IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

LEVI & KORSINSKY, LLP
Eduard Korsinsky
Nicholas I. Porritt
Steven J. Purcell
30 Broad Street, 24th Floor
New York, NY 10004
Tel: 212-363-7500
Fax: 212-363-7171

Brian E. Farnan (Bar No. 4089)
Michael J. Farnan (Bar No. 5165)
Rosemary J. Piergiovanni (Bar No. 3655)
FARNAN LLP
919 North Market Street, 12th Floor
Wilmington, DE 19801
Tel: 302-777-0300
Fax: 302-777-0301
bfarnan@farnanlaw.com
mfarnan@farnanlaw.com
rpiergiovanni@farnanlaw.com

Date: November 1, 2013

Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

The overriding theme of Groupon Inc.'s ("Groupon") opposition brief is that the settlement of this action has conferred no more than a "minimal" benefit on Groupon and its shareholders. (Groupon's Opposition Brief ("Opp.") at 2, 4, 9, 19.) In reaching that particular conclusion Groupon disingenuously ignores an essential and incontrovertible fact -- this action compelled Groupon's Board to rescind over two million of dollars worth of compensation issued to its Chief Operating Officer, Kal Raman ("Raman", in violation of the Company's shareholder-approved Plan. Holding aside that the amount of the rescission is anything but "minimal," the vindication of shareholders' contract rights is also important in its own right. As the Court of Chancery has stated, "it is critical as a matter of governance policy that [courts] ensure that these compensation plans when approved by shareholders are administered in strict accordance with the terms of the Plan and as the shareholders had the right to anticipate." *Sanders v. Wang*, 1999 Del. Ch. LEXIS 203, at *39 (Del. Ch. Nov. 8, 1999). And it is for this same reason that Groupon's agreement to adopt enhanced internal controls designed to ensure future compliance with the Plan is likewise of more than "minimal" consequence. When the actual benefits created by this litigation are properly considered, the award requested by Plaintiffs is fully justified and eminently reasonable according to well-established law.

ARGUMENT

I. Groupon's Opposition Fails to Rebut Plaintiffs' Showing That This Action Has Conferred Substantial Benefits on the Company and Its Shareholders Sufficient to Warrant Payment of A Reasonable Attorneys' Fee.

A. The Rescission of the Excess RSUs Created A Common Fund.

Groupon argues that any attorneys' fee in this case would have to be based on the lodestar method according to federal law. (Opp. at 1-2, 3, 8-12.) Thus, in an attempt to avoid dealing with the *Sugarland* analysis and other applicable case law that supports Plaintiffs'

Motion, Groupon begins its opposition with the unsupported assertion that "*Sugarland* applies only in Delaware state court." (Opp. at 8.) That is not true; many federal courts have recognized the relevance of *Sugarland Indus. v. Thomas*, 420 A.2d 142 (Del. 1980), for fee applications concerning benefits conferred on Delaware companies such as Groupon and their shareholders. *See, e.g.*, *Feuer v. Thompson*, 2013 U.S. Dist. LEXIS 84325, at *9 (N.D. Cal. June 14, 2013) ("In determining an appropriate fee award, a court applying Delaware law considers the '*Sugarland*' factors."); *Cohn v. Nelson*, 375 F. Supp. 2d 844, 864-66 (E.D. Mo. 2005) (applying the *Sugarland* analysis); *In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1449-52 (N.D. Cal. 1994) (same); *see also Lewis v. Chiles*, 719 F.2d 1044, 1049 (9th Cir. 1983) (recognizing that where plaintiff's action is based on a violation of state substantive law, state law legal principles apply with respect to attorneys' fees). Contrary to Groupon's results-oriented conclusion, the analytical framework for Plaintiffs' motion is dictated by the nature of the benefit conferred on Groupon, not their choice of forum. Indeed, with respect to the nature of this action and the benefit ultimately conferred, it is telling that Groupon does not mention that before this lawsuit was commenced Plaintiffs made a formal demand on the Board to rescind the 200,000 excess RSUs granted to Raman in violation of the Plan and adopt enhanced corporate governance to prevent future violations of the Plan. Of course, that is the relief ultimately achieved and for which Plaintiffs are properly seeking a reasonable attorneys' fee pursuant to Delaware state law principles.

In any event, Groupon's attempt to avoid Delaware law is not in fact outcome-determinative because, as Groupon acknowledges, the "federal law" outlined in its opposition brief also recognizes the appropriateness of awarding counsel a "percentage of the fund" created by the litigation. (Opp. at 8.) Thus, the key question is whether this action created a common

