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Case No. 11812-VCG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BRETT KANDELL, Derivatively on Behalf of Nominal Defendant, FXCM, Inc., Plaintiff, v. DROR NIV, WILLIAM AHDOUT, KENNETH GROSSMAN, DAVID SAKHAI, EDUARD YUSUPOV, JAMES G. BROWN, ROBIN DAVIS, PERRY FISH, ARTHUR GRUEN, ERIC LEGOFF, BRYAN REYHANI, and RYAN SILVERMAN, Defendants, - and - FXCM, INC., Nominal Defendant.	C.A. No. 11812-VCG PUBLIC VERSION FILED: May 8, 2019

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT, AWARD OF ATTORNEYS' FEES AND EXPENSES, AND AWARD OF INCENTIVE FEE

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Plaintiff Brett Kandell ("Plaintiff") respectfully submits this brief in support of approval of (1) the settlement (the "Settlement") of this stockholder derivative action (the "Action") on the terms set forth in the Stipulation and Agreement of Compromise, Settlement, and Release filed with the Court on February 19, 2019 (the "Stipulation"); and (2) Plaintiff's request for an award of attorneys' fees and expenses and an incentive fee to Plaintiff. A hearing is scheduled for June 5, 2019 for the Court to consider these matters.

PRELIMINARY STATEMENT

The Settlement provides a meaningful benefit to FXCM, Inc. ("FXCM" or the "Company") and was achieved only after three-and-a-half years of hard-fought litigation. The $1.55 million monetary recovery is a significant benefit to the Company (even after the deduction of attorneys' fees) – especially considering the fact that FXCM's market cap at the time the Settlement was reached was less than $200,000. In other words, the Settlement represented seven times the Company's market cap.

In this litigation, Plaintiff sought to hold the Defendants (FXCM's board of directors) liable for breaching their fiduciary duties with respect to two separate but related issues. First, Plaintiff alleged that the directors violated their duty of oversight by allowing the Company to violate U.S. Commodity Futures Trading Commission ("CFTC") Regulation 5.16, 17 C.F.R. §5.16 (2010) ("Regulation

5.16"), which prohibited foreign exchange trading firms like FXCM from representing that they would guarantee their customers against losses or otherwise limit their customers' losses. Plaintiff alleged that, in violation of Regulation 5.16, Defendants caused FXCM to represent to their (heavily leveraged) customers through marketing materials and in client agreements that customers would not be responsible for negative balances in their accounts. This purported guarantee allowed the Company to amass a large client base, but because FXCM was responsible for its client's negative balances, it exposed the Company to tremendous losses. Second, Plaintiff alleged that Defendants breached their fiduciary duties by agreeing to an unfair, extremely onerous $300 million loan from Leucadia National Corporation (the "Leucadia Loan") in the wake of massive customer losses following the Swiss National Bank's unpegging of the Swiss franc from the euro. The Leucadia Loan allegedly forced the Company to sell off valuable subsidiaries, under terms so onerous that the Company was eventually forced into bankruptcy.

Plaintiff's litigation efforts were extensive and included: the service of a books and records demand pursuant to Section 220 of the Delaware General Corporation Law (the "Section 220 Demand"); drafting a Verified Derivative Complaint and three amended complaints; briefing, and defeating in large part, Defendants' motion to dismiss (a rare victory for a *Caremark* duty of oversight claim); extensive discovery, including: (i) the review of over 200,000 pages of

documents produced by Defendants and third parties; and (ii) 12 fact depositions; and the retention of two experts. Notably, FXCM filed for bankruptcy just over two months after this Court's ruling on the motion to dismiss, which threatened the survival of these derivative claims. It was only because of Plaintiff's counsels' efforts that the Company agreed to carve out the derivative litigation from the reorganization plan's releases, which allowed Plaintiff to continue litigating the Action on behalf of the Company

As a result of the extensive fact discovery, Plaintiff had an excellent understanding of the relative strengths and weaknesses of the parties' claims and defenses. Throughout late 2018, Plaintiff's counsel and Defendants' counsel participated in a number of telephonic conferences during which the terms of a potential settlement were negotiated. On December 18, 2018, the parties reached an agreement-in-principle to settle the Action, whereby Plaintiff agreed to release the claims against Defendants in exchange for the payment of $1.55 million (the "Settlement Amount") to the Company. For the reasons set forth herein, Plaintiff submits that the Settlement confers a substantial benefit on the Company, particularly in light of the challenges confronting Plaintiff's claims.

In addition to seeking approval of the Settlement, Plaintiff seeks an "all-in" award of attorneys' fees and expenses of $465,000 for the benefits conferred through the Action (the "Fee and Expense Award"), to be deducted from the Settlement

Amount. Notably, Defendants have agreed to not oppose the Fee and Expense Award. Plaintiff and his counsel respectfully submit that the Court should award the full Fee and Expense Award as it fairly compensates Plaintiff's counsel in light of: (i) the significant benefit conferred by this recovery; and (ii) Plaintiff's counsel's contingency risk and investment of time and resources in achieving that benefit.

Plaintiff's counsel also seeks the Court's approval to pay, from the Fee and Expense Award, a $5,000 incentive award to Plaintiff (the "Incentive Fee Award") to compensate him for his diligent attention to and monitoring of this Action. The Incentive Fee Award requested here is less than the amount in the Notice; moreover, Defendants also do not oppose the Incentive Fee Award.

The deadline for objections to the Proposed Settlement, the Fee and Expense Award, and/or the requested Incentive Fee Award is May 15, 2019. To date, no objections have been filed, and Plaintiff's counsel have not received any objections.[1]

STATEMENT OF FACTS

A. Background of FXCM

In 2015, FXCM[2] was the largest foreign exchange (commonly referred to as

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[1] Should Plaintiff's counsel receive any objections prior to the settlement hearing set for June 5, 2019, Plaintiff's counsel will file them with the Court and bring them promptly to the Court's attention.

[2] FXCM changed its name to Global Brokerage, Inc. on February 27, 2017. FXCM and Global Brokerage, Inc. are referred to interchangeably herein as "FXCM."

"forex" or "FX") broker for individual investors in the United States, with nearly 200,000 customers.[3] On January 5, 2015, the Company's market cap was approximately $800 million.

