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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

ANKUR SAGGER, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

v.

MARK WOODWARD, BERNARD F MATHAISEL, JOHN B. MUMFORD, STEPHEN M. WARD, JR., CARL BASS, PATRICK J. O'MALLEY, III, INSIGHT VENTURE PARTNERS, EAGLE ACQUISITION SUB, CORP., EAGLE PARENT HOLDINGS, LLC, and E2OPEN, INC.,

Defendants.

WOLFRAM IRSA, on behalf of himself and all others similarly situated,

Plaintiff,

v.

E2OPEN, INC., MARK E. WOODWARD, JOHN B. MUMFORD, CARL BASS, BERNARD F MATHAISEL, PATRICK J. O'MALLEY, III, STEPHEN M WARD, JR., INSIGHT VENTURE PARTNERS, EAGLE PARENT HOLDINGS, LLC, AND EAGLE ACQUISITION SUB, CORP.,

Defendants.

MASTER CASE NO.: CIV 532534
(consolidated with Case No.: CIV 532551)

SEAN J. GRIFFITH'S MOTION AND NOTICE OF MOTION FOR APPOINTMENT OF *AMICUS CURIAE*, OR ALTERNATIVELY APPOINTMENT AS AN EXPERT PURSUANT TO CAL. EVID. CODE § 730

Judge: Hon. Joseph C. Scott
Dept.: 25
Settlement Hearing Date: March 4, 2016
Time: 9:00 a.m.

Date Action Filed: Feb. 13, 2015

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on March 4, 2016, at 9:00 a.m., or as soon as counsel may be heard, in Department 25 of the Superior Court of the State of California, County of San Mateo, Hall of Justice, 400 County Center, Redwood City, California 94063-1655, Professor Sean J. Griffith ("Griffith") will, and hereby does, move this Court, for Appointment of *Amicus Curiae*, or Alternatively Appointment as an Expert Pursuant to Cal. Evid. Code § 730, for matters relating to the settlement in this case which is the subject of a Settlement Hearing. As detailed in the accompanying memorandum of points and authorities, Griffith has submitted expert affidavits and *amicus curiae* in similar matters in several jurisdictions. In light of Griffith's experience in such settlements, his analysis of this matter would likely be useful for the Court as it considers whether to approve the proposed settlement.

The Motion will be made pursuant to the inherent powers of the court, Cal. Code Civ. P. § 128a, and Cal. Evid. Code § 730. This Motion is based on the accompanying memorandum of points and authorities, all pleadings, records and files in the Action, any evidence presented at or before the hearing, all other matters of which the Court may take judicial notice, and such additional evidence or argument as may be required by the Court.

DATED: February 16, 2016

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By: _____

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Defendants.

MASTER CASE NO.: CIV 532534
(consolidated with Case No.: CIV 532551)

SEAN J. GRIFFITH'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR APPOINTMENT OF *AMICUS CURIAE*, OR ALTERNATIVELY APPOINTMENT AS AN EXPERT PURSUANT TO CAL. EVID. CODE § 730

Judge: Hon. Joseph C. Scott
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I. INTRODUCTION

Sean J. Griffith ("Griffith"), by and through his undersigned counsel, respectfully submits this Memorandum of Points and Authorities in Support of Motion for Appointment of *Amicus Curiae* or Alternatively Appointment as an Expert pursuant to Cal. Evid. Code § 730 (the "Memorandum"), and requests appointment by this Court for the purpose of providing additional briefing to supplement Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Final Approval of Settlement (the "Approval Memorandum"). The need for an *amicus curiae* to provide an alternate perspective on the proposed settlement in this action (the "Settlement") is highlighted by the Approval Memorandum's failure to mention—despite its otherwise extensive reliance upon Delaware authority—recent case law critical of similar settlements. In particular, Plaintiffs omit any reference to *In re Trulia, Inc. Stockholder Litig.*, Consol. C. A. No. 10020-CB, 2016 WL 325008 (Del Ch. Jan. 22, 2016), decided only ***seven days*** before Plaintiffs filed the Approval Memorandum, and in which Griffith appeared as an *amicus curiae* with the permission of the Delaware Court of Chancery. The *Trulia* decision sets forth new standards and procedures in Delaware for the evaluation of "disclosure-only" settlements such as the one in this case. Those standards and procedures should be considered, and adopted, by this Court.

In the absence of an *amicus curiae* or a well-represented objector,[1] the Court is unlikely to receive briefing critical of the settlement from the parties presently before the Court. *See Trulia*, 2016 WL 325008, at *6 ("Once an agreement-in-principle is struck to settle for supplemental disclosures, the litigation takes on an entirely different, non-adversarial character. . . . [T]he Court receives briefs and affidavits from plaintiffs extolling the value of the supplemental disclosures and advocating for approval of the proposed settlement, but rarely receives any submissions expressing an opposing viewpoint.") An *amicus curiae* brief, however, will show that (a) the disclosures obtained by Plaintiffs in consideration for the settlement are of limited, if any, value; and (b) Plaintiffs' $500,000 fee request is outside the current "market" for similar settlements in

[1] As of the date of his Motion, Griffith is not aware of any objector having appeared in this action.

Delaware.

