IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE TRULIA, INC. STOCKHOLDER LITIGATION	Consolidated C.A. No. 10020-CB

DEFENDANTS' SUPPLEMENTAL BRIEF
IN SUPPORT OF PROPOSED SETTLEMENT

OF COUNSEL:

Deborah S. Birnbach
Goodwin Procter LLP
53 State Street
Boston, MA 02109
(617) 570-1000

Michael T. Jones
Goodwin Procter LLP
135 Commonwealth Drive
Menlo Park, CA 94025
(650) 752-3100

OF COUNSEL:

Alan S. Goudiss
Shearman & Sterling
599 Lexington Ave
New York, New York
10022-6069
(212) 848-4000

Rudolf Koch (#4947)
Sarah A. Clark (#5872)
Richards, Layton & Finger, P.A.
One Rodney Square
920 N. King Street
Wilmington, DE 19801
(302) 651-7700

Attorneys for Trulia, Inc., Pete Flint, Robert Moles, Theresia Gouw, Greg Waldorf, Sami Inkinen, Erik Bardman, and Steve Hafner

William M. Lafferty (#2755)
Morris Nicholas Arsht & Tunnell
1201 North Market Street
Wilmington, Delaware 19801
(302) 658-9200

Attorneys for Defendants Zillow, Inc. and Zebra Holdco, Inc.

Dated: October 16, 2015

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES & RULES

OTHER AUTHORITIES

INTRODUCTION

At the conclusion of the September 16, 2015 settlement hearing in the above-captioned action (the "Settlement Hearing"), the Court took the decision to grant settlement approval under advisement and requested supplemental briefing from the Parties on two issues. *In re Trulia, Inc. S'holder Litig.*, Consol. C.A. No. 10020-CB, at 43-45 (Del. Ch. Sept. 16, 2015) (TRANSCRIPT) ("Hearing Tr.") (Exhibit 1 hereto). First, the Court inquired about the appropriate standard for the Court to apply in considering the benefit of supplemental disclosures when deciding whether to approve a disclosure-only settlement. Second, the Court asked the Parties to brief the basis on which the Court may be asked to endorse a release of both known and unknown claims in connection with a disclosure-only settlement. *Id.*

As discussed in detail below, as to the first issue, the Court is not required to make a ruling on the merits of a case when approving a settlement. Accordingly, the standard for evaluating a disclosure-only settlement cannot require a finding of materiality because such standard would require a finding on the merits and would also require defendants to concede liability to settle an action. Rather, the Court's role as gatekeeper requires a fairness evaluation where the Court weighs the value of the claims being compromised against the value of the benefit to be conferred on the class by the settlement. Here, because the supplemental disclosures

provided a tangible, although minor, value to the Class, and the claims are weak, settlement approval is appropriate.

With respect to the release issue, the Parties have further evaluated the facts of the present matter and the Court's concerns expressed during the Settlement Hearing and revised the release language in this case to exclude references to unknown claims. *See* [Proposed] Order and Final Judgment (Exhibit 2 hereto).[1] Defendants have agreed to these modifications in this particular matter, given that discovery was conducted and they are confident that any hypothetical future claims related to the transaction and the Board's conduct in connection with the transaction would be deemed knowable given the litigation process.

Given these revisions, the Court need not opine on the unknown claim issue raised during the Settlement Hearing. However, in light of the Court's request and recent interest in this subject from the Court of Chancery, Defendants have briefed this issue. As set forth below, courts routinely and properly approve releases of known and unknown claims when such claims are related to the same set of operative facts. Such releases are supported by both Delaware case law and policy considerations. Although the Parties have proposed a narrower revised release in this instance given their mutual certainty in the transaction and litigation process, Defendants submit that the original permutation was reasonable as it was

[1] For ease of review, Defendants have also attached a markup of the [Proposed] Order and Final Judgment as Exhibit 3.

appropriately limited in scope—*i.e.*, expressly limited to claims—known or unknown—arising out of the merger.

For the reasons set forth below and in Plaintiffs' Brief in Support of Proposed Settlement, Class Certification, and Application for an Award of Attorneys' Fees and Reimbursement of Expenses, filed August 19, 2015 ("Plaintiffs' Brief ISO Settlement") (Trans. ID 57738869), Defendants respectfully request that the Court approve the settlement, with the revised release language, as fair, reasonable, and adequate.