FXCM primarily offered an agency model to its retail customers to execute trades.[4] In the agency model, when an FXCM customer executed a trade, FXCM acted as a credit intermediary, simultaneously entering into offsetting trades with both the customer and another bank acting as the FX market maker. *Id.* The Company earned trading fees and commissions by adding a markup to the price provided by the FX market makers. *Id.*

FXCM's 11-member Board included five insiders: CEO and Chairman Dror Niv; Chief Dealer and Managing Director William Ahdout; COO David Sakhai; Global Head of Dealing and Managing Director Eduard Yusupov; and Managing Director Kenneth Grossman.[5] (Niv, Ahdout, Sakhai, Yusupov, and Grossman are collectively referred to as the "Insider Defendants"). These five directors are co-

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[3] ¶28. All references to "Complaint" or "¶___" are to Plaintiff's Verified Third Amended Shareholder Derivative Complaint, filed on September 1, 2016.

[4] ¶33.

[5] ¶¶61-62.

founders and executives of the Company and were not listed as "independent" in the Company's annual proxies.[6]

B. FXCM's Zero-Debit Policy

The CFTC was one of FXCM's primary regulators. In September 2010, the CFTC adopted a policy prohibiting foreign exchange brokers from representing that they offered guarantees against customer losses or otherwise limited customer losses.[7] The rule, Regulation 5.16, states:

> (a) No retail foreign exchange dealer, futures commission merchant or introducing broker may in any way represent that it will, with respect to any retail foreign exchange transaction in any account carried by a retail foreign exchange dealer or futures commission merchant for or on behalf of any person:
>
> (1) Guarantee such person against loss;
>
> (2) Limit the loss of such person; or
>
> (3) Not call for or attempt to collect security deposits, margin, or other deposits as established for retail forex customers.[8]

On August 18, 2016, the CFTC filed a complaint (the "CFTC Complaint") against the Company alleging, among other things, a count for violating Regulation 5.16 premised on FXCM's marketing and customer agreements, which allegedly improperly represented that the Company guaranteed customers against loss.[9]

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[6] ¶95.

[7] ¶38.

[8] *Id.*

[9] ¶58.

C. The SNB discontinues its policy of pegging the Swiss Franc to the Euro

In September 2011, in response to a weakening euro, the Swiss National Bank ("SNB") instituted a policy pegging its currency, the Swiss franc, to the euro.[10] On January 15, 2015, the SNB announced that it was removing its currency peg.[11] The value of the Swiss franc rose rapidly after the announcement, at one point appreciating more than 41% against the euro before eventually settling at an 18% rise over the course of the day.[12] The volatility from the depegging (referred to herein as the "SNB Flash Crash") led to an instant loss of liquidity for traders in the Swiss franc-euro pair. Consequently, companies (including FXCM) had little ability to execute client stop orders or margin calls during this time.[13] In particular, FXCM's trading platform was unable to close out many of its customers' positions in time to prevent negative balances.[14]

After the markets closed on January 15, FXCM announced that its "clients experienced significant losses" as a result of the Swiss franc's movement, generating

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[10] ¶65.

[11] ¶68.

[12] ¶69.

[13] *Id.*

[14] *Id.*

"negative equity balances owed to FXCM of approximately $225 million."[15] The Company also announced that it was potentially in breach of certain regulatory capital requirements as a result of those debit balances.[16]

D. FXCM Enters into the Leucadia Loan

During a January 15, 2015 Board meeting that took place shortly after the SNB Flash Crash, Niv reported that FXCM's customers had negative balances totaling over $200 million that may not be collectible.[17] According to Niv, these losses would have to come out of the Company's capital, and that regulators would halt trading if FXCM did not raise $200 million that day to make up the difference. *Id.* During the meeting, Niv stated that the Company was working with investment bank UBS to raise the necessary capital to continue operations.[18]

At a Board meeting the next day, FXCM's then-CFO Robert Lande reported that the Company was negotiating a potential transaction with an investment banking subsidiary of the holding company Leucadia National Corporation ("Leucadia"), whereby Leucadia would extend to FXCM a two-year secured loan of up to $300

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[15] ¶71.

[16] ¶¶71-72

[17] ¶79.

[18] ¶81.

million (the "Leucadia Loan").[19] The terms of the loan would result in Leucadia receiving 75% of FXCM's cash flows generated in perpetuity through a warrant, as well as an initial interest rate of 10% per annum (increasing by 1.5% per annum each quarter and topping out at 20.5%), a loan fee of $21 million (exceeding the Company's entire 2014 net income of $17.15 million), and an extremely favorable value-sharing schedule for Leucadia.[20] The Board discussed the fact that a number of other parties had been contacted, but (i) regulators would not approve a deal with one interested company even though negotiations were at a relatively advanced stage; and (ii) none of the remaining interested parties were willing to execute a transaction within the time frame demanded by the regulators.[21]

When the Board reconvened later that day, Niv informed the Board that the Leucadia Loan was the only available means for FXCM to continue to operate given the regulators' deadline.[22] At 3:00 p.m., CFTC officials entered the meeting and threatened to shut down FXCM unless the Board approved the transaction.[23] The directors, other than director James Brown—who had abstained from voting on the

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[19] ¶86.

[20] ¶¶86, 97-98.

[21] ¶87.

[22] ¶89.

[23] ¶94.

Leucadia Loan because he was exploring participating in the transaction on the lender's side—then voted to approve the Leucadia Loan. *Id*.

On January 16, 2015, FXCM announced the details of the Leucadia Loan. When the markets learned of the terms of the Loan, FXCM's share price fell 89% (from $14.44 to $1.60) over two days.[24]

E. FXCM Enters into the MOU with Leucadia

Though it continued to operate, FXCM did not generate enough cash to pay back Leucadia within the two-year time frame of the Loan.[25] Thus, beginning in March 2015, FXCM was forced to shed many of its profitable subsidiaries to pay down the Loan.[26] Then, on March 10, 2016, FXCM announced that the Company and Leucadia had entered into a memorandum of understanding (the "MOU") to amend the terms of the Loan.[27] The MOU granted Leucadia a 49.9% interest in FXCM in exchange for extending the repayment term of the Loan for one year.[28] The MOU also included a long-term incentive program with a five-year vesting period for FXCM senior management which guaranteed senior management:

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[24] ¶99.

[25] ¶104.

[26] *Id.*

[27] ¶126.

[28] ¶128.

- 10% of all distributions or sales proceeds up to $350 million;
- 12% of all distributions or sales proceeds from $350 million to $850 million; and
- 14% of all distributions or sales proceeds above $850 million.[29]

Following the announcement of the MOU details, FXCM's share price fell over 23% on unusually high volume, further depleting the Company's value.[30]

F. FXCM's Current Corporate Structure

FXCM changed its name to Global Brokerage Inc. on February 27, 2017 and currently trades over the counter under the ticker "GLBR." The Company is now a holding company with limited business operations, and its primary asset is its ownership of limited liability company membership interests in Global Brokerage Holdings, LLC ("Holdings"). In turn, Holdings's primary asset is its 50.1% ownership of limited liability company interests in FXCM Group, LLC (with a Leucadia subsidiary owning the other 49.9%). FXCM Group, LLC and its subsidiaries are the operating companies that provide online foreign exchange trading.

