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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS SANDYS, Derivatively on Behalf of ZYNGA INC, Plaintiff below, Appellant, v. MARK J. PINCUS, REGINALD D. DAVIS, CADIR B. LEE, JOHN SCHAPPERT, DAVID M. WEHNER, MARK VRANESH, WILLIAM GORDON, REID HOFFMAN, JEFFREY KATZENBERG, STANLEY J. MERESMAN, SUNIL PAUL and OWEN VAN NATTA, Defendants below, Appellees -and- ZYNGA INC., a Delaware Corporation, Nominal Defendant below, Appellee.	No. 157, 2016 Court Below: Court of Chancery of the State of Delaware, C.A. No. 9512-CB PUBLIC VERSION - Filed July 18, 2016

PLAINTIFF BELOW-APPELLANT'S REPLY BRIEF

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I. PLAINTIFF HAS PROPERLY ALLEGED INSIDER TRADING CLAIMS AGAINST DEFENDANTS PINCUS AND HOFFMAN

Defendants assert that the complaint does not provide a basis reasonably to infer Hoffman's knowledge of adverse material facts (Outside Dir. Ans. Br. ("ODAB") at 15-18; Appellees' Ans. Br. ("AB") at 26) or that either Pincus or Hoffman acted based upon those facts in deciding to sell Zynga stock. AB at 26-27. These arguments both center on Average Bookings Per User ("ABPU") being only "one of a large number of operational metrics . . . provid[ing] insight into Zynga's business." ODAB at 17 & n.13; *see also* AB at 8-9.

[redacted] (the "Secondary"). Instead, the Company was also: (i) [redacted] ¶¶31, 72-74 (A025, A047-49)), (ii) [redacted] ¶¶28-29, 75-76 (A023-24, A049-50)); and (iii) [redacted]. ¶¶42-47 (A032-35). The Complaint alleges that [redacted]. ¶¶36, 37 (A028-29). Indeed, the prospectus ("Prospectus") Zynga filed with the Securities and Exchange Commission ("SEC") for the Secondary explicitly supports this allegation. ¶¶36, 37, 70 (A028-29, 046); B347.

In addition, Defendants ignore ABPU's materiality to the value investors assigned to Zynga stock. Thus, Zynga's belated disclosure of a decline in ABPU -- even when coupled with the Company's raising guidance -- still caused the price of the Company's stock to decline by almost 10%. ¶¶85-87 (A054-55); Plaintiff Below-Appellant's Opening Brief ("OB") at 17. ABPU's importance to the market price of Zynga stock further supports the Complaint's assertion, based in part on statements in the Prospectus, that the Board as well as senior management used "metrics such as ABPU. . . 'in evaluating and understanding [Zynga's results].'" ¶¶37, 70 (A029, A046).

These factual allegations provide "a reasonable basis from which knowledge can be inferred." *Pfeiffer v. Toll*, 989 A.2d 683, 692 (Del. Ch. 2010) (company's public statements about closely monitored metrics sufficient to permit inference of knowledge); *cf. Guttman v. Huang*, 823 A.2d 492, 503 (Del. Ch. 2003) (noting absence of such allegations of roles the directors played and information that would have come to their attention). Thus, Defendants' contention that it is unreasonable to infer that Hoffman knew of [redacted] is simply a quarrel with the Complaint's allegations and with statements the Company made in its own Prospectus. ¶¶ 37, 70 (A029, A046).

Pfeiffer is on point in holding that it is reasonable to infer a director's knowledge of [redacted] Defendants attempt to distinguish *Pfeiffer* as a case involving only one key operating metric. ODAB at 17. However, ABPU, which tracked Zynga's monetization of users, is as important an operating metric for Zynga as the number of communities in which Toll Brothers, Inc. was actively selling homes was for that company. In addition, as discussed above, [redacted]

Similarly unavailing is Defendants' effort to distinguish *Pfeiffer* based upon the length of time [redacted] ODAB at 18. Defendants fail to explain how the length of time [redacted] exists influences a director's possession of the underlying facts. Instead, *Pfeiffer* focused on the importance of the facts to the operational success of the company as a basis for the defendants' knowledge of those facts. 989 A.2d at 693.