ARGUMENT

I. THE STANDARD FOR DETERMINING THE BENEFIT OF SUPPLEMENTAL DISCLOSURES WHEN EVALUATING A DISCLOSURE-ONLY SETTLEMENT DOES NOT REQUIRE A DETERMINATION OF MATERIALITY.

A. The Proposal Must Be Fair, Reasonable, and Adequate.

Delaware has long favored the voluntary settlement of contested claims. *See, e.g.*, *In re Triarc Cos., Class & Deriv. Litig*., 791 A.2d 872, 876 (Del. Ch. 2001) ("Delaware law favors the voluntary settlement of corporate disputes"); *In re Resorts Int'l S'holders Litig. Appeals*, 570 A.2d 259, 265-66 (Del. 1990) ("Delaware law favors settlement of issues which have been voluntarily agreed upon by the parties"); *Kahn v. Sullivan*, 594 A.2d 48, 58-59 (Del. 1991); *Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964). This is also true in the context of class action litigation. *Nottingham P'rs v. Dana*, 564 A.2d 1089, 1102 (Del. 1989); *see also In*

re CareFusion Corp. S'holders Litig., C.A. 10214-VCN, at 41 (Del. Ch. Sept. 17, 2015) (TRANSCRIPT) ("It is accurately stated that Delaware favors the voluntary settlement of litigation.").

The general standard that has been used by the courts when determining whether to approve a class settlement is that the proposal must be "fair, reasonable, and adequate in the way in which it addresses the interests of all those who will be affected by it." 7B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1797.1 (3d ed.). A variety of different factors have been considered by courts in assessing fairness, including the likelihood of the class being successful in the litigation, the points of law on which the settlement is based, whether proper procedures were adopted for giving notice to the absent class members, whether a settlement would waive other viable claims, and whether there is any opposition from the class members to the proposed settlement. *Id.*; *see also In re Susser Hldgs. Corp. S'holder Litig.*, C.A. No. 9613-VCG, at 5, 59 (Del. Ch. Sept. 15, 2015) (TRANSCRIPT) (noting the importance of having no shareholder objections to the settlement when deciding to approve the settlement).

B. The Court's Role as Gatekeeper Requires Balancing the "Give" and the "Get" Obtained in the Settlement.

"[T]he Court of Chancery plays a special role when asked to approve the settlement of a class or derivative action" as it "must balance the policy preference for settlement against the need to insure that the interests of the class have been

fairly represented." *In re Riverbed Tech., Inc. S'holders Litig*., C.A. No. 10484-VCG, at 6 (Del. Ch. Sept. 17, 2015) (TRANSCRIPT) (internal citations and emphasis omitted). This balancing, however, does not require the Court to find the "settlement to be the best possible outcome for the Class conceivable by the Court." *Id*. at 6-7. Rather, the Court must balance the strength of a plaintiff's claims being compromised against the benefits for the class members secured by the settlement. *See Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1284-85 (Del. 1989).[2] To determine "whether the settlement falls within a range of results that a reasonable party in the position of the plaintiff . . . reasonably could accept," *Forsythe v. ESC Fund Mgmt. Co. (US), Inc.*, 2013 WL 458373, at *2 (Del. Ch. Feb. 6, 2013), the Court must weigh the "give" and the "get" obtained in the settlement, *In re Activision Blizzard, Inc. S'holder Litig.*, 2015 WL 2438067, at *12 (Del. Ch. May 20, 2015).

C. The Peppercorn Settlement Remains Fair When Class Claims, Once Examined, Are Found to Have Little Value.

Chancellor Allen famously stated that "surviving a motion to dismiss means, as a practical matter, that economical rational defendants (who are usually not apt

[2] *See also Riverbed*, C.A. No. 10484-VCG, at 6 ("This Court and our Supreme Court have recognized that the evaluation of fairness involves consideration of the 'balance [of] the value of all the claims being compromised against the value of the benefit to be conferred on the Class by the settlement.'") (alteration in original); *In re MCA, Inc. S'holders Litig.*, 598 A.2d 687, 691 (Del. Ch. 1991); *Brinkerhoff v. Texas E. Prod. Pipeline Co.*, 986 A.2d 370, 384 (Del. Ch. 2010).

to be repeat players in these kinds of cases) will settle such claims, often for a peppercorn and a fee." *Solomon v. Pathe Commc'ns Corp.*, 1995 WL 250374, at *4 (Del. Ch. Apr. 21, 1995), *aff'd*, 672 A.2d 35 (Del. 1996). Although the peppercorn settlement has been subject to recent academic criticism,[3] subsequent decisions have reaffirmed the viability of the peppercorn settlement in instances where class claims have little value. For example, Vice Chancellor Glasscock recently stated:

> To use the expression first made in this context by Chancellor Allen, the Plaintiffs have achieved for the Class a peppercorn, a positive result of small therapeutic value to the Class which can support, in my view, a settlement, but only where what is given up is of minimal value.