All of the Company's revenues are derived from distributions and payments made by Holdings to it, and Holdings derives all of its revenues from distributions

[29] ¶127.

[30] ¶132.

and payments made by FXCM Group, LLC to Holdings. Distributions from FXCM Group, LLC to Holdings, and in turn to the Company, were restricted based on the terms of the Leucadia Loan and subsequent agreements, and no distributions could be made until the Leucadia Loan was paid in full.

On December 28, 2017, the Company voluntarily withdrew its common stock from listing on NASDAQ, after NASDAQ had threatened its deregistration the prior month based on the Company's failure to maintain a $15 million market value for a ten-day period. The threat of the deregistration of its shares triggered the events leading to the Company's prepackaged bankruptcy, which was filed on December 11, 2017. On February 8, 2018, the confirmation order in the Bankruptcy Action became effective and FXCM exited bankruptcy.

In connection with a CFTC settlement unrelated to this case, FXCM was required to exit the U.S. market in 2017. On February 6, 2017, it announced it was selling its U.S. accounts to competitor Gain Capital. FXCM's last public financial filing was made on November 14, 2017. As of December 11, 2017, Defendant Kenneth Grossman was the only employee remaining on the Company's payroll.

G. Plaintiff Commences and Litigates the Action

On January 30, 2015, Plaintiff sent his Section 220 Demand to the Company. After negotiating the scope of the production, in March and April of 2015, the Company produced approximately 1,000 pages of documents to Plaintiff's counsel.

On December 18, 2015, Plaintiff filed the Complaint, asserting derivative claims for (i) breach of fiduciary duty; (ii) contribution and indemnification; (iii) waste of corporate assets; (iv) abuse of control; and (v) unjust enrichment. On March 4, 2016, Plaintiff filed an Amended Complaint, and when the Company announced the MOU on March 10, 2016, Plaintiff again sought leave to file the Second Amended Complaint, which was filed on May 31, 2016. After the CFTC filed its action against FXCM alleging, *inter alia*, violations of Regulation 5.16, Plaintiff filed the Third Amended Complaint on September 9, 2016.[31] On October 17, 2016, the Defendants moved to dismiss the Third Amended Complaint. Following briefing, a hearing on the motion dismiss was held on February 1, 2017.

On September 29, 2017, this Court issued its opinion denying in part and granting in part Defendants' motion to dismiss (the "MTD Op."). With respect to the claims related to the Leucadia Loan and the MOU, the Court denied the motion to dismiss, finding it "reasonably conceivable that entire fairness review is invoked here."[32] The Court's reasoning was based on the fact that the Complaint alleged that a majority of the directors who approved the transaction could not be considered

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[31] Each of the complaints also contained breach of fiduciary duty allegations related to: (i) the Board's adoption of a shareholder rights plan on January 30, 2015 (¶¶107-112), and (ii) the awarding of amended severance agreements and amended bonus plans to FXCM's executives (¶¶113-122).

[32] MTD Op. at 35.

disinterested after director James Brown expressed to the Board his wish to become involved in the transaction from the lender's side.[33] The Court also denied the motion to dismiss with respect to Plaintiff's claim that the Defendants breached their fiduciary duties by allegedly allowing FXCM to follow a business model premised on violations of Regulation 5.16.[34] The Court granted the motion to dismiss with respect to Plaintiff's breach of fiduciary claims related to the shareholder rights plan and waste claim predicated on the amended severance agreements and bonus plans.

Thereafter, Plaintiff served his initial request for production on Defendants on October 13, 2017. A major stumbling block to Plaintiff's prosecution of the litigation arose on December 14, 2017, when FXCM filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Action").[35] This Action was automatically stayed in conjunction with the prepackaged bankruptcy filing. Plaintiff's claims were in serious jeopardy of surviving, as derivative claims are often released when companies enter into bankruptcy plans. Because the derivative claims in this Action were valuable assets for the Company (which had a market cap of less than $3.5 million on the date it filed for bankruptcy), Plaintiff hired bankruptcy counsel to negotiate the

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[33] *Id.*

[34] MTD Op. at 46-53.

[35] *In re Global Brokerage, Inc.*, No: 17-13532-mew (S.D.N.Y.).

preservation of the derivative claims with FXCM's counsel, including filing an objection to FXCM's plan of reorganization on January 12, 2018.

After negotiations with FXCM's bankruptcy counsel, the Company ultimately agreed to carve out the derivative litigation from the reorganization plan's releases and allow Plaintiff to continue litigating the Action on behalf of the Company, with any recovery limited to available director and officer insurance coverage. In other words, Plaintiff was not able to recover against any of the Individual Defendants, even if he were able to secure verdicts against them. On February 8, 2018, the confirmation order in the Bankruptcy Action became effective and FXCM exited bankruptcy. The next day, an Amended Stipulation and Order Governing Case Schedule was submitted to this Court, and fact discovery resumed shortly thereafter.

From February to November 2018, Plaintiff undertook substantial discovery, including:

- Serving multiple sets of requests for the production of documents on Defendants and the review and analysis of 195,000 pages of documents produced by Defendants;

- Serving subpoenas for the production of documents on several third parties to the Action[36] and the review and analysis of 18,000 pages of documents produced in response to Plaintiff's third party subpoenas;
- Serving interrogatories on Defendants;
- Serving request for admissions on Defendants;
- Taking the depositions of Defendants Dror Niv, William Ahdout, Kenneth Grossman, David Sakhai, Eduard Yusupov, James Brown, Robin Davis, Arthur Gruen, Eric LeGoff, and Ryan Silverman; the Company's former Chief Compliance Officer Janelle Lester; and the Company's Chief Marketing Officer Sameer Bhopale.
- Responding to discovery requests from Defendants, including a request for production, interrogatories, and a deposition of Plaintiff.

During this period, Plaintiff also engaged two experts: (1) former CFTC Commissioner Bart Chilton, to testify on Regulation 5.16 and related issues; and (2) economist Michael Hartzmark, to testify on damages and economic considerations related to Defendants' alleged breaches of fiduciary duty. On November 30, 2018, Plaintiff and Defendants served their respective initial disclosures of expert witnesses.

[36] Plaintiff served subpoenas on the National Futures Association, Leucadia, Duff & Phelps LLC, UBS Securities LLC, and Point 72 Asset Management, L.P.