This Memorandum demonstrates the need for an *amicus curiae* brief as follows. *First*, the Memorandum provides context, omitted by Plaintiffs, concerning the problem of disclosure-only settlements and the recent sea-change in the treatment of such settlements by courts in other states. *Second*, the Memorandum demonstrates that the dispute arising from the E2open, Inc. ("E2open") transaction fits the familiar pattern of litigation leading to disclosure-only settlements that have been criticized by more recent authority. *Third*, the Memorandum illustrates the value of an *amicus curiae* brief by providing two specific examples of topics that the Approval Memorandum fails adequately to address: (i) the value of disclosure of revenue multiples used in a comparable companies analysis, and (ii) the amount of attorneys' fees appropriate for a disclosure-only settlement.

Based upon these arguments, the Court should appoint Griffith *amicus curiae*, tax his costs and attorneys' fees to the parties before the Court, and withhold the Court's approval of the Settlement until it has considered the additional information submitted by an *amicus curiae*.

II. THE PROBLEM OF DISCLOSURE-ONLY SETTLEMENTS

A. Disclosure Only Settlements Have Become Common Despite Delivering Limited, If Any, Benefits to Stockholders.

In the past decade, stockholder litigation arising out of mergers and acquisitions transactions has become ubiquitous, with 94.9% of all public-company mergers in 2014 with a deal value greater than $100 million being subject to at least one stockholder lawsuit.[2] This increase in litigation activity—more than doubling from 39.3% of such mergers in 2005—has been described by the Delaware Court of Chancery as "beyond the realm of reason." *Trulia*, 2016

[2] *See* Matthew D. Cain & Steven Davidoff Solomon, *Takeover Litigation in 2015* 2 (Jan 14, 2016), *available at* http://ssrn.com/abstract=2715890 (hereinafter, "*Takeover Litigation*"), *cited in Trulia*, 2016 WL 325008, at **8. Although this paper includes data from 2015, the authors intend to update their figures in the summer of 2016, *see Takeover Litigation* at 2, and the *Trulia* court described these figures as "too preliminary to be meaningful." *Trulia*, 2016 WL 325008, at *7 n.28. The paper suggests, however, that increased scrutiny of disclosure-only settlements has already resulted in a reduction in deal litigation. *See Takeover Litigation* at 5.

WL 325008, at *7. The vast majority of such cases settle with no monetary compensation to the class, and instead provide absent class members, as here, with nothing more than additional disclosures. *See Takeover Litigation* at 4 (describing only 18.1% of settlements in 2014 as "non-disclosure settlements").

The proliferation of disclosure-only settlements stems partly from a misalignment of incentives on the part of representative plaintiffs and corporate defendants. Plaintiffs derive settlement leverage because "[t]he lawsuits are filed only a relatively short time before the shareholder vote, and all it takes is a remote threat of injunction or delay to rationally incentivize settlement, even if defendants firmly and rightfully believe the lawsuit has no merit and would be disposed on a motion to dismiss or at the summary judgment stage." *City Trading Fund v. Nye*, No. 651668/2014, 2015 WL 93894, at *13 (N.Y. Sup. Ct. Jan. 7, 2015). Defendants "are incentivized to settle quickly in order to mitigate the considerable expense of litigation and the distraction it entails, to achieve closing certainty, and to obtain broad releases as a form of 'deal insurance.'" *Trulia*, 2016 WL 325008, at *6.

Mindful of these conflicts of interest, scholars (including Griffith), practitioners, and courts have examined such disclosure-only settlements with increasing scrutiny and criticism.[3] Empirical analysis suggests that the additional information provided to stockholders via

[3] *See, e.g.*, Joel Edan Friedlander, *How Rural/Metro Exposes the Systemic Problem of Disclosure Settlements* (U of Penn, Inst for Law & Econ Research Paper No. 15-40, forthcoming DEL. J. CORP. L., January 23, 2016), available at http://ssrn.com/abstract=2689877; 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 (2015) (hereinafter, "*Confronting the Peppercorn Settlement*"); Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1 (2015) (hereinafter, "*Correcting Corporate Benefit*"); Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465 (2015); Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKELEY BUS. L.J. 55 (2014); Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VANDERBILT L. REV. 1053 (2013) (hereinafter, "*The Market for Preclusion*").

disclosure-only settlements has no discernable effect on stockholder voting behavior, an effect one would expect to see if supplemental disclosures tended to be both negative and meaningful. *See Confronting the Peppercorn Settlement* at 585. Instead, the threat of an injunction to prevent a deal closing allows plaintiffs' attorneys to extract rents from virtually any merger or acquisition—a value colloquially described as a "merger tax." *See, e.g.*, *City Trading Fund*, 2015 WL 93894, at *13. As the Delaware Court of Chancery has noted, "[t]he omnipresent litigation undercuts the credibility of the litigation process. When every deal is subject to dispute, it is easy to look askance at stockholder litigation without remembering that stockholder litigation is actually an important part of the Delaware legal framework." *Acevedo v. Aeroflex Holding Corp.*, C. A. No. 7930-VCL, at 65 (Del. Ch. July 8, 2015) (TRANSCRIPT) (Whittaker Decl. at Ex. B).[4] Stockholder litigation is likewise a part of California's jurisprudence—and is similarly undermined by ubiquitous litigation.

