IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BRIAN MACCORMACK and MICHAEL TRAUGUTT, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	C.A. No. 13-940-GMS
v.	)	
GROUPON, INC.	)	
Defendant.	)	

GROUPON, INC.'S OPPOSITION TO
PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND EXPENSES

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CASES

Groupon, Inc. ("Groupon" or the "Company") respectfully submits this memorandum in opposition to plaintiffs' motion for attorneys' fees and reimbursement of expenses.

NATURE AND STAGE OF PROCEEDINGS

This case began on May 24, 2013, when plaintiffs filed a complaint and preliminary injunction motion seeking to enjoin a vote by Groupon's shareholders. According to plaintiffs, one of the four proposals Groupon had presented to its shareholders – Proposal No. 4 – violated Section 14 of the Securities Exchange Act of 1934 and Rules 14a-4(a)(3) and 14a-4(b)(1) promulgated thereunder. Less than ten days later, plaintiffs abandoned their preliminary injunction motion in exchange for Groupon's agreement not to certify the vote on Proposal No. 4 until this action was resolved. The vote proceeded as scheduled and Proposal No. 4 passed with 95% of the shares voted voting in favor of it. Shortly thereafter, the parties settled this lawsuit on terms set forth below. This motion concerns plaintiffs' request for attorneys' fees and expenses, which Groupon did not agree to pay in the settlement agreement. For the reasons set forth below, plaintiffs' request should be denied.

SUMMARY OF ARGUMENT

1. Plaintiffs are not entitled to an award of attorneys' fees and expenses because the instant litigation did not confer a substantial benefit on Groupon or its shareholders. To the contrary, the litigation caused harm to the Company and its shareholders.

2. Plaintiffs' requested fee based on the alleged benefit to Groupon flowing from the cancellation of 200,000 restricted stock units ("RSUs") granted to Kal Raman should be rejected for several reasons. Most importantly, Groupon did not receive a $2.33 million benefit from the cancellation of the RSUs, as plaintiffs' claim, and no "common fund" was created that would

justify application of the percentage-of-recovery method for calculating fees. If anything, the lodestar method applies here; however, plaintiffs have submitted no documentation from which a lodestar can be calculated, providing further basis to deny fees under the case law cited below.

3. Even if the percentage-of-recovery method did apply, plaintiffs' assertion that rescission of the RSUs benefited Groupon to the tune of $2.33 million is grossly exaggerated, as is plaintiffs' claim that they should be entitled to 25% of any such benefit. Groupon never received any money – let alone $2.33 million – from the recission of the RSUs, and the Company is unlikely to avoid the compensation expense it was required to take for the grant by the applicable accounting rules. Plaintiffs' request for 25% of the alleged benefit is further inappropriate because it is inconsistent with case law providing for a single-digit percentage where the so-called benefit is minimal.

4. Plaintiffs' request for $250,000 as an award for the "future cost savings and corporate benefits created by the corporate governance reforms contained in the Settlement" is unreasonable. Plaintiffs provide no support for this figure, and review of the corporate governance reforms that Groupon agreed to in connection with the settlement demonstrates that these "benefits" are minimal at best.

INTRODUCTION

Plaintiffs seek $835,987.19 in attorneys' fees and expenses arising under the substantial benefit exception to the American Rule. Plaintiffs' figure is comprised principally of two components: (1) $584,500, which is 25% of the alleged $2.338 million benefit to Groupon from the cancellation of 200,000 RSUs issued to Groupon's Chief Operating Officer, Kal Raman, and (2) $250,000 for the so-called "enhanced corporate governance procedures" that Groupon agreed

to implement pursuant to the parties' settlement agreement. For the reasons set forth below, plaintiffs' request should be denied.

First, plaintiffs' claim that they are entitled to $584,500 in attorneys' fees because Groupon agreed to rescind the RSUs to Mr. Raman reflects a misunderstanding of the relevant law and a misapplication of the relevant facts. According to plaintiffs, the instant case is a "common fund case" because Groupon allegedly will receive a direct financial benefit of over $2.33 million from the rescinded RSUs, thereby making the percentage-of-recovery approach to calculating attorneys' fees applicable. Plaintiffs are wrong. In fact, cancellation of Mr. Raman's RSUs did not result in the creation of a "common fund" from which to award attorneys' fees, and did not result in any financial benefit to the Company. Plaintiffs' own authority demonstrates as much, and further shows that the appropriate method for calculating attorneys' fees here is the lodestar method, which calculates a fee based on (1) the number of hours spent by counsel, (2) counsel's reasonable hourly rate, (3) the contingent nature of success, and (4) the quality of the attorneys' work. Despite their obligation to prove their lodestar, plaintiffs failed to submit *any* documentation from which the lodestar can be calculated (presumably because such documentation would demonstrate that they did very little work during this case's short lifespan). Plaintiffs' failure of proof justifies denying the fee request altogether. In any event, as demonstrated below, even if the Court were to apply the percentage-of-recovery method here, plaintiffs' suggestion that rescission of the RSUs benefited Groupon in the amount of $2.33 million is incorrect, as is plaintiffs' claim that they should be entitled to 25% of any such benefit.