From October through December 2018, Plaintiff's counsel and Defendants' counsel participated in a number of telephonic conferences during which the terms of a potential settlement were negotiated. On December 18, 2018, the parties reached an agreement in principle to settle the Action. A Memorandum of Understanding between the parties was signed on January 16, 2019, and the Court was informed of the settlement the next day.

On February 19, 2019, the parties filed the Stipulation, in which Plaintiff agreed to release all claims asserted in this Action against Defendants in exchange for the payment on behalf of Defendants of $1.55 million to the Company.

ARGUMENT

I. THE COURT SHOULD APPROVE THE SETTLEMENT AS FAIR, REASONABLE, AND ADEQUATE

A. Delaware Law Strongly Favors Settlements

Delaware law strongly favors voluntary settlements of corporate derivative actions.[37] While the Court's role in approving the settlement requires it to "insure that the interests [of the corporation] have been fairly represented," the approval process "does not require a definitive evaluation of the case on its merits," as doing

[37] *See*, e.g. *Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, 2012 WL 1655538, at *2 (Del. Ch. May 9, 2012).

so "would defeat the basic purpose of the settlement of litigation."[38] Instead, the Court "must consider the nature of the claims, possible defenses, the legal and factual circumstances of the case, and then apply its own business judgment in deciding whether the settlement is reasonable."[39]

The primary factors to be considered in the approval process are (i) the strength of the claims; (ii) the difficulties that would arise in enforcing the claims through the courts; (iii) the delay, expense and trouble of litigation; (iv) the amount of the compromise as compared with the amount of any collectible judgment; and (v) the views of the parties involved.[40]

Applying these standards here, the Settlement is fair, reasonable, and adequate, and should be approved.

B. Plaintiff Achieved a Significant Benefit for the Company

Plaintiff achieved his goal of conferring a significant benefit for FXCM. The Settlement provides for a $1.55 million cash payment to the Company, less Court-approved attorneys' fees and expenses. As noted above, at the time the parties agreed to the Settlement on December 18, 2018, FXCM's market cap was less than

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[38] *Id.*, quoting *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1283 (Del.1989), and *Rome v. Archer*, 197 A.2d 49, 53 (Del.1964).

[39] *Id.* at *3 (citing *Polk v. Good*, 507 A.2d 531, 535 (Del.1986)).

[40] *Polk,* 507 A.2d at 536.

$200,000. Thus, the Settlement exceeds the Company's entire market cap several times over. For a cash-strapped company with limited business operations, the Settlement is a significant boost to its bottom line.

Though many stockholder derivative action settlements include corporate reforms, such therapeutics were not a real option here. The most obvious corporate reform raised by this litigation would be a cancellation of FXCM's no debit policy. But in April 2015, shortly after the SNB Event, FXCM updated its U.S. client agreements by adding the following language: "Negative Balance Policy—traders shall at all times be liable to FXCM for any negative balance or debit balance in Trader's account(s)." Moreover, in connection with a 2017 CFTC settlement unrelated to this case,[41] the CFTC required FXCM to cease all U.S.-based forex operations and banned Defendants Niv and Ahdout from acting as forex brokers.[42] On February 6, 2017, it announced it was selling its U.S. accounts to competitor Gain Capital.

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[41] *See In the Matter of: Forex Capital Markets, LLC, FXCM Holdings, LLC, Dror Niv, and William Ahdout*, CFTC Docket No. 17-09, Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions (Feb. 6, 2017).

[42] As noted below, foreign exchange trading companies located outside the U.S. were not prohibited from advertising to customers against losses.

C. Analysis of the Strengths and Weaknesses of the Claims

Plaintiff at all times believed in the merits of the action. Nonetheless, Plaintiff would have faced significant risks litigating through trial on each of his claims.

1. Defendants Would Have Challenged Liability

a. The Regulation 5.16 Claim

Plaintiff alleged that FXCM's directors were liable as a result of knowingly causing, or knowingly failing to prevent, FXCM's violations of Regulation 5.16.[43] Plaintiff obtained a rare victory in prevailing on Defendant's motion to dismiss under *Caremark*, which is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[44] Under *Caremark*, Plaintiff must demonstrate that the director "fail[ed] to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities."[45] Plaintiff was prepared to argue that Defendants were put on notice of the introduction of Regulation 5.16 as an important new rule affecting the Company's business, and

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[43] MTD Op. at 48.

[44] *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A. 2d 959, 967 (Del. Ch. 1996).

[45] The Court's opinion denying in part Defendants' motion to dismiss suggests that the Regulation 5.16 claim may not be a true *Caremark* claim because it involves "violations of positive law"—*i.e.*, a claim for breach of the duty of loyalty. MTD Op. at 48. Whether treated as a *Caremark* claim or a claim for breach of the duty of loyalty, the Court's analysis is the same. Plaintiff would be required to prove Defendants willfully or consciously caused the Company to violate Regulation 5.16 or consciously failed to act when they learned of the violation. MTD Op. at 46-53.

thus breached their duties. Defendants, however, would argue that they did make efforts to comply with Regulation 5.16 and that these efforts were sufficient to satisfy their duty of good faith. Bad faith on the part of the directors "is a necessary condition" to liability under *Caremark*,[46] and the burden to show bad faith is extremely high.[47] Moreover, Plaintiff faced the difficult task of showing that Defendants acted with scienter, *i.e.*, that Defendants "*knew* that they were not discharging their fiduciary obligations."[48] How the Court would resolve this factual issue represented a real risk for Plaintiff at trial.[49]

Indeed, both documentary evidence and deposition testimony revealed evidence that Defendants could use to support their defense that the directors

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[46] *Caremark,* 698 A. 2d at 971.

[47] *In re Citigroup Inc. S'holder Deriv. Litig.,* 964 A.2d 106, 125 (Del. Ch. 2009) (Dismissing duty of oversight claims, stating, "The presumption of the business judgment rule, the protection of an exculpatory § 102(b)(7) provision, and the difficulty of proving a *Caremark* claim together function to place an extremely high burden on a plaintiff to state a claim for personal director liability[.]"); *In re Walt Disney Co. Deriv. Litig.,* 907 A.2d 693, 753 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) ("Bad faith has been defined as authorizing a transaction "for some purpose *other than* a genuine attempt to advance corporate welfare or [when the transaction] is *known to constitute* a violation of applicable positive law.").