B. Courts Take a Closer Look at Disclosure-Only Settlements.

Courts in Delaware and New York have begun to subject disclosure-only settlements to increased scrutiny. In several cases decided in the twelve months before *Trulia*, several judges concluded that proffered disclosure-only settlements had little value to absent stockholders and subsequently refused to approve such settlements. For instance, in January 2015 a New York court denied preliminary approval of a settlement class, finding the proposed settlement was not in the best interests of the class because plaintiffs had not "alleged *material* omissions or settled for *material* supplemental disclosures. . . ." *City Trading Fund*, 2015 WL 93894, at *19. Similarly, in July 2015, Vice Chancellor Laster refused to approve a disclosure-only settlement where plaintiffs settled for "precisely the type of nonsubstantive disclosures that routinely show up in these types of settlements." *Acevedo*, C. A. No. 7930-VCL at 73. A few months later, the same judge denied another motion to approve a disclosure-only settlement, noting that plaintiffs

[4] Citations to the "Whittaker Declaration" refer to the Declaration of Keola R. Whittaker in Support of Sean J. Griffith's Motion for Appointment of *Amicus Curiae*, or Alternatively Appointment as an Expert Pursuant to Cal. Evid. Code § 730, filed concurrently herewith.

provided inadequate representation to the class by filing litigation when "there wasn't a basis to file in the first place" and then failing to aggressively litigate when discovery turned up potentially valuable information. *In re Aruba Networks, Inc. Stockholder Litigation*, Consol. C. A. No. 10765-VCL, at 73 (Del. Ch. Oct. 9, 2015) (TRANSCRIPT) (Whittaker Decl. at Ex. C).[5]

Judge Ramos of the Commercial Division of the Supreme Court of the State of New York went even further in rejecting a disclosure-only settlement. Not only did he savage the purported materiality of the supplemental disclosures before him, but he also condemned the process by which such settlements had been approved in the past. "The willingness to rubber stamp class action settlements reflects poorly on the profession and on those courts that, from time to time, have approved these settlements." *In re Allied Health Care S'holder Litig.*, No. 352118/2011, 2015 WL 6499467, at *3 (N.Y. Supr. Oct. 23, 2015); *see also id*. at *1 ("Not one of the additional disclosures the defendants included in the supplement to the proxy at class counsels' urging could be characterized as significant nor would the failure to make any of the additional disclosures have resulted in this Court issuing a preliminary injunction to prevent or delay the merger.").

Another set of cases recognized that courts, particularly in Delaware, had created the expectation among litigants that disclosure-only settlements were appropriate, and thus proceeded to approve settlements already agreed while noting that future settlements would be subject to more exacting scrutiny. *See, e.g.*, *In re Riverbed Technology, Inc. S'holders Litig.*, C. A. No. 10484-VCG, 2015 WL 5458041, at *6 (Del. Ch. Sept. 17, 2015) (relying upon "past practice of [the Court of Chancery] in examining settlements of this type" and the "reasonable expectation that the very broad, but hardly unprecedented, release negotiated in return [for the settlement] would be approved by this Court.").[6] Some rulings slashed the fees requested by class plaintiffs,

[5] The *Aruba* plaintiffs found to be inadequate were represented by, among other firms, Rigrodsky & Long, P.A. and Levi & Korsinsky LLP, who are seeking fees for their representation of Delaware plaintiffs in this action. *See* Declaration of Evan J. Smith ISO Plaintiffs' Motion for Final Approval of Settlement, Exs. L & N (filed Jan. 29, 2016).

[6] Griffith served as an objecting shareholder in the *Riverbed* litigation. *See Riverbed*, 2015 WL 5458041, at *1.

unless such requests were already modest. *See id.* at *8 (cutting plaintiffs' fee award from the requested $500,000 to $329,881.61); *see also In re Silicon Image, Inc. S'holders Litig.*, C. A. No 10601-VCG, at 55, 58 (Del. Ch. Dec. 9, 2015) (TRANSCRIPT) (approving fee request of $425,000 but noting that "[i]f this were a post-July [2015] case, I suspect strongly my decision here would be different. . . .") (Whittaker Decl. at Ex. D); *In re Intermune, Inc. S'holder Litig.*, C. A. No. 10086-VCN, at 10, 14-15 (Dec. 29, 2015) (TRANSCRIPT) (cutting fee award from $470,000 to $325,000, and noting that in the future "a disclosure-only settlement, the scope of the release may well become a significant issue, even an impediment to approval of what over the years would have been approved.") (Whittaker Decl. at Ex. E).

Plaintiffs provide the Court with none of this recent authority. Indeed, while the Approval Memorandum makes numerous citations to older Delaware law in support of settlements, Plaintiffs include no case (from Delaware, California, or anywhere else) decided after 2013.

C. The *Trulia* Decision

The above lines of cases culminated in Chancellor Bouchard's decision in *In re Trulia Inc. Stockholder Litigation*, decided the week before Plaintiffs submitted their Approval Memorandum. It seems unlikely that Plaintiffs were unaware of the *Trulia* decision: Faruqi & Faruqi LLP, Rigrodsky & Long, P.A., and Milberg LLP (all firms in this action) served as counsel to plaintiffs in *Trulia*. *Trulia*, 2016 WL 325008, at *1. Moreover, the case received considerable attention in the press.[7]

Trulia, like the case before this Court, involved a disclosure-only settlement that did not "provide Trulia Stockholders with any economic benefits" and wherein "[t]he only money that would change hands is the payment of a fee to plaintiffs' counsel." 2016 WL 325008, at *1. During a settlement hearing on September 16, 2015, Chancellor Bouchard asked the parties to

[7] *See, e.g.*, Steven Davidoff Solomon, *Dealbook: Why the Surge in Merger Litigation Fizzled*, N.Y. TIMES, Jan. 22, 2016, http://www.nytimes.com/2016/01/23/business/dealbook/why-the-surge-in-merger-litigation-fizzled.html; Liz Hoffman, *A 'Nail in the Coffin' for Flimsy M&A Suits*, WALL ST. J., Jan 25, 2016, http://blogs.wsj.com/moneybeat/2016/01/25/a-nail-in-the-coffin-for-flimsy-ma-suits/.

submit supplemental briefing on issues of concern to the Chancellor with regard to the settlement. *Id*. at *4. Following the hearing, Griffith requested, and was granted, permission to appear as *amicus curiae*. *Id*.

