

TENTATIVE Order Regarding Motion for Attorneys' Fees

On July 24, 2020, Plaintiff Bennett Anschutz (Anschutz) moved for attorneys' fees. Dkt. No. 19. The parties agreed to extend the time-line for Pacific Premier Bancorp, Inc ("Pacific Premier") to respond. On August 24, 2020, Anschutz filed a corrected motion. Dkt. No. 24. Pacific Premier timely opposed the motion. Dkt. No. 27. Anschutz replied. Dkt. No. 28. Per the Parties' joint stipulation, Pacific Premier filed its sur-reply. Dkt. No. 29.

For the following reasons, the Court **DENIES** the motion.

I. BACKGROUND

1. Factual Background

The instant dispute relates to a recent merger between Pacific Premier and another bank, Opus. See generally, Compl., Dkt. No. 1. Pacific Premier provides "banking services to businesses, professionals, real estate investors, non-profit organizations and customers in its primary market area of Southern California." Id. ¶ 9. Anschutz is an owner of shares of Pacific Premier common stock. Id. ¶ 8.

After months of negotiations, Pacific Premier announced that it had entered into a definitive agreement (the "agreement") with Opus on January 31, 2020 in an all stock deal valued at approximately \$1.0 billion. Id. ¶ 22-28. Under the terms of the agreement, Opus stockholders would have the right to receive .9 shares of Pacific Premier common stock for each share of Opus common stock. Id. The culminating agreement had been revised numerous times, most notably, increasing the fixed exchange ratio from .8500 shares of Opus common stock to Pacific Premier common stock to .9 shares. Id. ¶ 23.

D.A. Davidson reviewed the financial aspects of the proposed transaction. Id. ¶ 28; Dkt. No. 27, Athey Decl., Ex. A ("Athey Decl."). It "rendered an opinion to the Pacific Premier board of directors to the effect that, as of such date and

subject to the procedures followed, assumptions made, matters considered, and qualifications and limitations on the review undertaken by D.A. Davidson as set forth in such opinion, the merger consideration to be paid to the Opus shareholders was fair, from a financial point of view” to Pacific Premier. Id.

In connection with the transaction and pursuant to the Securities Exchange Act, Pacific Premier filed a registration statement (the Form S-4) on March 16, 2020 with the Securities Exchange Commission. Id. ¶ 3. Anschutz alleges in his complaint that the S-4 contained material misrepresentations and omissions of fact that rendered it misleading. Id. ¶ 32.

The initial S-4’s financial disclosures featured 16 pages of explanation about D.A. Davidson’s analyses underlying its fairness opinion, in which it analyzed Pacific Premier’s valuation compared to other metrics, compared Pacific Premier’s and Opus’ stock price performances and volume, valued Pacific Premier and Opus stock using a net present value analysis, and also analyzed the transaction’s impact on Pacific Premier’s financial results. See Athey Decl., Ex. B at 103-118. D.A. Davidson reviewed financial statements and other historical financial and business information about Pacific Premier and Opus, publicly available earnings estimates for Pacific Premier and Opus for the years ending December 31, 2020 and December 31, 2021, as well as other market conditions. Id. at 104.

Anschutz alleged the following misrepresentations related to substantive omissions within the fairness opinion provided to Pacific Premier stockholders. Generally speaking, according to Anschutz, the description of D.A. Davidson’s fairness opinion and underlying analyses omitted key inputs and assumptions. Compl. ¶ 34. This information, “if disclosed, would significantly alter the total mix of information available” to Pacific Premier’s stockholders. Id. ¶ 34.

First, Anschutz claims that the S-4 failed to “provide material information concerning any of the financial projection either prepared by or approved by” Pacific Premier’s management or used by D.A. Davidson. Id. ¶ 35. Moreover, these projections would have been vital to Pacific Premier’s stockholders, according to Anschutz. Id. ¶ 36. The S-4 used publicly available average consensus street estimates. Athey Decl., Ex. B., pp. 75-79, 83-84, 86.

Second, Anschutz claims that while D.A. Davidson reviewed the net present value of Pacific Premier and Opus, the projections used in those calculations were not the only vital inputs that were missing from its fairness opinion. Id. Also missing in the S-4 was the terminal value of Opus common stock by December 31, 2025, the terminal value of Pacific Premier common stock by December 31, 2025, and the inputs and assumptions underlying the application of price to the final earning multiples. Id. ¶ 36. The S-4 included ranges of earnings multiples, book value multiples, and discount rates from a wide range of growth rates. Athey Decl., Ex. B, p. 85.

