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Case No. 2017-0337-SG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ORACLE CORPORATION DERIVATIVE LITIGATION	CONSOLIDATED C.A. No. 2017-0337-SG

PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES

Plaintiffs Firemen's Retirement System of St. Louis and Robert Jessup, by and through their undersigned counsel, hereby move the Court for an award of attorneys' fees of $5 million. The grounds for this motion are set forth below.

BACKGROUND

1. On March 19, 2018, this Court denied Defendants' motion to dismiss under Court of Chancery Rule 23.1, concluding: "Examining each allegedly non-independent director on the particular facts pertinent to her, as I must, I conclude there is reasonable doubt that a majority of the board that would have considered a demand would be capable of bringing its business judgment to bear." (Op. at 4)

2. Weeks later, in a May 11, 2018 press release, Oracle announced that the Board had elected Charles (Wick) Moorman IV and William G. Parrett to serve as directors, effective as of May 9, 2018. (Ex. A.) The reason for their appointment to the Board soon became apparent. On July 2, 2018, Moorman, Parrett, and Leon Panetta, acting as a special litigation committee ("SLC"), filed a motion to stay this litigation, which reported how Moorman and Parrett had been provisionally appointed to the SLC in early May, contingent on them becoming new directors:

> On the same day that the Board established the SLC, the Board appointed to the SLC former United States Secretary of Defense Leon Panetta. At that time the Board also decided provisionally to appoint William G. Parrett and Charles W. Moorman to the SLC. Messrs. Parrett and Moorman were not yet members of the Board, and their appointment to the SLC was contingent on their ultimately being approved as Board members and their agreement to serve on the SLC. Messrs. Parrett and Moorman subsequently were approved as Board members and they agreed to serve on the SLC.

(Mot. to Stay ¶ 10.)

3. The appointment of Moorman and Parrett as new directors meant that independent directors constituted half the Board. Immediately before the expansion of the Board to add Moorman and Parrett, Oracle had twelve directors. In its 2018 annual proxy statement, Oracle conceded that five of those directors were not independent: Ellison, Catz, Henley, Hurd, and James. (JX2131 at 7-10.) The Court had ruled in March 2018 that "Plaintiff has cast reasonable doubt on the independence of at least" two more directors: George Conrades and Naomi Seligman. (Op. at 47.) Arguably, seven of twelve directors lacked independence. After the appointment of Moorman and Parrett, at least seven out of fourteen were facially independent.

4. The predominance of non-independent directors on the Board over an extended period of time manifested itself in the inability of Oracle to prevail on a Rule 23.1 motion in three separate derivative litigations, or to establish the independence of certain purportedly independent directors. Apart from the

Defendants in this case losing a Rule 23.1 motion, in two prior derivative litigations no Rule 23.1 motion was even filed.

5. The first case involved alleged insider trading by Ellison and others. *See In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917 (Del. Ch. 2003). Oracle formed an SLC with two new directors who had joined the Board in October 2001, but then-Vice Chancellor Strine found that these new directors lacked independence from Ellison for purposes of that SLC's motion to terminate the litigation. *See id*. at 942-48.

6. The second derivative litigation, filed in 2012, challenged Oracle's acquisition of Ellison-owned Pillar Data Systems. *See In re City of Roseville Empls. Ret. Sys. v. Ellison*, C.A. No. 6900-CS, Dir. Defs.' (Corrected) Opening Br. in Supp. of Mot. to Dismiss the First Am. S'holder Deriv. Compl., 2012 WL 760520 (Del. Ch. filed Mar. 6, 2012). The defendants in that case did not move to dismiss under Rule 23.1 and they "chose not to defend the independence of the independence committee" that had approved the acquisition. *In re City of Roseville Empls. Ret. Sys. v. Ellison*, C.A. No. 6900-CS, tr. at 77-78, 2012 WL 4765136 (Del. Ch. Aug. 22, 2012).

7. Significant litigation effort was needed in this case in order for the board of directors of Oracle to decide that it was appropriate to add two independent directors that allowed for the creation of the SLC and made half of the entire board

independent. Counsel for plaintiff St. Louis Firemen pursued a books and records demand, successfully applied for appointment to lead this litigation, filed pleadings and briefs that led to the defeat of Defendants' motion to dismiss under Rules 12(b)(6) and 23.1, and initiated discovery.