[48] *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

[49] *See*, e.g., *De Angelis v. Salton/Maxim Housewares, Inc.*, 641 A.2d 834, 839 (Del. Ch. 1993), *rev'd on other grounds sub nom. Prezant v. De Angelis*, 636 A.2d 915 (Del. 1994) (potential difficulty in proving liability significant factor in settlement fairness).

fulfilled their oversight obligations. In particular, documents and testimony show that Defendants Sakhai and Niv reviewed Regulation 5.16 around the time it became effective and discussed how to comply with the new rule with FXCM's compliance department. FXCM's compliance department also discussed Regulation 5.16 with the National Futures Association (the "NFA"), the self-regulatory organization for the U.S. derivatives industry. According to an FXCM memorandum summarizing the call, the NFA informed FXCM that the Company could remain in compliance with the rule by eliminating all references to the word "guarantee," and simply referring to a "policy" of crediting customer accounts when negative balances were incurred. Defendants would surely argue that as Directors of FXCM, they were justified in relying on the Company's Compliance Department seeking out the NFA's guidance and conforming to it by proceeding with a limited, not absolute, policy against the collection of customer negative balances that had numerous exceptions that were detailed in the client agreement FXCM required its customers to sign.

Defendants also would argue that in the interim between the adoption of Regulation 5.16 and the SNB Flash Crash over four years later, the NFA regularly reviewed FXCM's advertisements and customer communications, and that there was no evidence that the NFA ever raised any concerns about the Company's policy. Moreover, while the CFTC did ultimately allege violations of Regulation 5.16

against FXCM in the CFTC Complaint, it did not allege that the wrongdoing was intentional or done in bad faith, let alone directed by Defendants. The CFTC's action concluded with a Consent Order in which none of the allegations were admitted, and it is Plaintiff's understanding based on evidence adduced in discovery, that the CFTC gathered very little evidence regarding violations of Regulation 5.16.

This evidence would provide support for Defendants' defenses and make Plaintiff's *Caremark* claims more challenging to prove.

b. The Leucadia Loan and MOU Claims

At the motion to dismiss stage, Plaintiff believed, based on evidence available at the time, that the Leucadia Loan was not approved by a majority of independent, disinterested directors. Indeed, five of the eleven directors (Niv, Ahdout, Grossman, Sakhai, and Yusupov) were corporate officers as well as directors whose livelihood as FXCM employees depended on the approval of the Leucadia Loan, and a sixth director, Brown, had expressed interest in participating in the transaction from the lender's side. Based on these allegations, the Court found that "[s]ince the facts alleged indicate that the transaction was not approved by a Board with a majority of disinterested and independent directors, it is reasonably likely that entire fairness

review will apply here."[50] The Court denied the motion to dismiss with respect to the MOU for similar reasons.[51]

With the burden on Defendants to prove that these deals were entirely fair, Plaintiff believed that he had good arguments that the two components of entire fairness—fair dealing and fair price[52]—were not satisfied. On December 7, 2018, Defendants moved for summary judgment on the Leucadia Loan and MOU, citing documentary evidence and calling into serious doubt whether the entire fairness standard would apply to these claims. The motion for summary judgment cited evidence that appeared to demonstrate that (1) Brown ultimately did not participate in the Leucadia Loan from the lender's side, and (2) after he made this decision not to participate, Brown participated in a second "re-approval" vote on the Leucadia Loan a week after the initial vote, meaning that the Leucadia Loan was approved by a majority of disinterested directors. According to Defendants, Brown's non-participation in the Leucadia Loan from the lender's side also rendered him disinterested when voting for the MOU.

These facts presented substantial risks to Plaintiff's Leucadia Loan and MOU claims. While Plaintiff would have forcefully opposed summary judgment,

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[50] MTD Op. at 36.

[51] MTD Op. at 37.

[52] *Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 746 (Del. Ch. 2007).

discovery revealed no factual evidence to dispute that Brown did not participate in lender-side financing of the Leucadia Loan, meaning that he would likely be considered disinterested with respect to the votes on the Leucadia Loan and the MOU. In the event that the Court determined that the Leucadia Loan and the MOU were approved by a majority of disinterested directors, these transactions would be subject to the director-friendly business judgment standard of review, not entire fairness.[53] To rebut the business judgment rule, it is a plaintiff's burden to show, by clear and convincing evidence, either "an extreme set of facts to establish that disinterested directors were intentionally disregarding their duties" or a decision that "is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[54] Even a single "'plausible and legitimate explanation for the board's decision' will defeat a claim of bad faith."[55]

If summary judgment was granted and business judgment was held to be the proper standard of review, Defendants would surely argue that entering into the Leucadia Loan and MOU was not "an extreme set of facts" or "so far beyond the bounds of reasonable judgment" that it constituted bad faith. Defendants would

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[53] *Aronson v. Lewis*, 473 A. 2d 805, 812 (Del. 1984), *overruled in part on other grounds by Brehm v. Eisner*, 746 A. 2d 244, 254 (Del. 2000).

[54] *In re MeadWestvaco S'holders Litig.,* 168 A.3d 675 (Del. Ch. 2017).

[55] *Id.* (quoting *In re Alloy, Inc.,* 2011 WL 4863716, at *12 (Del. Ch. Oct. 13, 2011)).

highlight that, under the circumstances, entering into the Leucadia Loan was the only option for the Company's survival. The CFTC gave FXCM barely 24 hours to raise $300 million,[56] [redacted] These potential buyers expressed interest and performed some due diligence in the January 15-16, 2015 time frame, but they were unable to provide the full amount of capital needed or could not provide the capital in such a short time frame. Indeed, even if summary judgment was denied, these facts could have been enough for the Court to conclude that the process undertaken by the Board was fair under entire fairness.

Balancing the inherent challenges of proving these claims at summary judgment and trial on the one hand and the value of the benefit conferred on FXCM on the other, Plaintiff believes the Settlement is fair, reasonable, and adequate.[57]

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[56] *See In re Bear Stearns Litig.,* 23 Misc. 3d 447, 468 (N.Y. Sup. Ct. 2008) (holding that board's decision, made under "extreme time pressure," to "locate only one bona fide bidder despite its best efforts to find competing offers" was protected because it was reasonable and in good faith); *Citron v. Fairchild Camera & Instrument Corp.*, 1988 WL 53322, at *17 (Del. Ch. May 19, 1988), *aff'd*, 569 A.2d 53 (Del. 1989) (emphasis in original) (entering judgment in favor of defendant directors for a challenged board decision where offer had to be considered in a short time frame).

[57] *De Angelis*, 641 A.2d at 839 (potential difficulty in proving liability significant factor in settlement fairness).