Third, Anschutz claims that the S-4 failed to disclose the individual multiples for each of the target companies analyzed by D.A. Davison as well as the individual multiples for each of the target transactions multiplied by D.A. Davidson. Id. ¶¶ 37-38. However, certain figures were disclosed, including the companies and transactions used by Davidson, the selection criteria used, and the high, low, mean, and median of 28 financial variables for the companies and transactions. Athey Decl., Ex. B, pp. 108-114. Notably, the 8-K Form, provided as part of the supplemental disclosures, provided information for only five of the seventeen variables in the S-4. Dkt. No. 19-3, pp. 517-518.

Anschutz also alleged misrepresentations related to a potential conflict of interest between Pacific Premier and D.A. Davidson. Compl. ¶ 42. Specifically, Anschutz alleged that while the S-4 noted that “in the two years preceding the date of the fairness opinion letter, D.A. Davidson had provided investment-banking services to Pacific Premier” and had been compensated, the S-4 failed to disclose the fees that it had received for this work or the precise nature of the work it performed. Id. ¶¶ 43-44; Athey Decl., Ex. B at p. 88. Because Pacific Premier failed to disclose those fees, Anschutz argued that its stockholders “may be materially mislead as to D.A. Davidson’s potential conflicts of interest.” Id. ¶ 45. The amended S-4 referenced that D.A. Davidson had been paid less than \$200,000 for a subordinated debt offering in 2019, Dkt. No. 19-3 at 110, and other information related to the work was publicly available. Athey Decl., Ex. E, p. 514 (¶ 37 & n.4).

Following Anschutz’ filing of the Complaint, Pacific Premier filed an amended S-4 on April 6, 2020. Mot. Dkt. No. 19-1 at 4. According to Anschutz, the new S-4 “directly addressed [] [his] allegation concerning the Registration

Statement's failure to disclose material information related to the potential conflicts of interest faced by" D.A. Davidson, i.e., "an extensive pre-existing relationship with Pacific" in which "it acted as the co-manager in connection with Pacific Premier's May 2019 subordinated debt offering" for which it receive \$200,000. Id. at 4-5.

Nonetheless, the new S-4 did not address the claims concerning the omission of financial projections and valuation analyses performed by D.A. Davidson, so Anschutz prepared a preliminary injunction and sent it to Pacific Premier as part of his meet and confer obligations. Id. at 5. Following receipt of the motion, Pacific Premier filed a Form 8-K which addressed the remaining deficiencies. Id. It did not negotiate with Anschutz prior to filing the 8-K, nor did it offer to settle the lawsuit or pay Anschutz's attorney's fees at that time. Rebuttal Aff. ¶¶ 9-12, Reply, Dkt. No. 27 ("Rebuttal Aff."). Pacific Premier subsequently issued another 8-K that provided additional information. Dkt. No. 19-3.

Pacific Premier held its shareholder meeting on May 5, 2020, in which shareholders cast a vote to approve the merger. Athey Decl., ¶ 16. Of the 50,567,876 shares cast, 50,485,885 voted for the transaction. Id.

B. Procedural Background

As mentioned above, Anschutz filed his complaint on April 2, 2020. Dkt. No. 1. On May 6, 2020, the day after Pacific Premier held its shareholder meeting, Anschutz voluntarily dismissed the case. Dkt. No. 12. On July 14, 2020, Anschutz reopened the case "for the limited purpose of adjudicating Plaintiff's Motion for Attorney's Fees." Dkt. No. 13 at 4. Anschutz filed his motion ten days later. Dkt. No. 19.

II. LEGAL STANDARD

The party seeking the fees bears the burden of establishing entitlement to an award and documenting the hours expended and relevant hourly rates. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

To calculate the "lodestar," the court must multiply the number of hours the

attorneys reasonably spent on the litigation by the reasonable hourly rate in the community for similar work. McElwaine v. U.S. West, Inc., 176 F.3d 1167, 1173 (9th Cir. 1999). The court may raise or lower the lodestar based on several factors:

(1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Fischel v. Equitable Life Assurance Soc’y, 307 F.3d 997, 1007 n.7 (9th Cir. 2002). The court must be cautious, however, not to adjust the lodestar figure based on any of the foregoing factors that are subsumed in the original lodestar calculation. Morales v. City of San Rafael, 96 F.3d 359, 364 & n.9 (9th Cir. 1996). The Ninth Circuit has noted that multipliers range from 1.0-4.0 and a “bare majority” fall within the range of 1.5-3.0. Vizcaino, 290 F.3d at 1051 n.6; Van Vranken v. Atl. Richfield Co., 901 F. Supp. 294, 298 (N.D. Cal. 1995) (“Multipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation.”).