In a 42-page opinion, Chancellor Bouchard set forth a new Delaware standard for the approval of disclosure-only merger settlements. While the opinion covered much more ground than can be adequately summarized here, three points are significant for consideration of the present Motion.

First, the Court suggested that, going forward, the preferred method of resolving merger claims based upon corrective disclosures would not be approval of a class settlement, but rather dismissal of a case with prejudice to named plaintiffs only, followed by a plaintiff's application for a mootness fee. *See id*. at *10. This procedure preserves the adversarial process because defendants are no longer bargaining for a broad release of liability against an absent class, and thus retain an incentive to object to any excessive request for fees. *See id*. Absent class members, meanwhile, do not give up the right to pursue further litigation if merited. *See id*.

Second, the Court announced a new standard for scrutinizing disclosure-only settlements:

> [P]ractitioners should expect that disclosure settlements are likely to be met with continued disfavor in the future unless the supplemental disclosures address a ***plainly material misrepresentation or omission***, and ***the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process***, if the record shows that such claims have been investigated sufficiently. In using the term "plainly material," I mean that ***it should not be a close call that the supplemental information is material*** as that term is defined under Delaware law.

Id. (emphasis added, citations omitted).[8]

[8] Although Plaintiffs did not mention the new standard set forth in *Trulia*, the Approval Memorandum relies heavily upon older Delaware authority for the proposition that non-monetary relief can support a class action settlement. *See* Approval Memorandum at 10-11, *citing In re Wm. Wrigley Jr. Co. S'holders Litig.*, 2009 Del. Ch. LEXIS 12, at **18-19 (Del. Ch. Jan. 22, 2009); *In re Staples Inc. S'holders Litig*, 792 A.2d 934, 960 (Del. Ch. 2001); and Donald J. Wolfe, Jr. and Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* (1998). Needless to say, *Trulia* casts doubt upon the continuing viability of these precedents.

Third, the *Trulia* Court recognized that when disclosures are not "plainly material," the non-adversarial posture of a class-action settlement may leave a judge without the benefit of adversarial briefing on the value of such disclosures. *See id.* at **7, 10. In such cases, "***it may be appropriate for the Court to appoint an* **amicus curiae** *to assist the Court in its evaluation of the alleged benefits of the supplemental disclosures***. . . ." *Id*. at *10 (emphasis added). In making such an appointment, "[t]he costs of the *amicus curiae* may be taxed to the parties, as appropriate, in the Court's discretion." *Id*. at *10 n.47.

III. THE E2OPEN LITIGATION FOLLOWS THE FAMILIAR RITUAL OF THE DISCLOSURE-ONLY SETTLEMENT.

The current action presents a typical example of the type of "routine disclosure-only settlements, entered into quickly after ritualized quasi-litigation, that plague the M&A landscape." *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1067 (Del. Ch. 2015). A comparison of Plaintiff's filings in this action and the decision in *Trulia* show that Plaintiffs have followed this ritual almost exactly:

E2open Case Documents	***In re Trulia Stockholders Litigation***
<u>*Step 1: Plaintiffs File a Flurry of Cases Following an Acquisition*</u>	
On or after February 12, 2015,[9] the following complaints were filed: (i) in the Superior Court of California for San Mateo County . . .: *Saggar v. Woodward et al.*, Case No. CIV 532534 and *Keehn v. E2open, Inc. et al.*, Case No. CIV 532551 . . . ; and (ii) in the Delaware Chancery Court: *Parshall v. E2open, Inc. et al.*, C.A. No. 10647-VCL, *Kim v. E2open, Inc. et al.*, C.A. No. 10674, and *de la Vega v. E2open, Inc. et al.*, C.A. No. 10714 . . . . (Stipulation of Settlement at 1.)[10]	Today, the public announcement of virtually every transaction involving the acquisition of a public corporation provokes a flurry of class action lawsuits alleging that the target's directors breached their fiduciary duties by agreeing to sell the corporation for an unfair price. (*Trulia* at *5.)

[9] E2open entered into a definitive Agreement and Plan of Merger eight days earlier, on February 4, 2015. Stipulation at 1.

