *Trulia*, 884 A.3d at 907-08 (rejecting settlement); *Riverbed*, 2015 WL 5458041, at *8 (reducing fees); *Gordon I*, 2014 WL 7250212, at *9 (rejecting settlement initially); *Gordon II*, 148 A.3d at 161 (reversing *Gordon I* and implementing enhanced standards for settlement approvals); *Vergiev*, Docket No.: L-2276-15 (rejecting settlement), Stipulation and [Proposed] Order of Dismissal at 4, *PMFG*,

addition to the specific results achieved in individual cases, to the extent that such objections reduce the incentive for parties to bring less meritorious litigation—in effect, to reduce the rate of the "merger tax"—they have systemic benefits as well.[25]

Yet objectors rarely appear.[26] Moreover, courts may be wary of objections out of concern that some litigants may simply seek to hold up the settlement process in order to extort a fee.[27] Although this is a real concern in other contexts, as a practical matter, the threat of "professional objectors" remains wholly theoretical in disclosure settlements.[28] Nevertheless, objectors and counsel seeking to press good faith objections face being characterized as such.[29] Perhaps the most significant obstacle, however, is

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C.A. No. 11223-VCS, 2016 WL 4594731, at *2 (resulting in a withdrawn settlement and a voluntary dismissal), *Remy*, 2017 WL 3530108, at *10 (sustaining objection and denying approval of settlement or award of fees to plaintiffs' counsel).

25. *See* Griffith, *supra* note 7, at 17-19, 46.

26. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1548-50 (2004) (showing that the objection rate is low across case types).

27. *See generally* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403 (analyzing issues of fairness and efficiency behind class actions); Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (highlighting concerns of objector "blackmail" and the use of quick-pay provisions used by class action counsel).

28. The authors are unaware of any "professional objector"—that is to say, an objector seeking merely to settle for a fee—ever appearing in a disclosure settlement, although class plaintiffs have raised such concerns to the Delaware Court of Chancery. *See Riverbed*, 2015 WL 5458041, at *2 ("The Plaintiffs opine that if objectors in Mr. Griffith's position are permitted to be heard, 'professional' objectors with nefarious strike-suit motives will pop up like mushrooms after a two-day rain."). This is not surprising. Just as class plaintiffs in M&A cases derive settlement leverage by threatening to disrupt deal closure, professional objectors derive settlement leverage by threatening to delay the flow of settlement consideration to class members or hold up fees to class plaintiffs through spurious appeals. *See* Brunet, *supra* note 27, at 435-39.

Disclosure settlements, however, do not lend themselves to either form of objection extortion. Opportunistic objectors cannot interpose themselves between the class and its supposed consideration, because class counsel seek to settle months after the supplemental disclosures have been issued. *See id.* at 432-33. Nor can objectors credibly threaten to delay payment of class counsel's fees. *See id.* at 428-29. Many disclosure settlements contain a "quick-pay" provision, under which defendants agree to pay fees when the trial court approves the settlement, on the condition that plaintiffs will repay the fees if a settlement is overturned on appeal. Fitzpatrick, *supra* note 27, at 1641, 1645.

29. Class plaintiffs and their counsel are frequent litigants in M&A class actions. *See generally* C.N.V. Krishnan et al., *Who Are the Top Law Firms? Assessing the Value of Plaintiffs' Law Firms in Merger Litigation*, 18 AM. L. & ECON. REV. 122 (2016); Adam B.

the dearth of material available to practitioners describing how to evaluate, and ultimately litigate, objections to disclosure settlements. This article addresses the issue, not as a theoretical exercise, but as a how-to manual. Part I provides a brief overview of the settlement approval process and where objections fit into it. Part II walks through the process of presenting an objection and addresses some of the challenges facing practitioners. Part III then looks at reasons that objectors, and their counsel, may find this style of litigation to be intellectually, and perhaps financially, rewarding.

Before proceeding, two caveats are in order. *First*, we have provided this content as general information only. It is not legal advice or legal opinion regarding any specific factual or legal circumstances. We address our comments principally to practitioners who might seek to represent objectors in disclosure settlements. It is not meant as a substitute for specific legal advice to stockholders, who would be well-served by seeking appropriate counsel.[30]

Second, an aspiring objector's counsel could reasonably ask why we are publishing a blueprint allowing "competitors" to replicate our efforts. The answer is as much practical as it is policy-oriented. Following *Trulia*, the percentage of M&A transactions subject to stockholder challenge fell—but only to about 60% in the first half of 2016.[31] By the end of 2016, another study found that the rate of stockholder challenges had risen to 73%.[32] Moreover, stockholder plaintiffs (and their counsel) increasingly began to

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Badawi & David H. Webber, Does the Quality of the Plaintiffs' Law Firm Matter in Deal Litigation? (Dec. 15, 2015) (unpublished manuscript), https://ssrn.com/abstract=2469573. Yet they will commonly assert that an objector, or their counsel, are "professional objectors." *See, e.g.*, Reply Memorandum of Law in Further Support of Plaintiffs' Motion for Final Approval of Settlement and Award of Attorneys' Fees and Reimbursement of Expenses and in Response to Objections at 4, *Vergiev*, Docket No.: L-2276-15 [hereinafter *Vergiev* Reply Brief].

30. For the avoidance of doubt, unless otherwise noted references to "plaintiffs," "defendants," or "objectors" performing some action follow the typical legal conceit of describing not the party, but their counsel. Although it may result in some confusion, most litigators in this area are used to reading "plaintiffs filed their brief" or "objector presented an argument" and understanding that counsel were responsible for the actual filing of papers and presentation of arguments.

31. SINHA, *supra* note 11, at 1.

32. *See* Matthew D. Cain et al., *The Shifting Tides of Merger Litigation* 20 (Univ. of Penn Inst. for Law & Econ., Research Paper No. 17-6, 2017), http://ssrn.com/abstract=2922121 (showing 73% of all completed deals subject to litigation); *id.* at 22 (showing decline in filing of challenges to mergers in Delaware from 61% of all deals involving Delaware companies in 2015 to 32% in 2016, and rise of filing in federal court from 20% to 37%).

bring cases outside of Delaware under the federal securities laws.[33] At least at present, it seems that class plaintiffs face only a modest chance of facing a well-represented objection to a disclosure settlement.[34] Thus, a sufficiently robust market exists that we have no need to jealously hide "trade secrets." If objections are to play a role in stemming the tide of abusive M&A class actions, more attorneys, not fewer, are needed.

I. The Settlement Approval Process

Before diving into the nuts and bolts of an objection, it is worth briefly outlining the process by which disclosure settlements are approved. The classic pre-*Trulia* disclosure settlement followed a predictable pattern. In each year from 2009 through 2015, somewhere between 85% and 95% of all merger transactions over $100 million attracted litigation.[35] In the first half of 2016, in the wake of the Delaware Court of Chancery's and other courts' efforts, filings fell and only 64% of all deals over $100 million attracted claims.[36] This is a decline of roughly one-third from the high, but still twice the historical average.[37]

Even following this modest decline, the process remains much the same. As the Court of Chancery memorably described it, "[T]he 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."[38] Plaintiffs usually seek an injunction threatening the close of the deal, which provides settlement leverage.[39]

There are variations on this theme: sometimes a plaintiff begins by alleging only claims related to the deal price, and then amends the complaint to include disclosure claims after the preliminary proxy is

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33. *See* CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2016 MIDYEAR ASSESSMENT 10 (2016), http://securities.stanford.edu/research-reports/1996-2016/Cornerstone-Research-Securities-Class-Action-Filings-2016-MYA.pdf.

34. *See* William B. Chandler III & Anthony A. Rickey, *The Trouble with* Trulia*: Reevaluating the Case for Fee-Shifting Bylaws as a Solution to the Over Litigation of Corporate Claims*, *in* CAN DELAWARE BE DETHRONED? EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW (Iman Anabtawi, Stephen M. Bainbridge, Sung Hui Kim & James Park, eds., forthcoming late 2017) (noting that most courts that have approved post-*Trulia* disclosure settlements have done so in the absence of an objector).

35. *See* Cain & Solomon, *supra* note 11, at 2, 2 tbl.A.

36. SINHA, *supra* note 11, at 1.

37. *See id.* at 2.

38. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 891 (Del. Ch. 2016).

39. *Id.* at 892.

issued.[40] Sometimes plaintiffs never amend their original complaint, although they seek to settle for disclosures.[41] Sometimes (particularly if plaintiffs are pursuing securities claims rather than state-law fiduciary-duty claims) they wait to file lawsuits until after the preliminary (or even the definitive) proxy is filed.[42] Whether disclosure allegations are brought in a complaint or not, however, the tactic is to threaten to prevent a deal from closing until defendants provide some additional information to stockholders and then to seek an attorney's fee for the "benefit."

Defendants, who often seek to close million- or billion-dollar deals, desire closing certainty and a release of any claims that might arise out of the transaction. As such, they are often willing to "self-expedite" discovery, providing class plaintiffs with a standard set of "core documents" that purportedly allow plaintiffs to evaluate the transaction in more detail.[43] The path to a disclosure settlement is then straightforward:

> Once the litigation is on an expedited track and the prospect of an injunction hearing looms, the most common currency used to procure a settlement is the issuance of supplemental disclosures to the target's stockholders before they are asked to vote on the proposed transaction. The theory behind making these disclosures is that, by having the additional information, stockholders will be better informed when exercising their franchise rights. Given the Court's historical practice of approving disclosure settlements when the additional information is not material, and indeed may be of only minor value to the stockholders, providing supplemental disclosures is a particularly easy "give" for defendants to make in exchange for a release.[44]

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40. *See, e.g.*, *id.* at 888-89.

41. *See, e.g.*, Class Action Complaint for Breaches of Fiduciary Duties, Evangelista v. Duggan, Case No.: 115CV278055 (Cal. Super. Ct.—Santa Clara Cty. filed Mar. 13, 2015), 2015 WL 1133583 (asserting no disclosure claims).