2. Plaintiff Would Have Faced Significant Difficulties in Establishing Damages

Even assuming Plaintiff were able to establish liability, proving damages would be complex and challenging.[58] Plaintiff's experts would be required to present an essentially novel theory of damages, linking some or all of the losses that FXCM's *customers* suffered in the SNB Flash Crash to damages incurred by the *Company*, and establishing that the Defendants' *marketing* of a guarantee against loss in violation of Regulation 5.16 was the proximate cause. The Court might find any such analysis to be speculative and imprecise.[59] Defendants would surely argue that the customers' losses and FXCM's damages were proximately caused by factors other than the Company's marketing and advertising, including (1) the unique and unprecedented nature of the SNB Flash Crash, which caused liquidity in the Swiss franc/euro trading pair to disappear almost instantly, and (2) the Company's "no-dealing desk" model, which meant that, as an intermediary between customers and liquidity providers, it was required to make the liquidity providers whole even if

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[58] *Id.* at 839 (difficulty proving damages a factor in settlement fairness); s*ee also Ryan v. Gifford*, 2009 WL 18143, at *8 (Del. Ch. Jan. 2, 2009) (approving settlement as fair where "the calculation of damages [was] particularly difficult to predict.").

[59] *See DeAngelis* at 639 ("[I]n order to justify the award of the $6.9 million in damages claimed by the Objectors' damage expert, plaintiffs would have to prove that the entire $3 per share decline in Salton's share price that was experienced after the November 27, 1991 announcement was caused by the alleged failures to disclose rather than by other factors.")

customers could not repay their losses. Defendants would no doubt cite evidence adduced in discovery that other forex brokers maintained similar no debit policies to that of FXCM, thus attenuating the causal link between the violation of Regulation 5.16 and damages to the Company. Defendants have also contrasted this aspect of FXCM from certain competitors, who took positions opposite their customers and therefore profited from the SNB Flash Crash, and would argue that the no-dealing desk model, and not advertising guarantees against losses, were the cause of the Company's Flash Crash-related losses. Thus, at trial "determining the appropriate remedy and quantifying damages would raise a host of difficult issues."[60]

Making Plaintiff's argument even more difficult, discovery revealed that Defendants could advance powerful arguments for significantly limiting potential damages. Defendants were taking the position that any losses suffered by FXCM as a result of covering the negative balances of its foreign subsidiaries' customers were not recoverable damages in this case because guarantees against loss were not illegal outside of the United States. Specifically, [redacted][61]

[60] *Forsythe*, 2012 WL 1655538 at *3.

[61] [redacted]

Defendants would argue that the CFTC only had jurisdiction over FXCM's United States trading subsidiary, Forex Capital Markets LLC ("FXCM US"), and thus Regulation 5.16 only applied to FXCM U.S.'s advertising and marketing materials. Accordingly, it is possible (and perhaps likely) that none of the losses incurred by FXCM's foreign subsidiaries could be the basis for damages resulting from the Company's violations of Regulation 5.16, and Plaintiff would be limited to a damages pool comprised of a small fraction of FXCM's total losses from the SNB Flash Crash, even putting aside the other challenges in proving damages.

Based on documents produced in discovery, negative equity for clients of FXCM US was approximately $23 million. Defendants would no doubt attempt to chip away at this figure. Specifically, discovery revealed that almost $19 million of the $23 million in U.S. client losses was attributable to a single individual. FXCM was ultimately able to recovery approximately $5.7 million from this customer, which Defendants would surely argue would reduce damages. In addition, one month before the SNB Flash Crash, this individual was reclassified by FXCM as an eligible contract participant (ECP), a sophisticated investor with total assets exceeding $10 million who was allowed to engage in more risky and complex transactions not available to retail customers. Because Regulation 5.16 by its terms

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only applies to retail customers, Defendants would argue at the very least that any losses suffered by the customer after he was reclassified as an ECP—over $11 million in negative equity—should be excluded from the damages calculations. Indeed, Defendants would likely argue that this customer's entire accumulation of negative equity—nearly $19 million—should also be excluded from the damages calculations.

The establishment and calculation of damages represented an additional risk to Plaintiff.

D. The Benefits of the Settlement Compare Favorably with the Risk of Proceeding to Trial

Weighing the benefits of the Settlement with the risks of continued litigation militates in favor of the Settlement. Plaintiff faced topflight defense attorneys and the prospect of responding to filings from ten individual board member defendants. Proceeding forward would involve briefing summary judgment motions, expert discovery and potential *Daubert* challenges, pretrial motions, motions in limine, and trial. Further, trying any case—particularly a complex stockholder derivative action such as this one—is always, at best, an uncertain proposition.[62]

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[62] *See e.g., Weiss v. Mercedes-Benz of N. Am., Inc*., 899 F. Supp. 1297, 1301 (D.N.J. 1995) *aff'd*, 66 F.3d 314 (3d Cir. 1995) (TABLE) ("[W]hen parties negotiate a settlement they have far greater control of their destiny than when a matter is [tried]. Moreover, the time and expense that precedes the taking of such a risk can be staggering. This is especially true in complex commercial litigation.").

Additionally, any posttrial judgment would likely trigger protracted insurance litigation without any payments to the Company, as well as likely appeals. During this time, the Company would not enjoy the benefits and protections delivered by the Settlement. These tangible and immediate benefits "strongly militate[] in favor of the Settlement."[63]

E. The Proposed Settlement Was Reached Through Arm's-Length Negotiations, and the Experience of Plaintiff's Counsel Favors Approval of the Settlement

In assessing whether a proposed settlement is fair, Delaware courts place considerable weight on whether it was reached through adversarial, arms-length negotiations.[64] The Settlement is the product of serious, informed and non-collusive negotiations following a thorough analysis of the strengths and weaknesses of the legal and factual issues in this Action. Plaintiff's counsel and Defendants' counsel

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[63] *See Velez v. Novartis Pharms.*, 2010 WL 4877852, at *13 (S.D.N.Y Nov. 30, 2010) ("Settlement at this juncture results in a substantial and tangible present recovery, without the attendant risk and delay of posttrial motions and appeals.") (citation omitted); *see also Ryan v. Gifford*, 2009 WL 18143, at *9 (Del. Ch. Jan. 2, 2009) ("Uncertainty is costly to Maxim and its shareholders, and by entering into the Settlement, Maxim's shareholders have obtained a significant and certain recovery. Although it is possible that there could have been a larger recovery after a trial, it is also possible that any recovery would have been smaller than the recovery under the Settlement.").

[64] *See, e.g.*, *Ryan v. Gifford*, 2009 WL 18143, at *5 ("The diligence with which plaintiffs' counsel pursued the claims and the hard-fought negotiations process weigh in favor of approval of the Settlement.").

participated in many adversarial negotiations discussing the merits of the case and a potential resolution of the litigation.