Here, if anything, the facts more strongly support a reasonable inference that Hoffman and Pincus knew and acted to sell Zynga stock in the Secondary based upon [redacted] ¶¶36-37, 41, 48, 52, 56, 58-59, 70, 75, 78, 81 (A028-29, A031, A035, A037, A039-40, A046, A049-53). *See, e.g.*, *Pfeffer v. Redstone*, 965 A.2d 676, 687 (Del. 2009)

(allegations concerning information "routinely disclosed to boards of directors" suffice to plead director knowledge).[1]

Silverberg v. Gold, 2013 Del. Ch. LEXIS 312 (Del. Ch. Dec. 31, 2013), is also on point. There, the corporate insiders were alleged to have sold stock while failing to disclose "that a very large number of physicians were reluctant to assume the financial risk resulting from Provenge being a high priced drug ($93,000) administered over a short period of time (one month)." *Id.* at *31. The directors had been informed "that 'physician and patient response' was *one of six considerations* relevant to establishing Provenge's sale price." *Id.* at *37-38 (emphasis added). Those facts were discussed at a board meeting occurring ten (10) months in advance of the relevant insider sales which began at the end of April 2010. *Id.* at *37.

Defendants attempt to distinguish *Silverberg* based on the issue of physician reluctance having been raised in board meetings. ODAB at 21-22. However, here too, [redacted]

[1] *Redstone* is distinguishable as the plaintiff sought to draw an inference of director knowledge concerning a subsidiary's cash flows that were not regularly reported to the board. Here, in contrast, Zynga's own SEC filings admit the Board regularly considered the Company's operating metrics, including ABPU, in evaluating Zynga's business. *See* ¶¶37, 70 (A026, A046); B346-47.

[redacted] *See* ¶39, 49 (A029-30, A035). *See also* ¶37 (A029) ("ABPU [was] used by the Company's management and the Board 'in evaluating and understanding [Zynga's] results[.]'")

In addition, the facts alleged in this action strongly suggest that Pincus and Hoffman used such inside information in selling stock in the Secondary. Zynga issued rosy projections causing the Company's stock to trade at historical highs. ¶¶49-50, 52, 55 (A035-36, A037, A039). Pincus and Hoffman then sold Zynga stock in the Secondary, which was timed to occur before the Company released its first quarter results. ¶111 (A066-67). In order to sell their stock, Pincus and Hoffman [redacted]. ¶¶58, 60, 64, 111, 126 (A039, A041, A043, A066, A075). These facts amply support a reasonable inference that Pincus and Hoffman possessed material inside information which they sought to exploit through selling their Zynga stock. *See, e.g., Pfeiffer*, 989 A.2d at 694 ("timing and amount" of

trades "support a pleading-stage inference that the sellers took advantage" of non-public information); *Silverberg*, 2013 Del. Ch. LEXIS 312, at *46-47.[2]

South v. Baker, 62 A.3d 1 (Del. Ch. 2012), upon which defendant Hoffman relies, is not on point as it involved a duty of oversight claim dependent upon the plaintiff's ability to allege bad faith conduct. In addition, in *South v. Baker*, the facts alleged to have been known by the directors were "nuts-and-bolts operational issues" relating to mine safety. *Id.* at 16. Here, in contrast, as discussed above, the Zynga Board [redacted] ¶¶36-37, 41, 48, 52, 56, 58-59, 70, 75, 78, 81 (A028-29, A031, A035, A037, A039-40, A046, A049-53). Those allegations are sufficient to create an inference of actual or constructive notice of the relevant facts in order to sustain a *Brophy* claim at the pleading stage. *See, e.g.*, *Wood v. Baum*, 953 A.2d 136, 142 (Del. 2008).[3]

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[2] Defendants do not dispute that Plaintiff alleged that Pincus had actual knowledge of these facts. *See* AB at 27; ODAB at 15 & n.10. In the 8 *Del. C.* §220 action Zynga was only required to produce documents sufficient to show the Company's operating metrics during the relevant time period but not any emails which would have demonstrated the flow of information within Zynga. A212-213 and 224-225.

[3] Even under the rigorous standard employed in evaluating federal securities law claims requiring a "strong inference" of scienter, the Supreme Court held that there is no need to produce the "smoking gun" which Defendants seemingly demand in this action. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007). *See also Rosenbloom v. Pyott*, 765 F.3d 1137, 1159 (9th Cir. 2014) (allegations of "actual or constructive knowledge of wrongdoing" suffice at the pleading stage in a stockholder derivative action).