III. DISCUSSION

A. Establishing Entitlement to the Award

Attorneys’ fees are recoverable for private actions under the Exchange Act when a plaintiff confers a substantial benefit upon a class represented by the defendant and demonstrates that his or her complaint against the defendant was meritorious. Lewis v. Anderson, 692 F.2d 1267, 1270 (9th Cir. 1982). A plaintiff may recover attorneys’ fees even if the benefit conferred arises from actions that moot the plaintiff’s claim. Lewis, 692 F.2d at 1270 (citing Reiser v. Del Monte Properties Co., 605 F.2d 1135, 1140 n. 4 (9th Cir.1979)) (“federal law permits a

fee award if a benefit arises from corporate remedial action that moots the plaintiff's claim.”). The “fate of the action itself does not determine” whether a Plaintiff should recover. Id.

Rule 14a of the Exchange Act makes it unlawful to solicit a proxy “in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.” 15 U.S.C. § 78n(a). Rule 14a–9 prohibits the solicitation of a proxy by means of a proxy statement that contains a statement that “is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.”¹ 17 C.F.R. § 240.14a–9(a).

“An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.” TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).² What establishes the materiality of an omitted fact may depend on the information already available to the investors, i.e., whether there is a “substantial likelihood that disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” TSC, 426

¹Pacific Premier also urges that the Court adopt a rule that an omission on its own does not establish a Section 14(a) or Rule 14a-9 claim. Opp’n at 7. It urges that the omission must render the relevant proxy statements false or misleading. Pacific Premier cites Hysong v. Encore Energy Partners LP, No. 11-CV-781, 2011 WL 5509100 (D. Del. Nov. 10, 2011), to demonstrate that absent a demonstration that an omission renders a proxy statement false or misleading, a court need not proceed to its materiality analysis. But again, Pacific Premier has failed to demonstrate that this rule applies within this district, this circuit, or that it has become the dominant view across federal courts. The Court therefore defers to the prevailing analysis that an omission is sufficient.

²The Court recognizes that a substantial portion of both parties’ briefing materials were devoted to arguments as to the applicable materiality standard. Pacific Premier urges the Court to adopt Trulia’s standard for omissions, specifically, that an omission was plainly material. See In re Trulia, Inc. Stockholder Litig., 129 A.3d 884, 898–99 (Del. Ch. 2016). Trulia been adopted by some courts. See e.g. Greenthal v. Joyce, 2016 WL 362312, at *6 (S.D. Tex. Jan. 29, 2016), Bushansky v. Remy Int’l, Inc., 262 F. Supp. 3d 742, 751–52 (S.D. Ind. 2017); Sanchez v. IXYS Corp., No. 17-CV-06441-WHO, 2018 WL 4787070, at *4 (N.D. Cal. Oct. 2, 2018). However, Pacific Premier has not demonstrated that this court, much less a plurality of district courts within the circuit, have adopted this standard as opposed to the standard from TSC. Therefore, the Court declines to adopt Trulia’s standard here.

U.S. at 449. The ‘total mix’ of information “normally includes information that is and has been in the readily available general public domain and facts known or reasonably available to shareholders.” Kapps v. Torch Offshore, Inc., 379 F.3d 207, 216 (5th Cir. 2004) (internal citation omitted); SEC v. Mozilo, No. CV 09–3994–JFW, 2009 WL 3807124, at *10 (C.D.Cal. Nov. 3, 2009) (“[T]he ‘total mix’ of information only includes information that is ‘readily’ or ‘reasonably’ available to an investor.”).

Therefore, when a party vindicates the statutory policy of “fair and informed corporate suffrage,” they have “[r]endered a substantial service to the corporation and its shareholders.” Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 396 (1970). “In order to exercise the right of corporate suffrage, shareholders must be informed of important issues confronting the corporation.” Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc., 54 F.3d 69, 72 (2d Cir. 1995).

However, Proxy statements need not be, and indeed, should not be, an exhaustive catalog of all information that might conceivably be helpful to a shareholder. See Mills, 396 U.S. at 448 (explaining that the materiality standard cannot be “unnecessarily low,” otherwise management might simply “bury the shareholders in an avalanche of trivial information”). “Section 14(a) and Rule 14a–9 do not obligate corporate officials to present, no matter how unlikely, every conceivable argument against their own recommendations.” Desaigoudar v. Meyercord, 223 F.3d 1020, 1024 (9th Cir.2000); Sanchez, 2018 WL 4787070, at *5 (“Shareholders are merely entitled to a fair summary of the substantive work performed by the investment bankers upon whose advice their board relied in reaching their recommendation.”).