Riverbed, C.A. No. 10484-VCG, at 13 (footnote omitted).

Similarly, in *In re TW Telecom*, this Court noted that "in the balance of things, given the weaknesses on both sides, the claims versus what's really being

[3] *See* Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 Tex. L. Rev. 557 (2015) (arguing that public company merger disclosures should be policed by the federal securities laws and courts should reject disclosure settlements as a basis for attorneys' fees based on empirical testing finding no significant evidence that disclosure-only settlements affect shareholder voting); *see also* J. Travis Laster, *A Milder Prescription For the Peppercorn Settlement Problem In Merger Litigation*, 93 Tex. L. Rev. 129, 130 (2015) (agreeing with Fisch et al. regarding the problem of excessive M&A litigation and identifying routine disclosure-only settlements as a contributing cause but proposing a solution whereby a stockholder plaintiff would have to make a greater showing before obtaining an expedited hearing on a preliminary injunction application to curb plaintiff's "leverage to extract a preclosing settlement").

obtained here, I will approve the settlement under the circumstances as being fair and reasonable." *In re TW Telecom, Inc. S'holders Litig.*, C.A. No. 9845-CB, at 51 (Del. Ch. Aug. 20, 2015) (TRANSCRIPT). Again, as described in these recent decisions, the focus of the Court's analysis centers around what plaintiffs are actually compromising. *See Barkan*, 567 A.2d at 1284-85.

D. Approval of a Settlement Does Not Require a Ruling on the Merits.

While the Court must necessarily review and assess the strengths and weakness of the claims in making its fairness determination, approval of a settlement is not a ruling on the merits. 4 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 13:42 (5th ed. 2014); *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986) (the court is "not required to decide any of the issues on the merits").

Rather, the Court's duty is to consider the nature of the claims, the possible defenses, the legal and factual obstacles to be faced by plaintiffs at trial, and the delay, expense, and complexity of litigation. *See Kahn*, 594 A.2d at 58-59; *Brinckerhoff*, 986 A.2d at 384 ("When assessing fairness, I am not required to make a definitive evaluation of the case on its merits. To do so would defeat the basic purpose of the settlement of litigation. I rather must consider the nature of the claims, possible defenses, the legal and factual circumstances of the case, and then apply my own business judgment in deciding whether the settlement is reasonable.") (internal quotations and citations omitted); *In re Phila. Stock Exch.*,

Inc., 945 A.2d 1123, 1137 (Del. 2008) ("On a motion to approve a settlement, the trial court is not required to try the case or decide the issues on the merits. Rather, the court's function is to consider the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and then apply its own business judgment in deciding whether the settlement is reasonable in light of these factors.") (internal quotation omitted); *CareFusion*, C.A. 10214-VCN, at 41 ("A settlement must be reviewed by the Court, but that does not mean that there is a full trial of the merits. Instead, the Court looks to the nature of the claims asserted, the possible defenses and the legal and factual circumstances.").

E. The Standard for Evaluating Settlement in Disclosure-Only Settlement Context Cannot Require Finding of Materiality Because Such Standard Would Require Finding on the Merits.

Decisions by the Court of Chancery evaluating disclosure-only settlements describe the same fairness considerations detailed above. *Riverbed*, C.A. No. 10484-VCG, at 6 ("[I]t falls to this Court to determine whether a proposed class action settlement is fair to the Class."); *see also Susser*, C.A. No. 9613-VCG, at 58 (addressing the "important question of the fairness of the settlement").