8. As of May 9, 2018, the date when Moorman and Parrett became members of the Board, Plaintiffs' counsel had devoted 1,249.05 attorney hours to this action.[1]

ARGUMENT

9. A stockholder plaintiff may recover attorneys' fees and expenses for creating a corporate benefit where "(a) the claim was meritorious when filed; (b) the action was benefitting the corporation; … and (c) the benefit was causally related to the lawsuit." *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1167 (Del. 1989). The Court applies "the *Sugarland* factors to make an equitable award" as to the amount of fees, giving "the greatest weight" to "the benefit achieved by the Plaintiffs' counsel in the course of the litigation" and looking to precedent to guide the Court's review. *Hollywood Firefighters' Pension Fund v. Malone*, 2021 WL 5179219, at *7 (Del. Ch. Nov. 8, 2021).

[1] (Friedlander Aff. ¶ 3 (470.7 attorney hours); Baron Aff. ¶ 3 (623.6 attorney hours); Del Gaizo Aff. ¶ 3 (154.75 attorney hours). These affidavits are filed contemporaneously herewith.

10. In a series of cases, this Court has recognized that the appointment of independent directors in connection with pending litigation is a compensable benefit.

11. In *City of Miami General Employees' & Sanitation Employees' Retirement Trust v. Foley*, C.A. No. 2020-0650-KSJM, tr. (Del. Ch. June 21, 2022) (Ex. B), Chancellor McCormick addressed an analogous fee request in derivative litigation that similarly challenged the acquisition of a company in which the subject company's board chairman had a financial interest. In *Foley*, no Rule 23.1 motion was filed. Instead, the company appointed an SLC of three directors, two of whom joined the board while the litigation was pending. *Id.* at 40-41. During a stay pending the outcome of the SLC's investigation, the parties settled the case for $20 million and certain corporate governance measures. *Id.* at 9, 41-42. Plaintiff requested attorneys' fees under "the mootness doctrine for the appointment of the two directors." *Id.* at 47. Chancellor McCormick found that a mootness fee was appropriate:

> The elements of the mootness fee request are met, the complaint was meritorious when filed, FNF acted by appointing two new independent directors before I resolved this case, and FNF acknowledged that the pendency of this action was a consideration in appointing the two independent directors. So these elements are met here.

Id. at 48.

12. To determine the appropriate mootness fee for the appointment of the two directors in *Foley*, the Chancellor surveyed prior cases, observing that

"decisions of this court reflect[] the extreme swings in values ascribed to this benefit." *Id.* at 49. The Chancellor noted that the two largest fee awards involved large-cap companies:

> By contrast, in the context of a much larger cap company, in *Google*, then-Chancellor Strine awarded 8.5 million in fees for a similar benefit, a corporate governance settlement that resolved a challenge to a stock plan that plaintiffs alleged would allow the controller to issue new classes of stock but maintain control without paying for it. The primary benefit of the settlement was that each time the controller sought to issue nonvoting stock, they would need approval of every independent director on Google's board. And in discussing the significance of this result, Chancellor Strine suggested that there are a network [effects] that make independent directors conscious of their reputations, not only in this court, but in their professional circles, and then the Chancellor awarded 8.5 million in fees.
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> …
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> And in *Activision*, this court views fees in the realm of 5 to 10 million as reasonable for the installation of two independent directors and the reduction of a controller's controlling stake in a large cap company.

Id. at 49-50 (discussing *In re Google Inc. Class C S'holder Litig.*, Cons. C.A. No. 7469-CS, tr. at 9-10 (Del. Ch. Oct. 28, 2013) (Ex. C), and *In re Activision Blizzard, Inc. Stockholder Litigation*, 124 A.3d 1025, 1071 (Del. Ch. 2015)[2]). In the context

[2] The cited page in *Activision* contains a footnote that reads as follows:

> *See In re Google Inc. Class C S'holder Litig.,* Cons. C.A. No. 7469–CS, tr. at 19–20 (Del. Ch. Oct. 28, 2013) (awarding $8.5 million plus expenses for a "largely corporate governance settlement" in which "the benefits are substantial" and "somewhere between a solid single and a double"); *In re Yahoo! S'holders Litig.,* C.A. 3561–CC, let. op. at 1 (Del. Ch. Mar. 6, 2009) (awarding $8.4 million for "substantial benefit" of amending employee severance plan in a manner that "made it less

of the fee application in *Foley*, the Chancellor stated that "the appropriate ballpark here is 1 to $2 million for the appointment of independent directors." *Id.* at 51.

13. *In re Tile Shop Holdings, Inc. Shareholder Derivative Litigation*, C.A. No. 10884-VCG, tr. (Del. Ch. Aug. 23, 2018) (Ex. D), addressed a contested fee application in the context of the settlement of derivative claims involving related-party supply agreements. *Id.* at 10-11. An independent director had been added to the board during the pendency of the litigation, and the parties agreed as part of the settlement that the director's appointment was motivated in substantial part by the lawsuit. *Id.* at 29-30. The Court found as follows:

> [G]etting an independent director is a substantial benefit to the corporation. And I understand the argument by the defendants that this did not tip the corporation from a non-independent board to an independent board, but it's a pretty close run thing either way. The effect of having an independent director on a board that is even close, I think, is magnified and it is a very substantial improvement for the corporation.