42. *See, e.g.*, Complaint for Violations of the Securities Exchange Act of 1934 at 2, Berg v. Whole Foods Market, Inc., C.A. No. 1:17-cv-677 (W.D. Tex. July 14, 2017) (filing complaint after preliminary proxy published by defendants); *Remy*, 2017 WL 3530108, at *2 (complaints filed after definitive proxy).

43. *Trulia*, 129 A.3d at 892.

44. *Id.* at 892-93 (footnotes omitted).

It often seems as if the claims regarding an unfair price or process are advanced only to get plaintiffs' counsel's foot in the door as soon as possible for leadership purposes.[45]

Once an agreement is reached, the litigation takes on a non-adversarial character.[46] Typically, the parties paper an initial deal through a memorandum of understanding ("MOU"), often filed with the court and disclosed to the market through an SEC filing.[47] The MOU contains the supplemental disclosures, provides for a process for reaching a final settlement, and usually contains defendants' admission that the lawsuit caused the supplemental disclosures and a provision for an attorney's fee.[48]

Stockholders then vote on the transaction. The vote is often almost unanimous—rarely do the supplemental disclosures cause stockholders to reassess the deal.[49]

Months may pass between stockholder approval of a deal and a motion for court approval from class plaintiffs. During this period, class plaintiffs conduct "confirmatory discovery," usually seeking additional documents and perhaps conducting depositions.[50] While class counsel are theoretically attempting to "confirm" the value of the settlement, "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.'"[51]

Eventually, the parties finalize their bargain, usually in a stipulation of settlement.[52] The stipulation puts meat on the bones of the MOU, typically including

45. *See generally* Leo E. Strine, Jr. et al., *Putting Stockholders First, Not the First-Filed Complaint*, 69 BUS. LAW. 1 (2013) (highlighting the various incentives plaintiffs' counsel might have).

46. *Trulia*, 129 A.3d at 893.

47. *See, e.g.*, *id.* at 889 (describing an agreement to enter into a MOU and publication with the SEC).

48. *See, e.g.*, Memorandum of Understanding at 10, 17-18, Ex. A, *Trulia*, 129 A.3d 884 (C.A. No. 10020-CB).

49. *See* Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 569 (2015).

50. *See Trulia*, 129 A.3d at 893, 893 n.24.

51. *Id.* at 893-94 n.24.

52. *See, e.g.*, Stipulation and Agreement of Compromise, Settlement, and Release at 10, *Trulia*, 129 A.3d 884 (C.A. No. 10020-CB).

- an abbreviated history of the litigation, the discovery conducted by plaintiffs, and the resolution of the litigation;
- an agreement by defendants not to object to a request for attorneys' fees to plaintiffs' counsel, so long as that request does not exceed an amount certain; and
- a "quick-pay" provision, under which defendants agree to pay fees to plaintiffs upon approval by the trial court, regardless of any appeal, so long as plaintiffs agree to pay back any fee award if an appellate court reverses.[53]

The stipulation often heralds a new, and oddly more expedited, phase of litigation. Plaintiff's first step is typically to seek preliminary approval of the settlement, either by filing a motion or by simply submitting the stipulation of settlement, along with a proposed form of notice to stockholders, a proposed form of order that allows for a schedule leading to a final approval hearing, and a proposed form of order for final approval. A typical schedule will include

- a deadline for the parties to provide notice to the stockholder class, often sixty days before the settlement hearing;
- a deadline for plaintiffs to serve an opening brief in favor of the settlement;
- a deadline for objections; and
- a deadline for a reply by parties to the objection.[54]

As discussed in more detail below, these deadlines may leave little time for a stockholder to raise substantive objections. One hindrance to the process is the limited notice required.[55] Although notice to all shareholders is a required element of class action settlement procedures, the mechanics of shareholder notice are notoriously unreliable, especially where small shareholders are concerned.[56] For instance, Professor Griffith received formal notice in less than half of the settlements in his portfolio of merger claims.

In the absence of an objector, this process typically leads to a settlement hearing at which the court hears argument and then determines whether to approve the settlement. This process is not automatic, and courts sometimes

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53. *See id.* at 2-8, 22-24.
54. *See, e.g.*, Scheduling Order at 5-8, *Trulia*, 129 A.3d 884 (C.A. No. 10020-CB).
55. *See* Brunet, *supra* note 27, at 447-48.
56. Lahav, *supra* note 20, at 83-84.

decline to approve settlements with weak consideration.[57] Generally, however, a settlement hearing results in the approval of a release of claims against defendants and an award of attorneys' fees to plaintiff's counsel.

II. Presenting an Objection

Objectors throw a monkey wrench into the otherwise smooth process of approving these settlements. In the sections below, we examine processes for becoming, or finding, clients; considerations in drafting objections; handling opposition from the settling parties; and, particularly if the objection is successful, applying for attorneys' fees and costs.

A. The Client

Stockholder objectors rarely receive any pecuniary benefit from challenging a settlement, although their counsel may seek fees. In the rare case where a stockholder feels that claims of actual value are being abandoned, the stockholder may seek to take over the litigation. In most cases, however, dissatisfied stockholders may believe that their rights are being given away to justify a fee to class counsel. When objectors have little personal incentive to retain an attorney, how are client and counsel to meet?

Professor Griffith followed a pattern that, while not unique, remains unusual. Starting in late 2014, he began purchasing a portfolio of shares of public companies that announced a merger or acquisition, anticipating that these transactions would inevitably lead to litigation, which would ultimately be resolved in a disclosure settlement. Professor Griffith filed his first objection in the summer of 2015 and later filed an amicus brief in the *Trulia* case.[58] Following *Trulia*, he continued to pursue a number of objections.[59] In all of these cases, he has been represented by counsel working on a contingency basis.

Thus far, this strategy has been relatively successful in sustaining an objection portfolio. So long as the parties continue to define settlement classes to include post-announcement buyers, post-announcement

57. *See, e.g.*, *In re* Transatlantic Holdings Inc. S'holders Litig., C.A. No. 6574-CS, 2013 WL 1191738, at *3 (Del. Ch. Mar. 8, 2013) (rejecting proposed disclosure settlement).

58. *See* Objection of Sean J. Griffith to Proposed Settlement in *Riverbed*, *supra* note 23; Griffith Amicus Curiae Brief in *Trulia*, *supra* note 23.

59. *See* sources cited *supra* note 23.

purchases suffice to confer standing to object.[60] To date, courts have been unreceptive to the argument that these post-merger purchases make Professor Griffith a "professional objector."[61]

This strategy, however, relies upon the existence of a litigant willing to maintain a portfolio specifically for this purpose, and an attorney willing to represent him in a number of courts across the nation. Professor Griffith has not sought compensation for his efforts, only fees for his counsel. But few stockholders are both knowledgeable of and engaged with the issue of over-litigation of M&A claims, and yet also willing to dedicate time and money (in the form of investments) to such projects.

The misaligned incentives that lead to a shortage of objectors mirrors those that justify the class action in the first place. Plaintiffs' counsel confront similar challenges in seeking claimants that will represent a class. Thus, the techniques used by plaintiffs' counsel may inform strategies useful to aspiring objectors' counsel.

Advertising. One possibility is advertising. High-volume filers of merger class actions often issue press releases publicizing "investigations" into mergers shortly after the mergers themselves are announced. These press releases contain little meaningful content except attorney contact information for stockholders interested in discussing "the legal ramifications of the investigation."[62] The releases are then picked up by popular stock market websites, such as Yahoo Finance, which often provide a link to press releases (and the law firm websites) at the bottom of the ticker page of each company under investigation.[63] Judging from the abundance of such releases and the proliferation of merger litigation, these advertisements appear successful.[64] Just as plaintiffs' firms file press releases announcing investigations of mergers, an objector-focused practice might file press releases announcing investigations of settlements.

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60. *See In re* Riverbed Tech., Inc. Stockholders Litig., C.A. No. 10484-VCG, 2015 WL 5458041, at *2 (Del. Ch. Sept. 17, 2015) (holding that post-announcement purchasers who are members of the class are entitled to oppose a settlement).

61. *See supra* notes 24-27 and accompanying text.

62. *See, e.g.*, *Brodsky & Smith, LLC Announces an Investigation of the Board of Directors of Diamond Resorts International, Inc. – DRII*, YAHOO!: FINANCE (July 8, 2016), http://finance.yahoo.com/news/shareholder-brodsky-smith-llc-announces-013500654.html.

63. *See, e.g.*, *Summary on Diamond Resorts International, Inc. (DRII)*, YAHOO!: FINANCE, http://finance.yahoo.com/quote/drii?ltr=1 (last visited May 13, 2017).

64. According to a possibly apocryphal story told to Griffith by a member of the Delaware bar, the major PR firms changed their policies and started accepting attorney press releases in 2009, the year merger litigation surged from its historic levels to over 85% of announced deals.

A word of caution is in order, however, for any attorney adopting such a strategy. Objectors, unlike plaintiffs, can anticipate that their motions will be subject to adversarial review and that plaintiffs will take issue with how an objector has come before a court. Attorney advertising rules differ throughout jurisdictions, and this article cannot attempt to summarize them. Objector's counsel should expect that any foot-fault in client acquisition may be pursued as part of the response to an objection or in opposition to objector's counsel's request for a fee. (This is one reason that the authors have not, to date, adopted this advertising strategy.)

Institutional clients. The ideal client for an objector practice is probably a large institutional investor who holds the market. This mirrors the strategy of certain plaintiffs' firms that have relationships with large institutional investors, allowing these firms to file claims in most any apparent incidences of securities fraud.[65] Such a client would likewise allow objections to most disclosure settlements.

Finding such a client, however, may be challenging. Institutional investors, especially mutual funds, might for business reasons opt not to engage in shareholder litigation—for instance, they may find it difficult to win investments from corporate 401(k) plans when those plans are used as a platform for litigation against the company or, by extension, to contest settlement releases sought by the company.[66] Certain pension funds, by contrast, do regularly engage in shareholder litigation.[67] The motives of these funds in participating in shareholder litigation are unclear.[68] To date, however, we are not aware of these institutional clients taking part in objections to disclosure litigation.