[10] Commentators have noted that some plaintiffs who file in Delaware and then find their cases assigned to Vice Chancellor Laster tend to drop Delaware litigation and seek redress in other jurisdictions. *See, e.g.*, Liz Hoffman, *The Judge Who Shoots Down Merger Lawsuits*, WALL. ST. J., Jan. 10, 2016, http://www.wsj.com/articles/the-judge-who-shoots-down-merger-lawsuits-1452076201 (noting a lawsuit against Dyax Corp. challenging merger in Delaware was dropped a

E2open Case Documents	***In re Trulia Stockholders Litigation***
Step 2: Defendants "self-expedite" and produce "core documents"	
On March 13, 2015 and thereafter, Defendants produced document discovery to Plaintiffs, including copies of Board minutes, Board presentations materials, banker books, and financial forecasts. (Stipulation at 2.)	[The incentive to settle quickly is] so potent that many defendants self-expedite the litigation by volunteering to produce "core documents" to plaintiffs' counsel, obviating the need for plaintiffs to seek the Court's permission to expedite the proceedings. . . . (*Trulia* at *6.)
Step 3: The Parties Settle for Supplemental Disclosures	
On March 19, 2015, the parties to the Actions, after arm's-length negotiations regarding Plaintiffs' claims, reached an agreement-in-principle to settle the Actions on terms reflected in a Memorandum of Understanding ("MOU"), which included, among other things, an agreement that the Company would make certain supplemental disclosures to E2open stockholders. . . . (Stipulation at 2.)	Once the litigation is on an expedited track and the prospect of an injunction hearing looms, the most common currency used to procure a settlement is the issuance of supplemental disclosures to the target's stockholders before they are asked to vote on the proposed transaction. (*Trulia* at *6.)
Step 4: Plaintiffs Engage in "Confirmatory Discovery"	
Following the close of the Acquisition, Plaintiffs conducted additional confirmatory analysis, which included the review of additional documents provided by Defendants, and depositions of a member of E2open's Board and a representative of its financial advisor, BofA Merrill Lynch. (Stipulation at 3.)	"Confirmatory" discovery is discovery taken after an agreement-in-principle to settle a case has been reached. Theoretically, it is an opportunity for plaintiffs' counsel to "confirm" that the settlement terms are reasonable. . . . In reality, given that plaintiffs' counsel already have resigned themselves to settle on certain terms, confirmatory discovery rarely leads to a renunciation of the proposed settlement and, instead, engenders activity more reflective of "going through the motions." (*Trulia*, at *7 n.24 (citations omitted).)

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day after assignment to VC Laster). Rigrodsky & Long, P.A., counsel to Delaware plaintiffs in this action, represented the plaintiff in Delaware challenging the Dyax merger, who—as in this case—chose to pursue litigation outside of Delaware rather than risk litigation before Vice Chancellor Laster. *See* Dyax Corp. (Form 8-K) 56 (Dec. 14, 2015) (noting that plaintiff dismissed his case in Delaware and, six days later, filed a similar action before the Superior Court of the Commonwealth of Massachusetts); Stipulation at 1 (noting that plaintiffs reached an agreement to proceed in California seven days after the Delaware lawsuits were filed).

E2open Case Documents	*In re Trulia Stockholders Litigation*

Step 5: The Court is Asked To Approve the Settlement Without Adversarial Briefing

These disclosures provided a substantial benefit for the members of the Class because they enabled E2open's stockholders to make a fully informed decision as to whether to tender their shares in the Offer. Defendants have stipulated that this litigation was the sole reason for making the Supplemental Disclosures. . . and Defendants have agreed not to oppose a fee and expense request up to $500,000. Accordingly, the Court should award Plaintiffs their requested attorneys' fees and expenses. (Approval Memo. at 22-23.)

The next step, after notice has been provided to the stockholders, is a hearing in which the Court must evaluate the fairness of the proposed settlement. Significantly, in advance of such hearings, the Court receives briefs and affidavits from plaintiffs extolling the value of the supplemental disclosures and advocating for approval of the proposed settlement, but rarely receives any submissions expressing an opposing viewpoint. (*Trulia* at *6.)

Plaintiff's celerity in reaching a disclosure-only settlement further illustrates the need for scrutiny by this Court that goes beyond consideration of the Approval Memorandum. The initial complaint in the *Saggar* action raised numerous allegations regarding the structure of the challenged tender offer and the financial unfairness of the merger.[11] These concerns are unaddressed by the Settlement, which did not, for instance, require a reduction to the termination fee in the transaction—although the Settlement purports to extinguish the right of class members to raise such claims in the future. *See* Stipulation at 5-6. Instead, Plaintiffs reached an agreement to settle for mere disclosures only ***nine days*** after filing an amended complaint attacking Defendants' disclosures, and only ***six days*** after receiving an initial production of documents from Defendants. *See* Stipulation at 2. Based on such abbreviated litigation, the Court should not take comfort that the claims "have been investigated sufficiently." *Trulia*, 2016 WL 325008, at *35.

[11] *See, e.g.*, Complaint, *Saggar v. Woodward*, Case No. CIV 53253 (filed Feb. 13, 2015) ¶¶ 34-36 (alleging that E2open's board failed to properly value the company); ¶¶ 37-42 (alleging, *inter alia*, that the merger agreement contained an improper termination fee, and that structuring the transaction as a tender offer constituted a violation of fiduciary duty by E2open's board members).

IV. THE COURT SHOULD APPOINT GRIFFITH AS *AMICUS CURIAE*.

A. This Court Has Authority to Appoint an *Amicus Curiae* and Tax Fees to the Parties.

This Court has the discretion to appoint an *amicus curiae* to provide assistance in rendering its decisions. *See, e.g., Stockton v. Dep't of Emp.*, 25 Cal. 2d 264, 272 (1944) (describing *amicus curiae* brief filed at trial court request); *Bd. of Admin. v. Wilson*, 52 Cal. App. 4th 1109, 1118 n.4 (1997) ("California State Employees Association (CSEA) appeared as amicus curiae in the trial court.") *cf. Overstock.Com, Inc. v. Goldman Sachs Group, Inc.*, 231 Cal. App. 4th 471, 489, (2014) (*citing In re Marriage Cases*, 43 Cal. 4th 757, 791 (2008) ("superior courts retain 'broad discretion over the conduct of pending litigation' and have 'the authority to determine the manner and extent of . . . entities' participation as *amici curiae* that would be of most assistance to the court'").