Rattner v. Bidzos, 2003 Del. Ch. LEXIS 103 (Del. Ch. Sept. 30, 2003), upon which Defendants also rely, is similarly distinguishable. *Rattner* focused on accounting improprieties involving technical issues arising under generally accepted accounting principles (GAAP) rather than the core business operations which are at issue in this action. *Id.* at *7-8, *16-20. In *Guttman*, unlike here, the complaint had no allegations of the roles the directors played and what information came to their attention in those roles. 823 A. 2d at 503.

II. THE COURT OF CHANCERY ERRED IN DETERMINING THAT THE COMPLAINT FAILED TO PLEAD DEMAND FUTILITY FOR THE *BROPHY* CLAIM

A plaintiff need not plead evidence or facts sufficient to sustain a judicial finding in order to raise a reasonable doubt as to a board's ability to consider a demand impartially. *E.g.*, *In re Ezcorp Inc.*, 2016 Del. Ch. LEXIS 14, at *108-09 (Del. Ch. Jan. 25, 2016) (citing cases). "The reasonable doubt standard is sufficiently flexible and workable to provide the stockholder with the keys to the courthouse in an appropriate case where the claim is not based on mere suspicions or stated solely in conclusory terms." *Beam v. Stewart*, 845 A.2d 1040, 1050 & n.26 (Del. 2004) (internal quotation marks omitted) (citing *Grimes v. Donald*, 673 A.2d 1207, 1217 (Del. 1996)). Here, Plaintiff has properly alleged that at least five of the nine Board members at the time the Complaint was filed were disabled from considering a demand.

A. Plaintiff Properly Alleged Interest as to Pincus and Hoffman

Plaintiff has properly alleged a claim for breach of the duty of loyalty relating to the sale of Zynga stock in the Secondary by defendants Pincus and Hoffman. *See* Point I, *supra*; *see also* OB at 25-26. Therefore, they are interested for purposes of considering a demand. *See, e.g.*, *Silverberg*, 2013 Del. Ch. LEXIS 312, at *53-54.[4]

B. Plaintiff Properly Alleged a Lack of Independence on the Part of Several Other Directors

Delaware courts employ "a flexible, fact-based approach to the determination of directorial independence[,] focus[ing] on whether the directors, for any substantial reason, cannot act with only the best interests of the corporation in mind . . . ." *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 937 (Del. Ch. 2003). This approach is a holistic one which looks at the totality of particularized facts pled as well as all reasonable inference drawn therefrom. *See Del. Cty. Emples. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1020 (Del. 2015).

[4] Since Hoffman sold stock in the Secondary, which is being challenged in this action, he still would be unable to independently consider a demand even assuming no claim had been asserted against him. *See, e.g.*, *Calma v. Templeton*, 114 A.3d 563, 576 (Del. Ch. 2015) (a director receiving a benefit from a questioned transaction lacks independence to consider a demand).

1. Mattrick

Defendants acknowledge that defendant Pincus has voting control of Zynga. ¶9 (A017). Nonetheless, Defendants contend that Plaintiff has not properly alleged the materiality of Mattrick's compensation. AB at 25. That argument cannot be seriously advanced. In his first year at Zynga, Mattrick received compensation valued at more than $57 million. A0319. That is a munificent sum material to anyone. In addition, Defendants' argument ignores that even absent specific facts concerning the amount of Mattrick's compensation, it is reasonable to infer that Mattrick did not serve as CEO of Zynga "as a matter of charity rather than for material compensation." *Grace Bros. v. UniHolding Corp.*, 2000 Del. Ch. LEXIS 101, at *32 & n.25 (Del. Ch. July 12, 2000) (Strine, V.C.) (citing cases).

2. Gordon and Doerr

Gordon and Doerr were not independent for NASDAQ listing purposes (¶117m (A072)), meaning that they had a relationship "which, in the opinion of the Company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director." NASDAQ Marketplace Rule 5605(a)(2) (A332). Defendants contend that those findings may have resulted from the "technical requirements of the listing rules – none of which have bearing on the demand futility inquiry." AB at 21.

The six relationships detailed in the NASDAQ rule are ones that preclude a board finding of independence. A332-33.[5] For purposes of the NASDAQ rule, however, the six relationships are not the sole basis for a board determination of independence *vel non*. *Id.* *See also, Gerber v. Enter. Prods. Holdings, LLC*, 2012 Del. Ch. LEXIS 5, at *33 (Del. Ch. Jan. 6, 2012) (a board's requirement under a securities exchange's independence rules to consider whether a director has a material relationship with the company is distinct from the enumerated disqualifying relationships), *aff'd in part rev'd in part on other grounds*, 67 A.3d 400 (Del. 2013).