Portfolio Monitoring. Taking another page from the class action plaintiff's playbook, an attorney with clients who own stock (and who might have concerns about the over-litigation of corporate claims) could

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65. *See* TOM BAKER & SEAN J. GRIFFITH, ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION 20, 30-39 (2010).

66. Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 WASH. U. L. Q. 869, 881 (2005) (noting that "a substantial component of business for the major mutual funds involves managing retirement accounts for publicly traded issuers. . . . Fund managers might reasonably be concerned that active litigation participation would hurt their ability to compete for this business from managers of public companies").

67. *See, e.g.*, David H. Webber, *Private Policing of Mergers and Acquisitions: An Empirical Assessment of Institutional Lead Plaintiffs in Transactional Class and Derivative Actions*, 38 DEL. J. CORP. L. 907, 935-37 (2014).

68. *Id.* at 936 (reviewing the literature on "pay-to-play" participation by pension funds in shareholder class actions).

consider offering "portfolio monitoring" services. Plaintiffs' attorneys offer, and even advertise, the option to "proactively monitor" an investor's portfolio to determine whether investments have been subject to "fraud," often for institutional clients.[69] As a practical matter, this means that if a law firm wishes to prosecute a class action, it has a portfolio of existing clients to whom it may pitch the case.

While some courts have expressed skepticism regarding portfolio-monitoring agreements,[70] others have held that such agreements do not represent a conflict with the interests of a class and expressly allow such plaintiffs and their counsel to serve as class representatives.[71] An attorney wishing to develop an objector's practice, particularly one whose existing clients have significant stockholdings, might consider adopting similar tactics.

B. Evaluating the Settlement

An attorney acting on behalf of his client next needs to determine whether the case is worth the client's investment or, if the client is being represented on contingency, the attorney's time, effort, and investment.

At first blush, the over-litigation of corporate claims suggests that the preponderance of objections *should* be meritorious. After all, unless one believes that the overwhelming majority of corporate mergers are the product of fraud on the part of corporate directors, a large number of these cases must be meritless. Yet parties to a settlement can be expected to argue that *their* case is different: their disclosures are unusually significant, their efforts intensive, their industry unusually sensitive to additional information, such that *this* settlement merits approval.

Based on our experience, there are a few materials that an objector should pull together as quickly as possible to evaluate a settlement.

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69. *See Securities Fraud*, BERNSTEIN LITOWITZ BERGER & GROSSMAN LLP, https://www.blbglaw.com/practices/110 (last visited May 13, 2017); *Portfolio Monitoring Program*, ROBBINS GELLER RUDMAN & DOWD LLP, http://www.rgrdlaw.com/services-portfolio-monitoring-program.html (last visited May 13, 2017).

70. *In re* Wash. Mut., Inc. Sec., Derivative & ERISA Litig., Nos. 2:08-md-1919 MJP, Co8-387 MJP, 2010 WL 4272567, at *8 (W.D. Wash. Oct. 12, 2010) ("While Bernstein Litowitz's tactics in recruiting [plaintiff] strike the Court as unseemly, the firm's relationship with [plaintiff] does not defeat class certification.").

71. *See, e.g.*, Plumbers & Pipefitters Nat'l Pension Fund v. Burns, 292 F.R.D. 515, 523-24 (N.D. Ohio 2013) (finding plaintiff and counsel adequate to represent the class); *In re* UTStarcom, Inc. Sec. Litig., No. C04-04908 JW, 2010 WL 1945737, at *8-9 (N.D. Cal. May 12, 2010) (holding that plaintiff and counsel with a portfolio-monitoring agreement are adequate for purposes of Fed. R. Civ. P. 23(a)).

Depending on the stage of litigation, some of these may or may not be available:

- The original proxy and the supplemental disclosures (both usually available from the SEC's website)
- The memorandum of understanding
- The stipulation of settlement
- The brief (if any) filed in support of preliminary approval of the settlement
- The court order approving the settlement
- The notice sent to the class (or the draft approved by the court)
- The brief filed by plaintiffs in support of final approval of the settlement

These documents, where available, should give objector's counsel a good understanding of the claims plaintiffs are making as to the value provided to stockholders by the settlement.

We have found that the best place to begin in case evaluation is the supplemental disclosures—the consideration purportedly garnered as a benefit for the class. As discussed below, the concept of "materiality" is central to the value of supplemental disclosures.[72] Although that concept can be malleable, we have developed one good rule of thumb: how easy have class counsel made it for a court to evaluate the case?

Proxy statements often run to hundreds of pages of densely printed text.[73] Supplemental disclosures, which appear in later SEC filings, often present information by repeating entire paragraphs with minor alterations, making it difficult to tell what has changed. As the Delaware Court of Chancery noted, evaluating disclosures "often requires that the Court become essentially a forensic examiner of proxy materials."[74] Although it is not an infallible rule, we have found that plaintiffs with a strong set of supplemental disclosures tend to highlight them—for instance, by including a redline of the disclosures against the original proxy in court filings—while litigants advancing weaker settlements will make it more difficult to

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72. *See* discussion *infra* Section II.C.2.

73. *See, e.g.*, *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 899-900 (Del. Ch. 2016) ("Here, the joint Proxy that Trulia and Zillow stockholders received in advance of their respective stockholders' meetings to consider whether to approve the proposed transaction ran 224 pages in length, excluding annexes.").

74. *Id.* at 894.

evaluate their achievements by, for instance, not filing a copy of the original proxy.

A more fulsome discussion of materiality is provided in Part II. But objector's counsel should consider these factors *before* deciding to invest the time and energy in launching an objection.

While every case is different, a number of other factors often contribute to an initial case evaluation. For instance, the stipulation and the notice will generally contain a description of the released claims, which can be compared to "state of the art" releases in class settlements.[75] Similarly, initial documents filed in support of a settlement will often contain a brief description of plaintiff's purported investigation in support of the settlement, including whether and when they conducted depositions.

Finally, an evaluation can include consideration of plaintiffs' counsel. A respected practitioner in the Delaware Court of Chancery has theorized that, at least in Delaware, the class-action-litigation bar is split into two tiers, in which the top tier aggressively prosecutes litigation and the lower tier pursues disclosure settlements.[76] While we have addressed this theory elsewhere,[77] plaintiffs represented by counsel in the top-tier firms can be expected to rely on their reputation in support of the settlement.[78]

C. Drafting the Objection

If the evaluation shows that an objection has merit, the preliminary approval order will usually require that an objection be raised through a filing with the court. *Pro se* objectors sometimes file letters objecting to settlements, but represented objectors typically file papers that resemble an answering brief in opposition to plaintiff's brief in support of final approval. Every objection will be unique and dependent on its facts. There are, however, some general tactics to consider.

1. Requirements of the Preliminary Approval Order

The shareholder notice or preliminary approval order sets forth the deadline for filing an objection to the settlement and provides what amounts

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75. See discussion *infra* Section II.C.4, for considerations of potential challenges to a release.

76. *See* Friedlander, *supra* note 12, at 904-10.

77. Sean J. Griffith & Anthony A. Rickey, *Who Collects the Deal Tax, Where, and What Delaware Can Do About It, in* HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION, Jessica Erickson, Sean Griffith, David H. Webber & Verity Winship eds, forthcoming 2018).

78. Friedlander, *supra* note 12, at 907-08.

to a briefing schedule.[79] In most cases, the plaintiff's brief in support of the settlement effectively functions as an opening brief, and the objection is the answer. Plaintiffs (and perhaps defendants) are typically afforded the opportunity to reply.[80] While the order may allow for an objection to be filed at any time before the deadline, waiting until after plaintiffs file their opening brief allows an objection to usefully reflect plaintiffs' arguments.

An objector should be aware, however, of timing issues that may not be immediately apparent based on the scheduling order. For instance, Delaware law allows a party to file a brief under seal, so that its contents are not publicly available, so long as a public version of the brief omitting confidential information is filed five days later.[81] If, as happened in two recent Delaware cases, the objection is due within five days of the initial filing, an objector will be effectively precluded from reviewing the brief in support of settlement prior to filing his own papers, unless he seeks a copy of the filing from plaintiffs or the court.

In both of these cases, objector's counsel reached out to plaintiffs and asked for a copy of the brief and an extension of time to file the objection.[82] In both cases, plaintiffs withdrew the proposed settlement before the objection deadline, so no objection was actually filed in either case.[83] As a practice point, an objector or counsel faced with this situation should consider filing an entry of appearance so that there is some record on the docket of the intent to file an objection.

The preliminary approval order and the settlement notice may also specify documents and information that must be filed along with an objection. These generally include notice of an intent to appear at the settlement hearing and proof of an objector's stock ownership (and thus class membership). Proof of ownership—which, it should be noted, plaintiffs rarely provide in their own papers—may often be satisfied with a copy of a brokerage statement, although the requirements vary by

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79. *See* Griffith & Lahav, *supra* note 20, at 1084.

80. *See id.* at 1084-85.

81. *See* DEL. CH. CT. R. 5.1.

82. *See, e.g.*, Stipulation and Order Amending Scheduling Order, *In re* PMFG, Inc. Stockholder Litig., C.A. No. 11223-VCS (Del. Ch. June 2, 2016) (extending filing deadline for objector); Stipulated and [Proposed] Order Regarding Mootness and Incentive Fee, *In re* Pepco Holdings, Inc. Stockholder Litig., C.A. 9600-VCMR (Del. Ch. Oct. 21, 2016). Mr. Rickey represented the objector in *Pepco*, and Mr. Griffith (represented by Mr. Rickey) was the objector in *PMFG*.

83. *See* Stipulation and [Proposed] Order of Dismissal, *PMFG*, C.A. No. 11223-VCS (dismissing action); Stipulation and [Proposed] Order to Terminate Settlement and to Dismiss Action, *Pepco*, C.A. 9600-VCMR (dismissing action).

jurisdiction. Objectors may also be required to provide a list of other cases in which they have objected to class settlements.

