

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

THOMAS SANDYS, Derivatively on )  
Behalf of ZYNGA INC., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
MARK J. PINCUS, *et al.*, )  
 )  
Defendants, )  
 )  
-and- )  
 )  
ZYNGA INC., )  
 )  
Nominal Defendant. )

C.A. No. 9512-CB

**PUBLIC VERSION**  
**E-FILED: Dec. 10, 2018**

**PLAINTIFF’S BRIEF IN SUPPORT OF APPLICATION FOR AWARD OF ATTORNEYS’ FEES, EXPENSES AND INCENTIVE AWARD**

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Plaintiff Thomas Sandys (“Plaintiff”) respectfully submits this brief, together with the affidavits of Jeffrey Abraham (“Abraham Aff.”) and P. Bradford deLeeuw (“deLeeuw Aff.”), in support of Plaintiff’s counsel’s application for an award of attorneys’ fees and litigation expenses in the amount of \$2,750,000, and an incentive award for Plaintiff in the amount of \$5,000 (the “Fee and Expense Request”), for their role in securing the common fund settlement of \$11,250,000 (the “Settlement”).

### **PRELIMINARY STATEMENT**

Plaintiff has litigated this case on behalf of nominal defendant Zynga, Inc. (“Zynga” or the “Company”) for more than six years. As set forth more fully in the Abraham Aff., Plaintiff’s substantial litigation efforts include: the service of a demand to inspect books and records pursuant to 8 *Del. C.* § 220 (the “220 Demand”); successfully prosecuting a books and records action following the Company’s refusal to adequately comply with the 220 Demand (*Sandys v. Zynga, Inc.*, C.A. No. 8450-ML (the “220 Action”)); drafting a Verified Derivative Complaint; briefing and argument of Defendants’ motions to dismiss; a successful appeal (*Sandys v. Pincus*, No. 157, 2016 (the “Appeal”)); mediation efforts which eventually led to a \$11,250,000 offer from Defendants, which the Company’s special litigation committee (“SLC”) ultimately accepted to settle this case; and additional

discovery (including motion practice) and investigation of the SLC's investigation and conclusions, supporting its decision to accept the Settlement.

There is no dispute that, absent Plaintiff's efforts, the \$11,250,000 common fund would never have been obtained and that Plaintiff's litigation efforts resulted in the Settlement that the SLC accepted and has presented to the Court. Plaintiff respectfully submits that the Fee and Expense Request – which the SLC itself does not oppose – is fair and reasonable considering the substantial benefits conferred on the Company. Plaintiff therefore respectfully requests that the Court grant the Fee and Expense Request in its entirety.

## **ARGUMENT<sup>1</sup>**

### **A. The Legal Standard Governing the Award of Attorneys' Fees**

An award of attorneys' fees and the reimbursement of expenses is warranted where counsel's efforts result in the creation of a common fund. *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989) (internal citations omitted); *See also Seinfeld v. Coker*, Del. Ch., 847 A.2d 330, 335 (2000) (“If an attorney recovers a common fund as the result of a settlement, as is occasionally the case in both

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<sup>1</sup> The Facts surrounding Plaintiff's claims, the procedural history of this litigation, including the Settlement and Plaintiff's subsequent investigation, are summarized in detail in the Abraham Aff., which is incorporated by reference, as well as the SLC's final Report concerning its investigation into Plaintiff's allegations (D.I. 118) (the “SLC Report”) and the SLC's Brief in Support of Approval of the Settlement (D.I. 315).

derivative and class action suits, he then may independently request an award of fees from that settlement fund.”)

As this Court has explained, determining the appropriate award of attorneys’ fees in a representative action:

Involves an exercise of judicial discretion taking into account the *Sugarland* factors, namely: “1) the results achieved; 2) the time and effort of counsel; 3) the relative complexities of the litigation; 4) any contingency factor; and 5) the standing and ability of counsel involved.” The benefit achieved is the most significant factor.

*In re Jefferies Grp., Inc. S’holder Litig.*, 2015 WL 3540662, at \*3 (Del. Ch. June 5, 2015) (quoting *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1254 (Del. 2012), citing *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980)).

The appropriate fee percentage is also guided by the stage at which the case settles. In *Americas Mining*, the Supreme Court explained that:

Delaware case law supports a wide range of reasonable percentages for attorneys’ fees, but 33% is “the very top of the range of percentages.” The Court of Chancery has a history of awarding lower percentages of the benefit where cases have settled before trial. When a case settles early, the Court of Chancery tends to award 10–15% of the monetary benefit conferred. When a case settles after the plaintiffs have engaged in meaningful litigation efforts, typically including multiple depositions and some level of motion practice, fee awards in the Court of Chancery range from 15–25% of the monetary benefits conferred. “A study of recent Delaware fee awards finds that the average amount of fees awarded when derivative and class actions settle for both monetary and therapeutic consideration is approximately 23% of the monetary benefit conferred; the median is 25%.” Higher percentages are warranted when cases progress to a post-trial adjudication.