Second, plaintiffs' request for $250,000 as an award for the "future cost savings and corporate benefits created by the corporate governance reforms contained in the Settlement" is wholly unsubstantiated. Plaintiffs seemingly conjure this figure out of thin air. Review of the

corporate governance reforms to which Groupon agreed demonstrates that these "benefits" are minimal at best, and any fee award should reflect this fact.

Under these circumstances, plaintiffs should not be entitled to any attorneys' fees. Should the Court be inclined to award some fees, however, Groupon submits that the fee award should be extremely minimal in light of the minimal effort expended by plaintiffs' counsel and the minimal corporate benefits achieved.

STATEMENT OF FACTS

On or about April 29, 2013, Groupon filed a Schedule 14A Definitive Proxy Statement (the "Proxy") which included four proposals for consideration by shareholders. ¶ 11.[1] This case concerned only Proposal No. 4, which proposed to amend Groupon's 2011 Incentive Plan (the "Plan") by increasing the number of shares authorized for issuance pursuant to the Plan from 50 million shares to 65 million shares, and increasing the maximum number of shares Groupon is allowed to grant to one individual in a calendar year pursuant to the Plan from 1,000,000 shares to 7.5 million shares. ¶ 12. On May 16, 2013, Groupon filed Amendment No. 1 to the Proxy (the "Proxy Amendment"), which supplemented the Proxy with information pertaining to the Company's grant of 1,200,000 RSUs to Mr. Raman. Groupon disclosed that this grant exceeded the Plan's 1,000,000 share limit. ¶ 16. The Proxy Amendment supplemented the description of Proposal No. 4 in the Proxy, noting that, if approved, the effective date of the proposed

[1] As used herein, references to "¶ _" are to plaintiffs' Class Action Complaint filed May 24, 2013. D.I. 4. References to "Mot." are to plaintiffs' Memorandum of Law in Support of Motion for Attorneys' Fees and Reimbursement of Expenses filed September 27, 2013. D.I. 21. References to "Horwood Decl." are to the Declaration of Daniel L. Horwood in Support of Groupon, Inc.'s Opposition to Plaintiffs' Motion for Attorneys' Fees and Expenses, filed concurrently herewith.

amendments to the Plan would be January 1, 2013, such that the grant of 200,000 excess RSUs to Mr. Raman would be permissible under the Plan as amended. ¶¶ 16-17.

On May 24, 2013, plaintiffs filed this action and their motion for preliminary injunction. The complaint and preliminary injunction motion alleged that Proposal No. 4 violated Section 14 of the Securities Exchange Act of 1934, specifically the "unbundling rules" set forth in Rules 14a-4(a)(3) and 14a-4(b)(1) promulgated thereunder by the Securities and Exchange Commission ("SEC"). ¶ 1; D.I. 1, 2. Plaintiffs sought to enjoin Groupon from (1) certifying or accepting votes cast in favor of Proposal No. 4 in the Proxy, (2) amending the Plan based on votes in favor of Proposal No. 4, and (3) violating SEC Rules 14a-4(a)(3) and 14a-4(b)(1) of the Exchange Act. ¶ 42; D.I. 2.

Less than ten days later, the parties reached an agreement pursuant to which plaintiffs withdrew their motion for preliminary injunction, allowing the shareholder vote to proceed as scheduled, and Groupon agreed not to certify the vote or otherwise implement Proposal No. 4 pending resolution of this lawsuit. This agreement was reported to the Court during a June 3, 2013, telephone conference and memorialized in a Stipulation Regarding Plaintiffs' Preliminary Injunction Motion filed the next day. D.I. 10. The parties also agreed to a briefing schedule for cross-motions for summary judgment regarding the issue presented by plaintiffs' complaint. *See id*. Because of the settlement, the motions were never filed.