Id. at 41. Because the case had been stayed and then settled after the filing of a motion to dismiss, without any "hard-fought substantive litigation leading to" the

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> expensive to sell Yahoo, making the company a more attractive target to potential suitors"); *Minneapolis Firefighters' Relief Assoc. v. Ceridian Corp.,* C.A. No. 2996–CC (Del. Ch. Feb. 25, 2008) (awarding $5.4 million for empowering a potential buyer to present a leveraged recapitalization proposal and eliminating a termination right for the merger partner in the event a new slate of directors was elected before the merger closed).

124 A.3d at 1071 n.30.

appointment of the new director, the Court determined that $1 million was a "proper plaintiff firm recovery for achieving the independent director alone." *Id.* at 41-42.

14. Subsequently, in *Hollywood Firefighters' Pension Fund v. Malone*, 2021 WL 5179219, this Court applied the teaching of *Activision* and cited *Tile Shop* in deciding that a fee award of $5.5 million was appropriate for certain changes in voting control in which "soft control" was maintained and "a facially independent board of directors was not established." *Id.* at *11.

15. Another pertinent precedent is Chancellor Bouchard's approval of a derivative settlement in *In re TerraForm Power, Inc. Derivative Litigation*, C.A. No. 11898-CB, tr. (Del. Ch. Dec. 19, 2016) (Ex. E). One of the components of the settlement was an agreement to add an additional independent director to the board. *Id.* at 13. In approving the settlement, Chancellor Bouchard listed the components, including the additional independent director, and described them as "meaningful benefits." *Id.* at 20, 21. The fee award of $3 million reflected that the case had been litigated by an investment fund on a non-contingent basis. *Id.* at 21.

16. Three factors gleaned from the above precedents inform Plaintiffs' fee request of $5 million:

a. One factor is the significance of causing two new independent directors to be added to the Board. Only here and in *Activision* did adding two new independent directors have a demonstrated dramatic impact on the overall board

composition. Plaintiffs had succeeded in calling into question the independence of a board majority, leading to the denial of Defendants' Rule 23.1 motion. After the appointment of the two new independent directors, at least half of the Board was facially independent, which was a significant evolution in the governance of Oracle. Empirical research supports that the most valuable outside director additions are those near the tipping point of a board majority.[3] Moreover, the two new directors constituted two-thirds of the SLC, which reflects the difficulty Oracle repeatedly has had in demonstrating the independence of its purportedly independent directors.

b. A second factor is the sheer size of Oracle. Its current market capitalization of approximately $277 billion makes it the 30th most valuable company in the world.[4] This scale magnifies the value of significant changes to board independence. There is empirical evidence that greater Board independence corresponds to increased firm value.[5]

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[3] John W. Byrd & Kent A. Hickman, *Do outside directors monitor managers? Evidence from tender offer bids*, 32 J. Fin. Econ. 195, 198 (1992) (finding "a curvilinear relationship between the proportion of independent directors on the board and the bidding firms' announcement-date abnormal returns"); *id.* at 213-216 (finding that positive value of additional independent directors peaks between 40-60% of board seats).

[4] https://companiesmarketcap.com/

[5] *See, e.g.*, Matthew Souther, *Does Board Independence Increase Firm Value? Evidence From Closed-End Funds*, 56 J. Fin. & Quantitative Analysis 313, 317, 333 (Feb. 2021) (reporting empirical analyses that "strongly support a positive relation between board independence and firm value, robust to a variety of specifications and

c. A third factor is the significant litigation effort that preceded the two additions to the board of directors. Plaintiffs accomplished the difficult and unlikely task of successfully fending off a motion to dismiss directed to the sufficiency of the allegations against Defendants Ellison and Catz and to the independence of a board majority. That success at the pleading stage required great effort and skill in developing the pleading and making the legal and factual arguments.

