HOW *RURAL/METRO* EXPOSED THE SYSTEMIC PROBLEM OF DISCLOSURE SETTLEMENTS

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ABSTRACT

The outcome of the Rural/Metro *litigation calls into question the major premise of disclosure settlements—that a global release of claims in exchange for supplemental disclosures is justified, supposedly because it safely can be assumed that the released damages claims challenging the transaction under* Revlon *and its progeny have been investigated and analyzed and have been found to be weak. In Part II of this Article, I discuss the history of disclosure settlements and postulate that the* Rural/Metro *litigation prompted a decisive break with an era of routine approval of disclosure settlements. In Part III of this Article, I discuss the contrast between the disclosure settlement phase and the post-disclosure settlement phase of* Rural/Metro *and how that contrast sheds light on policy issues raised by the routine approval of disclosure settlements. I argue that a generation of routine disclosure settlements undermined in various respects the proper functioning of a system for the judicial enforcement of fiduciary duties.*

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I. INTRODUCTION

There is no aspect of merger and acquisitions litigation more pervasive or significant than the disclosure settlement. It is the mechanism by which stockholder claims have been conclusively resolved for approximately half of all public company acquisitions greater than $100 million.[1] For that half of major acquisitions, the contracting parties and their directors, officers, affiliates, and advisors receive a court-approved global release of known and unknown claims relating to the merger in exchange for supplemental disclosures to stockholders prior to the stockholder vote.[2] The supplemental disclosures have no impact on stockholder approval of the merger. Nevertheless, until quite recently, in almost every such case, class counsel for the stockholder plaintiff received a court-approved six-figure fee award for having conferred a benefit on the stockholder class.[3]

Over the past year, the possible elimination of disclosure settlements has become a topic of discussion among academics, jurists, and the bar. The seeming impetus for this potential upheaval in merger and acquisitions litigation was a law review article based on an empirical study finding that supplemental disclosures have no effect on stockholder voting,[4] plus the litigation efforts of a co-author of that article, Professor Sean J. Griffith.[5] He has objected to disclosure settlements on the

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[1] *See* OLGA KOUMRIAN, CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES: REVIEW OF 2014 M&A LITIGATION 1 & fig.1, 4 & fig. 5, 5 & fig. 6 (2015).

[2] Typically, supplemental disclosures are the sole form of settlement consideration. Donald F. Parsons, Jr. & Jason S. Tyler, *Docket Dividends: Growth in Shareholder Litigation Leads to Refinements in Chancery Procedures*, 70 WASH. & LEE L. REV. 473, 489-90 (2013). Such settlements are sometimes known as "disclosure-only" settlements. *See id.* at 491-92. In a relatively small number of cases, supplemental disclosures are accompanied by minor changes to the acquisition agreement. *See id.* at 489-90. These settlements are sometimes known as "disclosure-plus" settlements. 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, 586 n.137 (2015). For convenience, I refer to both types of settlements as "disclosure settlements."

[3] *See, e.g.*, Fisch, Griffith & Davidoff Solomon, *supra* note 2, at 563-75; Phillip R. Sumpter, *Adjusting Attorneys' Fee Awards: The Delaware Court of Chancery's Answer to Incentivizing Meritorious Disclosure-Only Settlements*, 15 U. PA. BUS. L. 669 (2013).

[4] Fisch, Griffith & Davidoff Solomon, *supra* note 2.

[5] *See, e.g.*, Gordon v. Verizon Commc'ns, Inc., 2014 WL 7250212 (N.Y. Sup. Ct. Dec. 19, 2014).

grounds that the supplemental disclosures are worthless and the global releases are pernicious.[6]

A December 2014 decision by the Supreme Court of New York stridently rejected a proposed settlement.[7] Professor Griffith represented the objector, and the opinion cited a draft of the law review article he co-authored.[8] A month later, the Supreme Court of New York rejected another disclosure settlement, following the reasoning of the earlier opinion.[9]

In July 2015, Vice Chancellor Laster of the Delaware Court of Chancery rejected on broad grounds a proposed disclosure settlement involving Aeroflex Holding Corporation.[10] That transcript ruling referenced the same law review article co-authored by Professor Griffith and the two decisions in New York. It also urged continuation of a recent "trend in which the Court of Chancery looks carefully at these settlements."[11] In September 2015, Vice Chancellor Glasscock approved a disclosure settlement that Professor Griffith had objected to, but stated that the global release might have been rejected as overbroad but for "the reasonable reliance of the parties on formerly settled practice in this Court."[12] When rejecting a disclosure settlement involving Aruba Networks, Inc. in October 2015, Vice Chancellor Laster referred to disclosure settlements as a "real systemic problem" in which "pseudo-litigation" has created a "misshapen legal regime."[13]

More recently, on January 22, 2016, Chancellor Bouchard issued a lengthy written opinion, destined for publication in the Atlantic reporter, rejecting a disclosure settlement arising out of litigation challenging Zillow, Inc.'s acquisition of Trulia, Inc. in a stock-for-stock merger.[14] The *Trulia* decision was issued after consideration of supplemental briefing, including an *amicus curiae* brief filed by Professor Griffith. Chancellor Bouchard cited *Aeroflex*, discussed the law review article co-authored by Professor Griffith, and also discussed a draft of this

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[6] *See, e.g.*, *id.* at *2.

[7] *Id.* at *8-9.

[8] *Id.* at *2.

[9] City Trading Fund v. Nye, 9 N.Y.S.3d 592, 2015 WL 93894, at *19 (N.Y. Sup. Ct. Jan. 7, 2015) (Table).

[10] Transcript, Acevedo v. Aeroflex Hldg. Corp., C.A. No. 7930-VCL (Del. Ch. July 8, 2015) [hereinafter *Aeroflex* Transcript].

[11] *Id.* at 67-68.

[12] *In re* Riverbed Tech., Inc. Stockholder Litig., 2015 WL 5458041, at *6 (Del. Ch. Sept. 17, 2015).

[13] Transcript at 65, 70, 72, *In re* Aruba Networks, Inc. Stockholder Litig., Cons. C.A. No. 10765-VCL (Del. Ch. Oct. 9, 2015) [hereinafter *Aruba Networks* Transcript].

[14] *In re* Trulia, Inc. S'holder Litig., 129 A.3d 884 (Del. Ch. 2016).

Article.[15] The Chancellor concluded that, "[g]iven the rapid proliferation and current ubiquity of deal litigation, the mounting evidence that supplemental disclosures rarely yield genuine benefits for stockholders, the risk of stockholders losing potentially valuable claims that have not been investigated with rigor, and the challenges of assessing disclosure claims in a non-adversarial settlement process, the Court's historical predisposition toward approving disclosure settlements needs to be reexamined."[16]

In Part II of this Article, I discuss that "historical predisposition" and trace the evolution of its demise. For a generation, disclosure settlements have flourished despite widespread recognition that supplemental disclosures have little value. I surmise that Vice Chancellor Laster's call in *Aeroflex* and *Aruba Networks* for a halt to the routine approval of disclosure settlements was influenced in significant part by his oversight of *In re Rural/Metro Corporation Stockholders Litigation* ("*Rural/Metro*")[17] from early 2012 through early 2015.

In *Rural/Metro*, my law firm, currently named Friedlander & Gorris, P.A., but then named Bouchard Margules & Friedlander, P.A. ("F&G"), and co-counsel, Robbins, Geller, Rudman & Dowd LLP ("Robbins Geller"), objected to a seemingly routine disclosure settlement presented by Faruqi & Faruqi LLP ("Faruqi") in connection with the June 2011 sale of Rural/Metro Corporation ("Rural/Metro") to an affiliate of Warburg Pincus, LLC. We identified unexplored liability issues and submitted an expert affidavit on valuation. Vice Chancellor Laster issued a January 2012 transcript ruling rejecting the disclosure settlement, but characterizing the question as a "very close call."[18]

Upon replacing Faruqi as class counsel, F&G and Robbins Geller litigated damages claims at significant expense. On the eve of a May 2013 trial, we entered into partial settlements for a total of $11.6 million. In 2014, we obtained post-trial rulings that the sole non-settling defendant, RBC Capital Markets, LLC ("RBC"), aided and abetted breaches of fiduciary duty by the director defendants and was liable for damages of $76 million plus pre- and post-judgment interest. The

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[15] *Id.* at 895 & nn.30, 31, 34, 35.

[16] *Id.* at 896-97.

[17] *In re* Rural/Metro Corp. S'holders Litig., 102 A.3d 205 (Del. Ch. 2014), *aff'd sub nom.* RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816 (Del. 2015).

[18] Transcript at 134, *In re* Rural/Metro Corp. S'holders Litig., Cons. C.A. No. 6350-VCL (Del. Ch. Jan. 17, 2012) [hereinafter *Rural/Metro Settlement Hearing I*].

Delaware Supreme Court affirmed the judgment.[19] In December 2015, RBC paid approximately $98 million to satisfy the judgment in full.[20]

The partial settlements in, and the ultimate outcome of, the *Rural/Metro* litigation in the Court of Chancery call into question the major premise of disclosure settlements—that a global release of claims in exchange for supplemental disclosures is justified, supposedly because it safely can be assumed that the released damages claims challenging the transaction under *Revlon* and its progeny (*i.e.*, claims that a board of directors failed to act reasonably or in good faith during a sale process to obtain the highest price reasonably available)[21] have been investigated and analyzed and have been found to be weak. In *Rural/Metro*, original class counsel spent less than $15,000 and recommended the release of damages claims in exchange for supplemental disclosures.[22] Replacement class counsel spent over $1,683,000[23] investigating the same facts, obtained findings of liability, and recovered over $109 million.

As discussed in Part II of this Article, the *Rural/Metro* litigation prompted a decisive break with an era of routine approval of disclosure settlements. I believe the progress of the *Rural/Metro* litigation helps explain the *sua sponte* rejection of two disclosure settlements by Vice Chancellor Laster in 2014,[24] his subsequent call in *Aeroflex* and *Aruba Networks* for the end of the routine approval of disclosure settlements, as well as his rejection earlier this year of a partial disclosure settlement in *Haverhill Retirement System v. Kerley*,[25] a case involving key actors from *Rural/Metro*.

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[19] *RBC Capital Mkts.*, 129 A.3d at 879.

[20] Order Regarding Distribution of Funds, *In re* Rural/Metro Corp. S'holders Litig., Consol. C.A. No. 6350-VCL (Del. Ch. Jan. 12, 2016).

[21] *See* Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242 (Del. 2009) (discussing "*Revlon* duties" and citing *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986)). For convenience, I refer generally to damages claims as "*Revlon* claims," without regard for other standards of review or precedents that may be applicable when a corporation is sold for cash.

[22] Affidavit of Juan E. Monteverde, Exhibit 7 to Transmittal Affidavit of James P. McEvilly, III, *In re* Rural Metro Corp. S'holders Litig., Cons. C.A. No. 6350-CS (Del. Ch. Dec. 23, 2011).

[23] This sum is compiled from the following affidavits filed in *Rural/Metro*: Randall J. Baron Aff. (Oct. 16, 2013) ($672,498.97); Joel Friedlander Aff. (Oct. 16, 2013) ($623,712.90); Randall J. Baron Aff. (Oct. 29, 2014) ($206,020.21); Joel Friedlander Aff. (Oct. 29, 2014) ($180,849.82).

[24] Transcript, *In re* Theragenics Corp. S'holders Litig., 2014 WL 2587094 (Del. Ch. May 5, 2014) [hereinafter *Theragenics* Transcript]; Transcript, Rubin v. Obagi Med. Prods., Inc., C.A. No. 8433-VCL (Del. Ch. Apr. 30, 2014) [hereinafter *Obagi* Transcript] .

[25] Transcript, Haverhill Retirement Sys. v. Kerley, C.A. No. 11149-VCL (Del. Ch. Feb. 9, 2016) [hereinafter *Providence Service* Transcript].

Part III of this Article discusses the contrast between the disclosure settlement phase and the post-disclosure settlement phase of *Rural/Metro* and how that contrast sheds light on policy issues raised by the routine approval of disclosure settlements. I argue that a generation of routine disclosure settlements undermined in various respects the proper functioning of a system for the judicial enforcement of fiduciary duties:

- The widespread availability of disclosure settlements led to the creation of a two-tier stockholder-plaintiff bar with very different approaches to litigating the same type of case. One tier of firms adopted 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. Firms in the disclosure settlement bar were also able to bargain for an economic share of a case in exchange for standing down in the competition for appointment of lead counsel, since otherwise a leadership contest would consume critical weeks during the pendency of a transaction that would be better utilized pursuing fact discovery. Another tier of firms did not present disclosure settlements to the Court of Chancery, and instead litigated preliminary injunction motions and sought damages on *Revlon* claims.