The Court need not evaluate the benefit of the proposed settlement by analyzing whether the supplemental disclosures are material because such standard would require a finding on the merits, which is not necessary for settlement

approval.[4] For example, in *Susser*, the Court approved a disclosure-only settlement when plaintiffs' counsel argued, "Your Honor doesn't need to reach materiality, because the standard is different today. It's not an injunction; it's approval of a settlement. I don't think there is any question here that the settlement is fair." *Susser*, C.A. No. 9613-VCG, at 53. Similarly, in *In re Dr. Pepper/Seven Up Cos. Inc. S'holder Litig.*, 1996 WL 74214, at *4 (Del. Ch. Feb. 27, 1996), *aff'd*, 683 A.2d 58 (Del. 1996), the Court explained that it held "no view about how [it] would have ruled on a motion for summary judgment or at trial on claims that nondisclosures of this sort were material." However, "for purposes of the pending motions [to approve a settlement and award attorneys' fees] only," the Court found "that the settlement provided Dr. Pepper shareholders with additional information that might have been material in deciding whether to tender their

[4] Courts agree that the critical inquiry when assessing the merits of alleged omissions is materiality. *See Gantler v. Stephens*, 965 A.2d 695, 710 (Del. 2009) ("It is well-settled law that 'directors of Delaware corporations [have] a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action.' The essential inquiry here is whether the alleged omission or misrepresentation is material. The burden of establishing materiality rests with the plaintiff, who must demonstrate 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'"); *see also Trulia*, C.A. No. 10020-CB, at 29-30 ("[I]f I were at the PI stage, you would agree with me, wouldn't you, that you wouldn't get a PI to stop a deal—a very serious thing—unless material information was not disclosed or there was a misleading disclosure that you corrected, right?").

stock."[5] *Id*. If the Court were to withhold approval of disclosure-based settlements unless the disclosures were deemed to be material, it would essentially require defendants to admit that they breached their fiduciary duties in order to enter into settlement agreements in these cases. That cannot be the standard.

As settlement approval does not require a finding on the merits (*i.e.*, a finding of materiality), the standard requires the Court to balance the value of the claims being compromised against the cost to the Class to determine whether the settlement, and disclosures, provide some benefit to the Class. This standard has been articulated by the Court in a variety of ways. *See Susser*, C.A. No. 9613-VCG, at 19, 59 (describing the "nut of [the] value" of one of the supplemental disclosures, as well as that the disclosure have "some importance to stockholders" and achieve "something valuable"); *see also Dr. Pepper*, 1996 WL 74214, at *4 (holding that "even a meager settlement that affords some benefit for stockholders is adequate to support its approval"); *see also Riverbed*, C.A. No. 10484-VCG, at 14 (noting that the "Supplemental Disclosures had tangible, although minor, value to the Class"); s*ee also Assad v. World Energy Solutions, Inc.*, C.A. No. 10324-CB, at 41-42 (Del. Ch. Aug. 20, 2015) (TRANSCRIPT) (noting that the disclosure had

[5] *See also In re Chips and Techs. Inc. S'holders Litig.*, 1998 WL 409155, at *2 (Del. Ch. June 24, 1998) ("While it is unnecessary to decide the materiality as a matter of law of the additional information contained in Amendment No. 1, I note that the disclosures there made are both substantial and helpful to an understanding of the decision to authorize the transaction with Intel and to recommend it to the stockholders of Chips and Technologies.").

a "meaningful benefit"). Although the Court has used different language to express this standard in past cases, a finding of materiality is not required.

F. Plaintiffs Received Some Benefit from the Supplemental Disclosures.

As detailed by Plaintiffs' counsel in Plaintiffs' Brief ISO Settlement and at the Settlement Hearing, the supplemental disclosures that were negotiated in this case provided tangible, albeit minor, value to the Class. This information provided a "meaningful benefit" to the Class for the reasons stated by Plaintiffs' counsel. *Assad*, C.A. No. 13240-CB, at 41-42.

Moreover, the Class is benefiting from this settlement as it is born from an investigation of the transaction and the Board's conduct by Plaintiffs' counsel. During the course of investigating the merits of the Class's claims, Plaintiffs' counsel engaged in discovery, including three depositions. Exhibit 1, Hearing Tr. at 36. These depositions included questions related to alleged process claims. *Id*. Plaintiffs' counsel was also provided with core documents and e-mails related to the transactions. *Id*. Plaintiffs' counsel investigated state law claims, including "alleged breaches of fiduciary duties," and concluded that the "Supplemental Disclosures provided ample consideration for the Settlement and the release of the claims in this lawsuit, given the substantial risks, costs, and uncertainties of continued litigation." Plaintiffs' Brief ISO Settlement at 41. Plaintiffs' counsel also investigated "federal securities and antitrust claims" and "determined that

there were no viable federal claims to pursue whatsoever." *Id*. These steps provide comfort to the Class that the deal process was adequate and that no additional claims came to light during the discovery process.