On June 13, 2013, the proxy vote proceeded as scheduled. Proposal No. 4 received overwhelming support by Groupon shareholders, with over 95% of the total participating shares (over 800 million shares) voting to approve Proposal No. 4. Horwood Decl. ¶ 4, Ex. 2.[2]

On June 21, 2013, Groupon answered the Complaint and denied plaintiffs' allegations. D.I. 13. Shortly thereafter, and without any further briefing, discovery, or other substantive work in connection with the case, the parties began discussing settlement. In fact, almost every minute plaintiffs spent on this case after it was filed in May related to settlement negotiations. On July 10, 2013, the parties filed a stipulation extending the time to file their cross motions for summary judgment on the basis that they were "currently discussing resolution of the action." D.I. 14 at 1. Plaintiffs filed a stipulation further extending the time to file cross motions for summary judgment on July 24, 2013, noting that they had "made substantial progress on the substantive terms of a settlement." D.I. 16 at 2.

On August 15, 2013, the parties entered into a settlement agreement. *See* D.I. 17.[3] Pursuant to the parties' Settlement Agreement and Mutual Release (the "Settlement Agreement"), plaintiffs achieved almost none of the relief sought in the Complaint and the withdrawn preliminary injunction motion. The shareholder vote was not enjoined; it went forward as scheduled and Proposal No. 4 was approved by 95% of the voted shares. Horwood Decl. ¶ 4, Ex. 2. Plaintiffs agreed to voluntarily dismiss all claims against Groupon with

[2] This fact, coupled with the fact that no other lawsuits were filed challenging the Proxy's alleged violation of the SEC's "unbundling rules" (even though shareholder lawsuits like this one frequently attract copycat complaints brought by other shareholders) strongly suggests that Groupon's shareholders disagree with plaintiffs' assessment of the Proxy.

[3] Because of the need to document the terms in a formal written agreement and obtain the necessary signatures, the effective date of the agreement is September 12, 2013. *See* Mot. Ex. B.

prejudice; agreed that Groupon could certify the shareholder vote on Proposal No. 4, thereby allowing the implementation of Proposal No. 4's amendments increasing the Plan's total share limit and per-participant annual limit, exactly as Groupon's shareholders voted to do. Mot. Ex. B § 1(b). Groupon did agree to rescind the 200,000 RSUs granted to Mr. Raman in excess of the Plan's limit, but with the caveat that the Company may reissue these RSUs to Mr. Raman, should it choose to do so, after December 31, 2013. *Id.* § 1(a).[4] Thus, at most, with respect to the proxy vote they originally sought to enjoin, plaintiffs' lawsuit caused only a delay in the equity award to Mr. Raman, should the Company decide to re-award the RSUs in 2014 as it told shareholders – before this lawsuit was filed – it was "likely" to do if Proposal No. 4 was not approved. Horwood Decl. Ex. 1.

Groupon also agreed to modest corporate governance changes. In particular, Groupon agreed to (1) comply with the law, charters and other governing documents, and any applicable Groupon compensation plan; (2) engage a third party to review the process by which Groupon grants equity awards and to develop a checklist of key provisions to be reviewed prior to the issuance of equity awards; and (3) to retain adequate documentation of all awards made under the Plan and appoint an individual to monitor compliance. Mot. Ex. B § 1(d).

Groupon did not agree to pay plaintiffs' attorneys' fees. Instead, the Settlement Agreement provided that plaintiffs would apply to the Court for an award of fees and costs on the theory that the lawsuit and the Settlement Agreement conferred a substantial benefit upon

[4] In fact, the Proxy Amendment expressly noted that if Proposal No. 4 was not approved by the shareholders, the grant of 200,000 shares to Mr. Raman in excess of the Plan's annual per person limit would be deemed void, and "will instead likely be granted to Mr. Raman in 2014." Horwood Decl. Ex. 1.

Groupon and its shareholders. The Settlement Agreement further provided that Groupon disputed plaintiffs' claim for fees, and would oppose plaintiffs' motion.

ARGUMENT

I. PLAINTIFFS ARE NOT ENTITLED TO AN AWARD OF ATTORNEYS' FEES UNDER THE SUBSTANTIAL BENEFIT EXCEPTION

Under the "American Rule," litigants bear their own legal fees and expenses in the absence of statutory authority or contractual undertaking to the contrary. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970). Federal courts recognize an exception to the American Rule, known as the "substantial benefit" exception, under which attorneys' fees and expenses may be awarded to a plaintiff whose efforts resulted in conferring a "substantial" benefit to the company or its shareholders. *Id.* at 393-94. Plaintiffs' rely exclusively on this exception. Mot. at 7-8. To justify a fee award under the exception, the "'benefit must be something more than technical in its consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest.'" *Mills*, 396 U.S. at 396 (citation omitted).