- The widespread availability of disclosure settlements created perverse pressures on transactional counsel and defense counsel. Lawyers for target corporations and their fiduciaries, financial advisors and purchasers rationally expected that much M&A litigation can be resolved by means of a disclosure settlement. This knowledge lessened the influence of transactional counsel to uncover or police conflicts of interest while a sale process or transaction is pending and to ensure the prompt, full disclosure of material facts. When litigation began, defense counsel were incentivized to devote their talents to drafting supplemental disclosures amenable to a negotiated

resolution, and guiding litigation along a path of least judicial oversight. Successful merits-based litigation by plaintiffs' counsel empowers transactional counsel to avoid, police, and disclose conflicts of interest. Disclosure settlements do not.

- Routine disclosure settlements impeded the development of the law. In the many cases disposed of by means of a disclosure settlement, the Court of Chancery was not deciding whether certain facts were material and needed to be disclosed, or whether there existed a reasonable probability of success on a *Revlon* claim on a motion for preliminary injunction, or whether a *Revlon* claim is reasonably conceivable for purposes of a motion to dismiss. Instead, the Court of Chancery generated transcript rulings impervious to appellate review about whether a given disclosure was "helpful" and what fee award it was worth. In the absence of definitive adjudication, the law of disclosure settlements remained unclarified, the same disclosure issues recurred, and numerous opportunities to develop *Revlon* law were lost.

Disclosure settlement practice has operated as a shadow, parallel legal system within the Court of Chancery competing for judicial resources with a full docket of adversarial litigation. The institutionalization of routine disclosure settlements parodied the procedures for adjudicating claims of breach of fiduciary duty. The cases discussed below raise the retrospective question whether the routine approval of disclosure settlements entailed the routine release of absent class members' claims without due process of law.

II. DISCLOSURE SETTLEMENTS PRE- AND POST-*RURAL/METRO*

For a generation prior to the partial settlements and post-trial rulings in *Rural/Metro*, disclosure settlements were routinely approved. The Court of Chancery did not typically hold that the supplemental disclosures were material information that the defendants were obliged to disclose. Nonetheless, it was both rare and difficult for an objector who wished to pursue a damages claim under *Revlon* and its progeny to succeed in derailing a proposed disclosure settlement.

Within months of the partial settlements and trial in *Rural/Metro*, Vice Chancellor Laster rejected two disclosure settlements *sua sponte*.[26] Within a year of awarding damages and assessing individualized liability in *Rural/Metro*, Vice Chancellor Laster rejected two additional disclosure settlements *sua sponte* and broadly criticized the practice of their routine approval.[27] There may be additional factors at work, such as the widespread adoption of forum selection bylaws to curtail multi-jurisdiction litigation,[28] but I suggest that the timing relative to the progress of the *Rural/Metro* litigation is far from coincidental.

A. *The Era of Routine Disclosure Settlements Pre-*Rural/Metro

Twenty years ago, a husband-and-wife team of lawyers was surprised to read a settlement notice for a personal investment stating that stockholders would receive no cash payout for the settlement of a lawsuit challenging the sale of Dr. Pepper/Seven Up Companies, Inc. They drafted *pro se* briefs and argued an objection to the disclosure settlement and the attendant fee application.[29] They argued that the supplemental disclosures were an illusory benefit that did not justify the release of potential future claims and that the class plaintiffs and class counsel had not fairly and adequately represented the stockholder class.[30] They opposed the fee request of $690,000 on the grounds that the only difficulty faced by plaintiffs' counsel was the "struggle to find actionable misconduct," that there was no true contingency risk because "class actions alleging violations of fiduciary duties to shareholders seem to be

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[26] *See infra* Part II.C.2.

[27] *See infra* Part II.C.2.

[28] *See In re* Trulia, Inc. S'holder Litig., 129 A.3d 884, 899 (Del. Ch. 2016) (citing Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 965 (Del. Ch. 2013)).

[29] Email from Diane Olsson to Joel Friedlander (Sept. 21, 2015) (on file with the author).

[30] *In re* Dr. Pepper/Seven Up Cos., Inc. S'holders Litig., 1996 WL 74214, *3 (Del. Ch. Feb. 27, 1996).

settled with remarkable consistency," and that approval of the fee application would "promot[e] the abuse of class action litigation.[31]

Then-Vice Chancellor Chandler approved the disclosure settlement. He reasoned that the supplemental disclosures included "two or three possibly material facts" that provided "some benefit" sufficient to support the settlement.[32] While the Vice Chancellor found "nothing in the record" to support the objectors' "broad brush accusations," he noted that the objectors appeared "genuinely concerned about the long range effect on corporate decisionmaking, and the public policy implications, of increasing numbers of class action lawsuits filed and later settled for marginal benefits."[33] The court awarded $300,000 to plaintiffs' counsel, which represented a "modest premium" over regular hourly rates and was "justified because of the intense effort required over a short period of time by skilled attorneys that produced some benefit for the class."[34]

The objectors appealed. Without hearing oral argument, the Delaware Supreme Court issued a short order affirming "on the basis and for the reasons assigned by the Court of Chancery in its decision dated February 9, 1996."[35]

Disclosure settlements continued to proliferate.

In late 2004, F&G and Robbins Geller represented an objector to a proposed disclosure settlement arising from the sale of Prime Hospitality Corporation ("Prime").[36] Our objection was prompted by news that the buyer, Blackstone, had sold a major asset of Prime at a seemingly favorable price immediately after closing the acquisition.[37] We examined the record created by class counsel in confirmatory discovery and argued, among other things, that the directors of Prime had been uninformed of Prime's value and that the supplemental disclosures were not adequate consideration for the release of a litigable *Revlon* claim.[38]

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[31] *Id.* at *5.

[32] *Id.* at *4.

[33] *Id.* at *5.

[34] *In re Dr. Pepper/Seven Up Cos*., 1996 WL 74214, at *5.

[35] *In re* Dr Pepper/Seven Up Cos., Inc. S'holder Litig., 683 A.2d 58, 1996 WL 526008, at *1 (Del. Aug. 16, 1996) (Table).

[36] *In re* Prime Hospitality, Inc. S'holders Litig., 2005 WL 1138738, *2 (Del. Ch. May 4, 2005).

[37] *Id.* at *6.

[38] *Id.* at *2:

> Sheet Metal's second objection is based on the principle that a settlement agreement that asks the class to sacrifice a facially credible claim for small consideration is unfair and should be rejected. Sheet Metal maintains that if Prime's directors were indeed uninformed, defendants' supplemental disclosures would not be adequate or fair consideration for the release of litigable *Revlon/Macmillan* claims.

Class counsel had not deposed the CEO, who had received an acquisition offer for $12.00 per share and negotiated a price increase to the ultimate deal price of $12.25 per share that same day without first informing the Board, even though a regularly scheduled board meeting was to be held the very next day.[39]

Class counsel argued in their settlement brief that we "overlook[ed] several master facts," including that Prime "was extensively shopped for a period of 4 years" and "the Board was actively involved in the exploration process."[40] Class counsel argued that "the only viable claims" were disclosure claims that had been resolved by the disclosure settlement,[41] and sought a fee award of $325,000.

In a written opinion, Chancellor Chandler examined the factual record to the extent it had been developed in confirmatory discovery and analyzed during the objection briefing.[42] He stated that the question whether to approve the disclosure settlement "was not an especially easy one," because defendants had "created a facially sterile record" and doubt "remains with me when I ask whether that record could withstand the weight of a piercing investigation."[43] The Chancellor concluded that the settlement's proponents had "submitted a record that is so sparse and inconsistent that I am unable to conclude that their *Revlon* claim was worthless"[44] and that approval of the settlement "would be asking the absent class to sacrifice too much, for too little consideration."[45]

The concluding paragraph to Chancellor Chandler's opinion served as a guide to future litigants. He wrote that rejection of the proposed disclosure settlement did not change "the long-standing policy of this Court to favor settlement over litigation."[46] He added that proponents of a settlement must submit a sufficient record, and that, "at a minimum, blatant inconsistencies should be explored and explained and adversarial assertions tested."[47]

F&G and Robbins Geller took over the case from original class counsel and later settled it for $25 million. Chancellor Chandler remarked at the settlement hearing that the successful objection to the

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[39] *Id.* at *4.

[40] Plaintiffs' Brief in Support of Proposed Settlement and Application for Attorneys' Fees and Expenses at 4-5, *In re* Prime Hospitality, Inc. S'holders Litig., 2005 WL 356346 (Del. Ch. Jan. 10, 2005) (Cons. C.A. No. 652-N).

[41] *Id.* at 5.

[42] *In re* Prime Hospitality, Inc. S'holders Litig., 2005 WL 1138738 (Del. Ch. May 4, 2005).

[43] *Id.* at *7.

[44] *Id.* at *13.

[45] *Id.*

[46] *Prime Hospitality*, 2005 WL 1138738, at *13.

[47] *Id.*

disclosure settlement was a "rare event" and a "significant achievement."[48] In approving a fee award of $6.25 million, the Chancellor noted the effort and risk-taking associated with "delivering such a remarkable benefit, given [counsel's] dubious starting point."[49]

The unusual outcome in *Prime Hospitality* attracted no notice of which I am aware and did nothing to halt the routine approval of disclosure settlements. Transcript rulings approving disclosure settlements continued to proliferate, in Delaware and elsewhere.[50] Almost every public company sale for more than $100 million became the subject of multiple lawsuits,[51] often in both the company's state of incorporation and its principal place of business,[52] and approximately half of those cases were resolved by disclosure settlements.[53]

Then in 2011, Vice Chancellor Laster issued a rare published opinion discussing disclosure settlements.[54] The case arose in the unusual posture of an abandoned disclosure settlement following a voluntary supplemental disclosure by Sauer-Danfoss Inc. and the withdrawal of a tender offer by its controlling stockholder, which mooted the litigation.[55] The defendants argued that no fee award was justified in connection with the voluntary supplemental disclosures.[56] Plaintiff's counsel sought a fee award of $750,000.[57]

Vice Chancellor Laster observed that plaintiffs' counsel "conducted no adversarial discovery and obtained only the standard package of documents that defendants routinely provide to facilitate a disclosure-only settlement."[58] He analyzed each of the proffered supplemental disclosures and found all but one addressed "an immaterial

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[48]Transcript at 42, *In re* Prime Hospitality, Inc. S'holders Litig., Cons. C.A. No. 652-CC (Del. Ch. Sept. 19, 2007).

[49]*Id.* at 48.

[50]*See* Sumpter, *supra* note 3 (discussing a collection of transcript rulings on proposed disclosure-only settlements); *see also* Fisch, Griffith & Davidoff Solomon, *supra* note 2, at 558-63 (evaluating the effects of disclosure-only settlements on shareholder voting and "draw[ing] upon a hand-collected sample of 453 mergers involving publicly traded target companies announced from 2005 and completed through 2012 along with proxy-voting statistics provided to us by Institutional Shareholder Services (ISS) over the same period.").

[51]*See* Mark Lebovitch & Jeroen van Kwawegen, *Of Babies and Bathwater: Deterring Frivolous Stockholder Suits Without Closing the Courthouse Doors to Legitimate Claims*, 40 DEL. J. CORP. L. 491, 493 n.3 (2016).

[52]Edward B, Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused this Problem, and Can it be Fixed?*, 37 DEL. J. CORP. L. 1, 4 (2012).

[53]*See supra* note 1.

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

[55]*Id.* at 1119.