Moreover, while Griffith is unaware of California authority directly on point, courts outside of California have held, as in Delaware, that an *amicus curiae* may be awarded fees from parties to an action where "(1) a ***court-appointed*** *amicus* rendered services that helped resolve the question presented, and (2) the party taxed ***caused the situation*** prompting the appointment." *Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry State of Mont.* 694 F.2d 203, 205 (9th Cir. 1982) (emphasis added); *see also Schneider v. Lockheed Aircraft Corp.* 658 F.2d 835, 854 (D.C. Cir. 1981) (upholding principle but reversing award of *amicus* fees taxed against party that did not prompt appointment); *accord* 3B C.J.S. Amicus Curiae § 6 ("Where the court appoints an amicus curiae who renders services which prove beneficial to the solution of the question presented, the court may properly award compensation and direct it to be paid by the party responsible for the situation that prompted the court to make the appointment."). Here, the lack of fulsome adversarial briefing drives the need for an *amicus curiae* brief, and fees may be appropriately taxed to the parties if such a brief proves beneficial.

In addition to the Court's common law and equitable powers, California statute also authorizes the court to appoint an expert when such an expert would be helpful. California Evidence Code Sections 730 and 731(c) provide for designation of an expert by the Court—with

fees "apportioned and charged to the several parties in a proportion as the court may determine"—to assist the Court with regard to "the ***fact or matter*** as to which the expert evidence is or may be required." Cal. Evid. Code §§ 730, 731(a) (emphasis added). *Cf. Mercury Cas. Co. v. Superior Court*, 179 Cal. App. 3d 1027, 1032 (1986) (pursuant to Evidence Code section 730, the court has the authority to appoint disinterested expert to provide court with a report).[12]

B. Griffith's Experience Will Allow for a Helpful *Amicus Curiae* Brief to be Produced on a Compressed Timeline.

Professor Griffith's familiarity and experience with the evolving case law regarding stockholder class action litigation and disclosure-only settlements uniquely positions him to provide assistance the Court as *amicus curiae*. In Delaware, he has served as an objector to the *Riverbed* settlement, and as an *amicus curiae* in the *Trulia* case. *See Riverbed*, 2015 WL 5458041, at *2; *Trulia*, 2016 WL 325008, at *4. He has written numerous articles addressing class action stockholder litigation in the United States,[13] and has served as an expert witness and provided expert affidavits in three cases relating to the settlement of class actions involving mergers.[14] Professor Griffith's curriculum vitae is attached to the Whittaker Declaration as Exhibit A.

C. An *Amicus Curiae* Brief Will Provide the Court with Necessary Context in Considering the Settlement.

While the Court may instruct an *amicus curiae* to address a variety of issues, if appointed, Griffith proposes to address two specific topics:

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[12] The Ninth Circuit has suggested that 28 U.S.C. § 1920, a federal statute authorizing payment of court-appointed experts similar to Cal. Evid. Code § 731(a), provides a basis for the award of fees to a court-appointed *amicus curiae* in a manner similar to that allowed under common law. *See Miller-Wohl Co.*, 694 F.2d at 205 n.2.

[13] *See generally*, *Confronting the Peppercorn Settlement*, *supra* n.3; *Correcting Corporate Benefit*, *supra* n.3; *The Market for Preclusion*, *supra* n.3.

[14] Griffith submitted expert affidavits in *Gordon v. Verizon Commc'ns, Inc.*, No. 653084/13 (N.Y. Sup. Ct. filed Nov. 20, 2014); *In re Compuware Corp. S'holder Litig.*, Case No. 14-011437-CB (Mich., Cir. Ct. County of Wayne filed Sept. 29, 2015); and *Corwin v British Am. Tobacco*, 14 CVS 8130, N.C. Bus. Court (filed Feb. 10, 2016).

1. Are any of the supplemental disclosures made by Defendants "plainly material" and sufficient to support approval of the Settlement?

2. Is Plaintiffs' request for $500,000 in attorney's fees fair and reasonable in relation to the benefits conferred upon the Class, particularly in comparison with other recent fee awards?

In considering these questions, an *amicus curiae* brief will provide the Court with context helpful to its analysis of the Settlement. Absent such a brief, the Court is unlikely to receive similar context from parties committed to settlement approval.

A fulsome evaluation of these issues will require significant analytical work. The *Trulia* Court dedicated 16 pages of its opinion to the question of whether the relevant disclosures were plainly material. *Trulia*, 2016 WL 325008, at **11-17. In an earlier brief in the *Riverbed* litigation, Griffith dedicated almost 14 pages to the question of the materiality of supplemental disclosures. *See* Objection of Sean J. Griffith to Proposed Settlement and Application for Attorneys' Fees and Expenses, *In re Riverbed Tech., Inc. S'holders Litig*, Consol. C.A. No. 10484-VCG, at 17-31 (Del. Ch. Jul. 13, 2015). Two examples, however, can serve to demonstrate the type of additional information that the Court can expect from an *amicus curiae* brief.