Having established the applicable materiality standard, the Court now turns to each claim Anschutz claims to have been material and for which Pacific Premier provided supplemental information. In essence, the dispute between Anschutz and Pacific Premier centers on whether the underlying figures, assumptions, etc., were necessary to stockholders such that their absence from the original S-4 rendered the S-4 misleading.

i. Newly Disclosed Financial Projections

In its motion, Anschutz argues that the S-4 failed to provide “any of the financial projections approved by Pacific management and utilized by D.A. Davidson in its financial analyses. Specifically, the Registration Statement noted that D.A. Davidson utilized projections consisting of the consensus “street estimates” as discussed with and confirmed by Pacific management, and management-approved growth rates were applied to these estimates for the years after 2021.” Mot. at 11, Dkt. No. 24. As a result of Anschutz’ Complaint, Pacific Premier provided the following:

- (1) the mean analyst earnings per share estimates for Pacific for the years ending December 31, 2020 and December 31, 2021;
- (2) the mean analyst earnings per share estimates for Opus for the years ending December 31, 2020 and December 31, 2021;
- (3) the estimated long-term annual earnings per share growth rate for Pacific;
- (4) the estimated long-term annual earnings per share growth rate for Opus;
- (5) the estimated long-term annual asset growth rate for Pacific for the years ending December 31, 2022, December 31, 2023, and December 31, 2024; and
- (6) an estimated annual dividend payout ratio for Pacific for the years ending December 31, 2020 through December 31, 2024.

Id. at 13. According to Anschutz, this information was material because it was “crucial to a shareholder’s determination as to whether or not to approve the merger, and any data pertaining to Opus’ value took on particular significance in light of D.A. Davidson’s analyses.” Id. at 12. The failure to provide this information relied upon may have also created an impression that differed from reality, according to Anschutz. Id. The supplemental disclosures enabled shareholders to view the transaction from a longer-term perspective, which according to Anschutz, provided material and necessary information. Id. at 13-14. Anschutz’ expert also underscored the importance of providing sufficient information to stockholders to enable them to make adequately informed decisions. Keath Decl. at ¶¶ 15-16, Dkt. No. 19-3 (“Keath Decl.”). The expert added that the “Disclosure of projected dividends (or, when applicable, other measures of cash flow) and the financial metrics used to calculate terminal values

are critical to a stockholder’s ability to adequately assess the merits of substantially any merger transaction.” Id. ¶ 24.

In its Opposition, Pacific Premier claims that the Registration Statement disclosed that D.A. Davidson used “average consensus street estimates”, disclosed the results for any analyses it conducted, and that D.A. Davidson disclosed that the “street estimates” used were publicly available. Opp’n at 19, Dkt. No. 27. Regarding the management projections, Pacific Premier notes that the disclosures were not material because Anschutz failed to demonstrate how omitting the information made any statement misleading, the estimates were derived from publicly available information, the growth rates themselves were not material, the data needed to follow any of Davidson’s analysis was disclosed and publicly available, that EPS and asset growth rates were immaterial, and finally, any prospective financial information, as a projection of a future event, is shielded by a safe harbor under the PSLRA. Id. at 21-22; see also Athey Decl., Ex. E. at ¶¶ 59-60.

In its Reply, Anschutz reasserts the materiality of financial projection figures and the importance that financial projection figures may empower shareholders to determine future earnings. Reply at 7-8, Dkt. No. 28. Anschutz adds that the projections were not readily available because the average stockholder does not have access to the same information that D.A. Davidson has, “nor would it know where to search as the Registration Statement failed to describe the sources for these ‘street estimates’.” Id. at 8. In response to Pacific Premier’s claim about the PSLRA’s safe harbor, Anschutz claims that his Complaint does not take issue with the reliability of the projections disclosed or allege that they were misleading, but rather, merely claims that the projections relied upon for the financial analyses were omitted.

In its sur-reply, Pacific Premier contends that the street estimates were the only financial projections that the Complaint said were missing, but now, Anschutz is arguing that an array of metrics which the Complaint never sought constituted missing financial projections. Sur-reply at 5, Dkt. No. 29.

