

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WENDY LEE, individually and on behalf)
of all others similarly situated,)

Plaintiff,)

v.)

C.A. No. 8458-CB

MARK PINCUS, JOHN SCHAPPERT,)
WILLIAM GORDON, REID HOFFMAN,)
JEFFREY KATZENBERG, STANLEY J.)
MERESMAN, SUNIL PAUL, OWEN)
VAN NATTA, MORGAN STANLEY &)
CO. LLC, GOLDMAN, SACHS & CO.,)
and ZYNGA INC.,)

Defendants.)

ORDER GRANTING PLAINTIFF’S MOTION FOR CLASS CERTIFICATION

WHEREAS, on July 13, 2015, plaintiff filed a motion for an order certifying this action as a class action under Court of Chancery Rule 23(b)(1) or 23(b)(3);

WHEREAS, plaintiff requested in her motion that the class consist of: all stockholders of Zynga, Inc. (“Zynga”) who were subject to certain lockup restrictions on their shares of Zynga (the “Lockups”), and who were not permitted to sell shares in an April 2012 secondary offering (the “Secondary Offering”), including stockholders for whom the Lockups were waived, but who were barred from selling in or at the time of the Secondary Offering by Zynga’s trading blackout policy (the “Blackout Policy”), and excluding defendants and any person, firm, trust, corporation, or other entity related to or affiliated with any defendant (the “Class”);

WHEREAS, plaintiff requested in her motion to be designated as class representative for the requested class;

WHEREAS, on November 20, 2015, after the completion of briefing, this Court heard argument on plaintiff's motion for class certification;

IT IS HEREBY ORDERED, this 30th day of December, 2015, that:

1. Plaintiff's motion for certification of a class under Court of Chancery Rule 23(b)(3) is GRANTED.

2. Plaintiff Wendy Lee is certified as class representative.

3. The law firms of Prickett, Jones & Elliott, P.A. and Wohl & Fruchter LLP are certified as class counsel.

4. Certification of a class under Court of Chancery Rule 23 requires that the purported class meet all four criteria of Court of Chancery Rule 23(a) and fit into at least one of the categories designated by Court of Chancery Rule 23(b). Defendants do not dispute that the requirements of Court of Chancery Rule 23(a)(1), (2) and (4) have been satisfied.

Court of Chancery Rule 23(a)

5. A class must be "so numerous that joinder of all members is impracticable." Ct. Ch. R. 23(a)(1). "A showing of strong litigational inconvenience in the prosecution of claims separately or jointly by the proposed class members is

sufficient” to meet this test of impracticability. *Leon N. Weiner & Assocs., Inc. v. Krapf*, 584 A.2d 1220, 1225 (Del. 1991). A class of more than forty members has been held sufficient to meet the numerosity requirement of Rule 23(a)(1). *See id.* Plaintiff asserts that Zynga had 2,846 full-time employees as of December 31, 2011, and that she believes the eligible class members number in the hundreds. Plaintiff thus meets the numerosity requirement of Rule 23(a)(1).

6. Court of Chancery Rule 23(a)(2) requires there to be “questions of law or fact common to the class.” Plaintiff asserts that the individual defendants breached their fiduciary duties by selectively granting certain stockholders the right to sell their shares of Zynga in the Secondary Offering, while preventing the stockholders in the proposed class from doing so. Because plaintiff’s legal question is common to all class members, plaintiff meets the requirements of Rule 23(a)(2).

7. Court of Chancery Rule 23(a)(3) requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” “The test of typicality is that the legal and factual position of the class representative must not be markedly different from that of the members of the class.” *Weiner & Assocs.*, 584 A.2d at 1225 (Del. 1991) (internal quotation marks omitted). To meet the typicality requirement, the class representative’s claim should stem from the same course of conduct and same legal theories as the other class members’ claims. *See id.* at 1226.

8. Plaintiff's claim and the other class members' claims all rely on the same legal theory, breach of fiduciary duty, and all involve the same allegedly discriminatory decision to exclude some Zynga stockholders but not others from participation in the Secondary Offering. Although some class members, including plaintiff, allegedly were excluded because of the Lockup, and others allegedly were excluded because of the Blackout Period, the claims all arise from the same general course of conduct. Should the differences between these two groups later pose an issue, future division of the class may be possible. *See Emerald Partners*, 1991 WL 244230, at *4 (citing *Wright & Miller, Federal Practice & Procedure Civil 2d* § 1790 (1986)).

9. Although it is likely that class members have individualized circumstances surrounding their Zynga investments that differ from plaintiff's specific circumstances, plaintiff has presented damages theories that do not require individual analysis and that would be typical of the class as a whole, including damages based on unjust enrichment and damages following a framework similar to that used in *Duncan v. TheraTx, Inc.*, 775 A.2d 1019, 1023-24 (Del. 2001). Because these damages theories do not depend on the individual investment decisions of class members, the claims are similar in material respects and meet the typicality requirement of Rule 23(a)(3).