17. "The remainder of the *Sugarland* factors are comparatively straightforward to address." *Malone*, 2021 WL 5179219, at *11. "The case was taken by the Plaintiffs' counsel on a contingent basis, and the experience, skill,

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methods"); *id.* at 314 ("Point estimates indicate that a 10% increase in independent directors increases fund values by approximately 53 basis points (bps)."); James F. Cotter et al., *Do Independent Directors Enhance Target Shareholder Wealth During Tender Offers?*, 43 J. Fin. Econ. 195, 197 (1997) ("Controlling for target firm and tender offer characteristics, we find that [tender offer] targets with independent boards experience higher shareholder gains from the inception of the offer to its resolution than do other targets. The regression estimates indicate that the target shareholder gains from tender offers are about 20 percentage points greater when the board is independent, suggesting that independent outside directors perform a statistically and economically significant value-enhancing role during tender offers."), *cited in In re Cornerstone Therapeutics, Inc. S'holder Litig.*, 115 A.3d 1173, 1184 n.44 (Del. 2015); John W. Byrd & Kent A. Hickman, *Do outside directors monitor managers? Evidence from tender offer bids*, 32 J. Fin. Econ. 195, 219 (1992) (examining impact of board independence on acquiring firms' returns, and finding "less-negative returns to shareholders are associated with boards of directors in which at least half the members are independent of firm managers. Our evidence is therefore consistent with the claim that independent boards benefit shareholders").

standing and ability of both the Plaintiffs' and the Defendants' counsel are well known to this Court to be exemplary." *Id.* The implied effective hourly rate of $3,962 per attorney hour (after the deduction of expenses) during the relevant time period is reasonable in light of the non-contingent hourly rates of experienced and qualified counsel who practice before this Court,[6] and is within the range of this Court's precedents.[7]

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court award Plaintiffs' counsel $5 million.

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[6] *See generally* Dan Roe, *As Billing Rates Skyrocket, Historic Fee Leaders Find Company at $2,000 Per Hour*, American Lawyer (July 28, 2022), https://www.law.com/americanlawyer/2022/07/28/as-bankruptcy-rates-skyrocket-historic-fee-leaders-find-company-at-2000-per-hour/; Roy Strom, *Big Law Rates Topping $2,000 Leave Value 'In Eye of Beholder'*, Bloomberg Law (June 9, 2022), https://news.bloomberglaw.com/business-and-practice/big-law-rates-topping-2-000-leave-value-in-eye-of-beholder.

[7] *See, e.g*, *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1257 (Del. 2012) (affirming fee award that implied "'approximately $35,000 an hour, if you look at it that way'"); *Foley*, tr. at 55 (noting that awarded fee had "effective hourly rate and expenses of $8,748 per hour," which "is within the realm of hourly rates approved by this court when a plaintiff attains a substantial benefit along the lines achieved in this settlement"); *In re Activision Blizzard*, 124 A.3d at 1074 ("While the size of the award implies a generous hourly rate, in this case it is justified by the effort.").

FRIEDLANDER & GORRIS, P.A.

/s/ Joel Friedlander
Joel Friedlander (Bar No. 3163)
Jeffrey M. Gorris (Bar No. 5012)
David Hahn (Bar No. 6417)
1201 N. Market Street, Suite 2200
Wilmington, DE 19801
(302) 573-3500

Co-Lead Counsel

Words: 2,816

OF COUNSEL:

ROBBINS GELLER RUDMAN
& DOWD LLP

Randall J. Baron
David A. Knotts
655 West Broadway, Suite 1900
San Diego, CA 92101
(619) 231-1058

Christopher H. Lyons (Bar No. 5493)
414 Union Street, Suite 900
Nashville, TN 37219
(615) 244-2203
Co-Lead Counsel

ROBBINS LLP

Gregory Del Gaizo
5040 Shoreham Place
San Diego, CA 92122
(619) 525-3990
Additional Counsel

DATED: May 22, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on May 22, 2023, I caused a true and correct copy of the foregoing **Plaintiffs' Application for Attorneys' Fees** to be served upon the following counsel of record by File&Serve*Xpress*:

Elena C. Norman, Esquire
Richard J. Thomas, Esquire
Kevin P. Rickert, Esquire
Nicholas J. Rohrer, Esquire
Alberto E. Chávez, Esquire
YOUNG CONAWAY STARGATT & TAYLOR, LLP
1000 North King Street
Wilmington, DE 19801

Thomas A. Beck, Esquire
Blake Rohrbacher, Esquire
Susan M. Hannigan, Esquire
Matthew D. Perri, Esquire
Daniel E. Kaprow, Esquire
RICHARDS LAYTON & FINGER P.A.
One Rodney Square
920 N. King Street
Wilmington, DE 19801

Kenneth J. Nachbar, Esquire
John P. DiTomo, Esquire
Thomas P. Will, Esquire
MORRIS, NICHOLS, ARSHT & TUNNELL LLP
1201 N. Market Street, 16th Floor
Wilmington, DE 19801

/s/ Joel Friedlander
Joel Friedlander (Bar No. 3163)