1. Example 1: Supplemental Disclosures Relating to Mid-Cap Company Multiples in the Comparable Companies Analysis.

An *amicus curiae* brief can provide contrary authority concerning the materiality of certain supplemental disclosures. For instance, Plaintiffs argue that disclosures related to "the multiples of enterprise value to calendar years 2014 and 2015 for the eleven companies [included in a comparables analysis]" constitute information material to E2open stockholders. Approval Memo. at 5. Plaintiffs cite to *In re Celera Corp. S'holder Litigation* for the proposition that "a fair summary of a comparable companies or transactions analysis probably should disclose the market multiples derived for the comparable companies transactions." *Id.*, *citing* 2012 Del. Ch. LEXIS 66, at *122 (Del. Ch. Mar. 23, 2012), *rev'd in part on other grounds*, 2012 Del. LEXIS 658 (Del. Dec. 27, 2012).

As shown below, Plaintiffs rely on disclosures that are almost identical to supplemental

disclosures whose materiality was rejected in *Trulia*. The supplemental disclosures in the two cases differ only marginally: the *Trulia* disclosures include individual multiples of revenue and EBITDA for a single year, while the E2open supplemental disclosures provided individual values for multiples of revenue (but not EBITDA) over two years. The E2open disclosures also give enterprise growth ratios for the comparable firms. However, the Approval Memorandum does not suggest that revenue (as opposed to EBITDA), multiple years of data, or growth rates are independently meaningful. Plaintiffs suggest, as in *Trulia*, that this disclosure is material because individual multiples were provided for each comparable company. *See* Approval Memorandum at 5-6.

Trulia[15]

	FV / 2015 Revenue	FV / 2015 EBITDA
Trulia Street*	5.3x	33.8x
Zillow Street*	12.2x	58.8x
Real Estate		
REA Group Ltd.	10.5x	18.8x
SouFun Holdings Ltd.	5.9x	11.4x
CoStar Group, Inc.	7.2x	21.5x
Rightmove plc	11.9x	16.0x
Leju Holdings Ltd.	2.6x	9.1x
Move, Inc.	2.0x	14.6x
Median	6.5x	15.3x
SaaS		
salesforce.com, Inc.	5.7x	29.8x
NetSuite Inc.	9.0x	95.6x
Concur Technologies, Inc.	6.3x	35.3x
OpenTable, Inc.**	6.2x	15.4x
RealPage, Inc.	2.9x	13.8x
Tangoe, Inc.	2.1x	11.6x
Median	6.0x	22.6x
Other		
TripAdvisor, Inc.	9.3x	23.1x
Expedia, Inc.	1.6x	8.6x
Yelp Inc.	9.6x	45.7x
HomeAway, Inc.	6.0x	21.5x
Median	7.6x	22.3x

[15] *See* Trulia, Inc. (Form 8-K) 3 (Nov. 19, 2014).

E2open[16]

Selected Company	EV/2014 Revenues	EV/2015 Revenues	Revenue Growth 2015
SPS Commerce, Inc.	7.11x	5.83x	22.0%
RingCentral, Inc.	4.16x	3.36x	23.7%
Interactive Intelligence Group, Inc.	2.61x	2.35x	10.9%
8x8, Inc.	3.67x	3.09x	18.8%
Bazaarvoice, Inc.	3.30x	2.91x	13.3%
Intralinks Holdings, Inc.	2.66x	2.47x	7.9%
Tangoe, Inc.	2.02x	1.84x	10.1%
Sciquest, Inc.	2.70x	2.58x	4.7%
ServiceSource International, Inc.	0.83x	0.92x	(10.0)%
Brightcove, Inc.	1.71x	1.63x	4.7%
Five9, Inc.	1.68x	1.40x	20.1%"

The *Trulia* Court explicitly rejected that argument. Instead, Chancellor Bouchard distinguished the Court of Chancery's earlier opinion in *Celera* by pointing out that the *Celera* disclosures "simply listed the comparable companies with no summary multiple data at all. . . . In other words, the disclosures in Trulia's proxy . . . essentially started at the point where *Celera* ended."[17] *Trulia*, 2016 WL 325008, at *16. Following a detailed comparison of the *Trulia* and *Celara* disclosures, the Court was not persuaded that "individual company multiples are material or were even helpful in this case." *Id*. at *17.

The fact that the Court of Chancery determined that this type of disclosure regarding comparable companies multiples was "not material or even helpful" in a decision rendered ***seven days*** before Plaintiffs submitted their Approval Memorandum, and Plaintiffs' omission of such authority, should raise serious questions as to Plaintiffs' claims to the materiality of other disclosures. An *amicus curiae* brief can provide the Court with more detailed insight into Plaintiffs' assertions regarding the value of the purportedly corrective disclosures.[18]

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[16] *See* E2open, Inc. (Form 14D9/A) 4 (Mar. 19, 2015).

[17] Unlike the present case, Trulia's initial comparable company analysis included three summary values, because Trulia's bankers considered three different sets of comparable companies. *Trulia*, 2016 WL 325008, at *16.