2. Placing the Objection in Context

At the heart of any objection is the factual and legal basis upon which a court can reject a settlement. Again, every case is different, but we believe that most briefs should include a section that situates the disclosure settlement in the broader context of merger litigation generally. The degree of detail necessary will vary depending upon the particular jurisdiction. A brief before the Delaware Court of Chancery, or another state business court that frequently considers disclosure settlements, may merit less background detail than papers filed before a judge who rarely considers these issues. In any event, the brief should make clear that a given disclosure settlement is typical of a larger problem that other courts—including the Delaware Court of Chancery,[84] the Seventh Circuit Court of

84. *See In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 898-99 (Del. Ch. 2016) (announcing "plainly material" standard for supplemental disclosures and that disclosure settlements will henceforth be disfavored in Delaware). For Delaware cases scrutinizing settlement practices pre-*Trulia*, see *In re* Transatlantic Holdings, Inc. S'holders Litig., C.A. No. 6574-CS, 2013 WL 1191738, at *3 (Del. Ch. Mar. 8, 2013) (refusing to approve settlement for lack of "any real investigation," disclosure of additional background information, and overwhelming vote in favor of the transaction); Settlement Hearing and the Court's Ruling at 24, *In re* Medicis Pharm. Corp. S'holders Litig., C.A. No. 7857-CS (Del. Ch. Feb. 26, 2014) (refusing to approve settlement and noting that "giving out releases lightly . . . is something we've got to be careful about"); Settlement Hearing and Rulings of the Court at 20-21, Rubin v. Obagi Med. Prods., Inc., C.A. No. 8433-VCL (Del. Ch. Apr. 30, 2014), 2014 WL 2587074 (refusing to approve settlement and noting that "there are unknown unknowns in the world, and the type of global release . . . in this case and [similar] disclosure settlements provides expansive protection for the defendants against a broad range of claims, virtually all of which have been completely unexplored by the plaintiffs"); Settlement Hearing and Rulings of the Court at 69, *In re* Theragenics Corp. Stockholders Litig., C.A. No. 8790-VCL (Del. Ch. May 5, 2014), 2014 WL 2587094 (refusing to approve settlement and noting that "when a fiduciary action settles, I have to have some confidence that the issues in the case were adequately explored, particularly when there is going to be a global, expansive, all-encompassing release given"); Settlement Hearing and Request for Attorneys' Fees and the Court's Rulings at 73, Acevedo v. Aeroflex Holding Corp., C.A. No. 7930–VCL (Del. Ch. July 8, 2015) (refusing 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"); Settlement Hearings and Rulings of the Court at 73, *In re* Aruba Networks, Inc. Stockholder Litig., C. A. No. 10765-VCL (Del. Ch. Oct. 9, 2015) (refusing to approve settlement and 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* Riverbed Tech., Inc. Stockholders Litig., C.A. No. 10484-VCG, 2015 WL 5458041, at

Appeals,[85] and trial courts in states such as Texas,[86] New York,[87] New Jersey,[88] and North Carolina[89]—have begun to address.

Differing jurisdictions may have their own binding precedent regarding settlements, and even specific law on disclosure settlements and the materiality of supplemental disclosures.[90] For Delaware corporations, however, information is material only "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[91]

The recent Delaware standard for the approval of disclosure settlements was set forth in *Trulia*:

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*6 (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.").

85. *In re* Walgreen Co. Stockholder Litig., 832 F.3d 718, 726 (7th Cir. 2016) (reversing and remanding district court approval of disclosure settlement).

86. Kazman v. Frontier Oil Corp., 398 S.W.3d 377, 388 (Tex. App. 2013) (affirming the approval of the settlement agreement and modifying trial court decision to remove the attorney's fees awarded to class counsel).

87. New York state courts were among the first to refuse to approve settlements providing immaterial relief, but several early settlement refusals have been reversed on appeal. See, e.g., Gordon v. Verizon Commc'ns, Index No. 653084/13 (N.Y. Sup. Ct. Dec. 19, 2014), 2014 WL 7250212, at *2, *rev'd*, 148 A.D.3d 146 (N.Y. App. Div. 2017) (reversing trial court refusal to approve a settlement in which supplemental disclosures were deemed immaterial); City Trading Fund v. Nye, No. 651668/2014 (N.Y. Sup. Ct. Jan. 7, 2015), 2015 WL 93894, at *19, *rev'd*, 144 A.D.3d 595 (N.Y. App. Div. 2016) (same); *In re* Allied Healthcare S'holder Litig., No. 652188/2011 (N.Y. Sup. Ct. Oct. 23, 2015), 2015 WL 6499467, at *1 ("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.").

88. *See* Vergiev v. Aguero, Docket No.: L-2276-15 (N.J. Super. Ct. Law Div. June 6, 2016).

89. *See* Corwin v British Am. Tobacco PLC, No. 14 CVS 8130, 2016 WL 635191 (N.C. Super. Feb. 17, 2016); *In re* Newbridge Bancorp S'holder Litig., No. 15 CVS 9251, 2016 WL 6885882 (N.C. Super. Nov. 22, 2016).

90. *See, e.g.*, Corwin , 2016 WL 635191 (N.C. Super. Feb. 17, 2016).

91. Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944 (Del. 1985) (adopting standard of TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)). Said differently, information is material if, from the perspective of a reasonable stockholder, there is a substantial likelihood that it "significantly alter[s] the 'total mix' of information made available." Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1277 (Del. 1994) (emphasis omitted) (quoting *TSC Indus.*, 426 U.S. at 449).

> [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.[92]

The *Trulia* opinion provides a thorough review of the distortions introduced by disclosure settlements that led to an explosion of deal litigation and critiques the incentives given to parties to file and settle such claims. As such, the opinion can be cited not only for its holding, but as a useful summary for courts that are less familiar with these cases.

Trulia, obviously, is controlling authority in Delaware, and its reasoning has been adopted by courts in other jurisdictions.[93] In cases involving a Delaware-incorporated company in another jurisdiction, an argument can be made that *Trulia* applies under the internal affairs doctrine, which holds that the law of the forum applies to matters of procedure, but the law of the state of incorporation applies to matters of substance.[94] Under this doctrine, the general rules of applying for settlement approval and the overall requirement that the settlement be "fair," "reasonable," and (in federal court) "adequate" are procedural and therefore controlled by the law of the forum.[95] But the standards to apply in making these determinations are substantive and therefore controlled by the law of the state of incorporation.

At least one court has held that *Trulia* is *substantive* law and therefore controlling authority.[96] But an alternative argument, were a court to deem *Trulia*'s holding procedural and therefore not controlling outside of Delaware, is that the decision presents a persuasive rubric for analyzing a settlement, particularly where the forum's own standard for judging fairness

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92. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 898-99 (Del. Ch. 2016).

93. *See, e.g.*, *In re* Walgreen Co. Stockholder Litig., 832 F.3d 718, 725-26 (7th Cir. 2016); Statement of Reasons in *Vergiev*, *supra* note 23, at 6-9.

94. *See generally*, Note, *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for Its Continued Primacy*, 115 HARV. L. REV. 1480 (2002); *see also* Griffith & Lahav, *supra* note 20, at 1066.

95. 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 11:41 (4th ed. 2002).

96. *See* Final Order and Judgment in *Vergiev*, *supra* note 23; Statement of Reasons in *Vergiev*, *supra* note 23, at 6-9.

hearings is similar to that of Delaware.[97] Many jurisdictions tend to follow Delaware law on business matters, given the volume of cases decided in Delaware.[98]

Here, plaintiff's own brief can often be used in aid of an objection, as many plaintiffs themselves suggest that Delaware case law is authoritative and make frequent citation to Chancery cases in support of a settlement.[99] These briefs, however, tend to draw from pre-2015 cases and omit more recent, and skeptical, Delaware authority. An objection can hit two birds with one stone, both highlighting a plaintiff's omission of more recent authority and simultaneously arguing that *Trulia*, and other recent Delaware case law, is persuasive.

Finally, an objection should draw attention to the parallels between the settlement at bar and the paradigm of meritless, disclosure-only litigation outlined in *Trulia*. These involve (1) the filing of a flurry of cases following an acquisition announcement, (2) agreement by defendants to "self-expedite" and produce "core documents," (3) a settlement based on supplemental disclosures, (4) cursory confirmatory discovery, and (5) a request for settlement approval without the benefit of adversarial briefing.[100] Drawing express parallels with *Trulia* and other recent case law serves to put a case in context.

The critical work of the objector's brief, however, lies not in establishing general problems with merger litigation, but in proving that those problems are present in the settlement at hand. Thus, after briefly establishing this larger context and situating a settlement as the type disfavored by *Trulia* and later opinions, an objection should demonstrate problems with a particular settlement. *Trulia* provides a good roadmap for how to do so by focusing on the three elements that a plaintiff must demonstrate for a settlement to be approved: that the disclosures were "plainly material," that the release is narrowly tailored, and that the claims released have been adequately investigated.[101]

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97. Most states, including Delaware, adopt a version of Federal Rule of Civil Procedure 23. In addition, *Trulia* can be considered to supply Delaware's approach to the substance of determining what it means for a settlement to be fair and reasonable. *See Trulia*, 129 A.3d at 890-99.

98. *See, e.g.*, *Walgreen*, 832 F.3d at 725 (adopting *Trulia* in the Seventh Circuit on the basis of Delaware's experience with merger litigation).

99. *See, e.g.*, *Vergiev* Reply Brief, *supra* note 29, at 7 (citing to Delaware case law from 1976 and 1989 in support of award of fees).

100. *Trulia*, 129 A.3d at 891-94.

101. *Id.* at 898.

3. Challenge the Disclosures

Key to evaluating a post-*Trulia* disclosure settlement is a balancing of the "give" and the "get" for the stockholder class, which involves a comparison of the value of the supplemental disclosures with that of the potential claims bargained away by the release.[102] As *Trulia* recognized, in the absence of an adversarial hearing, a court must become "essentially a forensic examiner of proxy materials."[103] A strong objection should seek to assist a judge in this task.