[56]*Id.*

[57]*Id.*

[58]*Sauer-Danfoss*, 65 A.3d at 1139.

omission" that "will not support a fee award."[59] The Court awarded a fee of $75,000 for single "minimally beneficial" disclosure that corrected an errant description of the company's stock price history.[60]

Sauer-Danfoss is best known for the Vice Chancellor's gathering and sorting of unpublished precedents in which the value of supplemental disclosures was challenged. The Vice Chancellor's stated goal was to routinize the pricing of fee awards in disclosure settlements, based on the magnitude of the benefit of the given supplemental disclosure:

> Consistency promotes fairness by treating like cases alike and rewarding similarly situated plaintiffs equally. Establishing baseline expectations helps plaintiffs' counsel evaluate litigation opportunities and assists parties in negotiating reasonable fee awards. Recognizing the ranges developed through case-by-case adjudication—often in unreported transcript rulings—provides sister jurisdictions with helpful guidance when awarding fees in cases governed by Delaware law. Greater uniformity reduces opportunities for forum-shopping and other types of jurisdictional arbitrage, such as litigating in one court and then settling in another or presenting multiple fee applications to multiple courts.
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> A court can readily look to fee awards granted for similar disclosures in other transactions because enhanced disclosure is an intangible, non-quantifiable benefit . . . .[61]

Vice Chancellor Laster reasoned that weak disclosure settlements warrant a low-end fee award: "By granting minimal fees when deal litigation confers minimal benefits, this Court seeks to align counsel's interests with those of their clients and encourage entrepreneurial plaintiffs' lawyers to identify and litigate real claims."[62] While the Court expressed a preference for the litigation of "real claims," nothing in *Sauer-Danfoss* urges rejection of disclosure settlements.[63]

A law review article about disclosure settlements written in the immediate aftermath of *Sauer-Danfoss* captured the then-conventional wisdom that the exercise of judicial discretion over fee awards was the

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[59] *Id.* at 1128.
[60] *Id.* at 1138.
[61] *Id.* at 1136.
[62] *Sauer-Danfoss*, 65 A.3d at 1140-41 (citations omitted).
[63] *Id.* at 1141.

proper way to manage the conflicts of interest posed by disclosure settlements.[64] The article collected numerous transcript rulings and concluded by observing:

> Although the Court has criticized disclosure-only settlements, this does not mean that such settlements are on the way out . . . . [W]hat the criticism does show is that the Court is not approving disclosure-only settlements without first looking at the plaintiff's counsel's fee award . . . . [T]he Court will continue to adjust fee awards to match the benefits achieved by the plaintiffs in the litigation.[65]

B. *The* Rural/Metro *Litigation*

The same *Rural/Metro* litigation that led to partial settlements totaling $11.6 million and an affirmed final judgment against the sole non-settling defendant for more than $97 million began as a proposed disclosure settlement.

Faruqi was appointed lead counsel on May 27, 2011, the day after issuance of the definitive proxy statement.[66] After having sent demand letters commenting on the preliminary proxy statement, Faruqi sent an additional demand letter on June 5, 2011, requesting further disclosures. Faruqi negotiated a disclosure settlement concurrently with taking depositions on June 1, June 3, June 5, and June 10, 2011. The parties filed a memorandum of understanding on June 16, 2011, without Faruqi ever filing an opening brief on its motion for a preliminary injunction.[67]

When seeking approval of its proposed disclosure settlement, Faruqi argued that Rural/Metro's stockholders had been provided with all material information and that the merger price was within a range of fairness.[68] Faruqi incurred expenses of less than $15,000 to prosecute the action, including expert fees of $7,500 for advice supporting Faruqi's

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[64]Sumpter, *supra* note 3.

[65]*Id.* at 729.

[66]Order of Consolidation and Appointment of Lead Counsel, Llorens v. Rural Metro Corp., 2011 WL 2139008 (Del. Ch. May 27, 2011) (Nos. 6350-VCS, 6489-VCS).

[67]*See* Brief in Support of Objection of Plaintiff Joanna Jervis at 4-5, *In re* Rural Metro Corp. S'holders Litig., Cons. C.A. No. 6350-CS (Del. Ch. Jan. 2, 2012) [hereinafter *Rural/Metro* Obj. Br.].

[68]*See id.* at 6.

position that the challenged transaction was fairly priced.[69] Faruqi sought a fee award of $475,000.[70]

F&G and Robbins Geller submitted a 45-page brief objecting to the proposed settlement. The objection brief was supported by an expert affidavit of Kevin Dages, Senior Vice President of Compass Lexecon, explaining that RBC and Moelis & Company LLC ("Moelis") had both made a fundamental error in their discounted cash flow analyses of Rural/Metro that led them to not attribute any value to its $250 million acquisition program, even though management was publicly touting that strategy and projecting that the acquisitions would be profitable.[71] Our brief argued that (i) Rural/Metro's proxy statement misleadingly disclosed Moelis's discounted cash flow analysis, (ii) the DCF analyses for both RBC and Moelis were flawed for reasons not apparent from the proxy statement, (iii) Chairman of the Board and Special Committee Chair Chris Shackelton had an undisclosed interest in selling Rural/Metro, due to his hedge fund's highly concentrated, illiquid stake in Rural/Metro, and (iv) CEO Michael DiMino had initially opposed a prompt sale of the company, but soon joined forces with Shackelton to pursue an immediate sale.[72]

Faruqi submitted a reply brief contending that they made a "reasonable decision to settle the Action based on valuable disclosures and the advice of an outside financial expert rather than pursue claims without any merit that had a minimal chance of success after comprehensive discovery was conducted by Plaintiff."[73] Faruqi's reply brief characterized the confidential information memorandum provided to potential bidders as an "aggressive sale pitch document[]."[74] Defendants submitted a combined 42-page brief, supported by affidavits from RBC and Moelis.[75]

At the January 17, 2012 settlement hearing, defendants argued that our objection was the product of "sour grapes," "professional jealousies," "personal agendas," and "settling scores," because Faruqi had been

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[69]Affidavit of James P. McEvilly, III, Ex. 7 Ex. B, *In re* Rural Metro Corp. S'holders Litig., Cons. C.A. No. 6350-CS (Del. Ch. Dec. 23, 2011).

[70]Lead Plaintiff's Brief in Support of Proposed Settlement and Application for Attorneys' Fees and Expenses at 1, *In re* Rural Metro Corp. S'holders Litig., Consol. C.A. No. 6350-VCL (Del. Ch. Dec. 23, 2011).

[71]*Rural/Metro* Obj. Br. at 2, 27-29.

[72]*Id*. at 11-16, 38-44.

[73]Lead Plaintiff's Reply Brief in Further Support of Proposed Settlement and in Opposition to the Objection of Plaintiff Joanna Jervis at 1, *In re* Rural Metro Corp. S'holders Litig., Cons. C.A. No. 6350-VCL (Del. Ch. Jan. 12, 2012).

[74]*Id.* at 29.

[75]Defendants' Response to the Objection of Joanna Jervis to the Settlement, *In re* Rural Metro Corp. S'holders Litig., Cons. C.A. No. 6350-VCL (Del. Ch. Jan. 12, 2012).

appointed lead counsel instead of F&G and Robbins Geller.[76] Vice Chancellor Laster[77] described the question whether to approve the disclosure settlement as "a very close call,"[78] and noted that defendants may be correct in contending that our objection was motivated out of a "turf war" between rival plaintiffs' counsel.[79] The Court reaffirmed that supplemental disclosures are "sufficient to settle cases" and that "helium claims . . . can get released for helium consideration."[80] The Court noted that further discovery might show "that there's nothing here" and that a "102(b)(7) argument [might] be a dead winner on summary judgment."[81] Nonetheless, Vice Chancellor Laster rejected the proposed disclosure settlement, on grounds of lack of adequacy of representation under Court of Chancery Rule 24(a) and inadequacy of the settlement consideration.[82]

Vice Chancellor Laster reasoned that he did not have "a sufficient degree of confidence based on the record that was created."[83] The Vice Chancellor was not satisfied "that there was sufficient adversarial discovery at the document stage" or "sufficient thoroughness and vigor in [the] depositions."[84] He contrasted those failings with the objector's "very thorough presentation."[85]

The Court allowed F&G and Robbins Geller to take over the case, and approved a fee award to Faruqi of $475,000 for having obtained the supplemental disclosures.[86]

F&G and Robbins Geller added RBC and Moelis as defendants, obtained an order scheduling the case to be tried in early May 2013, and undertook full fact and expert discovery. Just before trial, we settled with Moelis for $5 million and with Rural/Metro and the director

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[76]Transcript of Settlement Hearing at 49, 79, 81, *In re* Rural Metro Corp. S'holders Litig., C.A. No. 6350-VCL (Del. Ch. Jan. 17, 2012) [hereinafter *Rural/Metro Settlement Hearing I*]. F&G and Robbins Geller had sought to be appointed lead counsel. Then-Vice Chancellor Strine entered Faruqi's proposed order of consolidation and appointment of lead counsel without explanation in advance of the scheduled oral argument on leadership. Order of Consolidation and Appointment of Lead Counsel, Llorens v. Rural Metro Corp., 2011 WL 2139008 (Del. Ch. May 27, 2011) (Nos. 6350-VCS, 6489-VCS).

[77]Then-Chancellor Strine reassigned the case to Vice Chancellor Laster shortly after we filed our objection brief. Order Reassigning Case, *In re* Rural Metro Corp. S'holders Litig., Cons. C.A. No. 6350-CS (Del. Ch. Jan. 9, 2012).

[78]*Rural/Metro Settlement Hearing I* at 134.

[79]*Id.* at 135.

[80]*Id.* at 136.

[81]*Id.* at 137.

[82]*Rural/Metro Settlement Hearing I* at 137.

[83]*Id.*

[84]*Id.*

[85]*Id.* at 138.

[86]*In re* Rural Metro Corp. S'holders Litig., Cons. C.A. No. 6350-VCL (Del. Ch. Mar. 7, 2012) (Order).

defendants for $6.6 million.[87] We tried the case against RBC on May 6–9, 2013. Post-trial briefing and oral argument followed.

Prior to any post-trial ruling on the merits respecting RBC, we sought Court approval of the partial settlements and applied for a fee award of slightly more than $3 million plus reimbursement of expenses of $1,296,211.86. At the settlement hearing, counsel for the director defendants spoke up in favor of our fee application, saying that the case had appeared meritless at the outset:

> They came in and they made something out of nothing here. . . . [T]his was a case where my view was this was a business judgment case. This was a third-party arm's-length buyer that paid a big premium on the way in, two fairness opinions, and a majority of we believe disinterested independent directors. . . . [M]y colleagues on the other side of the room deserve the credit, if you will, for making something out of nothing, because this was a nothing case."[88]

In approving a fee award of $2.9 million (an amount equivalent to six average disclosure settlements), plus reimbursement of expenses, Vice Chancellor Laster contrasted our litigation efforts with disclosure-settlement litigation:

> Here, the benefit conferred is cold hard cash in the amount of $11.6 million. This was not simply a disclosure-only settlement, which is how the matter started. . . .
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> . . . .
>
> In terms of contingency risk, unlike the typical disclosure-only settlement, this case involved real contingency risk. Plaintiff's counsel faced a material risk that the defendants would not settle, they would be forced to go through trial or, indeed, if they won at trial, had their result reversed on appeal.
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> [P]laintiff's counsel settled deep in the case, after full discovery, on the eve of trial. Plaintiff's counsel's affidavits reflect a total of 6,953 hours prosecuting the action up to the time of settlement. . . .

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[87] *In re* Rural Metro Corp. S'holders Litig., 88 A.3d 54, 63 (Del. Ch. 2014).

[88] Transcript of Settlement Hearing at 27-28, *In re* Rural/Metro Corp. S'holders Litig., Cons. C.A. No. 6350-VCL (Del. Ch. Nov. 19, 2013) [hereinafter *Rural/Metro Settlement Hearing II*].

> . . . .
>
> [T]he Court also recognizes that in this type of litigation that goes deep into the case, including to the eve of trial, valuation experts are a necessity, and quality valuation experts are expensive. The expert expenses totaled $1,116,263.04 . . . .
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> . . . .
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> In terms of the lodestar cross-check, it is actually a relatively low hourly rate [$417 per hour], at least for this type of litigation . . . .[89]

On March 7, 2014, the Court of Chancery issued an opinion finding RBC liable for aiding and abetting breaches by Rural/Metro's board of the duty of care and duty of disclosure.[90] On October 10, 2014, following another round of post-trial briefing and another oral argument, the Court of Chancery issued an opinion finding that RBC was a joint tortfeasor along with director defendants Shackelton and DiMino, and that RBC was responsible for 83% of the total damage to the class of $91,323,554.61 (*i.e.*, $75,798,550.33), plus pre- and post-judgment interest.[91]

On February 19, 2015, the Court of Chancery entered a Final Order and Judgment reflecting the Court approval of a fee award of one third of the total recovery ($93,263,680.27 as of February 16, 2015), and the Court's denial of fee shifting against RBC.[92] RBC posted a bond and appealed. We cross-appealed the Court's denial of fee-shifting. The Supreme Court affirmed the Court of Chancery's final judgment in all respects.