Here, it is highly unlikely that ***both*** Gordon and Doerr or members of their families were employed by Zynga during the past three years, accepted more than $120,000 in compensation from Zynga outside their service as Board members, were employed as an executive officer at any entity for which Pincus served as a member of the compensation committee, or were a partner or employee of Zynga's outside auditor. *See* NASDAQ Marketplace Rule 5605(a)(2)(A),(B),(C),(E),(F) (A332-33).

The only rule precluding a finding of independence which could plausibly apply to this action involves payments for property or services. NASDAQ

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[5] The seventh factor only applies to investment companies. *See* NASDAQ Marketplace Rule 5605(a)(2)(G) (A333).

Marketplace Rule 5605(a)(2)(D) (A332). However, Zynga did not disclose any such payments to Kleiner Perkins Caufield & Byers ("KPC&B"), in which Gordon and Doerr are both partners, even though the proxy rules require such disclosure. *See* 17 C.F.R. §229.404 (2016) (requiring disclosure of related party transactions).

It is reasonable to infer on this pleading motion, therefore, that the Board's finding that Gordon and Doerr lacked independence was not based upon any of the NASDAQ rule's seven enumerated preclusive relationships. Instead, the most likely explanation is that the Board determined that there existed a material business relationship between either Zynga or Pincus, on the one hand, and KPC&B or Gordon or Doerr, on the other hand, impairing the independence of both Gordon and Doerr.

Indeed, the strongest argument which Defendants can muster in favor of dismissal is that it is "***just as likely*** that Gordon and Doerr were listed as non-independent due to the many technical requirements of the listing rules . . ." AB at 21 (emphasis added). However, even assuming *arguendo* that Defendants are correct that the competing inferences are in equipoise that should constitute

"reasonable doubt" as to Gordon's and Doerr's independence under Delaware law. *See, e.g.*, *Sanchez*, 124 A.3d at 1020.[6]

In addition, for the reasons discussed above, Plaintiff believes that it is more likely than not that the six preclusive relationships did not impact the Board's finding of lack of independence. Here, Defendants fail to identify any relationship automatically precluding a finding of independence which could have affected the Board's determination that both Gordon and Doerr lacked independence. *Cf. Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 61 (Del. Ch. 2015) (determination of independence under NYSE Rules §303A.02 relating to employees within 3 years); *In re MFW S'holders Litig.*, 67 A.3d 496, 512 n.55 (Del. Ch. 2013) (discussing same listing rule), *aff'd sub nom.*, *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

Finally, as Plaintiff previously argued, Gordon demonstrated his lack of independence by approving the Secondary during a "blackout" period in which insider sales were not supposed to have taken place [redacted] OB at 32. These facts also create a reasonable

[6] Indeed, the U.S. Supreme Court has determined that an innocent explanation being "just as likely" as an inculpatory explanation satisfies the most stringent pleading standards of the federal securities laws, requiring a "strong" inference of scienter. *See Tellabs*, 551 U.S. at 328. Plaintiff respectfully submits that the Delaware law inquiry into the presence of reasonable doubt should not impose a more rigorous standard.

doubt with respect to a lack of independence. *See, e.g., Beam*, 845 A.2d at 1051 ("evidence that in the past the relationship caused the director to act non-independently vis a vis an interested director" also serves as a basis for properly alleging a lack of independence.)

3. Paul

Defendants, in arguing that Paul is independent from Pincus, seek to limit Pincus' current involvement with Paul's current company to that of an "advisory role" (AB at 23) while ***ignoring*** that Pincus is also an investor in Paul's business. OB at 33 (citing ¶117f (A071)). This continuing financial relationship, especially when combined with a more than 20 year relationship with Pincus, raises a reasonable inference that Paul is not independent. *See, e.g.*, *Sanchez*, 124 A.3d at 1022-23. *See also Beam*, 845 A.2d at 1051 (reasonable doubt of a director's independence may arise from a particularly close business affinity). In addition, as with Gordon, Paul approved the Secondary in a blackout period during which insider trading was otherwise not allowed, further calling into question his independence from Pincus.