A simple step that any objector should consider is whether plaintiffs have provided the court with ready access to the materials necessary to evaluate the disclosures. As noted above, plaintiffs often attach only the supplemental disclosures to their papers. An objection may assist the court simply by providing a copy of the proxy and explaining the changes, or even by providing a red-line copy. An objection may also highlight how class counsel have advanced (and abandoned) disclosure and fiduciary duty claims throughout the course of litigation. For instance, the *Riverbed* objection included a table tracking the history of lawsuits filed, claims asserted, claims abandoned, and claims settled.[104]

The crux of this argument, however, is an attack on each supplemental disclosure, demonstrating how it did not provide stockholders with "plainly material" information. The objection should demonstrate where plaintiffs have not met that standard, but rather merely made "a superficially persuasive argument that it is better for stockholders to have more information rather than less."[105]

Given the wide variety of disclosures that might be raised in any settlement, an exhaustive list of all possible arguments is beyond the scope of this article. Instead, it is more helpful to use as a model a single class of supplemental disclosure—in this case, the provision of additional detail regarding financial projections. For these disclosures, we then (1) demonstrate how plaintiffs have offered such disclosures as purportedly material settlement consideration; (2) illustrate how the law regarding such disclosures has evolved over time; and (3) mention some of the difficulties faced by objectors in convincing a court that the disclosures are not

102. *In re* Activision Blizzard, Inc. Stockholder Litig., 124 A.3d 1025, 1043 (Del. Ch. 2015) (stating that in evaluating settlements, the court must "assess[] the reasonableness of the 'give' and the 'get'").

103. *Trulia*, 129 A.3d at 894.

104. *See* Objection of Sean J. Griffith to Proposed Settlement in *Riverbed*, *supra* note 23, at 6.

105. *Trulia*, 129 A.3d at 894.

material. Once we cover that category of disclosures in detail, we will briefly discuss other issues that commonly arise in disclosure settlements.

a) Additional Financial Projections

As part of M&A disclosure settlements, plaintiffs often secure additional disclosures regarding the target company's financial projections, arguing that such information is "plainly material" because it allows stockholders to either test the banker's existing evaluation or run their own independent financial analysis.[106] The extent of the additional disclosures may vary from entire financial analyses considered by bankers[107] to additional, undisclosed line items from a financial summary.[108] Courts are then left, often without expert guidance, to assess whether the additional financial information is plainly material or whether it is simply additional data.[109]

In arguing for the materiality of this valuation information, plaintiffs regularly cite two cases, *In re Netsmart Technologies, Inc. Shareholders Litigation* and *Maric Capital Master Fund, Ltd. v. Plato Learning, Inc.*,[110] that contain broad language regarding the materiality of financial projections and, particularly, unlevered free cash flows. For instance, a plaintiff may suggest that *Maric Capital* stands for the proposition that disclosures are material—indeed, sufficiently material to enjoin a merger—where a board selectively discloses only some of the projections relied upon by its financial advisors.[111] Similarly, *Netsmart* contains readily quotable language regarding why "[a] reasonable stockholder deciding how to [vote

106. *See id.* at 898-01, 901 n.57.

107. *See In re* Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 201-02 (Del. Ch. 2007) (noting that the proxy omitted entire set of financial projections ultimately used in fairness opinion).

108. *See* Transcript of Oral Argument on Plaintiffs' Petition for an Award of Attorneys' Fees and Expenses and the Court's Ruling at 67:2-17, *In re* Baker Hughes Inc. S'holders Litig., C.A. No. 10390-CB (Del. Ch. Oct. 13, 2016) [hereinafter Transcript of Oral Argument in *Baker Hughes*] (supplemental disclosures added "several line items" to already disclosed projections "to get to a bottom-line estimate of free cash flows").

109. *See Trulia*, 129 A.3d at 898-99.

110. *Netsmart*, 924 A.2d at 203; Maric Capital Master Fund, Ltd. v. Plato Learning, Inc., 11 A.3d 1175, 1177-78 (Del. Ch. 2010).

111. *See, e.g.*, Plaintiff's Memorandum of Law in Further Support of Motion for Final Approval of Proposed Settlement and Negotiated Attorneys' Fees and Expenses and in Reply to the Sole Objection at 17-18, Bushansky v. Phoenix Cos., Docket No. (X08) FST-CV-15-6027891-S (Conn. Super. Ct. Feb. 23, 2017). Notably, the *Phoenix* court ultimately concluded, largely based on an affidavit from Plaintiff's expert, that the disclosures in that case were material. *See* Bushansky v. Phoenix Cos., No. X08FSTCV156027891S, 2017 WL 1194768, at **3-4 (Ct. Super. Ct. Feb. 23, 2017).

on a cash-out merger] would find it material to know what the best estimate was of the company's expected future cash flows."[112] Post-*Trulia*, plaintiffs are even more likely to advocate for the materiality of financial disclosures because they form the basis of one of the few disclosure settlements of 2016 approved by the Delaware Court of Chancery.[113]

The broad language of *Netsmart* and *Maric Capital*, however, rest upon their particular facts. For instance, *Netsmart* held that if a proxy discloses a banker's support for a transaction, "the valuation methods used to arrive at [a banker's] opinion as well as the key inputs and range of ultimate values generated by those analyses must also be fairly disclosed."[114] But it did so in the context of a proxy that omitted an entire set of final projections relied upon by the bankers, and instead disclosed an earlier set of figures.[115] Similarly, although *Maric Capital* stated that "management's best estimate of the future cash flow of a corporation that is proposed to be sold in a cash merger is clearly material information,"[116] the broader rule was stated in the context of undisclosed free cash flow figures produced by management and relied upon by the financial advisors in preparing their fairness opinion. These distinctions may often be glossed over by plaintiffs' counsel seeking to tout the materiality of supplemental disclosures.

Because *Maric Capital* was decided in 2010, however, the Delaware Court of Chancery has revisited the question of additional financial disclosures several times and has considerably narrowed the scope of *Netsmart* and *Maric Capital*. For instance, in two separate opinions in the same case, the court rejected the argument that unlevered free cash flows are *per se* material where the figures are derived by bankers, rather than management.[117] Similarly, Chancellor Bouchard recently distinguished *Netsmart*, *Maric Capital*, and *BTU* to find that the disclosure of additional line items in an already disclosed financial projection was not material,

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112. *Netsmart*, 924 A.2d at 177.

113. *See* Transcript of Settlement Hearing, *In re* BTU Int'l, Inc. Stockholders Litig., C.A. No. 10310-CB (Del. Ch. Feb. 18, 2016).

114. *Netsmart*, 924 A.2d at 203-04.

115. *Id.*

116. Maric Capital Master Fund, Ltd. v. Plato Learning, Inc., 11 A.3d 1175, 1178 (Del. Ch. 2010).

117. *See* Nguyen v. Barrett, C.A. No. 11511-VCG, 2016 WL 5404095, at *4 (Del. Ch. Sept. 28, 2016); Nguyen v. Barrett, C. A. No. 11511-VCG, 2015 WL 5882709, at *4 (Del. Ch. Oct. 8, 2015), *appeal denied*, No. 550, 2015, 2015 WL 5924668, at *1 (Del. Oct. 9, 2015) ("Our case law provides that, where the bankers derive unlevered, after-tax free cash flows rather than relying on management projections, the inputs on which they rely are not *per se* subject to disclosure.").

even if it did "provide helpful information for those stockholders who may be inclined to create their own DCF models."[118]

These cases suggest two obstacles that face an objector challenging the materiality of supplemental disclosures, particularly in courts outside of Delaware. First, the question of materiality is fact-driven and varies from case to case. There are some general principles: in disclosing a banker's analysis, all that is required is a "fair summary" of the banker's work.[119] The addition of granular details may not rise to the level of materiality.[120] Shareholders are not entitled to all details necessary to replicate the financial advisor's work.[121] But these principles are derived from specific

118. Transcript of Oral Argument in *Baker Hughes*, *supra* note 108, at 70:15-24.

119. *See In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 900 (Del. Ch. 2016) (emphasizing that "[a] fair summary, however, is a *summary*"). 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 that it is better for stockholders to have more information rather than less.

Id. at 894; *accord In re* Micromet, Inc. S'holders Litig., C.A. No. 7197-VCP, 2012 WL 681785, at *11 (Del Ch. Feb. 29, 2012) ("Stockholders are entitled to 'a fair summary of the substantive work performed by the investment bankers,' but 'Delaware courts have repeatedly held that a board need not disclose specific details of the analysis underlying a financial advisor's opinion.'" (footnote omitted) (citations omitted)); *In re* Cogent, Inc. S'holder Litig., 7 A.3d 487, 511 (Del. Ch. 2010) (holding stockholders are entitled to fair summary but not minutiae, and rejecting requests for additional disclosures).

120. Transcript of Hearing on Motion to Intervene and for an Award of Attorneys' Fees and Expenses at 9, *In re* Amylin Pharm. S'holders Litig., C.A. No. 7673-CS (Del. Ch. Feb. 5, 2013) ("You don't have to disclose details. You have to disclose the material information relevant to understanding the banker's thing."); Defendants' Brief in Support of Proposed Settlement and in Opposition to Plaintiffs' Application for Attorneys' Fees and Expenses at 22, *In re* Theragenics Corp. Stockholders Litig., C.A. No. 8790-VCL, (Del. Ch. May 5, 2014), 2014 WL 1867128 (rejecting supplemental disclosures that "add nothing more than further granular detail").

121. *In re* Plains Expl. & Prod. Co. Stockholder Litig., C.A. No. 8090-VCN, 2013 WL 1909124, at *8 (Del. Ch. May 9, 2013) (highlighting that a financial analyst's "duty to disclose financial information material to their 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"); *accord* Globis Partners, L.P. v. Plumtree Software, Inc., C.A. No. 1577-VCP, 2007 WL 4292024 at *12-13 (Del. Ch. Nov. 30, 2007) ("Delaware law does not require disclosure of all the data underlying a fairness opinion such

cases, each with their own facts, and do not easily lend themselves to bright-line rules.