In certain instances, courts have found projected valuations of a company to be material – “[a] reasonable shareholder would have wanted to independently evaluate management's internal financial projections to see if the company was

being fairly valued.” Brown v. Brewer, No. CV06-3731-GHK SHX, 2010 WL 2472182, at *21 (C.D. Cal. June 17, 2010); United States v. Smith, 155 F.3d 1051, 1064 n.20 (9th Cir. 1998) (“[I]nvestors are concerned, perhaps above all else, with the future cash flows of the companies in which they invest.”). Therefore, when a company provides valuation information, it must be complete and accurate. Id. (citing Zemel Family Tr. v. Philips Int'l Realty Corp., No. 00 CIV. 7438 MGC, 2000 WL 1772608, at *6 (S.D.N.Y. Nov. 30, 2000)). However, these situations are limited, and “federal courts generally agree that financial projections, “forward-looking statements,” “puffing,” or other soft financial information need not be disclosed.” Id. at *20.

At issue was whether the S-4 contained the necessary data to enable shareholders to determine or independently evaluate management’s internal projections; i.e., was it enough that the S-4 contained the ‘street estimates’ or did Pacific Premier need to do more.

The Court finds that the Corrective Disclosures containing the newly disclosed financial projections were not material. As mentioned above, the figures used were street estimates, were provided in the S-4, and were forward-looking. Anschutz claims that none of the financial projections approved by Pacific Premier management and used by D.A. Davidson were disclosed; i.e., neither the consensus estimates nor the growth rates applied to them.

While the situation is similar to Brown, in which the court grappled with whether the total mix of information before the shareholders included projected growth rates, there, the Defendants failed to disclose any of the underlying management projections used in formulating the fairness analysis opinions. Brown, 2010 WL 2472182, at *20. Here, Pacific Premier disclosed that the S-4 used street estimates, and the street estimates were available to the public. While Pacific Premier could have provided additional information, proxy statements need not be an exhaustive catalog of all information that could benefit possible shareholders. Resnik v. Swartz, 303 F.3d 147, 151 (2d Cir. 2002) (“Disclosure of an item of information is not required, however, simply because it may be relevant or of interest to a reasonable investor.”) Pacific Premier included in its S-4 the relevant facts and figures associated with the street estimates it used to calculate various projections within the Form.

Therefore, the Court does not find the additional information provided in the Corrective Disclosures to be material.

ii. Analytical Inputs for Opus and Pacific Premier

In its motion, Anschutz claims that the Net Present Value analysis for both Opus and Pacific Premier omitted “(i) the terminal value of Opus common stock at December 31, 2025; (ii) the terminal value of Pacific Premier common stock at December 31, 2025; and (iii) the inputs and assumptions underlying the application of P/E multiples of 10.0x to 24.0x.” Mot. at 17, Dkt. No. 24. Because none of the financial projections used by D.A. Davidson were disclosed, Anschutz argues that Pacific Premier stockholders had no way to use those projections to determine the terminal value by the end of 2025. Id.; see also Keath Aff. at 12. The Corrective Disclosures facilitated stockholder ability to determine the merits of any merger transaction. Id.; Keath Aff. at 13.

Further, Anschutz rehashes his earlier argument that “[n]one of the financial projections utilized by D.A. Davidson were disclosed in the Registration Statement. Thus, Pacific stockholders had no way of using these undisclosed projections to assist determining the terminal value” of Opus and Pacific Premier common stock. Id. at 17; Keath Aff. at 13. The absence of these figures prohibited stockholders from conducting their own calculations or assessing the validity of D.A. Davidson’s. Dkt. No. 24 at 18. Anschutz claims his Complaint “provided a substantial benefit to the Company’s stockholders by revealing crucial missing data concerning the projected dividends, EPS growth, and terminal values.” Id.

In its Opposition, Pacific Premier claims that the net present value omissions were immaterial. Opp’n at 20, Dkt. No. 27. Specifically, Pacific Premier claims that the Registration Statement’s disclosures about its net present value analysis was robust, by disclosing “(i) Davidson’s assumptions – including P/E multiples in the range of 10x to 24x and tangible book value of 120% to 240% – to estimate the terminal values in 2025; (ii) the discount rates (9-13%) used in the cash flow analysis for NPV, which were derived from an industry standard method and based on rates published by Duff & Phelps’ and (iii) Davidson’s analysis of how NPVs would be affected by changes in the assumptions, including

net income variations.” Id. at 20; Athey Decl., Ex. E, p. 521 (¶¶ 55-56); Athey Decl., Ex. B, p. 75-79, 83-84, 86.