C. Sua Sponte *Rejections of Disclosure Settlements Post*-Rural/Metro

Through mid-2015, disclosure settlements continued to be a fixture on the M&A litigation landscape, and counsel for plaintiffs and defendants continued to urge their approval. Only in recent months does there now exist significant litigation risk that any disclosure settlement might be rejected by the Court of Chancery *sua sponte*. The earliest manifestations of that risk were rulings by then-Chancellor Strine in

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[89] *Id.* at 34-38.

[90] *Rural Metro Corp.*, 88 A.3d at 54, 99-110.

[91] *In re* Rural/Metro Corp. S'holders Litig., 102 A.3d 205, 224, 263 (Del. Ch. 2014).

[92] *In re* Rural/Metro Corp. S'holders Litig., 2015 WL 725425 (Del. Ch. Feb. 19, 2015) (Order).

2013 and early 2014.[93] Vice Chancellor Laster issued two similar rulings in 2014.[94] In 2015, Vice Chancellor Laster issued two rulings that called into question the future of disclosure settlements, and in February 2016, Vice Chancellor Laster rejected a partial disclosure settlement with a narrow release.[95]

1. Three Rulings by Chancellor Strine

Viewed with hindsight, a transcript ruling by then-Chancellor Strine in *In re Transatlantic Holdings, Inc. Shareholders Litigation*, in early 2013, before the partial settlements in *Rural/Metro*, may be seen as the first in a series of *sua sponte* rejections of disclosure settlements.[96] Standing alone, *Transatlantic* would appear to have little significance. Chancellor Strine described his *sua sponte* rejection of the disclosure settlement as something he "rarely" has done.[97] He expressed "concern for the defendants," who "face an imponderable situation in which the cost of getting rid of non-meritorious claims . . . on the merits exceeds [the cost of] settling by giving out information . . . which doesn't possibly impair the vote."[98] Chancellor Strine noted that he applied a lenient standard to disclosure settlements, but that it was not satisfied in that particular case.[99]

After holding an original hearing and receiving supplemental submissions on the subject, Chancellor Strine ruled that plaintiffs failed "to explain why that additional information would have been meaningful—I'm not even going to use the word 'material'—would have been meaningful, would have been interesting, in any real way to someone voting on this transaction."[100] Chancellor Strine noted that he had "in the past bent and tried to say [that the supplemental disclosure] could kind of give somebody some extra confidence" respecting the fairness of the transaction, "even though, really, you're supposed to be getting disclosures which contradict or meaningfully affect the flow of information in a way that's different from what the board is suggesting."[101]

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[93] *See infra* Part II.C.1.
[94] *See infra* Part II.C.2.
[95] *See infra* Part II.C.2.
[96] Transcript, *In re* Transatlantic Holdings, Inc. S'holders Litig., 2013 WL 1191738 (Del. Ch. Mar. 8, 2013) [hereinafter *Transatlantic* Transcript].
[97] *Id.* at *1.
[98] *Id.* at *2, *3.
[99] *See id.* at *2.
[100] *Transatlantic* Transcript at *1.
[101] *Id.* at *2.

Chancellor Strine refused to certify the plaintiffs as adequate representatives of the class, noting that one of them held only two shares and the other could not recall if he voted against the merger.[102] He described the situation as one in which an apparently meritless suit "without any real investigation or depth was immediately traded away by the plaintiffs for simply more information which did not contradict the mix of information that was already available."[103] The disclosures had "so little apparent utility" that "the option value" of allowing a potential future damages claim to be filed by a different plaintiff exceeded the value of the disclosures.[104]

Chancellor Strine's December 2013 transcript ruling in *In re Talbots, Inc. Shareholders Litigation*, several months after the partial settlements in *Rural/Metro*, exemplifies his lenient-but-critical approach to disclosure settlements. In what he described as a "difficult case," he approved a disclosure settlement after criticizing plaintiffs' counsel for not having voluntarily dismissed the case: "if it were a perfect world, this case would have been graciously withdrawn by all the plaintiffs' lawyers everywhere and [they would have] said, 'Our bad. And our apologies to the directors.'"[105]

Chancellor Strine observed that he "cannot get anywhere close to finding that these [supplemental disclosures] are a material disclosure" and that he was "straining" to approve the settlement.[106] He added: "to be honest, [this is] the kind of case where I could have simply not approved the settlement . . . because the social utility of cases like this continuing to be resolved in this way is dubious."[107] Chancellor Strine approved the negotiated fee award request of $237,500, noting that "[i]f it weren't clearly negotiated I could have easily given 50,000, 75,000, 100,000 for this."[108]

The Wall Street Journal provided a megaphone for Chancellor Strine's excoriation of the plaintiff disclosure-settlement bar,[109] but the prospect of fee awards ensured that similar cases would be filed in Delaware and elsewhere and the prospect of obtaining global releases

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[102] *Id.* at *2-3.

[103] *Id.* at *3.

[104] *Transatlantic* Transcript at *2.

[105] Transcript at 11, 18, *In re* Talbots, Inc. S'holders Litig., Cons. C.A. No. 7513-CS (Del. Ch. Dec. 16, 2013) [hereinafter *Talbots* Transcript].

[106] *Id.* at 14-15.

[107] *Id.* at 15.

[108] *Id.*

[109] Liz Hoffman, *Delaware's Top Business Judge Lambasts Plaintiffs Lawyers*, WALL ST. J. LAW BLOG (Dec. 26, 2013 3:34 PM), http://blogs.wsj.com/law/2013/12/26/delawares-top-business-judge-lambasts-plaintiffs-lawyers/.

ensured that defendants would continue to enter into disclosure settlements. Chancellor Strine noted in *Talbots*: "If we didn't have the dynamic of [multiple] filings in different courts, one suspects the defendants may not have felt any pressure to settle the case at all."[110] Chancellor Strine further suggested that the same dynamic supported the continued approval of disclosure settlements: "when defendants have to deal with the phenomena they deal with, the Court has to be cautious with how it proceeds."[111]

In one of his final acts as Chancellor before his elevation to Chief Justice in February 2014, Chancellor Strine rejected a disclosure settlement involving Medicis Pharmaceutical Corporation, reasoning: "it looks like there was no 'there' there for any claims at all, but we're giving a release. . . . I just don't see enough value here that it's worth the release."[112] Chancellor Strine criticized plaintiffs' counsel for not dismissing the case without prejudice if they "are unwilling to make the personal investment as a firm and with [their] clients . . . to try to prove there is a damages case," so that "if somebody else in the class wants to come along and bring a real damages case, they're able to do so."[113] In rejecting the proposed settlement, Chancellor Strine recognized "the predicament of defendants" and noted that his ruling "in some ways has a punishing effect, because I don't know what else is out there that this leaves unresolved."[114]

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[110] *Talbots* Transcript at 11-12.

[111] *Id.* at 15.

[112] Transcript at 21, *In re* Medicis Pharm. Corp. S'holders Litig., Cons. C.A. No. 7857-CS (Del. Ch. Feb. 26, 2014) [hereinafter *Medicis* Transcript].

[113] *Id.*

[114] *Id.* at 21, 25.

2. Five Rulings by Vice Chancellor Laster

Vice Chancellor Laster rejected two disclosure settlements *sua sponte* in the Spring of 2014, within weeks of his finding of liability against RBC in *Rural/Metro*, and soon after Chancellor Strine led the way with his ruling in *Medicis*.[115] In 2015, while *Rural/Metro* was on appeal, Vice Chancellor Laster rejected two more disclosure settlements in which he articulated a broad critique of the routine judicial approval of disclosure settlements.[116] In early 2016, after the affirmance of *Rural/Metro*, Vice Chancellor Laster rejected a partial disclosure settlement in *Providence Service*, which involved the same key individuals who put together the sale of Rural/Metro Corporation.[117]

Rubin v. Obagi Medical Products, Inc. arose out of a challenge to supposedly preclusive defensive measures attendant to a friendly tender offer priced at $19.75 per share.[118] Within days of the filing of the complaint, a third-party offered to buy the target for $22 per share, and the original tender offeror increased its bid to $24 per share. Vice Chancellor Laster observed that in light of those events, the "plaintiffs acknowledge[d] that their price and process claims turned out to be weak to non-existent."[119] Nonetheless, the parties entered into a proposed disclosure settlement. Given the "market-clearing overbid," the supplemental disclosure of unlevered free cash flow forecasts was merely "helpful," not "material," and in light of previously disclosed metrics, the forecasts were also "largely cumulative."[120] Vice Chancellor Laster ruled that such "nonexistent consideration" could not support a global release.[121]

Vice Chancellor Laster recognized that "Delaware courts have often been quite deferential" in allowing global releases to be exchanged for weak disclosures, and that "such releases are the norm and generally they are approved."[122] The problem with such releases, he stated, "is that there are unknown unknowns in the world," and the potential unknown claims that are being released "have been completely unexplored by the

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[115] *Theragencis* Transcript; *Obagi* Transcript.

[116] *Aruba Networks* Transcript; *Aeroflex* Transcript.

[117] *Providence Service* Transcript.

[118] Plaintiff's Brief in Support of Class Certification, Final Approval of the Proposed Settlement, and Award of Attorneys' Fees and Reimbursement of Expenses, *Rubin v. Obagi Med. Prods., Inc.*, 2014 WL 1651095 (Del. Ch. Apr. 17, 2014).

[119] *Obagi* Transcript at 6.

[120] *Id.* at 7-8.

[121] *Id.* at 8-9.

[122] *Id.* at 8.

plaintiffs."[123] Vice Chancellor Laster expressed his willingness to approve a restructured settlement in which the release "only extended to the claims actually investigated by plaintiff's counsel and actually brought in this litigation or in the California litigation."[124]

In rejecting the disclosure settlement in *Obagi*, Vice Chancellor Laster went no further than Chancellor Strine had gone in *Transatlantic* or *Medicis*. The claims presented to the Court were assumed to be meritless and the supplemental disclosures were found to be worthless.[125] Vice Chancellor Laster was actually more lenient than Chancellor Strine in suggesting the alternative of a release limited to the *Revlon* and disclosure claims. In that scenario, a future plaintiff would be precluded from litigating the same claims.

In *In re Theragenics Corp. Stockholders Litigation*, Vice Chancellor Laster rejected *sua sponte* a disclosure settlement for a reason that echoes the rejections of the challenged disclosure settlements in *Prime Hospitality* and *Rural/Metro*.[126] The Court did not "have an adequate informational base at this point on a number of strange things in the record."[127]

The Court began by noting ways in which plaintiffs' counsel were typical of firms that regularly enter into disclosure settlements. They filed "fast . . . in multiple fora" on behalf of "small holders"; they belonged to law firms "who sue frequently"; "there wasn't evidence . . . of serious litigation activity"; they abandoned their damages claims and settled for supplemental disclosures and for appraisal process modifications that "did not seem to have any value whatsoever."[128]

The Court observed that the sale process contained some "bad facts" that had not been "adequately explored during discovery."[129] The lead financial advisor did not give a fairness opinion.[130] The original proxy statement contained disclosures of valuation ranges that were

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[123] *Obagi* Transcript at 8.
[124] *Id.* at 9.
[125] *See id.* at 7-8.
[126] *Theragenics* Transcript.
[127] *Id.* at 5.
[128] *Id*. at 5-6.
[129] *Id*. at 8.
[130] *Theragenics* Transcript at 8-9:

> Then you've got this odd division that Chancellor Strine before his elevation used to always comment on, where you've got one banker doing all the good stuff; in other words, all the deal advice, all the strategic decision-making, et cetera, and yet not providing any disclosure to stockholders. You've then got a second advisor coming in . . . and just giving the fairness opinion. Again, I'm not trying to say that any of these things are horrible and automatic, per se, invalid steps in a process. These are just things that before I sign off on a settlement, I need some indication they were meaningfully explored.