Second, as can be seen from decisions such as *BTU* and *Baker Hughes*, much of Delaware case law relating to the materiality of disclosures is found in transcript rulings, rather than cases included in the Atlantic Reporters or compiled by Lexis or Westlaw. These rulings, which are precedential in Delaware, form a layer of supplemental authority more readily available to frequent practitioners in mergers and acquisitions litigation than for non-specialists.[122] However difficult it may be to find these transcripts, establishing the "state of the art" on a question of materiality will be difficult without reference to them.

b) Other Categories of Disclosures

Every settlement will have a distinct set of supplemental disclosures, and a complete evaluation of each would require a treatise (if it were possible at all). There are several factors, however, that objectors should consider regarding any disclosure put forth in support of a settlement, regardless of content.

Has the "New" Information Already Been Disclosed? More often than one might suspect, plaintiffs present old material as valuable, new information. In both *Trulia* and *Walgreen*, the reviewing court noted that some of the supplemental information had already been disclosed in the original proxy.[123] Potential objectors should closely scrutinize proxy statements in search of supplemental disclosures that duplicate previously disclosed information.

Can the additional information be derived from material already in the proxy? Courts have found that additional information that could be derived

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that a shareholder can make an independent determination of value."); *In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 449 (Del. Ch. 2002) (noting in fair summary discussion that stockholders would find it material to know the advisor's basic valuation exercises, key assumption of those exercises, and range of values produced).

122. *Cf.* Edward M. McNally, *The Delaware Court of Chancery Speaks by Transcript*, LAW TECH. NEWS, Sept. 14, 2012 (noting that obtaining transcript opinions is "not cheap").

123. *See, e.g.*, *In re* Walgreen Co. Stockholder Litig., 832 F.3d 718, 722 (7th Cir. 2016) (stating that disclosure of risk factors "were based on language found in the proxy statement"); *Trulia*, 129 A.3d at 902-03 (noting that amount of synergies included in supplemental disclosure had already been included in the proxy); *see also* Order After Hearing on March 30, 2017 Plaintiffs' Motion for Final Approval of Class Action Settlement, Anderson v. Alexza Pharms., Inc., Case No. 16-CV-295357, 2-3 (Cal. Super. Ct.—Santa Clara Cty. Apr. 3, 2017).

from "simple arithmetic from data in the proxy statement" is not plainly material.[124]

Does the information merely confirm a non-occurrence? Objectors should attack supplemental disclosures that simply confirm the non-occurrence of an event that might have been material had it occurred. As a general rule, "[i]f a disclosure document does not say that the board or its advisors did something, then the reader can infer that it did not happen."[125] Thus, courts have found immaterial certain disclosures that stated management had *not* adjusted financial projections[126] or confirmed that buyers did *not* discuss with seller's management post-merger employment during deal negotiations.[127]

Does the disclosure support the merger? Finally, objectors should consider whether supplemental disclosures would have discouraged stockholders from voting in favor of a transaction. Even if such disclosures might be material, however, they are considered less valuable because directors already have an incentive to disclose information that would support their deal.[128]

4. Challenge the Release

Whereas a challenge to the disclosures argues that the plaintiff class has received little or no benefit, a challenge to the release argues that approval of the settlement would require the class to abandon claims without receiving commensurate compensation. This attack focuses on the kitchen-sink breadth of the typical release. Prior to *Trulia*, these releases encompassed claims "known and unknown," "ripe and unripe," "investigated and uninvestigated," and otherwise threw as expansive a net as possible.

Since *Trulia*, however, the Delaware Court of Chancery has approved a small number of disclosure settlements with narrower releases.[129] Indeed,

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124. *Walgreen*, 832 F.3d at 722.

125. *In re* Sauer-Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1132 (Del. Ch. 2011).

126. *Id.*

127. *See id.*; Statement of Reasons in *Vergiev*, *supra* note 23, at 8.

128. *See In re* Riverbed Tech., Inc. Stockholders Litig., C.A. No. 10484-VCG, 2015 WL 5458041, at *5 n.18 (Del. Ch. Sept. 17, 2015) ("While it is possible that 'positive' disclosures may add materially to the total mix of information considered by a stockholder, a board of directors has every reason to make such positive disclosures in support of an action it has recommended; little judicial oversight is needed with respect to such disclosures.").

129. *See In re* BTU Int'l, Inc. Stockholders Litig., C.A. No. 10310-CB, 2016 WL 680252 (Del. Ch. Feb. 18, 2016); *In re* NPS Pharm. Stockholders Litig., C.A. No. 10553-VCN, 2016

plaintiffs have cited to these cases in support of disclosure settlements when challenged by objectors.[130] For instance, although the Delaware Court of Chancery approved a settlement in February 2016 that nominally released claims under foreign and administrative law, it did so with specific reservations:

> The release, as revised, is consistent, in my judgment, with the scope of a release that would pass muster under *Trulia* because it is limited to the release of disclosure claims and fiduciary duty claims relating to the decision to enter the merger.
>
> It would be better, in an ideal world, that the release not include words like "foreign claims" or "regulatory claims," and counsel, in the future, should exclude such terms because they really have no relevance to the nature of the claims that are being released. But in this circumstance, I view the inclusion of those phrases in this release as a product of the editing, as the revision process occurred post-*Trulia* in forming this particular release . . . .[131]

Notably, a later release in *In re Regado Biosciences, Inc. Stockholder Litigation*, approved on July 27, 2016, did not include such claims.[132] Thus, a strong objection should indicate where a proposed release extends beyond the latest "state of the art" releases approved by courts in the relevant jurisdiction or the Delaware Court of Chancery.

An objector should also be mindful of the scope of claims brought by plaintiffs in their complaint. For instance, if plaintiffs sued in federal court, they may have omitted state-law fiduciary-duty claims. While we are not aware of a federal court that has addressed this argument to date, the logic of decisions like *Walgreen* and *Trulia* suggest that a release should only cover claims that were brought, or could have been brought, in the case. Likewise, plaintiffs often structure a release such that the class effectively releases any claims that it might have against the named plaintiffs or their counsel, and an objection can bring such discrepancies to the reviewing court's attention.

WL 680256 (Del. Ch. Feb. 18, 2016); *In re* Regado Biosciences, Inc. Stockholder Litig., C.A. No. 10606-CB, 2016 WL 4040729 (Del. Ch. July 27, 2016).

130. *See, e.g.*, *Vergiev* Reply Brief, *supra* note 29, at 14 (arguing that "the extent *Trulia* altered the analysis of disclosure-based settlements in Delaware . . . is far from clear given the post-*Trulia* final approval orders in *BTU* and *NPS Pharmaceuticals*").

131. Transcript of Settlement Hearing, *supra* note 113, at 40.

132. *See Regado*, 2016 WL 4040729, at *2.

Plaintiffs frequently raise two related arguments when challenged regarding a release. The first is that the released claims were not, in plaintiff's estimation, worth much, and that the release thus gives up nothing at all. The second is that unless an objector means to take over the case and pursue claims for money damages—typically long after the transaction has closed—the objector implicitly agrees that the released claims have no value.

There are a number of answers to these arguments. First, these contentions fundamentally misapprehend what a class stands to lose from a broad release: "[T]he option value of having some more diligent plaintiff be able to come forward with a damages action in the future, if there is something that arises."[133] Indeed, one of the factors leading to the *Trulia* decision was the recognition that claims that later proved valuable had come close to being released in disclosure settlements.[134] Courts have rejected settlements that never received an objection by plaintiffs' counsel interested in taking over the case.[135]

Second, the restoration of adversarial proceedings in disclosure settlements would be undermined if objectors were only encouraged to present arguments where they believed the claims held actual, current value, rather than the "option value" described in *Transatlantic*.[136] Courts have recognized that the over-litigation of M&A cases creates drain on the American economy.[137] This problem would not be addressed by a system that allowed objections only in those cases where the objector could find evidence of underlying value such that the objector was willing to litigate the case.

5. Challenge the Investigation

An objection may also challenge whether claims that fall within the scope of a post-*Trulia* release have been investigated by plaintiffs' counsel to a degree sufficient to support a release of claims. This prong of *Trulia* speaks to the same concern as the limitation on the scope of a release:

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133. *See In re* Transatlantic Holdings, Inc. S'holders Litig., C.A. No. 6574-CS, 2013 WL 1191738, at *2 (Del. Ch. Mar. 8, 2013).

134. *See In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 895, 895 n.32 (Del. Ch. 2016).

135. *See Transatlantic*, 2013 WL 1191738, at *3.

136. *Id.* at *2.

137. *See, e.g.*, *In re* Walgreen Co. Stockholder Litig., 832 F.3d 718, 724 (7th Cir. 2016) ("The type of class action illustrated by this case—the class action that yields fees for class counsel and nothing for the class—is no better than a racket. It must end.").

plaintiffs in the habit of pursuing quickly filed complaints will inadvertently give up valuable claims, or even turn the other way when evidence of misconduct does appear.[138]

Although plaintiffs generally bear the burden of demonstrating that a settlement passes muster, they often provide reviewing courts with little detail regarding the scope of the investigation beyond brief descriptions of depositions and vague assertions that "thousands" of pages of documents were reviewed. An objection may highlight these faults to a reviewing court.

The limited production of "core documents" by defendants prior to the MOU is one red flag that an objection should highlight. Delaware courts have described these documents—mostly board minutes, banker presentations, and where applicable, documents reviewed by special committees—as production intended to facilitate disclosure settlements.[139] Indeed, one Vice Chancellor has gone so far as to note that if a plaintiff "were actually going to litigate a case and litigate a preliminary injunction or litigate an expedited trial, there is no way [the plaintiff] would just accept those core documents."[140]

138. *See, e.g.*, Transcript of Settlement Hearings and Rulings of the Court at 59-61, 73, *In re* Aruba Networks, Inc. Stockholder Litig., C.A. No. 10765-VCL (Del. Ch. Oct. 9, 2015) (emphasizing that plaintiffs' counsel failed to pursue evidence of misconduct unearthed during discovery); Transcript of Settlement Hearings and Rulings of the Court at 39, Haverhill Ret. Sys. v. Asali, C.A. No. 9474-VCL (Del. Ch. June 8, 2015) ("The fundamental problem in this case is I simply do not know the types of things that may have gone on here or the types of things that might be covered by this global release.").