In its Reply, Anschutz asserts that the omission of certain projections prohibited stockholders to either “(i) independently assess the Company’s Net Present Value (“NPV”) based on the projected cash flows expected by management, or (ii) critically review the NPV analyses performed by the Financial Advisors in order to assess their accuracy and/or reasonableness, and therefore the amount of weight (if any) to place on the valuation indications derived from them.” Reply at 10; Rebuttal Aff. at 8-9, Dkt. No. 28-2 (“Rebuttal Aff.”). Whereas Pacific Premier claimed that the underlying figures used to calculate the NPV for Opus and Pacific Premier were immaterial, Anschutz argues that these figures were a central element of the calculation and could facilitate a better understanding of the NPV outcomes, and Anschutz adds that its Complaint cured these defects. Id. at 11, Rebuttal Aff. at 8-9. Specifically, the failure to include projected dividends was not merely an omission of an unimportant element in calculating the NPV, but rather “the most crucial element of any NPV analysis.” Id. at 11-12; Rebuttal Aff. at 9. Lastly, Anschutz contends that the failure to quantify growth rates beyond 2020 and 2021, i.e., until 2025, misled stockholders by making the merger appear appealing and simultaneously downplaying the Opus’ future success. Id. at 12.

Anschutz has failed to present sufficient facts to demonstrate that the omissions here were material. While Anschutz presents an expert declaration in support of its motion and reply, Pacific Premier’s expert declaration rebuts the same, and this disagreement at least indicates that to some investors, the information may have been useful, but to others, it would not have been. Regardless, Anschutz cannot escape the reality that a proxy statement need not disclose every item of information simply because some investor may find it relevant. See In re Hot Topic, Inc. Sec. Litig., No. CV 13-02939 SJO JCX, 2014 WL 7499375, at *9 (C.D. Cal. May 2, 2014) (“Plaintiff’s argument chiefly rests on Defendants’ omission of certain accounting details from the Proxy Statement, including stock based compensation expense, working capital, taxes or marginal tax rate, net income, and unlevered free cash flows. Requiring these particularized accounting details as a matter of course would threaten to bury the shareholders in an avalanche of trivial information.”) (footnote and internal citation omitted); see also, Sodhi v. Gentium S.p.A., No. 14-CV-287 JPO, 2015 WL 273724, at *5

(S.D.N.Y. Jan. 22, 2015) (“a disclosure statement must contain only a fair summary of the underlying bases for a financial advisor's fairness opinion.... Investors, as a general matter, are not entitled to disclosures sufficient to make [their] own independent assessment of a stock's value ... [d]isclosure of an item of information is not required ... simply because it may be relevant or of interest to a reasonable investor” “[Q]uibbles with a financial advisor's work simply cannot be the basis of a disclosure claim.”) (internal quotations, footnote, and citations omitted).

Additionally, Anschutz argues that with the additional information provided, shareholders could determine that longer-term growth projections differed considerably than shorter-term ones. Dkt. No. 24 at 19. But, “Section 14(a) and Rule 14a–9 do not obligate corporate officials to present, no matter how unlikely, every conceivable argument against their own recommendations. They instead require that officials divulge all known material facts so that shareholders can make informed choices.” Masters v. Avanir Pharm., Inc., 996 F. Supp. 2d 872, 879 (C.D. Cal. 2014) (citing Desaigoudar, 223 F.3d at 1022).

Therefore, the Court does not find the omitted information here to be material.

iii. Individual Multiples

In its motion, Anschutz argues that the S-4 omitted the observed multiples for each comparable company and transaction, and that the disclosure of these multiples is material to stockholders because “this analysis is a market-based valuation technique that is “built upon the premise that similar companies provide a highly relevant reference point for valuing a given target.”” Mot. at 14, Dkt. No. 24. This is because the analysis is based on company/transaction comparability, and the more similar those companies are, the greater reliability the valuation should be. Id.

Anschutz further asserts that “[w]ithout the omitted information, the Company’s stockholders were restricted to the range, mean and median figures, and could not determine whether the purportedly comparable companies and transactions were truly comparable.” Id. at 15. However, with the filing of the corrected disclosures, Anschutz adds that several hundred new data points were

disclosed, including “(i) pricing multiples such as P/TBV multiples and numerous trailing and forward EPS multiples; (ii) other valuation metrics, such as market premia, core deposit premia, and dividend yields; and (iii) operating metrics that provide the context necessary to make benchmarking decisions... which are wildly used by investors and financial analysts” Id. at 15. These figures enabled stockholders to “accurately understand Pacific’s and Opus’ value relative to the comparable companies and precedent transactions reviewed by D.A. Davidson.” Id. at 16; Keath Aff. at 9.