10. Court of Chancery Rule 23(a)(4) requires the class representative to "fairly and adequately protect the interests of the class." This requirement calls for the class representative to retain competent, experienced counsel, to have interests that are not antagonistic to the interests of the other class members, and to possess a basic

understanding of the case. See *In re TD Banknorth S'holders Litig.*, 2008 WL 2897102, at *2 (Del. Ch. July 29, 2008). Because plaintiff has retained qualified counsel, her interests are aligned with those of the class, and there is no indication that she lacks an understanding of the case, she has met the requirements of Rule 23(a)(4).

11. For the reasons explained in paragraphs 5-10 above, plaintiff has satisfied all of the requirements of Rule 23(a).

Court of Chancery Rule 23(b)

12. A class may be certified if it fits into one of the three categories specified in Court of Chancery Rule 23(b). Plaintiff requested certification under either Rule 23(b)(1) or Rule 23(b)(3). Because the Court certifies this class under Rule 23(b)(3), this order does not address whether the class could have been certified under Rule 23(b)(1).

13. Court of Chancery Rule 23(b)(3) allows certification if the Court finds that the questions of law or fact common to the class members predominate over questions affecting individual members, and finds that a class action is a superior method of adjudication. A class certified under Rule 23(b)(3) must provide members with notice and an opportunity to opt out. Ct. Ch. R. 23(c)(2).

14. Plaintiff's two theories of damages turn on questions of law and fact common to the class members that predominate over questions affecting individual class members. The first theory uses the "highest intermediate value" method for calculating damages, as explained in *Duncan v. TheraTx* and other cases. Put simply, this method estimates damages based on the change in stock price between the time a defendant

restricted a plaintiff's sale of shares and the time the restriction is lifted. *Duncan*, 775 A.2d at 1023-28 (Del. 2001). The methodology does not depend on the plaintiff's actual investment decisions or intentions. In *Duncan*, the methodology was used for an individual plaintiff rather than a class, but the lack of individual circumstances in the calculation makes it potentially suitable for a class, because common questions predominate over individualized ones. Although the necessary calculations in this case may be more complicated due to the additional stock restrictions built into the Secondary Offering, plaintiff has made a *prima facie* showing that the calculations would be unlikely to involve any individualized data.

15. The second theory seeks to recover restitution damages to prevent unjust enrichment. Although unjust enrichment claims frequently refer to an impoverishment of a plaintiff, restitution may be awarded based solely on the benefit conferred upon a defendant, even in the absence of an impoverishment. *See Metcap Sec. LLC v. Pearl Senior Care, Inc.*, 2009 WL 513756, at *5 n.26 (Del. Ch. Feb. 27, 2009) *aff'd*, 977 A.2d 899 (Del. 2009). Therefore, a claim for damages to prevent defendants' unjust enrichment would not necessarily require a showing of individual harm to each class member. Consequently, common questions of law and fact would predominate under an unjust enrichment damages theory.

16. *Wit Capital*, a case applying New York substantive contract law in a Delaware law class certification decision, is distinguishable. *See Wit Capital Grp., Inc. v. Benning*, 897 A.2d 172 (Del. 2006). In *Wit Capital*, the Delaware Supreme Court

reversed the certification of a class under Rule 23(b)(3) because, under New York law, an injury in fact must be established, and the “parties also agree[d] that the failure to show that some fact of injury exists can defeat class certification while issues going only to the measure of damages cannot.” *Id.* at 180. In that case, plaintiff had argued that all purported class members had suffered a common fact of injury, the loss of an opportunity to sell shares after an initial public offering, due to defendant’s failure to allocate shares in the offering to them. The court reasoned that the plaintiffs were unable to demonstrate injury in fact, because had the class members been allocated shares in the offering, some of them would have profited and others would have lost money, depending on when they sold the shares. *Id.* at 184-86. The court concluded that because plaintiffs could not establish a fact of injury common to all class members, the class did not satisfy the predominance requirement of Rule 23(b)(3). *Id.*

17. Putting aside that *Wit Capital* relies on principles of New York contract law not at issue here, the case is inapplicable because of the damages theories plaintiff has proposed in this case. Because *Duncan* defines damages as the change in the market price of a stock without regard for when or whether a plaintiff would have sold her shares, the existence of damages under that theory could be established without any analysis of class members’ individual circumstances. Similarly, under plaintiff’s restitution damages theory, class members would not necessarily need to make any individualized showing of impoverishment, but could instead be awarded damages based on defendants’ unjust enrichment.

18. Although plaintiff's damages theories will need to be tested on their merits, for purposes of class certification, her damages claims ostensibly do not rely on individual characteristics of the class members beyond their share ownership and whether they were restricted by the Lockup or by the Blackout Period. Legal and factual questions common to the class predominate. Thus, a class action is a superior method of adjudicating these claims, both because of their commonalities and because class members may not have a practical opportunity to litigate their claims outside of a class action structure. For these reasons, the Class is certified under Court of Chancery Rule 23(b)(3).



Chancellor