51 A.3d at 1259-60. In assessing fee awards under the applicable *Sugarland* factors, the primary consideration is the benefit achieved through the litigation. *Id.* at 1254; *see also Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000) (“*Sugarland*’s first factor is indeed its most important - the results accomplished for the benefit of the shareholders.”)

**B. The Results Achieved, the Primary *Sugarland* Factor Supports the Requested Fee Award**

Plaintiff achieved a substantial benefit for Zynga and its stockholders in the form of a common fund in the amount of \$11.25 million funded by the Company’s D&O insurers. That Plaintiff was able to obtain \$11.25 million for Zynga and its stockholders is particularly impressive, given that the SLC concluded that Plaintiff’s claims “lack[ed] merit” and/or deemed their pursuit “contrary to the best interests of Zynga and its stockholders.” D.I. 118 at 163.

Furthermore, there is no doubt that Plaintiff’s efforts were the most substantial factor, if not the sole factor, in creating the \$11.25 million Settlement. Indeed, the entire settlement amount for which this case is being settled was initially offered to Plaintiff after the lengthy settlement discussions during the mediation. Absent Plaintiff’s efforts, Zynga would have received nothing for the claims being compromised in the Settlement.

The \$2,750,000 in attorneys' fees and reimbursement of expenses being sought by Plaintiff in this case amounts to 24.44% of the \$11.25 million net financial benefit achieved. This is in line with other common fund case fee awards by this Court including an award by this Court of attorneys' fees of 23.5% of a \$10 million common, plus expenses of \$112,456 amounting to 24.61% of the common fund in other class litigation arising out of the sale of stock by Zynga insiders. *See Lee v. Pincus*, C.A. No. 8458-CB (Del. Ch. Mar. 27, 2017) (TRANSCRIPT). *See also In re China Integrated Energy, Inc. Stockholders Litig.*, 2015 WL 7777473 (Del. Ch. Dec. 2, 2015) (26% of the common fund); *City of Monroe Emps.' Ret. Sys. v. Murdoch*, C.A. No. 2017-0833-AGB (Del. Ch. Feb. 9, 2018) (TRANSCRIPT) (25% of the common fund where the settlement also included corporate governance reforms).

### **C. The Secondary *Sugarland* Factors Also Support the Fee Requested**

#### **1. The Time and Effort of Counsel**

The time and effort of counsel serves as a “backstop check” on the reasonableness of a fee award. *Franklin Balance Sheet Inv. Fund v. Crowley*, No. 888-VCP, 2007 WL 2495018, at \*14 (Del. Ch. Aug. 30, 2007); *see also In re Del Monte Foods Co. S'holders Litig.*, No. 6027-VCL, 2011 WL 2535256, at \*12-13 (Del. Ch. June 27, 2011) (time and effort serves as a “cross-check”). This factor has

two separate components -- time and effort -- with effort being the more important factor of the two. *Id.* at \*12.

The time and effort set forth by Plaintiff's counsel support the Fee and Expense Request. As set forth above and in the Abraham Affidavit, the Settlement followed six years of litigation efforts by Plaintiff. Among other things, Plaintiff conducted a thorough investigation, including fully litigating the 220 Action, drafted a complaint that stated claims sufficient to overcome a motion to dismiss, engaged in substantial briefing and prosecuted a successful appeal to the Delaware Supreme Court. Abraham Aff. ¶¶ 9, 11, 13, 18, 19. Following remand, Plaintiff propounded discovery and conducted motion practice. *Id.* at ¶ 43. After Zynga formed the SLC, Plaintiff engaged in mediation efforts which resulted in the \$11.25 million offer the SLC ultimately determined to accept in the Settlement. Abraham Aff. ¶ 37.<sup>2</sup> In addition, this litigation was conducted efficiently, by a small team of attorneys. There was no time devoted to a contest for case leadership or other matters that are properly excluded on the grounds that they "provide no benefit to stockholders," *Jefferies Grp.*, 2015 WL 3540662, at \*4 n.12. A breakdown of Plaintiff's counsel's time and expenses is detailed in the accompanying Abraham Affidavit and deLeeuw

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<sup>2</sup> After the SLC determined to enter into the Settlement, Plaintiff pressed forward with attempting to obtain the best possible recovery for Zynga by thoroughly investigating the SLC's investigation and conclusions, including documentary and deposition discovery, as well as motion practice. *Id.* at ¶¶ 43-46.