4. Siminoff

Defendants assert that Siminoff and her husband co-owning a private plane with Pincus evidences nothing more than a mere friendship or business relationship. AB at 19-20. This Court, however, has recognized that a reasonable

doubt of a director's independence exists where there is "a particularly close or intimate personal or business affinity." *Beam*, 845 A.2d at 1051. Co-ownership of a private plane, like co-ownership of a vacation home, requires more than casual friendship. The relationship rather requires active, ongoing cooperation to facilitate use and maintenance of an expensive asset. Siminoff could not impartially consider a demand where any decision that displeased Pincus would impair a relationship involving a property in which she has a significant investment. *See, e.g.*, *MFW*, 67 A.3d at 509 n.37 (a close friendship where the parties, for example, "shared a beach house" would demonstrate a material relationship impairing independence for pleading purposes).

C. Plaintiff Properly Alleged That the Other Director Defendants Would Be Interested In Considering a Demand

The directors serving on Zynga's Board at the time of the Secondary (also referred to herein as the "Director Defendants")[7] are potentially liable for approving the Secondary [redacted]

See OB at 26-29; *see also* Point III, *infra*. That conduct arises from the same

[7] The "Director Defendants" include defendants Pincus, Gordon, Hoffman, Katzenberg, Meresman and Paul, who served as directors of Zynga at the time of the Secondary and at the time Plaintiff filed his complaint. The lack of independence or disinterestedness on the part of Hoffman, Gordon and Paul is also separately addressed above. *See* Point II.B, *supra*.

events, *i.e.*, the Secondary, upon which the *Brophy* liability of Pincus and Hoffman is premised

III. THE COMPLAINT PROPERLY ALLEGES A CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST THE DIRECTOR DEFENDANTS

To facilitate the Insider Trading Defendants' sale of Zynga stock in the Secondary the Director Defendants necessarily had to: (1) [redacted] (¶58 (A039-40)); (2) [redacted] (¶60 (A041)); and (3) approve the disclosures contained in the SEC registration statement pursuant to which the Zynga stock was sold (¶58-59 (A039-40)). Defendants contend that they cannot be held liable for those actions. Specifically, Defendants contend that even though the Director Defendants constitute a majority of the Board, Plaintiff has not properly alleged demand futility because: the decision to allow for the sale of shares in the Secondary had a proper corporate purpose of facilitating an orderly distribution of shares and increasing the public float (AB at 35 (citing Op. at 39-40)); Plaintiff has failed to demonstrate their knowledge of the material undisclosed adverse facts; and the non-selling Director Defendants did not personally benefit from the sales of Zynga Stock. ODAB. at 24-25. Defendants are in error on all points.

A. No Legitimate Business Purpose of the Company Was Advanced Through the Director Defendants' Approval of the Sale of Stock in the Secondary Without Proper Disclosure

Facilitating an orderly distribution and increasing the public float of shares may very well have been legitimate objectives of the Board. Those objectives, however, could have been accomplished by Zynga's sale of stock (which would also have brought financing into the Company), without freeing insiders to sell. Moreover, what is material here is the ***timing*** of the Secondary during a blackout period for trading without disclosing material adverse facts existing at that time. Had Defendants waited until they fully disclosed all relevant material facts, there would have been no wrongdoing involved.

B. Plaintiff Has Properly Alleged the Director Defendants' Constructive Knowledge of the Relevant Material Undisclosed Facts

Defendants ignore that on a pleading motion, such as the one currently before the Court, there is no need to demonstrate actual knowledge. Instead, particularized allegations of *constructive* knowledge suffice even for purposes of Rule 23.1. *See, e.g., Wood, supra.* Here, as demonstrated above, Plaintiff alleged facts sufficient to support a reasonable inference that the Director Defendants knew of the relevant material adverse undisclosed facts. *See* Point I, *supra*.

C. There is no Requirement That a Defendant Receive a Personal Benefit to be Liable for a Breach of the Fiduciary Duty of Loyalty or Good Faith

There is no requirement that a person benefit from a breach of fiduciary duty to be personally liable. *In re Emerging Communs., Inc. S'holders Litig.*, 2004 Del. Ch. LEXIS 70, at *140-44 (Del. Ch. May 3, 2004), which Plaintiff previously cited (*see* OB at 21), is on point in demonstrating that a director who did not personally benefit from a transaction can still be held liable for knowingly enabling the wrongful acts of another fiduciary. *See also In re Dole Food Co., Inc. Shareholder Litig.*, 2015 Del. Ch. LEXIS 223, at *132-34 (Del. Ch. Aug. 27, 2015).