"downright misleading."[131] The Vice Chancellor "hankered for some exploration of it in depositions," but discovered that the lawyer who deposed the investment banker was unacquainted with basic knowledge about valuation.[132] The supplemental disclosures appeared to "complicate the problem" and not be "accurate."[133]

Over a year later, in *Aeroflex*, Vice Chancellor Laster issued a transcript ruling that spoke more broadly about disclosure settlements.[134] He acknowledged that "this is the type of settlement which courts have long approved on a relatively routine basis," and that the Court did so "largely out of sympathy for the defendants," as "a necessary evil," because, it was commonly thought that due to the enhanced scrutiny required by a *Revlon* claim, "without a settlement, there wasn't any way for the defendants to get out of the case without costly litigation."[135]

Vice Chancellor Laster briefly identified numerous ways in which the courts had learned that "routine approval of these settlements carries real consequences, all of them bad."[136] They are as follows:

(i) "M&A litigation proliferated" and "fees climbed."[137]

(ii) It was empirically established in the law review article *Confronting the Peppercorn Settlement* that supplemental disclosures "do not provide any identifiable much less quantifiable benefit to stockholders."[138]

(iii) "Perhaps more importantly, in my view, the omnipresent litigation undercuts the credibility of the litigation process."[139] One aspect of this problem is that has become "easy to look askance at stockholder litigation without remembering that stockholder litigation is actually an important part of the Delaware legal framework."[140] "[I]t undercuts Delaware's

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[131] *Id*. at 12.
[132] *Id*. at 12, 15.
[133] *Id*. at 15.
[134] *Aeroflex* Transcript.
[135] *Id.* at 62-64.
[136] *Id.* at 87.
[137] *Id*. at 64.
[138] *Aeroflex* Transcript at 65.
[139] *Id.*
[140] *Id.*

> credibility as an honest broker in the legal realm" when directors find themselves sued in multiple jurisdictions despite having run a pristine sale process with no conflicts.[141] A separate aspect of the credibility problem is that "some—indeed, probably many—cases that should be litigated actually don't get litigated."[142] Instead, they are quickly settled for supplemental disclosures.
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> (iv) Global releases extinguish claims that have not been investigated and they sweep too broadly, with "significant deleterious effects."[143] Vice Chancellor Laster pointed to the "virtually blanket protection" they provide to pending derivative claims, federal securities law claims, and even to antitrust claims against colluding private equity buyers.[144]

For those reasons, and also because it had become easier for defendants to obtain dismissals of *Revlon* claims, Vice Chancellor Laster stated "that the trend in which the Court of Chancery looks more carefully at these settlements is a good one."[145]

That discussion was a prelude to the Vice Chancellor's analysis of the facts. He agreed with plaintiff's counsel that discovery revealed "no evidence of divergence of interest" that would support a *Revlon* claim.[146] As for the settlement consideration, it consisted of changes to the merger agreement that could have no effect on the sale process and "the type of nonsubstantive disclosures that routinely show up in these type of settlements" and do not support a global release.[147]

The holding in *Aeroflex* is no different than the holdings in *Transatlantic*, *Medicis*, or *Obagi*. What was new in *Aeroflex* was the

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[141] *Id.* at 66.

[142] *Aeroflex* Transcript at 66.

[143] *Id.* at 65-66

[144] *Id.* at 65-66; *see also* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 377-78 (1996) (recognizing that Delaware global release can extend to federal securities law claims that can only be litigated in federal court); Dahl v. Bain Capital Partners, LLC, 963 F. Supp. 2d 38, 50-51 & n.10 (D. Mass. 2013) (discussing effect of releases on antitrust claims); J. Travis Laster, *A Milder Prescription for the Peppercorn Settlement Problem in Merger Litigation*, 93 TEX. L. REV. 129, 145 & n.80 (2015) (discussing how the disclosure settlement arising out of Bank of America's acquisition of Countrywide Financial Corporation eliminated any potential breach of fiduciary duty claims belonging to sell-side stockholders, including the claim that the merger was motivated by a desire to terminate stockholder derivative claims).

[145] *Aeroflex* Transcript at 67-68.

[146] *Id.* at 70.

[147] *Id*. at 73.

dicta that "probably many" *Revlon* cases that "should be litigated" are instead being resolved prematurely and inadequately by means of disclosure settlements.[148] That observation is consistent with Vice Chancellor Laster's findings of liability and damages in *Rural/Metro* as well as his rejection of the disclosure settlement in *Theragenics*.

In *Aruba Networks*, Vice Chancellor Laster again rejected a disclosure settlement *sua sponte*.[149] He identified a potential *Revlon* claim for damages, and found that the plaintiffs were inadequate representatives, thereby disqualifying them from litigating the case.[150] Strong dicta in *Aruba Networks* best illustrates how *Rural/Metro* has apparently influenced the Vice Chancellor's current thinking that disclosure settlements pose a systemic problem. No longer is it a "very close call" whether to approve a disclosure settlement in the face of litigable *Revlon* claims.[151]

Vice Chancellor Laster began his transcript ruling in *Aruba Networks* by observing that the case was not meritorious when filed, because there was nothing about the transaction as described in the proxy statement that "suggests a lack of reasonableness."[152] He then observed that in discovery, plaintiffs were provided with direct evidence that the proxy statement was "materially inaccurate and misleading as to the timing" of discussions between the company's top executives and the bidder about their post-closing compensation.[153] This disclosure violation could have supported an injunction and was "potentially a post-closing damages situation," due to the importance of the executives to the value of the company.[154] An alternative potential form of monetary recovery was to recoup the compensation of the second banker, because the bidder had insisted on its retention.[155]

Plaintiffs' counsel had not evaluated a potential monetary recovery. Vice Chancellor Laster characterized plaintiffs' counsel's conduct as a "harvesting-of-a-fee opportunity," as there was no "basis to file in the first place" and when something fell into plaintiffs' counsel's lap in discovery, "it was just dealt with through the disclosure and the fee."[156] Plaintiff's discovery record "was really weak," as the deposition

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[148] *Id*. at 65.
[149] *Aruba Networks* Transcript at 58-75.
[150] *Id.* at 73-74.
[151] *Rural/Metro Settlement Hearing I* at 134.
[152] *Aruba Networks* Transcript at 59.
[153] *Id.* at 60.
[154] *Id.* at 61.
[155] *Id.* at 62.
[156] *Aruba Networks* Transcript at 73; *see also id.* at 63.

questioning gave the Court little "comfort" about the factual investigation.[157] Plaintiffs' settlement presentation raised "red flags," such as plaintiffs' failure to provide the Court with the proxy statement and their filing of a "canned brief" with a "complete absence of deal-related facts" in the Statement of Facts.[158]

Vice Chancellor Laster spoke broadly about the "systemic problem" of exchange global releases for supplemental disclosures, given the "sue-on-every-deal phenomenon" and the "cases-as-inventory phenomenon."[159] The Court questioned plaintiffs' disparagement of the value of any released claims, saying: "I have been told a lot of glowing things in the context of settlements that are less than reliable."[160] The Court attributed this conduct to the following dynamic: "when people have a path to getting paid, behavior starts to reflect how one gets paid."[161]

Vice Chancellor Laster dismissed any suggestion that the litigants had any "reliance interest" in past practice of the Court, because "I've been giving these [disclosure settlements] a hard look for a while now."[162] Vice Chancellor Laster observed that litigants had been responding to his hard-look approach by voluntarily dismissing their cases immediately upon judicial assignment or by settling them in other jurisdictions.[163] Vice Chancellor stated that this response was "perfectly fine with me," because "I would prefer to devote judicial resources to real litigation, not pseudo-litigation."[164]

The Court dismissed the case on the grounds of inadequacy of representation by the plaintiffs, which barred the named plaintiffs from going forward with the claims.[165] The Court also refused to award any fee for the supplemental disclosures.[166] For future reference in similar cases, Vice Chancellor Laster suggested the alternative of a "disclosure-only release," which would not foreclose a future plaintiff from suing for damages based on the supplemental disclosures and a claimed diversion of merger proceeds.[167]

In *Providence Service*, a transcript ruling issued soon after Chancellor Bouchard's opinion in *Trulia*, Vice Chancellor Laster closed

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[157] *Id.* at 63-64; *see also id.* at 71.
[158] *Id.* at 64.
[159] *Id.* at 65.
[160] *Aruba Networks* Transcript at 69.
[161] *Id.* at 69.
[162] *Id.*
[163] *Id.* at 72.
[164] *Aruba Networks* Transcript at 72.
[165] *Id.* at 74.
[166] *Id.* at 74-75.
[167] *Id.* at 71.

the door he had opened in *Obagi* and *Aruba Networks* about the alternative of a "disclosure-only release." *Providence Service* involved a challenge to a financing arranged by three of the key individuals from *Rural/Metro*: hedge fund manager Chris Shackelton, whose hedge fund provided the financing to Providence Service Corporation ("Providence") while he served as Chairman of the Board of Providence; Tony Munoz of RBC; and Barry Brooks of Paul Hastings, who simultaneously served as outside counsel to Providence and as counsel to Shackelton's hedge fund.[168] The stockholder plaintiff obtained supplemental disclosures about the conflicts of interest and the background of the transaction, and then entered into a partial settlement in which plaintiff agreed to release duty of disclosure claims and claims that the stockholder vote was inequitably coerced, and defendants agreed not to oppose an interim attorney's fee of $1.275 million.

Vice Chancellor Laster observed that the initial disclosures "were painfully inadequate" and that the supplemental disclosures contained "truly striking information about conflicts at the director level, at the significant stockholder level, at the management level, at the legal counsel level, at the investment banker level," such that it was "truly amazing how the information that was put out so dramatically changed the total mix of information."[169] Given the "numerous questions" raised by the supplemental disclosures, the continuing nature of the litigation, and the fact that the disclosures enabled a revised transaction to unfold, the Vice Chancellor Laster considered it "ill-advised at this point to try to . . . surgically excise a small portion of the claims as part of the settlement. . . . [W]hat this settlement would ask me to do is artificially black out that aspect of it and close my mind to that aspect of it when evaluating other claims."[170] Put differently, the proposed partial release could impede the plaintiff in establishing liability and thereby reward defendants for the deficiencies of their original disclosures.

The Vice Chancellor suggested that the plaintiff make a "mootness-based fee application," and told defendants that he would not hold them to the $1.275 million they had agreed not to oppose in the context of a partial settlement.[171] A mootness-based fee application would allow for arms-length bargaining over a proposed interim fee

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[168] *See* Plaintiff's Opening Brief in Support of Motion for Preliminary Injunction, Haverhill Retirement Sys. v. Kerley, C.A. No. 11149-VCL (Del. Ch. Aug. 20, 2015) (public redacted version).

[169] *Providence Service* Transcript at 27-28.

[170] *Id.* at 30-31.

[171] *Id.* at 33.

award, unencumbered by negotiation over a partial release. This procedure is itself an innovation from the disclosure settlement phase in *Rural/Metro*, when Vice Chancellor Laster approved a fee award of $475,000 even though that number had been negotiated in conjunction with an inadequate disclosure settlement that granted defendants a global release.

III. WHAT *RURAL/METRO* TEACHES ABOUT DISCLOSURE SETTLEMENTS

Whether or not Vice Chancellor Laster's oversight of the *Rural/Metro* litigation influenced his subsequent transcript rulings rejecting disclosure settlements, *Rural/Metro* highlights how disclosure settlements are systemically problematic. Damages claims that were on the verge of being released by original class counsel in exchange for supplemental disclosures and a $475,000 legal fee were litigated by new class counsel, who obtained partial settlements worth $11.6 million on the eve of trial plus an affirmed post-trial judgment of more than $97 million.[172]

Important questions are raised by the fact that dramatically increased value could be obtained for class members by new counsel litigating the same claims by means of a post-closing, damages-focused litigation strategy. What confidence can the Court of Chancery (or any trial court) have that disclosure settlement practice is an effective means for screening the merits of released *Revlon* claims? Would it be preferable to dispense with disclosure settlements and rely instead on the procedures of adversarial litigation for the screening of cases that are not voluntarily dismissed?

This Part discusses how *Rural/Metro* exposed systemic problems posed by judicial policies favoring the release of *Revlon* claims in exchange for supplemental disclosures. It examines the issue in light of the practices of plaintiffs' counsel, transactional counsel, and defense counsel. It also discusses how disclosure settlements pose problems for judicial administration and the development of the law.