II. THE PARTIES PROPOSE A REVISED RELEASE FOR THE COURT'S CONSIDERATION.

The Parties submit a revised release for the Court's consideration and approval in light of the concerns articulated by the Court at the Settlement Hearing regarding the scope of the release as originally drafted.[6] *See* [Proposed] Order and Final Judgment (Exhibit 2 hereto). Defendants were comfortable agreeing to a narrower release in this case given the level of discovery afforded to the Class to explore the allegations asserted in the Complaint and confidence in the litigation process.

In paragraph 10, the release now excludes language related to unknown claims from the definition of "Released Claims" and specifies that the "Released Claims" are those claims that "have been, could have been, or in the future can or might be asserted" in any court or proceeding by the Plaintiffs or Class members "in their capacity as a Trulia stockholder, which have arisen, could have arisen, or arise now or hereafter may arise out of or relate to" the present action and the

[6] *See* Exhibit 1, Hearing Tr., at 30 (indicating concern about the "broad" scope of the release in that it includes "unknown claims"); *see also In re Aruba Networks, Inc. S'holder Litig.*, C.A. No. 10765-VCL (Del. Ch. Oct. 9, 2015) (TRANSCRIPT); *see also Acevedo v. Aeroflex Hldg. Corp.*, C.A. No. 7930-VCL (Del. Ch. July 8, 2015) (TRANSCRIPT).

subject matter thereof, including claims relating to the allegations in the Complaint, the Merger Agreement, the Transaction, etc. The paragraph defining "Unknown Claims" (previously Paragraph 12) has been struck, and claims "aris[ing] under the Hart-Scott-Rodino, Sherman, or Clayton Acts, or any other state or federal antitrust law," have been carved out of the definition of "Released Claims."

With these modifications, the release requested by the Parties is narrower than many recently deemed reasonable by this Court. *See Susser*, C.A. No. 9613-VCG, at 57 (approving a settlement including unknown claims and noting that the Court is "pleased to say that this release is somewhat narrower. Although still quite broad, it is at least limited to the, as I see it, the fiduciary duty claims that arose out of the transaction."); *see also Assad*, C.A. No. 13240-CB, at 41 (approving a settlement release including unknown claims when one disclosure provided a "meaningful benefit" to the class); *Riverbed*, C.A. No. 10484-VCG, at 13, 15 (approving a release including a release of unknown claims when the "give from the Class in connection with the Settlement is basically nil"). Accordingly, the Parties' revised release conforms to Delaware precedent, is reasonable under the present circumstances, and should be approved by the Court.

III. COURTS ROUTINELY AND PROPERLY APPROVE RELEASES OF KNOWN AND UNKNOWN CLAIMS WHEN SUCH CLAIMS ARE RELATED TO THE SAME SET OF OPERATIVE FACTS.

Although the Parties' narrowed release moots the second question posed by the Court regarding unknown claims, to fulfill the Court's request, and to brief an issue that has significant institutional importance, Defendants respectfully provide the following analysis on this topic.

A. Delaware Courts Traditionally Have Approved General Releases.

"Delaware courts recognize the validity of general releases." *Deuley v. Dyncorp. Int'l, Inc.*, 8 A.3d 1156, 1163 (Del. 2010). Such a release "is intended to cover everything—what the parties presently have in mind, as well as what they do not have in mind." *Corporate Prop. Assocs. v. Hallwood Grp. Inc.*, 817 A.2d 777, 779 (Del. 2002) (*quoting Hob Tea Room*, 89 A.2d 851, 856 (Del. 1952)).

Broad releases are important from a policy perspective. They are an important tool for settling disputes precisely because they are designed to provide "complete peace." *In re Phila. Stock Exch.*, 945 A.2d at 1137. "Indeed, settlement is often not possible without granting such 'global peace.'" *In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *10 (Del. Ch. Mar. 31, 2009). This is particularly true as parties focus on avoiding piecemeal litigation and ensuring that other courts recognize their Delaware-based settlement. *CareFusion*, C.A. 10214-VCN, at 35, 47 (approving disclosure-only settlement with release of unknown

claims when counsel for defense argued that the global release of unknown claims was driven by (1) the legitimate goal of wanting to avoid piecemeal litigation and (2) wanting to make sure that the release is afforded full faith and credit and due process in other sister courts around the country, including California).