Plaintiffs' assertion that the "*Sugarland* factors" provide the appropriate analysis for assessing attorneys' fees (Mot. at 11) is wrong. *Sugarland* applies only in Delaware state court; therefore, the Delaware Chancery Court opinions that plaintiffs cite in their Motion are not relevant to the analysis required here. Federal courts typically use one of two methods for assessing attorneys' fees in substantial benefit cases: (1) the percentage-of-recovery method, which calculates the fee award based upon a reasonable percentage of the benefit obtained; or (2) the lodestar method, which calculates the fee award based on the number of hours spent by counsel, counsel's reasonable hourly rate, the contingent nature of success, and the quality of the

attorneys' work. *See, e.g.*, *Segen v. OptionsXpress Holdings, Inc.*, 631 F. Supp. 2d 465, 470 (D. Del. 2009). Where the benefit conferred is minimal in nature, courts award (at most) only minimal fees; where no benefit is conferred, courts award no fees. *See, e.g.*, *Zucker v. Westinghouse Electric Corp.*, 265 F.3d 171 (3d Cir. 2001) (no fees awarded; although corporation received $250,000 settlement as a result of derivative suit, Court held there was no substantial benefit to the corporation to justify attorneys' fees because suit cost over $1.4 million to defend); *Mostaed v. Crawford*, Nos. 3:11-cv-00079-JAG, 3:11-cv-00082-JAG, 2012 WL 3947978, at *13 (E.D. Va. Sept. 10, 2012) (no fees awarded where court determined that counsel conferred no benefit on the corporation); *Seinfeld v. Robinson*, 246 A.D.2d 291, 297 (N.Y. App. Div. 1998) (noting that "the existence of a significant number of cases where courts have termed the benefits of the derivative litigation before them to be 'scant,' 'slight,' 'modest,' or even 'minimal,' and have . . . granted attorneys' fees, albeit fees largely reduced from the sums demanded.") (citations omitted).

A. Plaintiffs' Fee Request Based Upon the Rescission of Mr. Raman's RSUs Should Be Rejected

1. Plaintiffs' Claim That the Cancellation of Mr. Raman's RSUs Created a "Common Fund" From Which Counsel Is Entitled to a Percentage Is Incorrect; the Lodestar Method Is Appropriate Here

Plaintiffs claim that the cancellation of Mr. Raman's RSUs created a "common fund" of approximately $2.33 million, from which they are entitled to 25% in attorneys fees. *See* Mot. at 8, 12-13.[5] Plaintiffs are wrong. In fact, this is not a "common fund" case, as plaintiffs' own authority demonstrates.

[5] Plaintiffs' flawed calculation of a $2.33 million benefit is discussed below.

The vast majority of cases cited in plaintiffs' Motion (all but three) involve "traditional" common fund cases wherein, pursuant to a class action settlement, the corporation pays a large sum of money into a "common fund" for the benefit of allegedly harmed class members. *See* Mot. at 13 (citing *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 172 (E.D. Pa. 2000) (plaintiffs obtained $111 million settlement fund for the benefit of shareholders allegedly harmed by securities fraud)).[6] The three "non-traditional" common fund cases plaintiffs cite, derivative cases wherein the benefit obtained reverted back to the corporation, also concerned settlements involving substantial *cash* payments made to the corporation *by third parties*. *See* Mot. at 12-13 (citing *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1253 (Del. 2012) (corporation obtained damages amounting to $2.03 billion from judgment rendered in derivative action); *In re Cendant Corp.*, 232 F. Supp. 2d 327, 332 (D.N.J. 2002) (derivative settlement resulted in payment of $54 million to corporation from former directors and offers)); Mot. at 9 (citing *Ryan v. Gifford*, No. 2213-CC, 2009 Del. Ch. LEXIS 1, at *38, *42 (Del. Ch. Jan. 2, 2009) (derivative settlement resulted in payment of $28 million to corporation from individual defendants, and their insurance carriers)).