fund. Groupon's argument that it did not is simply wrong. (Opp. at 9-12.) There is no dispute that Plaintiffs' actions have resulted in the cancellation of 200,000 RSUs wrongfully granted to Raman in excess of what the Plan allowed. Groupon's only basis for claiming this does not create a common fund is the fact that the cancellation of the RSUs did not literally create a "pool of money." (Opp. at 11.) However, as many courts have recognized, a literal "pool of money" is not required for there to be a common fund. Indeed, the Delaware Supreme Court recognized in *Sugarland* that the result obtained here -- cancellation of excess equity compensation -- is a paradigmatic example of a common fund: "[W]here directors [are] required to restore to the corporation money improperly paid *or stock options improperly given*[,] . . . *the benefit to the corporation is measured in dollars and there is a direct causal relationship between the actions of counsel and creation of the 'entire' fund or benefit conferred*." 420 A.2d at 152 (emphasis added). In this same vein is *Ryan v. Gifford*, 2009 Del. Ch. LEXIS 1 (Del. Ch. Jan. 2, 2009), which Groupon unsuccessfully attempts to distinguish. (Opp. at 10.)[1] Contrary to Groupon's assertion, the *Ryan* court expressly based the attorneys' fee award on "*the cancellation, re-pricing, and surrender of thousands of stock options* and for significant corporate governance reforms designed to prevent future wrongful option grants," in addition to a "cash recovery of over $28 million." *Ryan*, 2009 Del. Ch. LEXIS 1, at *41.[2] Nor can Groupon distinguish *Sanders*

[1] Groupon's attempt to distinguish *Ryan* appears in its discussion of a supposed distinction between "traditional" and "non-traditional" common fund cases. (Opp. at 10.) This purported distinction does not appear to have any basis in the law but, more importantly, it is not clear what relevance Groupon is even attaching to it.

[2] Groupon's attempts to distinguish Plaintiffs' other cases fail for the same essential reason. (Opp. at 12-13, n.9.) Groupon simply cannot dispute that in each of these cases the court awarded attorneys' fees based on a common fund comprised in part of cancelled stock awards. *See In re Unitedhealth Group S'holder Derivative Litig.*, 631 F. Supp. 2d 1151, 1155 (D. Minn. 2009) (awarding attorneys' fees where, pursuant to the settlement, the defendant transferred

v. Wang, where the court awarded attorneys' fees "in the amount and form of 20% of the number of shares to be returned to Computer Associates pursuant to the Settlement, or a total of 900,000 shares of Computer Associates' common stock, which fees and expenses the Court finds to be fair and reasonable." 2000 WL 34015564, at *3 (Del. Ch. June 22, 2000).

Groupon's fallback argument is to look to what might happen in the future. Specifically, Groupon contends that there is no common fund because the Company can simply "undo" the benefit conferred here by reissuing the RSUs to Raman in 2014. (Opp. 7, 15.) As an initial matter, this argument does not make logical sense -- a contingent future event does not change the essential nature of the actual facts as they exist today. Moreover, future compensation decisions made by the Board, whether concerning Raman or anyone else, have nothing to do with this case. If the Board chooses to provide Raman with an award of RSUs in 2014, that award will count against the annual limit for 2014 and it is doubtful that Groupon would dispute that its Board has a fiduciary duty to make such future compensation decisions on the basis of the facts and circumstances then existing. Indeed, as Groupon itself emphasizes, an award made in 2014 will have completely different tax and accounting effects than the award that Plaintiffs challenged here. (Opp. at 15-16.) This Court should reject Groupon's attempt to invoke future contingencies to downplay the significance of what Plaintiffs have achieved.

B. Plaintiffs' Request For 25% of the Common Fund Is Reasonable.

In addition to disputing the existence of a common fund, Groupon challenges Plaintiffs' calculation of the size of the fund and the percentage Plaintiffs should be allowed to recover. (Opp. at 14-17.) Though Groupon would otherwise look to what the future might bring (i.e., "re-

---

stock and options to the company); *Moses v. Pickens*, 1982 Del. Ch. LEXIS 486, at *1-2 (Del. Ch. Nov. 10, 1982) (awarding attorneys' fees where the defendant surrendered an option to purchase 1,200,000 shares worth approximately $4 million).

issuance" of RSUs), when it comes to valuing the rescinded RSUs, Groupon would prefer to look to the past. (Opp. at 15.) Of course, the value of the RSUs at the time they were actually cancelled -- $2.33 million -- is the most logical value to consider in terms of what was created by Plaintiffs' efforts and now exists in terms of a common fund. Groupon offers no valid reason why that valuation should not be used and instead argues that, because Groupon's stock price has risen, Plaintiffs have somehow harmed the Company by causing the cancellation of awards the Board had no authority to grant.[3]

Turning to the appropriate percentage of recovery, while Groupon flatly insists that an award of 25% of the common fund is "too much" for this particular case, it is telling that Groupon does not address, much less contradict, the fact that the Manual for Complex Litigation itself expressly states that "[a]ttorney fees awarded under the percentage method are often between 25% and 30% of the fund." Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION § 14.121 at 187 (2004). Nor can Groupon deny that Plaintiffs' fee request of 25% of the common fund is well within the range of fees awarded by courts nationwide on a percentage of the benefit basis. *See, e.g.*, *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1260 (De. 2012) ("A recent study . . . reports that median attorneys' fees awarded from settlements in