In its Opposition, Pacific Premier claims that these individual multiples were publicly available and immaterial given the other information available to stockholders. Opp’n at 14, Dkt. No. 27. Specifically, the S-4 had already disclosed the companies and transactions analyzed by D.A. Davidson, the selection criteria used, and the high, low, mean, and median of the variables used for these companies, meaning that the financial metrics that Anschutz asserts were missing were disclosed already. Id. at 14; see also Athey Decl., Ex. E, p. 520. Because the information was already available within the S-4 and also publicly available, Pacific Premier contends that it is impossible for it to have been material. Pacific Premier also argues that the supplemental information only partially responded to Anschutz’ request (Anschutz requested information about 28 financial variables, but Pacific Premier provided only 10). Id. at 15; Athey Decl., Ex. E, p. 518. Lastly, Pacific Premier argues that courts frequently hold that individual multiples for each comparable are immaterial and need not be disclosed because stockholders are entitled only to a fair summary and not information sufficient to perform their own analyses or independently examine the work. Id. at 15-16; see also Sanchez, 2018 WL 4787070; Himmel v. Bucyrus Int’l, Inc., No. 10-C-1104, 2014 WL 1406279 (E.D. Wis. Apr. 11, 2014); Bushansky v. Remy Intl., Inc., 262 F. Supp. 3d 742 (S.D. Ind. 2017); Ridley v. Hutchinson Tech., Inc., 216 F. Supp. 3d 982 (D. Minn. 2016); Vardakas v. DG Energy, Inc., No. 17-CV-10247, 2018 WL 1141360 (D. Mass. Mar. 2, 2018); Greenthal v. Joyce, No. 16-CV-41, 2016 WL 362312 (S.D. Tx. Jan. 29, 2016).

In his Reply, Anschutz asserts that the Corrective Disclosures provided observed multiples and that without the observed multiples for each comparable company and transaction, Pacific Premier’s stockholders had insufficient information to enable themselves to draw meaningful conclusions about the relationship between Pacific Premier’s and Opus’ stock. Reply at 13, Dkt. No. 28.

By providing the figures it did, Anschutz contends that Pacific Premier prevented stockholders from determining if the comparable companies / transactions were actually comparable. *Id.* at 14 (citing In re Radiology Assocs., Inc., 611 A.2d 485, 490 (Del. Ch. 1991) (“The utility of the comparable company approach depends on the similarity between the company the court is valuing and the companies used for comparison. At some point, the differences become so large that the use of the comparable company method becomes meaningless for valuation purposes.”)).

In response to Pacific Premier’s assertions that the additional information was publicly available, Anschutz claims that just because the information was public available “after extensive sleuthing does not mean it was readily available to the average Pacific stockholders.” *Id.* Anschutz also contends that courts frequently find the omission of individually observed multiples to be material when that omission renders the summary of valuation analysis misleading. *Id.* at 15; see In Re Apple Computer Sec. Litig., 886 F.2d 1109 (9th Cir. 1989); Dale v. Rosenfeld, 229 F.2d 855, 858 (2d Cir.1956); Smith v. Robbins & Myers, 969 F. Supp. 2d 850, 872-73 (S.D. Ohio 2013). Finally, Anschutz claims that the details provided did not give a fair summary of D.A. Davidson’s analysis.

The Court finds the failure to include individual multiples in the S-4 to be immaterial.

Courts within the Ninth Circuit have not required the disclosure of all figures associated with a S-4. Sanchez, 2018 WL 4787070, at *4 (absent allegations of board wrongdoing, a description of selected company analysis, the inputs used in the analysis, and the 25th, 50th, and 75th percentile of the multiples of the selected companies is sufficient). Moreover, because these figures were disclosed and were publicly available, concerned shareholders may have conducted their own research as well.

iv. Conflict of Interest Issue

In his motion, Anschutz argues that information regarding D.A. Davidson’s financial interest in the merger and prior work performed for Pacific Premier (as well as the fees it received) were material. Dkt. No. 24 at 9. Specifically, the disclosures “revealed for the first time that D.A. Davidson acted as co-manager in

connection with Pacific’s May 2019 subordinated debt offering, for which D.A. Davidson received a fee of roughly \$200,000 in the aggregate.” Id. at 10.

In its Opposition, Pacific Premier argues that information was not material because first, the precise nature of the work was already publicly disclosed, see Athey Decl. ¶ 37, and because shareholders did not need to know how much Pacific Premier paid D.A. Davidson. Opp’n at 17-18, Dkt. No. 18. Regarding the latter, Pacific Premier contends that Anschutz’ cases are inapposite because each involved some element of fraud by the financial advisor, that Anschutz’ claim that D.A. Davidson had some ulterior motive is without merit, that other district courts have rejected similar claims, and finally, that Anschutz’ claim that D.A. Davidson would sell its opinion because it is a smaller investment bank is uninformed. Id. at 18-19.