Defendants attempt to distinguish *Emerging* as a case in which there was actual evidence of the defendants' knowledge of the wrongdoing. However, that distinction is unavailing because the decision in *Emerging* came after merits discovery and trial. Here, in contrast, a pleading motion being made prior to any pre-trial discovery is at issue and Plaintiff has adequately alleged that the Director Defendants knew of the relevant facts relating to [redacted] *See* OB at 21.

The Director Defendants also assert that it is not reasonable to infer that they knew of the undisclosed material adverse facts given they did not sell any Zynga stock in the Secondary. ODAB at 25. In making this argument, however, Defendants mistakenly assume that every breach of the fiduciary duty of loyalty

must involve a personal profit motive. That is clearly not the case, as "[t]he reason for the disloyalty (the faithlessness) is irrelevant, the underlying motive (be it venal, familial, collegial, or nihilistic) for conscious action not in the corporation's best interest does not make it faithful, as opposed to faithless." *Guttman*, 823 A.2d at 506 n.34.

D. Plaintiff's Claim is Not Precluded by This Court's Decision in the *Cornerstone* Case

In re Cornerstone Therapeutics Inc., S'holder Litig., 115 A.3d 1173 (Del. 2015) does not, as Defendants contend, foreclose liability. Instead, *Cornerstone* only holds that a shareholder must allege non-exculpated claims against a director. *Id.* at 1179. Here, as demonstrated above, Plaintiff has alleged precisely such a non-exculpated claim based upon the Director Defendants' approval of the Insider Trading Defendants' sale of Zynga stock at the time the Director Defendants knew that material adverse information [redacted] had not been properly disclosed. *See* Point III.B, *supra*. *See also Cornerstone*, 115 A.3d at 1186-87.

In addition, at the time this action was filed, it was sufficient under then prevailing law that the individual at issue was a member of a board of directors, the majority of which was charged with a breach of the fiduciary duty of loyalty. *See, e.g.*, *In re Cornerstone Therapeutics Inc. S'holder Litig.*, 2014 Del. Ch. LEXIS

170, at *41-42 (Del. Ch. Sept. 10, 2014), *rev'd*, 115 A.3d 1173 (Del. 2015) (the plaintiffs alleged that "the Director Defendants negotiated or facilitated the unfair transaction. Such a pleading is sufficient, under controlling precedent, to withstand a motion to dismiss on behalf of the Director Defendants."). Accordingly, at the time Plaintiff instituted this action, the Director Defendants faced a substantial risk of personal liability arising from their approval of the Secondary. OB at 27-28 (citing cases). Indeed, the Chancery Court in a related litigation employed that very test in sustaining claims brought against Zynga's directors. *See Lee v. Pincus*, 2014 Del. Ch. LEXIS 229, *41-42 (Del. Ch. Nov. 14, 2014).

Defendants assert that no such potential for liability exists because *Cornerstone* established what the law had always been. AB at 32-33. However, retroactive application of a new Supreme Court decision should remain analytically distinct from the facts which a director would have considered at the time he or she received a demand. A director can only make a decision based upon his or her perception of the law as it exists at the time a demand is made. Here, the perception prior to *Cornerstone* was that directors could be subject to suit without respect to their individual conduct in breaching their fiduciary duties. *Cornerstone*, 115 A.3d at 1179 ("we acknowledge that the body of law relevant to these disputes presents a debate between two competing but colorable views of the law.") Indeed, the Director Defendants' perception of the law at the time is

betrayed by their failure to move for dismissal on that basis. *See generally Lee*, 2014 Del. Ch. LEXIS 229.

There is also no merit to Defendants' contention that this Court's holding in *Rales v. Blasband*, 634 A.2d 927 (Del. 1993) limits an analysis of demand futility to the facts, rather than the law, at the time of the complaint's filing. Instead, *Rales* and other decisions by this Court traditionally look holistically at the facts and law existing at the time an action is filed. *See, e.g., Stone v. Ritter*, 911 A.2d 362, 367-70 (Del. 2006) (analyzing the state of the law in determining whether the directors faced a substantial likelihood of liability).

CONCLUSION

For the reasons stated above and in Plaintiff's Opening Brief, Plaintiff respectfully submits, the Court of Chancery's Opinion should be REVERSED.

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CERTIFICATE OF SERVICE

I, Nicholas J. Rohrer, hereby certify that on July 18, 2016, I caused to be served a true and correct copy of the foregoing document upon the following counsel of record in the manner indicated below:

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