A. *The Two-Tier Plaintiff Bar*

Rural/Metro illustrates a phenomenon of industry structure in the stockholder-plaintiff bar. One tier of law firms pursued disclosure settlements as a business model. Another tier of law firms never presented disclosure settlements to the Court of Chancery, and instead

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[172] *See In re* Rural/Metro Corp. S'holders Litig., 102 A.3d 205, 263 (Del. Ch. 2014), *aff'd sub nom.* RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816 (Del. 2015).

brought *Revlon* cases with the objective of seeking a significant monetary recovery and/or significant non-monetary relief. The latter firms account for a disproportionate share of the significant monetary recoveries from *Revlon* claims.[173]

The data for this phenomenon can be compiled in any number of ways. Whenever F&G applies to be appointed lead counsel, we submit a list of cases in which we have obtained recoveries of $10 million or more. Whenever F&G and Robbins Geller move to be appointed co-lead counsel, we supply a chart identifying the largest post-merger common fund recoveries obtained in recent years, and identifying those actions in which we and any additional co-moving counsel served as lead or co-lead counsel. A recent iteration of this chart submitted to the Court of Chancery in July 2015,[174] shows that F&G, Robbins Geller, Grant & Eisenhofer P.A. ("G&E"), and Bernstein Litowitz Berger & Grossman LLP ("BLBG") were lead or co-lead counsel in twelve of the fifteen cases with the largest post-merger common fund recoveries obtained on behalf of target corporation stockholders:[175]

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[173] *See infra* Figure 1.

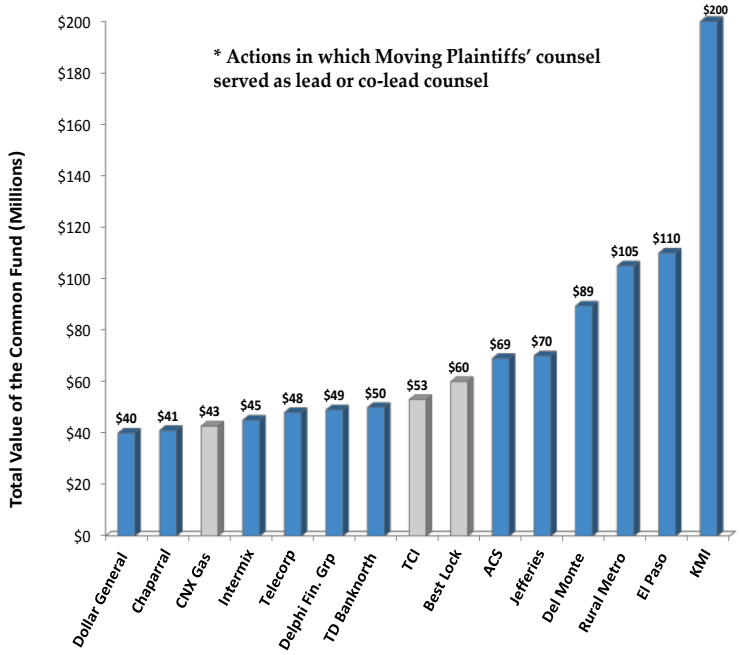
[174] Brief in Support of Motion for Consolidation and Appointment as Lead Plaintiff at 20, N. Cal. Pipe Trades Pension Plan v. Scaminace, C.A. No. 11216-VCN (Del. Ch. July 7, 2015).

[175] For each case referenced in the chart, listed below is the name of the target corporation, the year of the transaction announcement, and the latest firm names of lead counsel:

Dollar General Corporation (2007): BLBG; Robbins Geller
Chaparral Resources, Inc. (2006): F&G; Robbins Geller
CNX Gas Corporation (2010): Rigrodsky & Long, P.A.
Intermix Media, Inc. (2005): Robbins Geller
TeleCorp PCS, Inc. (2001): F&G
Delphi Financial Group (2011): BLBG; G&E; Robbins Geller
TD Banknorth, Inc. (2007): Robbins Geller; Prickett, Jones & EIliott, P.A.
Tele-Communications, Inc. (1998): Abbey Spanier, LLP
Best Lock Corporation (1997):Young Conaway Stargatt & Taylor, LLP; Taylor & McNew LLP
Affiliated Computer Services, Inc. (2009): BLBG; G&E; Robbins Geller
Jefferies Group, Inc. (2012): BLBG; G&E; Faruqi; Saxena White, P.A.
Del Monte Foods Company (2010): G&E; Robbins Geller
Rural/Metro Corporation (2011): F&G; Robbins Geller
El Paso Corporation (2011): BLBG; G&E; Labaton Sucharow LLP
Kinder Morgan, Inc. (2006): Robbins Geller; Chimicles & Tikellis LLP

The chart does not include the more recent Stipulation and Agreement of Settlement in *In re Dole Food Co., Inc. Shareholder Litigation*, Cons. C.A.. No. 8703-VCL (Del. Ch. Dec. 7, 2015), in which Robbins Geller, G&E and Kessler Topaz Meltzer & Check, LLP ("KTMC") settled post-trial for approximately over $115 million.

Figure 1



Reasonable arguments can be made about how best to compile the list of relevant cases and how to delineate particular firms. Should the same list include both *Revlon* cases and freeze-out mergers by majority stockholders? Should the list also include other types of challenges to corporate transactions that have led to large monetary recoveries?[176] How low should the cut-off point be? Did each co-lead counsel in a particular case contribute substantially to the outcome?[177] Was the case

[176]Notable recoveries from other forms of transactional challenges include: (1) the $1.263 billion derivative recovery obtained by Prickett, Jones & Elliott, P.A. and KTMC in *In re Southern Peru Copper Corp.*, 30 A.3d 60 (Del. Ch. 2011), *revised and superseded by* 52 A.3d 761 (Del. Ch. 2011); (2) the $275 million class and derivative recovery obtained by F&G and Bragar Eagel & Squire, PC ("BES") in *In re Activision Blizzard, Inc. Stockholder Litigation*, 124 A.3d 1025 (Del. Ch. 2015); (3) the $137.5 million derivative recovery obtained by BLBG, G&E, Bernstein Liebhard LLP, Chimicles & Tikellis LLP, and Labaton Sucharow LLP in *In re: Freeport-McMoran Copper & Gold Inc. Derivative Litigation*, 2015 WL 1565918 (Del. Ch. Apr. 7, 2015); and (4) the $100.2 million recovery (plus pre- and post-judgment interest) obtained by BES in *In re: El Paso Pipeline Partners, L.P. Derivative Litig.*, 2016 WL 451320 (Del. Ch. Feb. 4, 2016), *stayed pending appeal*, 2016 WL 614489 (Del. Ch. Feb. 11, 2016).

[177]At the settlement hearing in *In re: Jefferies Group, Inc. Shareholders Litigation*, 2015 WL 3444692 (Del. Ch. Mar. 25, 2015) (Cons. C.A. No. 8059-CB), Chancellor Bouchard

litigated to trial? How does the recovery compare to the size of the transaction? How many significant recoveries has a particular firm obtained? In what percentage of cases has a given firm obtained significant relief? How often does the same firm enter into disclosure settlements?

However the data is analyzed, the proposition should hold true that there are two tiers of firms with two different business models for prosecuting *Revlon* cases in the Court of Chancery. This distinction reflects the different economics and attributes associated with pursuing disclosure settlements and pursuing monetary recoveries.

As seen in Faruqi's fee application in *Rural/Metro*, entering into a disclosure settlement is a low-cost proposition, less than $15,000 in out-of-pocket expenses, including expert fees.[178] A fee award of $475,000 creates a healthy operating margin. Since almost any *Revlon* case could be resolved by means of a disclosure settlement, there was, until very recently, little risk associated with generating that margin. A business model based on fee awards from disclosure settlements puts a premium on maximizing the number of disclosure settlements and minimizing the costs associated with each settlement.

The economics of obtaining a fee award based on a monetary recovery are far different. A law firm that aims to generate significant monetary recoveries must devote significant resources to each case. A significant monetary recovery is only possible if defense counsel perceives a material risk in losing on the merits, which generally means that plaintiff counsel has uncovered facts sufficient to defeat a dispositive motion and has demonstrated a willingness to litigate through trial, which entails significant expert expenses.[179] Each such case carries significant contingent risk and requires an in-depth investigation into the facts. Skillful advocacy and a reputation for tenacity are also required.[180]

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asked presenting counsel from G&E what work was performed by Faruqi and Saxena White, P.A. *Id.* at 36. The G&E lawyer responded by discussing the structural inefficiencies of litigating class actions, because the Court "pushe[s] plaintiffs' attorneys very hard to resolve leadership and participation ourselves without getting the Court involved. And so I submit in almost every case, there are more law firms involved than need to be involved." *Id.* at 37. He further explained that he "tried to distribute work fairly but also distribute work according to ability," so that some firms did first-level document review, while other firms reviewed the culled documents and took depositions. *Id.* at 38-39.

[178] *See supra* note 69 and accompanying text.

[179] *See supra* note 89 and accompanying text.

[180] On a biographical note, I think it not coincidental that former associates of Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") have populated upper-tier firms representing stockholder plaintiffs: myself and my former partners, Chancellor Andre Bouchard and David Margules; Stuart Grant, Jay Eisenhofer, and Megan McIntyre of G&E; and Mark Lebovitch of BLBG. In the hostile takeover era, Skadden sued boards of directors and often prevailed,

The partial settlements of $11.6 million in *Rural/Metro* were not reached until after co-lead counsel incurred expert expenses of over $1.1 million and expended 6,953 hours of attorney time, much of which was partner time.[181]

A law firm representing stockholder plaintiffs in the Court of Chancery generally employs one model of litigation or the other. Either a case is staffed and managed in a way designed to garner a disclosure settlement, or it is staffed and managed in a way designed to seek a significant monetary recovery. The same law firm does not employ both models of litigation in different cases. Nor does a case evolve from one form of litigation to the other. Some law firms try to amass a portfolio of disclosure settlement cases. Other firms try to pick their spots and litigate those cases intensely, even if the result is a lost preliminary injunction motion or dispositive motion or a voluntary dismissal.[182]

In *Rural/Metro*, at the hearing on the proposed disclosure settlement, Faruqi contended that they were initially interested in the question of whether director defendant Shackelton had a conflict of interest based on the stock holdings of his hedge fund, Coliseum. Yet, Faruqi decided not to subpoena Coliseum for its internal emails. When questioned on this point, Faruqi argued that when the preliminary proxy statement was issued Faruqi "did not see supporting evidence for us to be able to pursue subpoenaing Coliseum," and decided instead to focus its energies on "disclosure issues in light of the preliminary proxy."[183] Faruqi justified its approach by arguing that it "uncovered" at Shackelton's deposition that "he did not have liquidity issues" and it "obtained" a supplemental disclosure that Coliseum was not rolling over its equity into the buyer.[184] Faruqi did not uncover evidence of a conflict of interest or obtain disclosure of a conflict of interest.

This approach of pivoting from an alleged *Revlon* violation to an immaterial supplemental disclosure is rational if the plaintiff firm's objective is to garner a disclosure settlement at the lowest possible cost. This approach will not suffice if the plaintiff firm's objective is to investigate the public record for allegations that would justify full

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creating such landmark precedents as *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) and *Mills Acquisition Co. v. MacMillian, Inc.*, 559 A.2d 1261 (Del. 1989).

[181] *See supra* note 89 and accompanying text.

[182] *See, e.g.*, *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573 (Del. Ch. 2010) (denying *Revlon*-based motion for preliminary injunction); *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975 (Del. Ch. 2005) (same). In both cases, co-lead counsel invested resources in presenting expert reports to support motions for preliminary injunction on *Revlon* grounds, and subsequently dismissed the cases for no compensation.

[183] *Rural/Metro Settlement Hearing I* at 8-9.

[184] *Id.* at 6-7.

discovery of a potential conflict of interest, and then obtain documents that would allow for effective depositions and ultimately a finding that a key defendant was conflicted—as Shackelton was found to be.[185]

Given the two-tier nature of the shareholder plaintiff bar, skepticism is warranted when a plaintiff law firm presents a disclosure settlement and contends that there is no viable theory of a conflict of interest or no viable basis for finding that a deal price is not within a range of fairness. A law firm presenting a disclosure settlement is not incentivized to devote the human resources and financial resources necessary to uncover such theories. Its incentives are to minimize costs, minimize risk, procure the disclosure settlement, and move on to the next case.