[6] *See also* Mot. at 13 (citing *In re Aetna Inc. Sec. Litig.*, No. CIV. A. MDL 1219, 2001 WL 20928 (E.D. Pa. Jan. 4, 2001) ($81 million dollar settlement fund for benefit of allegedly harmed shareholders); *In re Ravisent Techs., Inc. Sec. Litig.*, No. Civ.A.00-CV-1014, 2005 WL 906361 (E.D. Pa. Apr. 18, 2005) ($7 million dollar settlement fund for the benefit of 961 class members); *In re ATI Techs., Inc. Sec. Litig.*, No. CIV.A. 01-2541, 2003 WL 1962400 (E.D. Pa. Apr. 28, 2003) ($8 million settlement fund for benefit of over 10,000 class members); *In re EquiMed, Inc. Sec. Litig.*, No. 98-CV-5374 (NS), 2003 WL 735099 (E.D. Pa. Mar. 3, 2003) ($1.8 million settlement obtained for benefit of class); *In re Cell Pathways, Inc., Sec. Litig. II*, No. 01-CV-1189, 2002 WL 31528573 (E.D. Pa. Sept. 23, 2002) (plaintiffs obtained $2 million settlement fund for approximately 36,000 class members); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136 (E.D. Pa. 2000) (plaintiffs obtained $7.3 million settlement fund on behalf of over 5,200 allegedly defrauded students); *In re Auto. Refinishing Paint Antitrust Litig.*, No. 1426, 2008 WL 63269 (E.D. Pa. Jan. 3, 2008) ($39 million settlement fund awarded to class of 2,000 members)).

Unlike these "common fund" cases cited by plaintiffs, here there is no pool of money being distributed to stockholders, or reverting back to the corporation, from which plaintiffs' counsel can claim entitlement to a percentage. Indeed, there is no pool of money at all. Plaintiffs did not seek, and neither Groupon nor anyone else agreed to pay, cash to resolve this action. Groupon agreed to rescind 200,000 of the RSUs granted to Mr. Raman, but the rescission of stock awards does not create a "fund." Further, far from creating a "common fund," plaintiffs' lawsuit achieved no more than a delay in the RSU award to Mr. Raman, should the Company decide to re-award the grant in 2014.[7] Under these circumstances, there is simply no "common fund" from which to award plaintiffs' counsel a percentage.

In fact, plaintiffs' own case law demonstrates that where the settlement terms consist principally of the cancellation or rescission of stock options, as opposed to lump sum payments to the corporation, the lodestar method applies. *See* Mot. at 9 (citing *In re UnitedHealth Grp. Inc. S'holder Derivative Litig.*, 631 F. Supp. 2d 1151, 1158 (D. Minn. 2009) (applying lodestar method to calculate fee based on (1) the number of hours spend by counsel, (2) counsel's reasonable hourly rate, (3) the contingent nature of success, and (4) the quality of the attorneys' work)). *Ryan,* cited by plaintiffs (Mot. at 9), is also instructive. There, the Court awarded plaintiffs' counsel one-third of the cash (i.e., "common fund") recovered for the corporation, while referring to the stock option cancellation achieved in the settlement as a "non-monetary recovery." *Ryan,* 2009 Del. Ch. LEXIS 1, at *42. There was no cash component to the

[7] As set forth above, Groupon announced in the Amended Proxy that it was "likely" to issued the grant to Mr. Raman in 2014 if Proposal No. 4 was not approved. Horwood Decl. Ex. 1.

settlement here.[8] Plaintiffs know that the lodestar method is appropriate here – their own case law says so – but nonetheless they made no effort to demonstrate that they are entitled to a recovery under that method.

2. Plaintiffs Have Failed to Submit Documentation From Which a Fee Amount Under the Lodestar Method Could Be Issued

Pursuant to the lodestar method, attorneys' fees are calculated "by multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of the attorneys. The [resulting] multiplier is a device that attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305-06 (3d Cir. 2005). "[T]he fee applicant bears the burden of establishing entitlement to an award and *documenting the appropriate hours expended and hourly rates.*" *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (emphasis added).

Here, plaintiffs have submitted no documentation detailing their counsels' "appropriate hours expended and hourly rates" or any other information from which the lodestar can be calculated. Instead, plaintiffs downplay the importance of attorneys' hours in the calculation of fees, claiming that the effort of counsel is of "lesser" importance here. *See* Mot. at 14. This is not surprising given the result in this case, in which counsel undoubtedly spent very little time

[8] The two other cases cited by plaintiffs here are irrelevant to the issue at hand. *See* Mot. at 9. In *Moses v. Pickens*, No. 6242, 1982 Del. Ch. LEXIS 486 (Del. Ch. Nov. 10, 1982), it appears that the attorneys' fees were negotiated and agreed-upon as part of the settlement, so there was no discussion of the appropriate method of calculation. *Id.* at *2. In *Sanders v. Wang*, No. CIV.A. 16640-NC, 2001 Del. Ch. LEXIS 82, at *9-10 (Del. Ch. May 24, 2001), the court denied attorneys' fees to counsel who merely copied the complaint from previously filed derivative suit, and brought claim in another jurisdiction.

and the case settled quickly (for little to no benefit), without any discovery or any substantive briefing other than the preliminary injunction motion that they withdrew.[9]

Plaintiffs' unjustified reliance on the percentage-of-recovery method, rather than the correct lodestar method, does not justify their failure to provide evidence documenting the time expended in the matter. This is because "[e]ven where calculating attorneys' fees as a percentage of the recovery, the Third Circuit recommends that district courts employ an abbreviated version of the lodestar method 'to cross-check the reasonableness' of the court's proposed fee." *See, e.g.*, *Segen,* 631 F. Supp. 2d at 470 (citing *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006)).