[18] In addition to providing legal authority, an *amicus curiae* brief can also highlight factual issues that would ordinarily be disclosed to the Court through adversarial briefing. For instance, Plaintiffs assert that one of the supplemental disclosures "provided the names of the eleven mid-cap companies in the software industry" reviewed by E2open's bankers. *See* Approval Memo. at 5. The Approval Memorandum does not make clear, however, that the original 14D-9 had

2. Example 2: Data Concerning the Market Value of Disclosure-Only Settlements.

In the Approval Memorandum, Plaintiffs cite to five California cases, one District of Delaware case, and three Delaware Court of Chancery cases for the proposition that substantial awards of attorney's fees are appropriate recognition for the supposed benefits of a disclosure-only settlement. Approval Memo. at 23-24. None of these cases, however, were decided more recently than 2012, and none of the cherry-picked Delaware cases reflect a fee award below $500,000. *Id.* This omission allows the Approval Memorandum to obscure the general downward trend in fee awards for disclosure-only settlements in more recent years. *See Takeover Litigation* at 5 (showing a decline in the mean fee award for disclosure only settlements from $475,000 in 2012 to $362,000 in 2015). Nor do Plaintiffs disclose more recent Delaware cases providing for much lower fees for disclosure-only settlements. *See, e.g.*, *Riverbed*, 2015 WL 5458041, at *8 (awarding fees of $329,881.51 in comparison to $500,000 requested); Order Approving Settlement, *In re Susser Holdings Corp. S'holder Litig.*, Consol. C. A. No. 9613-VCG at 6 (Sept. 15, 2015) (reducing fee award from requested $600,000 to $472,695.29) (Whittaker Decl. at Ex. F); Order and Final Judgment, *In re Vitesse Semiconductor Corp. S'holder Litig.*, C. A. No. 10828-VCP at 10 (Del. Ch. Sept. 29, 2015) (reducing fee award from $350,000 requested to $200,000) (Whittaker Decl. at Ex. G); *In re Intermune, Inc. S'holder Litig.*, C. A. No. 10086-VCN, at 10, 15 (Dec. 29, 2015) (TRANSCRIPT) (reducing fee award from requested $470,000 to $325,000). Contrary to Plaintiffs' suggestion in the Approval Memorandum, fee awards greater than $500,000 for disclosure-only settlements are an endangered species in the Delaware Court of Chancery, if they are not already extinct.

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already disclosed the same list of names. *Compare* Whittaker Declaration at Ex. H (excerpt from E2Open 14D-9 filed February 26, 2015) *with* Whittaker Declaration at Ex. I (excerpt from E2Open 14D-9/A filed March 19, 2015).

The gravamen of the supplemental disclosures is not so much the list of comparable companies—which did not change—but the description of the list as "publicly traded ***mid-cap*** companies" rather than merely "publicly traded companies." *See id.* (emphasis added). An adversarial brief contesting materiality (for instance, on a motion to dismiss) would likely highlight this distinction to the Court. Here, in the absence of contested briefing—and without an *amicus curiae*—the Court will be forced to parse the disclosures without assistance.

As these citations demonstrate, Plaintiffs' fee request appears to be at the high end of the range of values recently approved in Delaware. An *amicus curiae* brief can put such fee awards in more fulsome context, including analysis of fee awards in comparison to deal value or implied plaintiff loadstar.

D. The Court's Decision in this Case Will Influence the Law Beyond California.

Finally, the Court should consider more extensive briefing on these issues because its decision in this case will influence not only California corporate law, but the course of corporate litigation throughout the nation. As the Court of Chancery recognized in *Trulia*, "enhanced judicial scrutiny of disclosure settlements [in Delaware] could lead plaintiffs to sue fiduciaries of Delaware corporations in other jurisdictions in the hope of finding a forum more hospitable to signing off on settlements of no genuine value." *Trulia*, 2016 WL 325008, at *11. Plaintiffs' decision to pursue this litigation in California, rather than to face Vice Chancellor Laster in Delaware, suggests that concerns regarding a flight from scrutiny have merit. *See supra* at 8 n.10. Were California courts to become a haven for the disclosure-only settlements rejected by its sister courts, the effect of the *Trulia* decision on "merger tax" litigation could be substantially dulled.[19]

V. CONCLUSION

For the reasons set forth above, the Court should appoint Griffith as *amicus curiae* or, in the alternative as a court-appointed expert, to provide further briefing to the Court on the questions set forth in Section IV, and other topics that the Court may find useful. The Court should tax the *amicus curiae*'s attorney's fees and costs to the parties seeking approval of the settlement.

[19] Delaware corporations like E2open could, in the future, seek to avoid "merger tax" litigation by adopting forum selection bylaws requiring class plaintiffs to litigate in Delaware. *See Trulia*, 2016 WL 325008, at *11 However, such bylaws by their very nature rely upon courts outside Delaware for their enforcement.

Griffith anticipates that briefing on the two questions set forth above can be completed within nine days of the date of appointment. Griffith has retained competent and experienced counsel capable of briefing these issues in an expedited manner.

DATED: February 16, 2016 MCGUIREWOODS LLP

By: _____

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 633 West Fifth Street, Floor Sixty Seven, Los Angeles, California 90071.

On February __, 2016, I served the foregoing document(s) described as SEAN J. GRIFFITH'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR APPOINTMENT OF AMICUS CURIAE, OR ALTERNATIVELY APPOINTMENT AS AN EXPERT PURSUANT TO CAL. EVID. CODE § 730 on the interested parties in this action:

X by placing ___ the original X a true copy thereof enclosed in sealed envelopes addressed as follows:

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X **(BY MAIL)** Following ordinary business practices at the Los Angeles, California office of McGuireWoods LLP, I placed the sealed envelope(s) for collection and mailing with the United States Postal Service on that same day. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice, such correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February __, 2016 at Los Angeles, California

K. GHALAMBOR
Type or Print Name

Signature