139. *See Trulia*, 129 A.3d at 892; *In re* Sauer-Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1121 (describing "the standard categories of documents that defendants routinely produce to facilitate a disclosure-only settlement").

140. Transcript of Oral Argument on Plaintiff's Motion for Expedited Proceedings and Rulings of the Court at 26-27, City of Daytona Beach Police & Fire Pension Fund v. Examworks Grp., Inc., C.A. No. 12481-VCL (Del. Ch. filed June 17, 2016). Vice Chancellor Laster's commentary, although given in ruling on a motion to expedite, is worth quoting at length:

> [Y]our proposal focused on, at least in the first instance, the customary core documents, which, for better or for worse -- and you now will hear a skeptical view -- was something that was essentially worked out as a matter of practice with people who really weren't interested in litigating cases. And so what turned out to be the customary core documents, yeah, they were core documents, but if you were actually going to litigate a case and litigate a preliminary injunction or litigate an expedited trial, there is no way you would just accept those core documents. If really what you wanted was a disclosure-only settlement, then, yeah, you would be content with just those core documents. That would be fine.

Similarly, an objection can highlight the scope of deposition testimony taken by plaintiffs' counsel. In *Trulia*, counsel took three depositions, two before the parties agreed to settle and one in confirmatory discovery.[141] Many settlements are based on less, including cases in which no defendants are deposed, only bankers. Unless an objector is willing and able to bear the expense of seeking discovery himself, access to the content of deposition testimony may be limited, but an objection may at least highlight the volume of discovery or lack of detail regarding the extent thereof.[142]

Again, plaintiffs bear the burden of demonstrating that claims have been sufficiently investigated.[143] A good objection focuses on reasons to doubt that discovery was aimed at uncovering the real strength of claims being released, rather than ticking the boxes required at a fairness hearing.

6. Challenge Attorneys' Fees

Motions for approval of disclosure settlements are usually coupled with motions for an award of fees to plaintiffs' counsel.[144] Settlements, however, are typically not conditioned on an award of attorneys' fees.[145] Thus, even when a judge is inclined to approve a settlement, an objector may argue in the alternative that the achievements do not merit a substantial fee award because the settlement is of very little real value to the class.[146]

As with the arguments on the merits, a strong objection can provide adversarial rigor to the application for attorneys' fees.[147] The following list, while not exhaustive, may provide fodder for an objector challenging an award of fees.

Is the requested fee award in line with recent precedent? Even before *Trulia*, and particularly after that ruling, fee awards for disclosure settlements have declined, at least in Delaware. For instance, the recent *BTU* and *Regado* awards were limited to $325,000 and $300,000, inclusive of expenses, respectively.[148] Plaintiffs seeking greater rewards will often

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Id.

141. *Trulia*, 129 A.3d at 893.

142. *See, e.g.*, Fitzpatrick, *supra* note 27, at 1631, 1631 n.29; Lahav, *supra* note 20, at 85-86.

143. *See* Fisch, Griffith & Solomon, *supra* note 49, at 569.

144. *See, e.g.*, *id.* at 573-74.

145. *See, e.g.*, *id.*

146. *See, e.g.*, *id.* at 568.

147. *See id.* at 569.

148. *See In re* BTU Int'l, Inc. Stockholders Litig., Case No. 10310-CB, 2016 WL 680252, at *3 (Del. Ch. Feb. 18, 2016); *In re* Regado Biosciences, Inc. Stockholder Litig., C.A. No. 10606-CB, 2016 WL 4040729, at *3 (Del. Ch. July 27, 2016).

cite to older settlements in order to justify higher fees. An objection provides the opportunity to demonstrate where these benchmarks are misleading.

Apart from recent settlements, another good source for context in disclosure fee awards is Vice Chancellor Laster's opinion in *In re Sauer-Danfoss Inc. Shareholders Litigation*.[149] That ruling collects many disclosure settlements, separating them into three categories based upon the value of the supplemental disclosures to stockholders, the degree of investigation and litigation conducted in the case, and the fee award.[150] While it does not reflect events in post-*Trulia* stockholder litigation, it can provide an easily accessible benchmark for fee awards.

Have plaintiffs made an attempt to reduce duplication of effort? The use of lodestars to justify fee awards presents a perverse incentive to representative counsel, because a higher lodestar makes it easier to justify a higher fee. It is not uncommon to see four, five, or more law firms joining together to represent multiple clients in disclosure cases, adding hundreds of hours to the lodestar on behalf of different clients.[151] Each firm typically submits affidavits describing its own efforts, which allows an objector to compare the submissions and make rough judgments as to whether efforts have been coordinated to reduce cost.

Are counsel's rates reasonable for the jurisdiction? Plaintiff's counsel often base their lodestar on rates that can exceed $700 per hour.[152] These rates may be in line with prevailing fees in New York or Delaware. Courts in other jurisdictions, however, have cut fees where the lodestars were justified by rates greater than those common for local counsel.[153]

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149. 65 A.3d 1116 (Del. Ch. 2011).

150. *See id.* at apps. A, B, C.

151. In the *Vergiev* case, for instance, plaintiffs provided over a dozen separate affidavits from law firms to support their lodestar. *See* Certification of Audra Depaolo in Support of Plaintiff' Motion for Final Approval of Settlement and Award of Attorneys' Fees and Reimbursement of Expenses Exs. 4-18, Vergiev v. Aguero, Docket No.: L-2276-15 (N.J. Super. Ct. Law Div. June 6, 2016) (attaching affidavits in support of fees from Faruqi & Faruqi, LLP; Kirby McInerney LLP; Cohn Lifland Pearlman Herrman & Knopf LLP; Rigrodsky & Long, P.A.; Johnson & Weaver, LLP; Ryan & Maniskas, LLP; Kahn, Swick & Foti, LLC; Abraham, Fruchter & Twersky, LLP; Levi & Korsinsky LLP; Gardy & Notis, LLP; Pomerantz LLP; and Kantrowitz, Goldhamer & Graifman, P.C.).

152. *See, e.g.*, Affidavit of Miles D. Schreiner in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Application for Award of Attorneys' Fees and Expenses at 1, *Vergiev*, Docket No.: L-2276-15.

153. *See, e.g.*, *In re* Newbridge Bancorp S'holder Litig., 15 CVS 9251, 2016 WL 6885882, at *13-15, *18 (N.C. Super. Nov. 22, 2016) (finding that prevailing rates for North

Does the benefit to the class merit a fee? It is not unheard of for a court to determine that plaintiffs secured supplemental disclosures sufficient to support a settlement but not to justify a significant award to plaintiff's counsel.[154]

Ultimately, a peppercorn settlement merits a peppercorn fee. Even where a court grants approval of a settlement, a strong objection can still add value to the settlement process by providing evidence in support of the argument that the settlement does not justify plaintiff's fee request.

D. Anticipating Possible Opposition

It would be naïve to expect that plaintiffs' counsel, particularly those who for the last ten years have been involved in a multimillion dollar industry of litigating almost every major merger and profiting from disclosure settlements, would simply stand aside when an objector appears. That said, it has happened.[155] More often, however, the parties to a settlement attempt to defend their work and attack the objector. Again, while every case is different, based on our experience, class counsel often employ two techniques to dissuade objectors: attacks on an objector's integrity and the use of discovery.

1. Distinguishing Meritorious Objections From Those of "Professional Objectors"

In almost every case in which Professor Griffith objected, plaintiffs have attacked either Professor Griffith, his counsel, or both, as "professional objectors" seeking to profit by interfering with a settlement. These accusations come with more than a little irony—plaintiffs, after all, are simultaneously seeking fees for their work.

The "professional objector" label is normally reserved for objectors who seek to be bought off by class counsel in exchange for withdrawing an objection.[156] As discussed above,[157] we are unaware of any such objectors in the context of disclosure settlements and doubt they will become

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Carolina business attorneys were less than for Delaware counsel, and reducing fees to an implied hourly rate of $258.00).

154. *See, e.g.*, *id.* at *18 (finding that supplemental disclosures were "of only marginal benefit to the Class" and did not justify plaintiff's full fee request); *In re* Riverbed Tech., Inc. Stockholders Litig., C.A. No. 10484-VCG, 2015 WL 5458041, at *8 (Del. Ch. Sept. 17, 2015) (reducing fees from requested $500,000 to $329,881.61, taking into account the "modest benefit conferred").

155. *See supra* note 83 and accompanying text.

156. *See supra* note 26 and accompanying text.

157. *See supra* note 28 and accompanying text.

common anytime soon. Because plaintiffs typically raise this argument in their reply brief after the objector has appeared, however, an objector may have a limited opportunity to present rebuttals.

Counsel should therefore anticipate the argument and, rather than wait for oral argument or a sur-reply, distinguish himself and his client from the "professional" variety in the objection itself. In addition, an objector can offer to assuage concerns on this point by providing an affidavit attesting that he or she will not sell or settle an objection without court approval.

2. Discovery

Finally, our experience is that some, but not all, plaintiffs seek discovery from objectors challenging a disclosure settlement. Again, there is an irony here, in that plaintiffs often provide no discovery into their positions or litigation history, and defendants often produce nothing beyond the "core documents" and confirmatory discovery agreed between the parties. Real, adversarial discovery will be left for the objector.

These discovery requests miss the point of the objection, which will rarely be based on any facts specific to the objector but will nevertheless involve substantial effort on the parts of objector and counsel. Document requests may run dozens of pages and purport to require production of information in formats that individual stockholders (or their counsel) are not readily equipped to produce.

Where such requests are overly burdensome and the costs of responding outweigh a reasonable benefit, response requires careful consideration of local discovery rules and mores. Many jurisdictions require a meet-and-confer between counsel before discovery disputes are brought to the court, and this allows counsel to present creative solutions to discovery disputes. For instance, if plaintiffs suggest they want "all documents relating to the transaction" to understand an objector's stance on presently viable causes of action, objector's counsel can offer to provide an affidavit.