In the end, plaintiffs' failure to provide evidence regarding the time expended, as *Hensley* requires, provides further basis for denying plaintiffs' request for fees altogether. *Hensley*, 461 U.S. at 437 (fee applicant "bears the burden of . . . documenting the appropriate hours expended and hourly rates"); *see also In re Cent. Ice Cream Co.*, 836 F.2d 1068, 1074 (7th Cir. 1987) (denying attorneys' fees based on the inadequacy of documentation presented to the court); *Pelt v. U.S. Bank Trust Nat'l Ass'n,* 259 F. Supp. 2d 541, 542 (N.D. Tex. 2003) (same);

[9] Plaintiffs suggest that the fact "[t]hat Plaintiffs' counsel was able to produce a settlement shortly after the Complaint was filed is an indication of the lawsuit's obvious merit." Mot. at 14. The parties' decision to resolve this action, however, should not give rise to an inference that plaintiffs would have prevailed if the record had been fully developed and presented to the Court. If Groupon had responded to plaintiffs' preliminary injunction motion, it would have demonstrated that there is very little case law regarding the "unbundling" rules that plaintiffs invoked, and no decisions in the District of Delaware. Groupon would have shown that (1) Proposal No. 4 was drafted in a manner entirely consistent with other companies' proxy statements seeking similar amendments to their equity incentive plans, (2) that the SEC did not comment on Groupon's Proxy (*see* Horwood Decl. ¶¶ 2-3), and (3) that the materiality rules set forth by NASDAQ Rule 5635(c) (which does not include increases as to the per person annual limit among its list of *per se* material items that even requires shareholder approval) suggest that Proposal No. 4 did not inappropriately bundle material items.

United States v. 947 Firearms, Nos. 09-CV-566-TCK-FHM, 09-CR-089-TCK, 2012 WL 609913, at *2 (N.D. Okla. Feb. 24, 2012) (same).[10]

3. Plaintiffs' Fee Request Is Inappropriate and Excessive, Even Under the Percentage-of-Recovery Model

Even if the percentage-of-recovery method were appropriate here – and it is not for the reasons explained above – plaintiffs still would not be entitled to the fees they seek. Plaintiffs' claim that Groupon realized "an immediate financial benefit of approximately $2.33 million as a result of the cancellation of the 200,000 RSUs wrongfully granted to Raman" (Mot. at 2) is incorrect and their claim to 25% of the alleged benefit is excessive.

Plaintiffs' assertion that Groupon received a $2.33 million benefit – the alleged fair market value of the 200,000 RSUs Groupon agreed to rescind – is wrong for two reasons. First, as set forth above, Groupon did not receive any cash payment or any other pool of money when it rescinded Mr. Raman's RSUs. *See supra* § I.A.1. Rather, because the agreement allows Groupon to re-issue the grant in 2014 – which, before the lawsuit was filed, it said it was "likely" to do if Proposal No. 4 had been voted down by its shareholders (Horwood Decl. Ex. 1) – all plaintiffs have achieved is a short delay of an expense to Groupon. Delaying a grant that was approved by 95% of the voting shares, at significant cost to the Company, cannot be considered a benefit that is "'something more than technical in its consequence and . . . one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests

[10] Plaintiffs cannot rectify this omission by including documentation of attorneys' hours expended and hourly rates in their reply memorandum. "Pursuant to Local Rule 7.1.3(c)(2), a party is not permitted to 'reserve material for the reply brief which should have been included in a full and fair opening brief.' Typically, the Court disregards such newly-raised arguments." *LG Display Co. v. AU Optronics Corp.*, Nos. 06-726-LPS, 07-357-LPS, 2010 WL 5463305 (D. Del. Dec. 29, 2010) (citing *Schock v. Baker*, No. 09-647-GMS, 2010 WL 3614646, at *2 n.1 (D. Del. Sept. 10, 2010)).

of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest,'" as is required to justify a fee award under the "substantial benefit" exception. *See Mills*, 396 U.S. at 396 (citation omitted).