Delaware courts also consider the opinion of experienced counsel in determining the fairness of a settlement.[65] Plaintiff's counsel, Saxena White, and Delaware counsel, Andrews & Springer, are experienced investor advocates who have litigated numerous lawsuits on behalf of companies and stockholders in this Court and others.[66] Plaintiff's counsel believes that the Settlement is fair and in the best interest of the Company, and this conclusion was fully informed by the significant litigation activity preceding the parties' agreement to the Settlement. Indeed, counsel for Plaintiff has litigated this Action for over three and-a-half years and has conducted significant document and deposition discovery,[67] consulted several subject matter and damages experts, conferred and negotiated with Defendants, and comprehensively assessed and analyzed the claims and damages in this Action. Accordingly, Plaintiff and his counsel were well-aware of the strengths and weaknesses of the claims in the Action while negotiating and agreeing to the Settlement. This factor further supports approval of the Proposed Settlement.[68]

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[65] *Polk*, 507 A. 2d at 536.

[66] *See* Sborz Aff., Exs. 1 and 2 (Saxena White and Andrews & Springer resumes).

[67] *See supra* at pp. 15-16.

[68] *See Neponsit Inv. Co. v. Abramson*, 405 A.2d 97, 99 (Del. 1979) (approving a settlement based, in part, on plaintiff's counsel's conclusion, reached after

Finally, to date, no FXCM stockholder has filed an objection nor even contacted counsel to express any dissatisfaction or concern regarding any aspect of the Settlement. The absence of any such objection also weighs in favor of approving the Settlement. The deadline to serve objections to the Settlement is May 15, 2019, and Plaintiff will respond if any objections are filed.

II. PLAINTIFF'S COUNSELS' REQUEST FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES SHOULD BE GRANTED

Plaintiff's counsel requests an award of attorneys' fees and expenses totaling $465,000 (previously defined as the "Fee and Expense Award"). Defendants' counsel do not oppose the Fee and Expense Award. For the reasons set forth below, Plaintiff's counsel submits that the Fee and Expense Award is reasonable and merited under the circumstances.

A. The Applicable Standard

Plaintiff's counsel in a derivative action are entitled to an award of attorneys' fees and expenses if the efforts confer a benefit upon the corporation. The amount of such an award is committed to the sound discretion of the Court under the well-established *Sugarland* factors.[69] Under *Sugarland*, the Court considers multiple

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conducting pretrial discovery, that the settlement was fair and in the best interest of the class).

[69] *Sugarland Indus. v. Thomas*, 420 A. 2d 142, 147-50 (Del. 1980).

factors, including: (i) the results achieved by the litigation; (ii) the amount of time and effort by plaintiff's counsel; (iii) the relative complexity of the issues; (iv) whether counsel was working on a contingency fee basis; and (v) the standing and ability of the attorneys involved.[70] The Court may also consider prior fee awards in similar cases as guidance for the exercise of its discretion.[71]

B. The Results Accomplished in Light of the Uncertainty of Success on the Merits Warrants Approval of the Requested Fee and Expense Award

The benefits achieved through litigation are accorded the greatest weight in determining an appropriate fee award.[72] As discussed above, Plaintiff faced significant obstacles in recovering damages for the benefit of FXCM, including establishing liability for the *Caremark* claims and establishing the damages suffered by the Company. Plaintiff's counsel negotiated a Settlement that resulted in direct financial benefits to FXCM and its stockholders through the payment of $1.55 million on behalf of the Defendants. Given the uncertainty of success on the merits, the settlement represents an excellent result for the Company and its stockholders. Indeed, FXCM's market cap was less than $200,000 on the day this Action settled, meaning that this Settlement was the equivalent of seven times FXCM's market cap.

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[70] *Id.* at 149.

[71] *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1136 (Del. Ch. 2011).

[72] *Seinfeld v. Coker*, 847 A. 2d 330 (Del. Ch. 2000).

C. The Contingent Nature of the Litigation Supports the Requested Fee and Expense Award

The contingent nature of the representation is the "second most important factor considered by this Court" in awarding attorneys' fees.[73] "It is the 'public policy of Delaware to reward risk-taking in the interests of [stock]holders.'"[74] Delaware courts have repeatedly recognized that an attorney may be entitled to a much larger fee when the compensation is contingent rather than paid on an hourly or contractual basis.[75] Contingency risk is assessed at the outset of the litigation.[76]

This case was litigated on an entirely contingent basis. Counsel for Plaintiff have not been paid for their work, nor have any of their costs or expenses been reimbursed, and litigating the Action required the allocation of a substantial amount of Plaintiff's counsel's resources, including considerable out-of-pocket expenses. Accordingly, Plaintiff's counsel took on substantial contingency risk in pursuing Plaintiff's claims, a factor supporting the requested Fee and Expense Award.

D. The Significant Efforts of Plaintiff's Counsel Support the Requested Fee Award

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[73] *Dow Jones & Co. v. Shields*, 1992 WL 44907, at *2 (Del. Ch. Jan.10, 1992).

[74] *See In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1073 (Del. Ch. 2015), *as revised* (May 21, 2015), *judgment entered sub nom. In re Activision Blizzard, Inc. S'holder Litig.*, 2015 WL 2415559 (Del. Ch. May 20, 2015).

[75] *Chrysler Corp. v. Dann*, 223 A.2d 384, 389-90 (Del. 1966); *accord Ryan v. Gifford*, 2009 WL 18143, at *13.

[76] *See, e.g., In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d at 1140.

In applying *Sugarland*, Delaware courts should "look at the hours and efforts expended" as a cross-check, but treat the hours expended as of "secondary importance to the benefits achieved."[77] The more important aspect is "effort, as in what plaintiff's counsel actually did."[78]

While the Action did not reach trial, the road to this recovery involved significant litigation activity as described *supra* at pages 15-17, spanning over three-and-a-half years and included the 220 Request, the research and drafting of multiple complaints, significant discovery efforts, extensive consultation with experts, and the filing of summary judgment motions. The Grzandziel and Andrews Affidavits submitted herewith contain a breakdown of Plaintiff's counsel's time and expenses in this Action. From inception through the date the parties entered into the Memorandum of Understanding (January 16, 2019), Plaintiff's counsel devoted a total of 9,211.55 hours to this litigation, with a total lodestar of $4,485,996.25 at their currently applicable hourly rates.[79]

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[77] *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1258 (Del. 2012).

[78] *In re Del Monte Foods Co. Shareholders Litig.*, 2011 WL 2535256, at *13 (Del. Ch. June 27, 2011) (citations omitted).

[79] *See* Time and Expense Affidavits of Brandon T. Grzandziel (the "Grzandziel Aff."), ¶5 and Peter B. Andrews (the "Andrews Aff."), ¶2.