The incentives and practices of the plaintiff disclosure settlement bar raise constitutional concerns. "In the class action setting, adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members."[186] In the words of the Delaware Supreme Court: "Notice [and opt-out rights are] no substitute for extensive document examination, depositions of adverse witnesses, securing expert advice on complicated issues, and aggressive negotiation at arms-length."[187] The Court of Chancery is not permitted to consider the merits of a settlement until the Court first determines that the class representative has provided adequate representation, because "an adequate representative, vigorously prosecuting an action without conflict and bargaining at arms-length, may present different facts and a different settlement proposal to the court than would an inadequate representative."[188]

Appreciation of the industry structure of the plaintiff's bar should also guide the appointment of lead counsel. A law firm with a track record of presenting disclosure settlements can be expected to pursue the same litigation strategy. Law firms that have achieved significant monetary recoveries and have not presented disclosure settlements can be expected to investigate and pursue *Revlon* claims. Express analysis of law firm track record, a factor Vice Chancellor Laster endorsed in *In re Del Monte Foods Co. Shareholders Litigation*,[189] allows the Court of

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[185] *In re* Rural/Metro Corp. S'holders Litig., 102 A.3d 205, 255-58 (Del. Ch. 2014).

[186] Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 388 (1996) (Ginsburg, J., concurring in part and dissenting in part).

[187] Prezant v. De Angelis, 636 A.2d 915, 924 (Del. 1994).

[188] *Id.* at 925; *see also id.* at 926 ("Consideration of the merits of the settlement can occur only after the requisites of Rule 23 have been satisfied.").

[189] 2010 WL 5550677, at *11 (Del. Ch. Dec. 31, 2010) ("None of the other firms who seek the leadership position have comparable track records in this Court.").

Chancery to influence whether a case will be litigated by means of a disclosure settlement or by adversarial litigation on the merits.

Express focus on track record should also lead to more effective leadership structures and more effective adversarial litigation. Firms would better be able to gauge which firms are plausible candidates for appointment to a leadership role, reducing the number of situations in which leading plaintiff firms feel pressured to give away percentage interests in a case to avoid leadership disputes.[190] In the critical weeks while a transaction is pending, time otherwise devoted to multiple rounds of briefing and argument on leadership disputes is better utilized pursuing fact discovery. In *Rural/Metro*, for example, leadership was not determined until the day after the definitive proxy statement was filed, and the leadership hearing was not scheduled to occur until the following week.[191]

B. *The Dulling Effect of Routine Disclosure Settlements on Transactional Counsel and Defense Counsel*

Rural/Metro sheds light on how the routine exchange of supplemental disclosures for global releases has had a systemic negative effect on corporate governance. Sell-side fiduciaries, financial advisors, third-party buyers, and their respective counsel became complacent about whether stockholder litigation will uncover conflicts of interest with a detrimental effect on a sale process. So long as it is commonplace for stockholder plaintiff counsel to recommend the exchange of a global release for supplemental disclosures, regardless of whether the sale process was pristine or problematic, stockholder litigation loses its deterrent effect. Transactional lawyers in negotiated acquisitions have less clout over their clients and other deal participants to police the integrity of fiduciary decision-making.

Evidence for this hypothesis can be seen in the post-trial fact-finding in *Rural/Metro* about the conduct of the deal participants.[192] This Article will not elaborate on those findings. Instead, I note the abundant law firm practice pointers published on the Internet in the immediate aftermath of Court of Chancery rulings in *Rural/Metro*,[193] and I briefly

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[190] *See supra* note 173-75 and accompanying text.

[191] *See supra* text accompanying note 66.

[192] *In re* Rural/Metro Corp. S'holders Litig., 88 A.3d 54 (Del. Ch. 2014).

[193] See, for example, the following law firm client memos about the post-trial Court of Chancery rulings in *Rural/Metro*: *Delaware Chancery Court Holds That (1) the Delaware Uniform Contribution Among Tortfeasors Act (DUCATA) Does Not Bar Contribution for All Intentional Torts, and (2) a Credit Under DUCATA Is Not Available for a Director's Settlement If the Director Would Have Been Exculpated Under a Section 102(b) (7) Provision*,

discuss three recent articles addressing the evolution in practice regarding the identification and management of conflicts of interest.[194]

Consider the following list of "Principal Takeaways" from a representative law firm client memorandum written by a leading Wall Street firm after the initial liability opinion in *Rural/Metro*.[195] I submit that the list does not suggest that vigilance over avoiding, policing, and disclosing conflicts of interest was a hallmark of pre-*Rural/Metro* sales processes:

SEC. L. ALERT (Simpson Thacher & Bartlett LLP), Oct. 2014, at 9-13, *archived at* https://perma.cc/RAZ5-Q23B; *In re Rural/Metro Corp. Stockholders Litigation*, DEL. Q. (Winston & Strawn LLP), Oct.-Dec. 2014, at 2-5, *archived at* https://perma.cc/EB36-9ZLH; *In re Rural/Metro Corp. Stockholders Litigation: Delaware Chancery Court Holds Financial Advisor Liable for 83% of Damages to Stockholders in Connection with Aiding and Abetting Breaches of Fiduciary Duty by Board of Directors*, SULLIVAN & CROMWELL LLP (Oct. 17, 2014), *archived at* https://perma.cc/8VV6-ENN2; *From Bad to Worse—Rural/Metro Financial Advisor Hit With $75.8 Million in Damages*, MCGUIREWOODS LLP (Oct. 17, 2014), *archived at* https://perma.cc/9VVF-AHQJ; *Court of Chancery Addresses Monetary Liability of Directors in Follow-On Rural/Metro Opinion*, MORRIS, NICHOLS, ARSHT & TUNNELL LLP (Oct. 13, 2014), *archived at* https://perma.cc/XXR8-3E8Y; *Rural/Metro II: Additional Lessons for Financial Advisors, Directors and Counsel in M&A Transactions And Related Litigation*, ORRICK, HERRINGTON & SUTCLIFFE LLP (Oct. 15, 2014), *archived at* https://perma.cc/C6YT-66F9; *Delaware Chancery Court's Decision in Rural Metro—A Cautionary Tale For All Company Gatekeepers*, SEC. & CORP. GOVERNANCE LITIG. Q. (Seyfarth Shaw LLP), Oct. 8, 2014, *archived at* https://perma.cc/H5FH-TUVB; *A Strong Message to Bankers Playing Both Sides of Sales Processes*, MORRIS JAMES LLP (Mar. 26, 2014), *archived at* https://perma.cc/7FJC-6UCP; *Reliance by Directors: What's a Conscientious Director to Do?*, INSIGHTS (Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates), Mar. 25, 2014, *archived at* https://perma.cc/HS27-8V7G; *Key Lessons from the Rural Metro Delaware Case*, NEWS & INSIGHTS (Sidley Austin LLP), Mar. 17, 2014, *archived at* https://perma.cc/BWH5-33NU; *Delaware Court of Chancery Finds Financial Advisor Liable for Aiding and Abetting Breaches of Fiduciary Duty*, WSGR ALERT (Wilson Sonsini Goodrich & Rosati), Mar. 13, 2014, *archived at* https://perma.cc/9A9N-FUW9; *Delaware Court of Chancery Finds Financial Advisor Liable for Aiding and Abetting Fiduciary Duty Breaches*, CLIENT MEMORANDUM (Davis Polk & Wardwell LLP) Mar. 12, 2014, *archived at* https://perma.cc/W7BC-PK2V; Paul Rowe, *Court of Chancery Stresses Need for Board Monitoring of Advisors and Potential Conflicts*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Mar. 11, 2014), *archived at* https://perma.cc/69JS-VWP6 (based on a Wachtell, Lipton, Rosen & Katz memorandum); *Financial Advisor Liable for Aiding and Abetting Buyout Target Board's Breach of Fiduciary Duty*, ROPES & GRAY ALERT (Ropes & Gray LLP), Mar. 10, 2014, *archived at* https://perma.cc/9R4W-358R; *Chancery Court Continues Its Scrutiny of Investment Banks' Behavior*, DEL. UPDATE (Jones Day) Mar. 2014, *archived at* https://perma.cc/WTK2-28EC.

[194] *See* William W. Bratton & Michael L. Wachter, *Bankers and Chancellors*, 93 TEX. L. REV. 1 (2014); Eric S. Klinger-Wilensky & Nathan P. Emeritz, *Financial Advisor Engagement Letters: Post-Rural/Metro Thoughts and Observations*, 71 BUS. LAW. 53 (Winter 2015-16); Leo E. Strine, Jr., *Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-making and Reduce the Litigation Target Zone*, 70 BUS. LAW. 679 (2015).

[195] *Delaware Court of Chancery Finds Financial Advisor Liable for Aiding and Abetting Fiduciary Duty Breaches*, *supra* note 193, at 3.

- While the Court did not find that sell-side advisors providing financing to a bidder is per se impermissible—and the Court will continue to review such engagements on a case-by-case basis—the *Rural Metro* opinion underscores the risks where sell-side financial advisors also provide or seek to provide buy-side financing. The opinion further confirms that simply engaging a conflict-free second financial advisor to issue a fairness opinion does not cure any actual or perceived material conflicts of interest involving another financial advisor, particularly when those conflicts are not disclosed to the board.

- Financial advisors must be diligent in disclosing actual or potential material conflicts of interests to their clients and in applicable SEC filings. Indeed, *Rural Metro* likely will only amplify the already significant spotlight on investment banking conflicts of interest in M&A litigation. A troubling implication of the opinion is that it may encourage shareholder-plaintiffs to add investment banks as aider and abettor defendants at the outset, with the hopes that document discovery will uncover a previously undisclosed material conflict of interest. Such a development would compound the already difficult and complex judgments that investment banks and their advisors—and the Court of Chancery—wrestle with in determining what is a material conflict of interest that needs to be disclosed.

- The *Rural Metro* opinion is another sobering reminder of the need by boards to be active and reasonably informed participants in the sales process, including with respect to the board's obligation to identify, consider, and proactively respond to actual or potential material conflicts of interest involving financial advisors. These conflicts issues need to be addressed in the sales process and cannot be cured entirely through robust disclosure in the SEC filings relating to the transaction.

. . . .

> • The Court appeared skeptical of the ad hoc fairness committee employed by the financial advisor to deliver its fairness opinion. The fairness committee was permitted to consist of any two or more managing directors who were available to review and approve the proposed opinion, which in this case included a managing director who had never sat on a fairness committee. The Court contrasted this with the process employed by some other investment banks, which have standing fairness committees staffed by designated senior bankers who oversee the opinion process and review opinions to ensure quality and consistency. Advisors may consider reviewing their fairness committee and opinion processes in light of the Vice Chancellor's analysis of this committee's level of quality control.[196]

A law review article written during the pendency of *Rural/Metro* and cited by the Delaware Supreme Court reflects on the approach toward financial advisor conflicts that reigned at the height of the routine disclosure settlement era:

> Robert Kindler, a banker at Morgan Stanley, has been quoted as saying, "We are all totally conflicted—get used to it." What is he telling us? . . . Whatever Mr. Kindler's more particular communicative motivation, he makes one thing absolutely clear: bankers themselves are untroubled by conflicts and have no incentive to ameliorate any resulting problems through self-regulation.[197]

The authors discuss *Rural/Metro* and two banker-conflict cases that were roughly contemporaneous with the Rural/Metro transaction and led to significant monetary settlements, *In re Del Monte Foods Co. Shareholders Litigation*[198] and *In re El Paso Corporation Shareholder Litigation.*[199] The authors conclude by posing the following question: "Why, if the possibility for intervention against banker conflicts lay

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[196] *Id.*
[197] Bratton & Wachter, *supra* note 194, at 82.
[198] 25 A.3d 813 (Del. Ch. 2011).
[199] 41 A.3d 432 (Del. Ch. 2012).

inherent in the structure of *Revlon* inquiry, did it take so long for intervention to occur?"[200] One reason may be that banker conflicts were perceived as fertile ground for negotiating disclosure settlements.

A post-*Rural/Metro* law review article written by Delaware practitioners who advise directors of companies exploring strategic alternatives advocates for the inclusion of representations in financial advisor engagement letters as an efficient tool to vet financial advisor conflicts of interest.[201] By the evidence in their article, vetting of financial advisor conflicts was lax during the era of the routine approval of disclosure settlements, and only improved after *Del Monte*, *El Paso*, and especially *Rural/Metro*.