Affidavit. Through October 10, 2018, which was the date of the last deposition of an SLC member, Plaintiff's Counsel devoted 2,450.30 hours to this litigation. *See* Abraham Aff. ¶ 61; deLeeuw Aff. ¶ 3. The requested fee award would therefore represent an implied hourly rate of approximately \$1,092, which is well within the range awarded by other cases. *See, e.g., City of Monroe Emps.' Retirement System v. Murdoch, et al.*, C.A. No. 2017-0833-AGB (Del. Ch. Feb. 9, 2018) (ORDER) (awarding fee representing an implied hourly rate of \$3,979); *In re El Paso Corp. S'holder Litig.*, C.A. No. 6949 (Del. Ch. Feb. 29, 2012) (ORDER) (awarding fee that represented implied hourly rate of \$2,538); *In re Jefferies Grp., Inc.*, 2015 WL 3540662, at \*2 (Del. Ch. June 5, 2015) (awarding fee that represented implied hourly rate of \$2,200).

## **2. The Relative Complexities of the Litigation**

In determining the award of plaintiff's counsel's fees and expenses, the Court also will consider the relative complexities of the litigation. "All else equal, litigation that is challenging and complex supports a higher fee award." *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1072 (Del. Ch. 2015). Here, Plaintiff's counsel took on a challenging case against determined opposition. The case involved complex issues regarding demand futility, as evidenced by this Court's initial dismissal of this Action.

This litigation was factually complex because it did not involve false statements of historical fact such as those contained in a company's financial statement. Instead, the gravamen of the claim related to Defendants' knowing of the impending decline in Zynga's operations based upon internal operating metrics or other similar facts. Accordingly, Plaintiff needed to prove and understand the materiality of the particular adverse facts at issue in light of the potentially multitude of factors affecting both Zynga's future performance and its stock price. In addition, Plaintiff needed to understand and prove that the adverse facts at issue extend beyond risk factors already disclosed by the Company or otherwise known by investors through the many securities analysts which followed the Company.<sup>3</sup>

### **3. The Contingent Nature of Counsel's Engagement**

"It is the 'public policy of Delaware to reward risk-taking in the interests of shareholders.'" *Activision Blizzard*, 124 A.3d at 1073. Counsel is entitled to a larger fee when the compensation is contingent. *See Ryan v. Gifford*, No. 2213-CC, 2009 WL 18143, at \*13 (Del. Ch. Jan. 2, 2009).

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<sup>3</sup>The complexity of the factual allegations is evident and supported by the report issued by the Special Litigation Committee taking 120 pages including dozens of single spaced footnotes to analyze the facts related to liability (*see* D.I. 118 at 193-313), and another 25 pages to discuss damages. *Id.* at 83-107.

Plaintiff's counsel undertook representation in this case on a wholly contingent basis, which required the allocation of substantial resources to prosecute the litigation, including depositions and payment of other out-of-pocket expenses. Plaintiff's counsel had to advance these funds, which ultimately totaled \$72,767.63, without reimbursement on a contingent basis, and with the knowledge that such expenses might not be repaid at all. As Vice Chancellor Laster noted in *Activision Blizzard*, “[n]ot all contingent cases involve the same level of contingency risk.” 124 A.3d 1025, 1073. Here, unlike cases that offer a “ready-made exit” through a settlement for supplemental disclosures or corporate therapeutics, this case presented the “realistic possibility that Counsel would receive nothing for their time and effort.” *Id.*<sup>4</sup> In addition, the resources devoted here could have been devoted elsewhere through the acceptance of other engagements. Accordingly, the contingent nature of this case and the preclusion of other work support the full award of Plaintiff's Fee and Expense Request.

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<sup>4</sup> Indeed, proving a *Brophy* claim requires evidence of the trader's mental state, including that the trades were motivated “in whole or in part” by the material adverse inside information. This is indisputably a very difficult standard to meet, as it requires proof of the trader's subjective intent. At the outset of this litigation -- which is the point in time at which risk is properly measured -- Plaintiff's counsel faced substantial risks to succeeding on such a claim.