[3] Groupon's characterization of *Zucker v. Westinghouse Elec. Corp.*, 265 F.3d 171 (3d Cir. 2001), as "instructive" is without merit. (Opp. at 16.) Unlike here, that derivative action provided little intrinsic benefit while impeding the settlement of a related class action. *Zucker*, 265 F.3d at 177. Indeed, the plaintiffs in *Zucker* could not explain how or why the company was benefited from the action. *Id.* Similarly, Groupon's citation to *Segen v. OptionsXpress Holdings, Inc.*, 631 F. Supp. 2d 465 (D. Del. 2009), is inapposite, as the primary benefit that the company received there was based on a violation of Section 16(b) of the Securities Exchange Act, 15 U.S.C. § 78p(b), not on a violation of shareholder-approved compensation plan under Delaware state law. *Id*. at 465.

securities class actions are generally in the range of 22% to 30% of the recovery until the recovery approaches approximately $500 million.").[4]

C. The Corporate Governance Reforms Are Substantial.

With respect to the corporate governance reforms achieved by the Settlement, while Groupon does not deny that these reforms are designed to ensure future compliance with the Plan, it nonetheless takes issue with the portion of the fee request attributable to that benefit. (Opp. at 18-19.)[5] However, given that the Plan violation that led to this litigation concerned RSUs worth over two million dollars, which have now been cancelled due to Plaintiffs' efforts, Plaintiffs' request for $250,000 for fixing this problem is far from unreasonable. Indeed, as Groupon does not and cannot deny, courts routinely recognize that plaintiffs are entitled to attorneys' fees where plaintiffs' actions lead to such "therapeutic relief" and have awarded substantial fees for this sort of benefit. *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 395 (1970) ("[A] corporation may receive a 'substantial benefit' from a derivative suit, justifying an award of counsel fees, regardless of whether the benefit is pecuniary in nature."); *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164-65 (Del. 1989) ("[S]uccessful derivative or class action suits which result in the recovery of money or property wrongfully diverted from the corporation,

[4] Although Groupon attempts to distinguish certain cases Plaintiffs cited in their opening brief by arguing that the cases involved "complex class action lawsuits, novel theories of law, and/or enormous alleged financial frauds, and subsequently recovered a large common fund," Groupon cannot deny that Plaintiffs' request is well within the accepted range of recovery. (Opp. at 16-17 n.12.) Moreover, while Groupon argues that Plaintiffs' percentage of the recovery should be reduced because the common fund is lower than in "mega-fund" cases, this is the opposite of what courts have actually done; if anything, the percentage decreases the larger the common fund is. *See In re Cendant Corp.*, 232 F. Supp. 2d 327, 337 (D.N.J. 2002) ("As a general rule, as the size of a fund increases, the appropriate percentage to be awarded to counsel decreases.").

[5] Because Groupon merely objects to the amount of Plaintiffs' requested fee without providing any indication of an amount it would deem more appropriate for the agreed-upon corporate governance reforms, this Court should treat this aspect of the fee request as unopposed.

or which result in the imposition of changes in internal operating procedures that are designed to produce such monetary savings in the future, are viewed as fund creating actions."); *Chrysler Corp. v. Dann*, 223 A.2d 384, 388-90 (Del. 1966) (awarding derivative counsel $450,000 in fees for conferring a benefit consisting of change in the company's compensation plan that will "benefit [the company] in the long run").

In a last-ditch attempt to deny Plaintiffs' counsel any compensation in this case, Groupon argues that no fee should issue at all because of Plaintiffs' failure to provide "documentation" of counsel's lodestar in the opening motion. (Opp. at 12-14.) Of course, the reason Plaintiffs did not include such information is because, consistent with Delaware law, Plaintiffs' claim for a reasonable attorneys' fee is based entirely on the benefits achieved by this litigation. *Ams. Mining Corp.*, 51 A.3d at 1255-56, 1257-58 (holding that the benefit achieved is the "most important of the *Sugarland* factors" and "is the common yardstick by which a plaintiff's counsel is compensated" (citations omitted)); *see also* Plaintiffs' Motion for Attorneys' Fees at 11-12. Though Groupon seeks only to distract from the relevant inquiry, Plaintiffs have included a declaration from counsel detailing the hours spent on this matter and billing rates of the individuals involved. (Reply Declaration of Eduard Korsinsky, dated October 31, 2013).

CONCLUSION

For the foregoing reasons and the reasons set forth in their opening brief, Plaintiffs respectfully request that this Court award Plaintiffs' counsel attorneys' fees and expenses in the aggregate amount of $835,987.19.

Dated: November 1, 2013

Respectfully submitted,

FARNAN LLP

/s/ Brian E. Farnan
Brian E. Farnan (Bar No. 4089)
Michael J. Farnan (Bar No. 5165)
Rosemary J. Piergiovanni (Bar No. 3655)
919 N. Market Street, 12th Floor
Wilmington, Delaware 19801
Tel: (302) 777-0300
Fax: (302) 777-0301
bfarnan@farnanlaw.com
mfarnan@farnanlaw.com
rpiergiovanni@farnanlaw.com

LEVI & KORSINSKY, LLP
Eduard Korsinsky
Nicholas I. Porritt
Steven J. Purcell
30 Broad Street, 24th Floor
New York, New York 10004
Tel: (212) 363-7500
Fax: (212) 363-7171

Attorneys for Plaintiffs