Second, the Company did not benefit in the amount of the fair market value of the RSUs at the time of the Settlement Agreement. This was not an amount returned to the Company. At most, rescission of the grant allows Groupon to avoid the compensation expense for the 200,000 RSUs required by the applicable accounting rules. Per the accounting rules, that compensation expense was calculated using the "current market value" of the RSUs at the time of grant. Horwood Decl. ¶ 5. In the Amended Proxy, Groupon demonstrated this calculation using the April 23, 2013 closing price of Groupon's stock shortly before the Proxy was filed, which was $6.36. Multiplying $6.36 stock price by the 200,000 RSUs granted to Mr. Raman amounted to only $1.27 million. Horwood Decl. ¶ 5, Ex. 1. Plaintiffs do not allege this figure was misstated or calculated incorrectly; indeed, they do not mention it at all. Even this number, however, which is barely more than half the value claimed by plaintiff, overstates the alleged benefit to Groupon from the rescission because the Settlement Agreement allows Groupon to reissue the 200,000 RSUs to Mr. Raman, and the Company has indicated that it is "likely" to do so in 2014. Horwood Decl. Ex. 1. If Groupon's stock price is higher at the time of re-grant than it was on April 23, 2013, the compensation expense to Groupon will be greater than it originally was.[11] In other words, Groupon will be forced to expense more than the $1.27 million incurred in

[11] Plaintiffs' Motion acknowledges that Groupon's stock price has risen substantially since it's $6.36 price on April 23, 2013. As of September 12, 2013, the date immediately following execution of the Settlement, Groupon's stock price was $11.69. Mot. at 9.

connection with the initial grant. Thus, in the end, the delay caused by this litigation will likely require the Company to take a larger accounting charge. This is an expense, not a benefit.

Zucker v. Westinghouse Electric Corp., a derivative case cited by plaintiffs (*see* Mot. at 7), is instructive. There, the Third Circuit held that no attorneys' fees were appropriate when the corporation was not "better off" as a result of the litigation. 265 F.3d at 176-77. Thus, even though the corporation received $250,000 as a result of the derivative suit (a more tangible benefit than any alleged benefit conferred here), the Court held there was no substantial benefit to the corporation to justify attorneys' fees because the derivative suit cost over $1.4 million to defend. *Id.* Here, as in *Zucker*, Groupon received no benefit from the cancellation of Mr. Raman's 200,000 RSUs, will likely be forced to take an increased compensation expense when it re-issues Mr. Raman's RSUs in 2014, and the Company was forced to spend legal fees defending the suit. Under these circumstances, no fee award is appropriate.

Finally, even if the Company had received a benefit, plaintiffs would not be entitled to receive 25% of that benefit. The Third Circuit has delineated seven factors for district courts to consider in awarding attorneys' fees based on a reasonable percentage of the total recovery:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000). Application of these factors here weighs against an award of 25% of any benefit conferred by the litigation.[12]

[12] The cases plaintiffs cite in support of an award of 25% bear no resemblance to this case. They all involve matters in which plaintiffs' counsel spent years litigating complex class action lawsuits, novel theories of law, and/or enormous alleged financial frauds, and subsequently recovered a large common fund. *See* Mot. at 13 (citing, *e.g.*, *Automotive Refinishing*, 2008 WL (Continued . . .)

This Court's ruling in *Segen* is illustrative. 631 F. Supp. 2d at 470-77. Applying the *Gunter* factors, the *Segen* court found that (1) plaintiff's counsel created a significant benefit to Options' shareholders (recovery by Options of $1.1 million), which would not have occurred without their efforts; (2) there were no objections by shareholders to awarding plaintiff's counsel a significant percentage of the recovery; and (3) plaintiff's counsel was considerably skilled and brought about the result quickly. *Id.* Nonetheless, the Court determined that a reasonable award of attorneys' fees in the case amounted to only 8% of the total recovery because:

> (4) the claims at issue were not particularly complex and were settled before litigation ensued, so (5) counsel incurred only a moderate risk that they would not be paid for their investigative efforts, rather than the more significant risk of non-payment attendant to litigation[, and] Plaintiff's counsel (6) did not spend enough time on the matter to warrant their proposed fee.

Id. Here, like in *Segen*, plaintiffs' claim was not particularly complicated, no substantive motions were litigated and no discovery was conducted, plaintiffs' counsel incurred minimal risk of nonpayment for its investigative efforts and did not spend enough time on the matter to warrant a substantial fee. Accordingly, if the Court applies a percentage-of-recovery approach here, the percentage employed should be very small.