In his Reply, Anschutz responds to these claims by citing a series of cases underscoring the concept that shareholders must know of whatever factors may influence the financial advisor’s analysis. Reply at 18, Dkt. No. 28. Additionally, Anschutz claims that the information provided in the Registration Statement – i.e., that “D.A. Davidson has, during the two years preceding the date of the fairness opinion letter, provided investment banking services to Pacific Premier” – was insufficient to fully apprise Pacific Premier shareholders of the relationship between the two companies. Id. at 19. Moreover, this information is all the more relevant, according to Anschutz, because of D.A. Davidson’s desire to conduct more business with Pacific Premier. Id.

The Court finds that the Corrective Disclosures did not provide any material information that would benefit the stockholders. While it is true – and Anschutz argues correctly – that potential conflicts of interest need to be disclosed, and the failure to disclose them may render a S-4 misleading, the Court finds that not to be the case here.

First, the Court finds Anschutz’ argument that the fee received created a conflict of interest, particularly for a company like D.A. Davidson, conclusory and without factual basis. Even in some of the key cases to Anschutz’ argument, the Chancery Court in Delaware found egregious instances of possible self-dealing not to constitute a conflict of interest. See e.g. David P. Simonetti Rollover IRA v. Margolis, No. CIV.A.3694-VCN, 2008 WL 5048692, at *6 (Del. Ch. June 27,

2008) (finding no conflict of interest where that the financial advisors hired by Defendant had previously advised Defendant in another deal, that the financial advisor possibly acquired non-public information in the process, and finally, the financial advisor had a separate financial interest in the merger where that was contingent on the merger's success). The Court rejects the notion that a prior business relationship in an unrelated transaction creates a conflict. Moreover, in other instances in which the financial advisor received payment contingent upon the merger's success, Courts have found that disclosure of the exact amount or nature of the payment is immaterial. House v. Akorn, Inc., 385 F. Supp. 3d 616, 621 (N.D. Ill. 2019); see also Bushansky v. Remy Intl., Inc., 262 F. Supp. 3d 742, 748 (S.D. Ind. 2017) ("Additionally, Plaintiffs have not presented any evidence or case law establishing that the inclusion of historical fees in similar situations is material")

Second, the Court finds little merit in Anschutz' argument because there is no evidence of bad faith or deceit by Pacific Premier. Where a board has been misled by conflicted individuals, the Delaware Supreme Court has enjoined the prospective merger. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del.1989) (enjoining a prospective merger when the board's lack of involvement in a sale process enabled mismanagement and allowed certain individuals to steer the deal to a specific company, despite having an interest with that company). That is not the case here, though.

Finally, information concerning the services D.A. Davidson had provided Pacific Premier in the two years prior was publicly available. Athey Decl., Ex. E, p. 514 (¶ 37 & n.4). Courts frequently hesitate to declare publicly available information to be material. In re Convergent Techs. Sec. Litig., 948 F.2d 507, 513 (9th Cir. 1991); In re Textainer P'ship Sec. Litig., No. C-05-0969 MMC, 2005 WL 3801596, at *6 (N.D. Cal. Dec. 12, 2005); In re Xerox Corp. Sec. Litig., 935 F. Supp. 2d 448, 488 (D. Conn. 2013). Therefore, absent any evidence of deceit, the Court finds that because the information was also publicly available, it cannot be material.

Essentially, while it is true that "it is imperative for the stockholders to be able to understand what factors might influence the financial advisor's analytical efforts," Simonetti, 2008 WL 5048692, at *8, Anschutz presumes that a conflict of interest exists. Having reviewed similar situations, and in particular, situations

involving egregious instances of self-dealing or conflict, the Court is not persuaded.

Because the Court has determined that the information provided was not material, it need not assess whether Anschutz is entitled to attorneys' fees.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** the motion.

IT IS SO ORDERED.

Effective immediately all oral arguments are VACATED. The Court will continue to post tentatives in the afternoon of the Court day prior to the scheduled hearing (e.g., Friday afternoon for Monday hearings). Any party may file a request for hearing of no more than five pages no later than 5:00 p.m. the day following the scheduled hearing (e.g., Tuesday 5:00 p.m. for a Monday hearing) stating why oral argument is necessary. If no request is submitted, the matter will be deemed submitted on the papers and the tentative will become the order of the Court. If the request is granted, the Court will advise the parties when and how the hearing will be conducted. The Court asks for the parties' understanding and patience in these difficult times.