Counsel for Plaintiff incurred total expenses of $416,813.76.[80] After subtracting these expenses, the net requested fee award is $48,186.24. The effective hourly rate represents a significant and substantial negative lodestar multiplier, is well below counsel's typical hourly rate, and is within the range approved by this Court in comparable cases. A so-called "negative" multiplier highlights the reasonableness of the requested fee.[81]

As noted in the chart below, the requested Fee and Expense Award is in line with awards approved in comparable cases, and is made even more reasonable by the fact that the net requested fee award (*i.e.*, 3.1%) is significantly *below* ranges approved by this Court in comparable cases.

Case Name	**Settlement Recovery Amount**	**Awarded Percentage Recovery**	**Stage of Settlement**
In re Emerson Radio S'holder Deriv. Litig., C.A. No. 3392-VCL, 2011 WL 1135006, at *7 (Del. Ch. Mar. 28, 2011)	$3,000,000	29.1%	Reviewed approximately 100,000 pages of documents; took 11 depositions; engaged in some motion practice.

[80] *See* Grzandziel Aff., ¶6; Andrews Aff., ¶3.

[81] *See In re Fasteners Antitrust Litig.*, 2014 WL 296954, at *8 (E.D. Pa. Jan. 27, 2014) (negative multiplier confirms reasonableness of counsel's fee request); *In re Auto. Refinishing Paint Antitrust Litig.*, 2008 WL 63269, at *6 (E.D. Pa. Jan. 3, 2008) (same).

Buttonwood Tree Value Partners, LP v. LBC Capital, Inc., et al., C.A. No. 9743-CB (Jan. 11, 2010)	$2,100,000	28.6%	Reviewed 100,000 pages of documents; took three depositions; and engaged in some motion practice.
In re China Integrated Energy, Inc. S'holders Litig., C.A. No. 6625-VCL (Dec. 2, 2015)	$1,000,000	26%	Reviewed several thousand pages of documents but settled before any depositions were taken and before the parties engaged in motion practice.

E. Relative Complexity of the Litigation

In determining the award of Plaintiff's counsel's fees and expenses, the Court also will consider the relative complexities of the litigation. "All else equal, litigation that is challenging and complex supports a higher fee award."[82] Courts generally recognize that stockholder derivative litigation is notoriously difficult. This was a highly complex case, involving both board oversight claims (which are historically challenging, as evidenced by the few *Caremark* claims that have survived motions to dismiss) and a challenge to two corporate transactions. The Regulation 5.16 damages analysis, which would have sought to tie the Company's losses following the SNB Flash Crash to the Company's no-debit policy, was unique and untested. And FXCM's bankruptcy filing in December 2017 added another

[82] *In re Activision Blizzard, Inc. Stockholder Litigation*, 124 A.3d at 1072.

layer of complexity to the prosecution of Plaintiff's claims. Notwithstanding these challenges, Plaintiff's counsel was able to secure a significant benefit for FXCM.

F. The Standing and Ability of Counsel Supports the Requested Fee and Expense Award

Under *Sugarland*, the Court should also consider the "standing and ability of Plaintiff's counsel." As demonstrated in the attached resumes of Saxena White and Andrews & Springer, Plaintiff is represented by law firms with extensive experienced in stockholder derivative litigation.[83]

The standing of opposing counsel may also be considered in determining an allowance of attorneys' fees. Defendants are represented by the experienced, skillful, and well-respected firms of King & Spalding LLP and Morris Nichols, Arsht & Tunnell LLP. As such, this factor militates in favor of approval of the requested Fee and Expense Award.

* * *

Taking all of the *Sugarland* factors into account, an award in the amount of $465,000, inclusive of expenses, is warranted here.

III. A $5,000 INCENTIVE FEE AWARD IS APPROPRIATE

In addition to the Fee and Expense Award, Plaintiff's counsel also petitions this Court for the Incentive Fee Award to Plaintiff in the amount of $5,000 to be paid

[83] See Sborz Aff., Exs. 1 and 2 (Saxena White and Andrews & Springer resumes).

out of any fee award granted by the Court. The Court has broad discretion in deciding "whether to grant an incentive award to a named plaintiff" following the "conclusion of the litigation."[84] The Court has routinely awarded incentive fee awards in class or derivative litigation when the plaintiff has contributed meaningfully to the litigation.[85] The Court has also explained that these awards incentivize stockholders, like Plaintiff, to bring meritorious lawsuits "on behalf of a large and diffused class of shareholders who do not have the organizational ability or funds to seek redress themselves."[86] Incentive fee awards also serve to compensate a plaintiff for the "reputational risk" undertaken by serving as a class representative.[87]

Here, Plaintiff filed this Action, monitored the Action's prosecution through regular contact with his counsel, and maintained continuous ownership of his FXCM

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[84] *Chen v. Howard-Anderson*, 2017 WL 2842185, at *3 (Del. Ch. June 30, 2017).

[85] *See, e.g.*, *In re Saba Software, Inc. S'holder Litig.*, C.A. No. 10697-VCS (Sept. 26, 2018) (ORDER) (awarding incentive fee award to plaintiff in the amount of $100,000); *In re CytRx Corp. S'holder Deriv. Litig. II*, C.A. No. 11800-VCMR (May 17, 2018) (ORDER) (awarding incentive fee award to each plaintiff in the amount of $2,500). *See also In re Orchard Enters. S'holder Litig.*, C.A. No. 7840-VCL, 2014 WL 4181912, at *13, note 8 (Del. Ch. Aug. 22, 2014), *judgment entered sub nom. In re Orchard Enters. Inc. S;holders Litig*. (Del. Ch. 2014) (collecting cases).

[86] *In re Dunkin' Donuts S'holder Litig.*, 1990 WL 189120, at *10 (Del. Ch. Nov. 27, 1990).

[87] *Chen*, 2017 WL 2842185, at *5.

shares through its roughly three-and-a-half-year duration. Plaintiff reviewed drafts of the original complaint as well as each of the three amended complaints, produced documents in response to Defendants' request for production, and was deposed. Additionally, in accordance with this Court's practice, the requested Incentive Fee Award was fully disclosed in the notice to FXCM stockholders and, as of the date of this Motion, has not received any objections from FXCM's stockholders. Thus, the request for the Incentive Fee Award should be granted.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully submits that the Court should approve the Settlement, the Fee and Expense Award, and the Incentive Fee Award in their entirety.

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Dated: May 1, 2019

PUBLIC VERSION FILED:
May 8, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on May 8, 2019, I caused to be served a true and correct copy of the foregoing *Public Version of Plaintiff's Motion for Final Approval of Proposed Settlement, Award of Attorneys' Fees and Expenses, and Award of Incentive Fee* via File & Serve*Xpress* upon the following counsel of record:

Kenneth J. Nachbar
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