B. A Release Including Unknown Claims Is Reasonable When Circumscribed to the Same Core Facts at Issue in the Litigation.

It is reasonable for the scope of a release to include both known and unknown claims if it is factually circumscribed in that it relinquishes only causes of action arising from the same core of operative facts at issue in the action. *Nottingham*, 564 A.2d, at 1105-07. A release may also include causes of action not brought in the class action, although they could have been, where they relate to or arise from the same core of facts pertaining to the merger transaction. *Id*. at 1107.

Conversely, "a release may be overbroad if it could be interpreted to 'encompass any claim that has *some* relationship—however remote or tangential—to any 'fact,' 'act' or conduct 'referred to' in the Action.' In other words, a release is overly broad if it releases claims based on a common set of tangential facts, as opposed to operative or core facts." *UniSuper Ltd. v. News Corp.*, 898 A.2d 344, 347 (Del. Ch. 2006).

Where the release does not extinguish "hidden or concealed" claims (as it explicitly did in *UniSuper Ltd. v. News Corp.*, 898 A.2d at 348), or a claim

concealed by fraudulent conduct of the released party (*see E.I. du Pont de Nemours and Co. v. Fla. Evergreen Foliage*, 744 A.2d 457, 461 (Del. 1999)),[7] the fact that unknown claims are to be released has long been permissible. *See In re Phila. Stock Exch.*, 945 A.2d at 1146-48 (approving release that released all claims concerning the Tender Offer at issue); *see also Rutman v. Kaminsky*, 226 A.2d 122, 126 (Del. 1967) ("[T]he proposed release is in the usual form, limited to matters contemplated by the complaints, releasing the former officer from 'any matter related to any of the acts and transactions described in the complaints in the said actions.'").

C. A Global Release Is Particularly Reasonable When Cost to the Class Is Deemed Minimal After a Thorough Investigation.

Given the importance of balancing the benefits and costs of a settlement to a class, global releases are particularly reasonable when a thorough investigation by

[7] Parties litigating claims in Delaware, particularly those with strong connections to California, are conscious of the requirements of Cal. Civ. Code § 1542 when crafting settlement release language. Section 1542 provides that: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor." In essence, Section 1542 offers automatic statutory preservation of "unknown" claims that materially affect the decision to enter into a settlement. However, California courts allow parties to waive the protections of Section 1542, and permit parties to extinguish unknown claims and eliminate the rights protected by Section 1542. Although waiver is permitted in California, it too is subject to the same exceptions observed by Delaware courts regarding hidden claims or those concealed by fraud. *See Chung v. Johnston*, 274 P.2d 922, 926 (Cal. Dist. Ct. App. 1954).

plaintiffs' counsel uncovers that the class claims are weak. *Riverbed*, C.A. No. 10484-VCG, at 6 ("[I]f I may describe what has been achieved for the Class as a peppercorn, what has been released looks more like a mustard seed.").

Where there has been a thorough process, "a court may assume that the parties have a good understanding of the strengths and weaknesses of their respective cases" and "that the settlement's value is based upon such adequate information." 4 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 13:50 (5th ed. 2014). Moreover, "discovery demonstrates that the parties have litigated the case in an adversarial manner and is, therefore, a direct indicator that a settlement is not collusive but arms-length." *Id*.

In recent decisions, the Court has highlighted a number of factors to evaluate in considering the robustness of the investigation and litigation process. For example, the Court noted the importance of significant discovery work leading to the supplemental disclosures, including depositions and document exchanges. *Riverbed*, C.A. No. 10484-VCG, at 20; *Susser*, C.A. No. 9613-VCG, at 58. Additionally important is whether Plaintiffs' counsel has been involved in a multitude of cases involving shareholder challenges and had the opportunity to thoroughly investigate, and found no viable, federal or state claims. *Riverbed*, C.A. No. 10484-VCG, at 13. Also deemed significant is whether the settlement was agreed to after a hard-fought negotiation where there is no evidence of

collusion between the parties. *Susser*, C.A. No. 9613-VCG, at 39. Lastly, it is important to ascertain whether notice was widely disbursed to the class with no one appearing to object or "ask[ing] to carry the torch of prosecuting th[e] action." *Id.* at 59.