The authors locate the historical source for their preferred conflict-vetting approach as a presentation at the American Bar Association, Business Law Section, Mergers & Acquisitions Committee Forum in April 2011, prepared in light of the preliminary injunction opinion in *Del Monte.*[202] The authors also identify other approaches for addressing financial advisor conflicts, which they refer to as approaches reflecting a "positive evolution from pre-*Rural/Metro* practice."[203] In the pre-*Rural/Metro* era, directors were not "provided a disclosure memorandum or a bankers' book containing a slide on conflicts."[204]

According to the authors' "post-*Rural/Metro* experience, financial advisors and their counsel . . . recognize that . . . conflicts-related disclosures that demonstrate care in the retention of a financial advisor will mitigate the possibility that the financial advisor will be liable for aiding and abetting a breach of the directors' duty of care."[205] Even so, the authors refer to their "unfortunate repeat experience of a financial advisor surfacing conflicts only upon a 'more focused conflicts search' performed in drafting its fairness opinion letter."[206]

Another post-*Rural/Metro* law review article originated as a keynote address delivered by Chief Justice Strine at the October 2014 Delaware Business Law Forum, not long after the liability opinion in *Rural/Metro.* The Chief Justice advised legal and financial advisors "Why Conflicts Matter and Must Be Identified, Disclosed, Monitored, and Addressed."[207] Chief Justice Strine noted that his advice, if

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[200] Bratton & Wachter, *supra* note 194, at 83.
[201] Klinger-Wilensky & Emeritz, *supra* note 194, at 54.
[202] *Id.* at 54 n.6.
[203] *Id.* at 55.
[204] *Id.* at 57.
[205] Klinger-Wilensky & Emeritz, *supra* note 194, at 55.
[206] *Id.* at 56.
[207] Strine, *supra* note 194, at 687.

followed, "reduces the target zone for plaintiffs' lawyers."[208] The timing of the Chief Justice's advice suggests that effective conflict identification and conflict monitoring by transactional counsel and their clients had not been a universal priority in the era of the routine approval of disclosure settlements.

The ready availability of disclosure settlements can exacerbate a natural tendency of transactional counsel not to confront their clients or other deal participants about their actual or potential conflicts.[209] If all participants in a sale process rationally expect much M&A litigation to be resolved by means of a disclosure settlement, then the filing of litigation is seen as an opportunity to obtain a global release. That opportunity does not reward diligence and circumspection in conflict identification and disclosure. One way to tee up a disclosure settlement is to hold back from disclosing in the preliminary proxy statement facts about financial advisor compensation, the full extent of a financial advisor's ties to a private equity buyer, components of the financial advisor's DCF analysis, or compensation-related discussions between management and the buyer. The plaintiff disclosure settlement bar can be expected to look for supplemental disclosures on these topics to resolve the litigation.

Litigators on the defense side can also become complacent about potential conflicts. If a disclosure settlement is expected, an aim of the defense lawyer is to assist in the identification and scripting of supplemental disclosures that will support a disclosure settlement. A potential or actual conflict may be interpreted as merely a disclosure issue. A goal of the litigation defense may be to keep the litigation on the path of a disclosure settlement, and key means to that end are identifying the forum and the process by which a circumscribed investigation of the facts is likely to occur. The prospect of a future trial in these circumstances can seem fantastical. So long as there was a sales process and an unaffiliated third party that paid a premium price, litigation claims based on alleged conflicts of interest may be underestimated as a "nothing case."[210]

The era of routine disclosure settlements coincided with an era in which sell-side financial advisors pursued profits by financing the

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[208] *Id*. at 679.

[209] An eminent transactional lawyer told me about an unpleasant experience when he advised a target board about a conflict of interest of a financial advisor, which prompted the board to select a different financial advisor, to the anger of the replaced financial advisor. He further told me that the threat of adversarial *Revlon* litigation is important to stiffen the spine of transactional counsel in such circumstances.

[210] *Rural/Metro Settlement Hearing II* at 28.

acquisitions of their clients and by developing strong relationships with private equity firms, CEOs welcomed opportunities to be purchased by private equity firms, and activist stockholder directors pursued idiosyncratic investment strategies and sometimes rolled over their equity into the acquirer. Yet, vigilance over conflicts of interest was not omnipresent, and heightened vigilance did not become more widespread until defendants suffered adverse litigation outcomes in adversarial *Revlon* litigation.

C. *Disclosure Settlements Impede Development of the Law*

A senior Delaware lawyer once told me that corporate law during the hostile takeover years of the 1980s was like administrative law, because every transaction was litigated. But out of that litigation activity, a rich body of fiduciary duty law quickly grew that has informed boardroom decision-making ever since.

The recent era of routine disclosure settlements is more akin to administrative law than was the hostile takeover era of the 1980s. A large percentage of significant transactions have been resolved by means of a regulated process that results in unpublished transcript rulings and orders approving class certification, a stipulation of settlement, and a fee award.[211] These rulings lack the indicia of persuasive authority for purposes of guiding decisions in future cases. They are not typically subjected to appellate review. They are attenuated from governing standards set decades earlier, such as the Delaware Supreme Court's statement in *Tandycrafts, Inc. v. Initio Partners* that "a heightened level of corporate disclosure, if attributable to the filing of a meritorious suit, may justify an award of counsel fees,"[212] or its statement in *Prezant v. De Angelis* that an adequate representative is someone who has been "vigorously prosecuting an action without conflict and bargaining at arms-length."[213]

Disclosure settlements are like the scores of no-action letters issued annually by the staff of the Division of Corporate Finance of the Securities and Exchange Commission respecting whether a proposed stockholder resolution may be omitted from a registrant's proxy statement under the "ordinary business" exclusion of SEC Rule 14a-8(i)(7).[214] These cursory letters resolve the great majority of disputes.

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[211] *See supra* note 50 and accompanying text.
[212] 562 A.2d 1162, 1165 (Del. 1989).
[213] 636 A.2d 915, 924 (Del. 1994).
[214] 17 C.F.R. § 240.14a–8(i)(7) (2011).

Only rarely does such a proceeding result in adversarial litigation and the creation of new law.[215]

Rural/Metro is unique among *Revlon* cases because a proposed disclosure settlement led to adversarial litigation that proceeded to a trial, a post-trial final judgment in the Court of Chancery, and an appeal. Along the way, the Court of Chancery issued written opinions on such subjects as leave to move for summary judgment by director defendants and financial advisors in light of the discovery record,[216] whether the trial record should be reopened to admit an affidavit recently filed in bankruptcy court,[217] the liability of a financial advisor for aiding and abetting breaches of fiduciary duty under *Revlon* and the duty of disclosure,[218] and the availability of judgment reduction for settlement credit in light of the equitable doctrine of unclean hands and the joint tortfeasor status of certain director defendants under the Delaware Uniform Contribution Among Tortfeasors Act.[219] The post-trial rulings withstood appeal.[220]

Had the proposed disclosure settlement in *Rural/Metro* been approved, these opinions would not have issued. A disclosure settlement forecloses the creation of law in a given case, and a system of routine approval of disclosure settlements systemically impedes the development of the law.

In each such case, the stockholder plaintiff could have pressed a motion for a preliminary injunction based on alleged non-compliance with the duty of disclosure. Ruling on such a motion would require a determination whether there was a reasonable probability of success that an omitted fact was material or whether a given disclosure was false or misleading in a material respect. Any such ruling would guide future disclosure practice. Similarly, any alleged *Revlon* violation could be the subject of a ruling on a motion for preliminary injunction or a motion to dismiss or motion for summary judgment.

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[215] *See, e.g.*, Trinity Wall Street v. Wal-Mart Stores, Inc., 792 F.3d 323, 351 (3d Cir. 2015) ("We thus suggest that [the SEC] consider revising its regulation of proxy contests and issue fresh interpretive guidance."); Staff Legal Bulletin No. 14H (Oct. 22, 2015) (expressing disagreement with the reasoning of the majority opinion in *Trinity Wall Street*), *archived at* https://perma.cc/P3XE-F2B2.

[216] *In re* Rural Metro Corp. S'holders Litig., Cons. C.A. No. 6350-VCL (Del. Ch. Apr. 1, 2013).

[217] *In re* Rural Metro Corp. S'holders Litig., 2013 WL 6634009 (Del. Ch. Dec. 17, 2013).

[218] *In re* Rural Metro Corp. S'holders Litig., 88 A.3d 54 (Del. Ch. 2014).

[219] *In re* Rural/Metro Corp. S'holders Litig., 102 A.3d 205 (Del. Ch. 2014).

[220] RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816 (Del. 2015).

Obtaining a disclosure settlement rather than disclosure injunction provides no such guidance. Pre-*Trulia*, the Court of Chancery did not necessarily rule that a supplemental disclosure was material. Instead, the Court's principal task was to evaluate the helpfulness of the supplemental disclosure for purposes of rendering a fee award. The fee awards accumulate, and the disclosure issues recur, without authoritative resolution.

In one of the last pre-*Trulia* Delaware transcript rulings approving a disclosure settlement, Vice Chancellor Glasscock stated that "the disclosure of the unlevered cash flows on which the [financial] advisor relied has value to the stockholders."[221] The Vice Chancellor noted: "I don't know why those disclosures weren't made here, because . . . our Court and the Supreme Court -- has expressed from the bench and in writing that those type of disclosures are generally significant -- there's the weasel word . . . -- to stockholders."[222] If there exists a rule of law that unlevered cash flows are material and must be disclosed, then the initial non-disclosure of such information should not be rewarded by a global release upon the issuance of a supplemental disclosure. If the information is not material, why does its supplemental disclosure warrant a $425,000 fee award? Disclosure settlement practice perpetuated the legal limbo on an easily adjudicated issue and allowed for the perpetuation of disclosure settlements.

Only in the aftermath of *Rural/Metro* has there been self-conscious ferment about the contours of disclosure settlement law. In the absence of adversarial litigation or appellate review over disclosure settlements, basic unanswered questions have been asked, such as whether every fee award based on a supplemental disclosure must be predicated on a finding of materiality, whether the public policy favoring settlement applies to a global release of claims in exchange for supplemental disclosures, and the proper relationship between the scope of a release and the supplemental disclosures that serve as settlement consideration. Until *Trulia*, virtually no published or written opinions addressed these topics.[223]

Even in the absence of rulings on the merits, each application for approval of a disclosure settlement continues to impose a significant burden on the Court of Chancery. The Court is spared issuing opinions

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[221] Transcript at 55-56, *In re* Silicon Image, Inc. S'holder Litig., C.A. No. 10601-VCG (Del. Ch. Dec. 9, 2015).

[222] *Id.* at 56.

[223] *But see In re* Sauer-Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1128 (Del. Ch. 2011) (finding that fee award had to be predicated on sole supplemental disclosure that "was material").

on motions for preliminary injunctions or motions to dismiss, but the work needed to approve a disclosure settlement is arguably greater. The Court is being asked to evaluate the overall merits of a case and the appropriateness of a release, without the benefit of adversarial briefing. Indeed, key issues may not be briefed at all, and key questions may not have been asked at depositions. Vice Chancellor Laster's transcript ruling in *Aruba Networks*, for example, illustrates how a proper investigation by the Court requires an independent reading of the proxy statement and reading of the deposition transcripts. To the extent the Court approves a settlement without undertaking a hard look at the merits of each claim being released, the burden on the Court is transformed into a question about the integrity of the legal system.

IV. CONCLUSION

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 without trying to establish a *Revlon* violation. The disjunction between the pre- and post-disclosure settlement phases of the *Rural/Metro* litigation illustrates those negative effects.

Some of these negative effects are outlined in a handful of post-*Rural/Metro* rulings rejecting disclosure settlements *sua sponte*, including the rejection of a recent partial disclosure settlement involving key dealmakers from *Rural/Metro*. In *Trulia*, Chancellor Bouchard discussed a draft of this Article and expressly noted that the *Rural/Metro* litigation was a "particularly vivid example" of how potentially valuable claims may be released without adequate investigation in a disclosure settlement.[224] Going forward, the Court of Chancery should closely analyze whether it is appropriate to grant a release of any scope in exchange for supplemental disclosures.

[224] *In re* Trulia, Inc. S'holder Litig., 129 A.3d 884, 895 (Del. Ch. 2016).