#### 4. The Standing and Ability of Counsel

Plaintiff's attorneys that prosecuted this action on behalf of Zynga are experienced in stockholder class and derivative litigation and have practiced extensively before this Court.<sup>5</sup> Opposing counsel's standing may also be considered in determining an allowance of counsel fees. In this case, Defendants were represented by experienced, skillful, and well-respected counsel. That Plaintiff's counsel was able to develop and prosecute a novel claim raising a broad variety of merits issues, adverse to highly experienced and capable defense counsel at the firms of Morrison & Foerster LLP, Latham & Watkins LLP, Pillsbury Winthrop Shaw Pittman LLP and Wilson Sonsini Goodrich & Rosati, P.C., Abrams & Bayliss LLP,

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<sup>5</sup> Rosenthal, Monhait & Goddess, P.A., is well known to this Court. The cases litigated by Abraham, Fruchter & Twersky, LLP ("AF&T") include: *In re Third Avenue Trust Shareholder & Deriv. Litig.*, Consol. C.A. No.12184 in which AF&T acted as co-lead counsel in a case achieving a \$25 million cash recovery; *In re CytRx Corp. Stockholder Deriv. Litig.*, Consol. C.A. No. 9864-VCL in which AF&T acted as co-lead counsel in a case achieving the repricing of almost 90% of stock options alleged to have been spring loaded; *Silverberg ex rel. Dendreon Corp. v. Gold*, C.A. No. 7646-VCP in which AF&T, acting as lead counsel, achieved a \$4.5 million settlement of *Brophy* claims.

Morris, Nichols, Arsht & Tunnell LLP and Young Conaway Stargatt & Taylor LLP, supports the requested fee award.<sup>6</sup>

**D. Plaintiff Should Receive a \$5,000 Incentive Award**

Plaintiff also seeks approval of an incentive award for Plaintiff in the amount of \$5,000. In evaluating whether to grant an incentive award, this Court has considered the following four factors: “(1) lead plaintiff makes unusually significant efforts monitoring the litigation; (2) the efforts result in a direct benefit to the class; (3) the lead plaintiff owns so few shares that she stands to gain only a small pro-rata recovery as a member of the class; and (4) notice is provided to the class.” *In re Fuqua Industries, Inc. Shareholder Litigation*, 2006 WL 2640967, at \*2 (Del. Ch. Sept. 7, 2006).

Here, Mr. Sandys made a very substantial contribution by monitoring this litigation for more than six years. He spoke regularly by phone with Plaintiff’s counsel concerning the progress of the litigation and maintained a binder of materials

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<sup>6</sup> The reasonableness of the Fee and Expense Request is also supported by the fact that the SLC does not oppose it. A negotiated fee application that “falls within a reasonable range [warrants] deference to the parties’ negotiated amount.” *Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, No. 1091-VCL, 2012 WL 1655538, at \*7 (Del. Ch. May 9, 2012). After Plaintiff’s counsel notified the SLC’s counsel that Plaintiff had determined not to challenge the Settlement, the SLC agreed it would not oppose a fee application for an award in an aggregate amount not to exceed \$2,750,000. See Abraham Aff. at ¶ 60.

relevant to this litigation. *See* Affidavit of Thomas Sandys (“Sandys Aff.”) ¶4. Mr. Sandys freely gave his opinion on all matters related to the litigation including Plaintiff ultimately endorsing the proposed Settlement. Sandys Aff. ¶4. Mr. Sandys also had to maintain his ownership of Zynga stock throughout the more than six years of proceedings in this case even when more attractive investment opportunities presented themselves. Sandys Aff. ¶5.

Mr. Sandys owns a relatively small proportion of the Company’s total number of shares outstanding. Mr. Sandys brought this action because he believes that it is wrong for corporate insiders to trade based upon inside information and he brought this action to implicate what he perceives to be an important public policy. Sandys Aff. ¶2.

The modest incentive award sought by Plaintiff is amply supported by precedent. *See, e.g., In re Comverge S’holders Litig.*, C.A. No. 7368-VCMR, (Del. Ch. April 10, 2013) (ORDER) (awarding plaintiffs \$5,000 each); *In re Tibco Software Inc. S’holder Litig.*, C.A. No. 10319-CB (Del. Ch. Sept. 7, 2016) (order) (Trans. ID 59527142) (awarding \$10,000); *Flax v. Pet360, Inc.*, C.A. No. 10123-VCL (Del. Ch. Aug. 1, 2016) (order) (Trans. ID 59357094) (same); *Strougo v. Hollander*, C.A. No. 9770-CB (Del. Ch. Feb. 3, 2016) (order) (Trans. ID 58518393) (same); *Calma v. Templeton*, C.A. No. 9579-CB (Del. Ch. Sept. 9, 2016) (order) (Trans. ID 59541703) (awarding \$2,000).

Finally, the proposal to obtain an incentive award for Mr. Sandys was disclosed in the Notice disseminated to Zynga stockholders. No objections have been made to the proposed payment. Accordingly, Plaintiff should be granted an incentive award in the amount of \$5,000 payable from any award of attorneys' fees payable to his counsel.

### CONCLUSION

For the reasons set forth herein, Plaintiff's Fee and Expense Request in the amount of \$2,750,000 should be granted and the Court should also award an incentive fee to Plaintiff in the amount of \$5,000.

Dated: December 3, 2018

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**CERTIFICATE OF SERVICE**

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