Another way of diffusing discovery requests may be to point to the unnecessarily expedited nature of the settlement process and to ask for a delay of the settlement hearing to allow for discovery. Given that the transaction has already closed, settlement approval rarely involves any ticking clock. A request for a delay of the settlement hearing to allow, for instance, for more convenient scheduling of a deposition (particularly if it will reduce costs) may be reasonable. The request may also separate plaintiffs who legitimately need discovery from those who are simply hoping to drive away an objector.

To date, we are not aware of any court that has considered disclosure settlements and allowed plaintiffs to conduct wide-ranging discovery into objectors who present legal arguments concerning the over-litigation of corporate claims or adversarial presentations of plaintiffs' own facts. For instance, in the *Riverbed* case, the settlement proponents' motion to compel discovery of Professor Griffith was refused.[158]

III. Why Represent Objectors?

There are many reasons to object to disclosure settlements as a policy matter. Prior to *Trulia*, the near-automatic award of attorneys' fees for insubstantial disclosure relief fueled the sue-on-every-deal phenomenon, imposing a litigation tax on every major corporate transaction.[159] Disclosure settlements offered a perfect opportunity for rent-seeking: plaintiffs' counsel could extract fees, defendants could ensure their deals would reach a vote (and purchase insurance in the unlikely event that improprieties came to light post-closing), and the deadweight loss was small enough to avoid inspiring organized stockholder challenge. Real opposition arose only at the point when almost every deal became subject to litigation—the point at which it became embarrassing.[160]

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158. Letter Opinion, *In re* Riverbed Tech., Inc. Stockholder Litig., C.A. No. 10484-VCG, 2015 WL 4251189, at *1 (Del. Ch. July 14, 2015) (finding that objector's "standing is a purely legal issue based on the date of acquisition of his stock; no further evidence-gathering on this issue is relevant"; that the opinions of an objector regarding settlement "speak for themselves"; and that an expedited schedule mitigated against "the inconvenience and expense of further discovery" into the objection).

159. *See* Fitzpatrick, *supra* note 26, at 1636.

160. *See, e.g.*, JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE, 90 (2015) (noting that in the context of merger class actions, "incentives to sue have become excessive, and litigation is growing out of control, like algae in a petri dish"); *see also* OLGA KOUMRIAN, SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES: REVIEW OF 2014 M&A LITIGATION 1 (2015), https://www.cornerstone.com/Shareholder-Litigation-Involving-Acquisitions-2014-Review.pdf (finding that in 2014, shareholders challenged approximately 93% of large mergers and acquisitions); Cain & Solomon, *supra* note 11; James D. Cox & Randall S. Thomas, *Corporate Darwinism: Disciplining Managers in A World with Weak Shareholder Litigation*, 95 N.C. L. REV. 19, 27 (2016) (noting that "litigation against publicly-held companies that undertake deals is now of epidemic proportions"); Fisch, Griffith & Solomon, *supra* note 49, at 558 ("Multiple teams of plaintiffs file lawsuits challenging virtually every public company merger, often in multiple jurisdictions." (footnote omitted)); Friedlander, *supra* note 12, at 919 ("There are system-wide negative effects from the longstanding grant of releases to defendants and continued subsidization of a plaintiff disclosure settlement bar that sued on every significant M&A transaction and collected significant fees . . . ."); Griffith, *supra* note 7, at 2 ("[T]he

The reintroduction of adversarial litigation to the settlement process provides one corrective to the perverse incentives that led to this rent-seeking litigation that has drawn the integrity of the corporate bar into question. Simply put, if plaintiffs' counsel can anticipate a loss whenever—and wherever—they bring meritless litigation, they can be expected to bring fewer cases in the first place. Recognizing the importance of adversarial briefing, the Delaware Court of Chancery has gone so far as to consider appointing an amicus curiae, with fees taxed to the parties, to provide an adversarial evaluation of settlement consideration.[161] The Seventh Circuit has similarly suggested that a trial judge confronted with doubts as to the value of a settlement *should* appoint an independent expert.[162]

To date, however, we are unaware of any court actually appointing an amicus curiae—compensated or not—to evaluate a disclosure settlement. Yet courts have been willing to award fees to counsel who represented stockholder objectors, even in cases where settlements were ultimately approved.[163] The mechanics of applying for such fees vary from jurisdiction to jurisdiction, and an objector's counsel is well-advised to research those requirements at the same time that he or she evaluates a disclosure settlement. In particular, counsel should research what procedural steps need to be taken to seek fees *before* accepting representation, and make

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problem is one of too much and not enough: too much in the way of filings, and not enough consideration at settlement. In terms of filings, virtually every merger transaction is challenged . . . ." (footnote omitted)); Charles R. Korsmo & Minor Myers, *The Structure of Stockholder Litigation: When Do the Merits Matter?*, 75 OHIO ST. L.J. 829, 840-41, 895 (2014) (finding indicia of agency costs in merger class action claims suggesting that the merits count for very little in such claims); Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 155 (2011) (discussing merger lawsuits as "cookie-cutter complaints"); Webber, *supra* note 67, at 909-10; Marianna Wonder, Note, *The Changing Odds of the Chancery Lottery*, 84 FORDHAM L. REV. 2381, 2382 (2016) (noting that the volume of merger filings and the "similarity between so many of these cases . . . indicates that M&A litigation has become routine, regardless of actual merit").

161. *See In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 898-99 (Del. Ch. 2016); *see also* Letter from Vice Chancellor J. Travis Laster to Counsel at 6-7, Haverhill Ret. Sys. v. Asali, C.A. No. 9474-VCL (Del. Ch. June 8, 2015) (proposing the appointment of an amicus curiae to assess the value of non-pecuniary relief).

162. *See In re* Walgreen Co. Stockholder Litig., 832 F.3d 718, 724 (7th Cir. 2016) (noting that trial judge could "have appointed her own expert to explain the significance (or rather lack thereof) of the supplemental disclosures, and she should have done that given her doubts about the lawyers' explanations" (internal citation omitted)).

163. *See, e.g.*, *In re* Riverbed Tech., Inc. Stockholders Litig., C.A. No. 10484-VCG, 2015 WL 7769861, at *3 (Del. Ch. Dec. 2, 2015).

sure that any steps are taken to preserve the right to bring a fee request. Thus far, awards to objectors have not approached the six-figure fees routinely awarded to plaintiffs who secure merely "helpful" supplemental disclosures. The number of successful objections—let alone fee awards[164]—remains quite low, however, and as plaintiffs bring more cases outside of Delaware, there is reason to believe that opportunities to earn fees will be more common. After all, objectors provide a greater benefit to courts that are not used to confronting disclosure settlements, particularly where plaintiffs seek settlement approval and fees without disclosing relevant authority such as *Trulia*.

Moreover, there are other advantages to taking up these cases for counsel interested in the state of M&A class action litigation. From a business perspective, these cases resolve themselves fairly quickly—largely due to the unnecessarily expedited briefing schedule demanded by the parties—and thus do not require a law firm to warehouse a large inventory of slow-moving cases. Assuming plaintiffs are unsuccessful in demanding discovery from an objector, disclosure settlements rarely turn on disputed factual issues that involve extensive discovery or document review. Instead, they tend to revolve around the presentation of complex, dynamic legal issues to courts that would otherwise be required to review settlements without adversarial presentation of issues.

The cases are, to be honest, fun—at least by the standards of legal work. This litigation provides the rare opportunity to correct and to make manifest a misalignment of incentives among participants in a legal world who have, for far too long, profited from lawsuits brought against almost every transaction, no matter how well-intentioned a company's directors or properly conducted the sale process. The correction of these incentives will eliminate a very lucrative market for a small but well-compensated portion of the plaintiffs' bar, and this guarantees a vigorous resistance. This is good work, toward a good outcome, and more attorneys should involve themselves in it.

164. The *Walgreen* objector, for instance, was represented by the Center for Class Action Fairness, a non-profit that did not seek fees. On the other hand, the unsuccessful objector in *Phoenix Companies* sought fees based upon the settling party's post-objection agreement to modify the release, and the *Phoenix* court approved a settlement with objector's counsel that permitted a fee of $72,000.00. *See* Stipulation and Order re: Objector James K. Webber's Motion for an Award of Attorney's Fees and Expenses or in the Alternative Motion for Reargument and Reconsideration, Bushansky v. Phoenix Cos., No. X08-FST-CV-15-6027891-S (Ct. Super. Ct. Apr. 13, 2017).

Conclusion

Counsel to objectors in disclosure settlements have the Fissian opportunity to do well while doing good. Objectors restore adversarial context to cases where the parties otherwise jointly seek a court's blessing of settlements that may provide no benefit to absent stockholders. Well-represented objections that present fulsome context to courts tasked with evaluating settlements not only add value to individual proceedings, but address an imbalance that led to the expansion of deal litigation "beyond the realm of reason."[165] The authors have been part of this movement, but with more than two-thirds of all transactions still subject to litigation, more work is necessary to stem this tide. It is our hope that other counsel will find this article useful in bringing objections to meritless disclosure settlements, thus adding their voices to the chorus proclaiming that enough is enough.

165. *Trulia*, 129 A.3d at 894.

OKLAHOMA LAW REVIEW

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COMMENT

NOTES

VOLUME 70 WINTER 2018 NUMBER 2

Cite as: 70 OKLA. L. REV. ____ (2018).

The *Oklahoma Law Review* online edition, ISSN 2473-9111, is edited and compiled at the College of Law of the University of Oklahoma. Copyright November 2017 by the *Oklahoma Law Review*. Manufactured in the United States of America. The *Oklahoma Law Review* is published quarterly and is available online via Digital Commons, Westlaw, Lexis, HeinOnline, and the OLR's website at http://www.law.ou.edu/faculty-and-scholarship/journals/oklahoma-law-review.

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OKLAHOMA LAW REVIEW

EDITED AND COMPILED AT THE COLLEGE OF LAW OF THE UNIVERSITY OF OKLAHOMA
AND PUBLISHED QUARTERLY