Where a thorough investigation reveals that "the 'give' from the Class in connection with the settlement is basically nil," *Riverbed*, C.A. No. 10484-VCG, at 13, the circumstances support a release of both known and unknown claims.[8]

D. The Ability to Release Unknown Claims Is Important from a Policy Perspective to Reduce Uncertainty Regarding the Scope of a Release.

Allowing parties to release unknown claims is also supported by public policy as it provides certainty regarding the scope of a release. If a release only pertains to "known" claims, subsequent litigation may arise regarding whether a

[8] Recently, when faced with thorough litigation and settlement negotiation processes, this Court has indicated that the expectations of the parties when negotiating the settlement should be considered in the Court's equity determination. *Susser*, C.A. No. 9613-VCG, at 57 ("I . . . think that it is something that equity has to take account of that in the past we have, more or less, routinely agreed to settlements of this kind with broad releases and that settlements entered in good faith and that are executory deserve some equitable consideration, despite what I think can be described as the growing discomfort with broad releases. In other words, the expectations of the parties matter when they're reasonable."); *see also Riverbed*, C.A. No. 10484-VCG, at 14 ("I note first that, given the past practice of this Court in examining settlements of this type, the parties in good faith negotiated a remedy—additional disclosures—that has been consummated, with the reasonable expectation that the very broad, but hardly unprecedented, release negotiated in return would be approved by this Court."); *but see Aruba Networks*, C.A. No. 10765-VCL, at 71.

claim was "known" at the time of settlement and the answer may prove difficult to determine. For example, questions may arise regarding who, in particular, the claim must be known by: the named plaintiff, the class, or someone else? Questions may also arise regarding: (i) whether the named plaintiff should have known, (ii) instances where a member of the class knew but did not object, and (iii) instances where a plaintiff knew some but not all of the underlying facts. Avoiding such uncertainty is precisely why defendants agree to enter into settlements in the first place.

A broad finding by the Court that parties may never release unknown claims will lead to increased uncertainty and further litigation as described above. The net result will likely involve less willingness for parties to enter into settlement agreements. Also, to the extent that this type of litigation has become taxing on defendants, it should be policed in other ways, such as enforcing tougher standards for expedition. *See* J. Travis Laster, *A Milder Prescription for the Peppercorn Settlement Problem in Merger Litigation*, 93 Tex. L. Rev. 129 (2015) (proposing that an "alternative approach" to curb the "problem of excessive M&A litigation" would involve "requiring a stockholder plaintiff to make a greater showing before obtaining an expedited hearing on a preliminary injunction application" as granting such motions "is what gives a stockholder plaintiff leverage to extract a preclosing settlement"). Otherwise, if directors or Delaware companies are forced to litigate

every deal that they are involved with, they should at least be able to obtain appropriate releases in situations where plaintiffs take discovery and the cost to the class is deemed minimal after a thorough investigation.

CONCLUSION

For the foregoing reasons, Defendants request that the Court approve the Parties' Settlement.

OF COUNSEL:

Deborah S. Birnbach
Goodwin Procter LLP
53 State Street
Boston, MA 02109
(617) 570-1000

Michael T. Jones
Goodwin Procter LLP
135 Commonwealth Drive
Menlo Park, CA 94025
(650) 752-3100

/s/ Rudolf Koch
Rudolf Koch (#4947)
Sarah A. Clark (#5872)
Richards, Layton & Finger, P.A.
One Rodney Square
920 N. King Street
Wilmington, DE 19801
(302) 651-7700

Attorneys for Trulia, Inc., Pete Flint, Robert Moles, Theresia Gouw, Greg Waldorf, Sami Inkinen, Erik Bardman, and Steve Hafner.

OF COUNSEL:

Alan S. Goudiss
Shearman & Sterling
599 Lexington Ave
New York, New York
10022-6069
(212) 848-4000

/s/ William M. Lafferty
William M. Lafferty (#2755)
Morris Nicholas Arsht & Tunnell
1201 North Market Street
Wilmington, Delaware 19801
(302) 658-9200

Attorneys for Defendants Zillow, Inc. and Zebra Holdco, Inc.

Dated: October 16, 2015