(. . . continued)
63269 (counsel dedicated 48,251.85 hours and the case involved novel legal issues); *Cell Pathways*, 2002 WL 31528573 (class counsel devoted 2,600 hours and two years on the litigation); *Aetna*, 2001 WL 20928 (noting prolonged, three year litigation)); *see also* Mot. at 9 (citing *UnitedHealth*, 631 F. Supp. 2d at 1154 (referring to "years of zealously contested litigation" which included "extensive discovery and many motions" and plaintiffs' counsel having spent 34,737.4 hours of work in connection with the case); *Ryan*, 2009 Del. Ch. LEXIS 1, at *42 (noting plaintiffs' attorneys spent over 7,780 hours over the course of two years time "in pursuit of this complex and difficult litigation," including "extensive discovery" and "substantial motion practice," and that plaintiffs' counsel secured "the second highest recovery among all of the numerous backdated options derivative actions that have been brought and settled throughout the country")); Mot. at 12 (citing *Cendant*, 232 F. Supp. 2d at 338 (describing action as "complex, long-standing case" that "has been the subject of a great deal of discovery and motion practice"; plaintiffs' counsel spent over 12,000 hours prosecuting the case).

B. Plaintiffs Grossly Exaggerate the Value of the "Additional Corporate Governance Procedures"

Plaintiffs also seek an award of $250,000 for the "future cost savings and corporate benefits created by the corporate governance reforms contained in the Settlement." Mot. at 2-3. The Court should deny this request.

As an initial matter, plaintiffs provide absolutely no basis for their assertion that $250,000 is appropriate; indeed, they appear to have picked the number out of thin air. Moreover, a review of the "enhanced corporate governance controls" for which plaintiffs claim responsibility (*see id.* at 6-7) demonstrates that plaintiffs grossly exaggerate the value of the corporate benefits their litigation has supposedly conferred. According to plaintiffs, as a result of their litigation, the Company agreed to (1) comply with the law, charters and other governing documents, and any applicable Groupon compensation plan; (2) engage a third party to review the process by which Groupon grants equity awards and to develop a checklist of key provisions to be reviewed prior to the issuance of equity awards; and (3) to retain adequate documentation of all awards made under the Plan and appoint an individual to monitor compliance. *Id.* Compliance with the law and retention of stock compensation award documentation are hardly significant corporate governance reforms. And Groupon's agreement to engage a third party to review the process by which Groupon grants equity awards and develop a checklist of key provisions to be reviewed prior to the issuance of equity awards imposes an additional cost to the Company, while providing a modest benefit, at best. This very modest reform at most justifies a very modest fee award. *See In re BEA Sys., Inc. S'holders Litig.*, No. 3298-VCL, 2009 WL 1931641, at *1 (Del. Ch. June 24, 2009) (awarding $81,297 in fees, less than a quarter of what plaintiffs requested, where plaintiffs obtained two "unmistakably modest" changes to proxy materials); *see also Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.*,

54 F.3d 69, 70-71 (2d Cir. 1995) (affirming the district court's award of $54,140 in attorneys' fees for a violation SEC Rule 14a-8 where plaintiffs conferred modest benefit of facilitating the discussion between shareholders and management); *United Operating Co. v. Karnes*, 482 F. Supp. 1029, 1031-32 (S.D.N.Y. 1980) (awarding $40,000, less than 30% of what was requested, and discussing the "basic dilemma" courts face deciding whether to disallow attorneys' fees under the substantial benefit exception when corporate governance changes provide "some benefit" to the corporation but "the major benefit to the company is the termination of this expensive and time-consuming litigation").

II. PLAINTIFFS ARE NOT ENTITLED TO RECOVER THEIR EXPENSES

In addition to attorneys' fees, plaintiffs seek to recover expenses in the amount of $1,487.19. The American Rule and the "substantial benefit" exception apply to expenses as well as fees. *See Mills*, 396 U.S. at 391. Thus, for the reasons set forth above, plaintiffs are not entitled to recover their expenses.[13]

CONCLUSION

For the foregoing reasons, Groupon submits that the Court should deny plaintiffs' request for attorneys' fees and expenses altogether. Should the Court be inclined to grant plaintiffs some fees, Groupon submits that any award should be extremely modest, reflective of the minimal (at best) corporate benefits obtained here.

[13] Plaintiffs' submission reflects that more than half of their expense claim is an $805 entry for "Notice and Wire Services." *See* Declaration of Eduard Korsinsky ¶ 3. Notice of the settlement was not issued in this case, however, and plaintiffs have failed to provide an explanation for this expense.

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October 25, 2013

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October, 2013, a copy of Defendant Groupon, Inc.'s Opposition to plaintiffs' Motion for Attorneys' Fees and Costs was served, by CM/ECF, upon the following counsel:

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