



DIVISION OF
CORPORATION FINANCE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

February 1, 2022

Douglas K. Schnell
Wilson Sonsini Goodrich & Rosati

Re: Zynga Inc. (the "Company")
Incoming letter dated February 1, 2022

Dear Mr. Schnell:

This letter is in regard to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by the California Public Employees' Retirement System (the "Proponent") for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders. Your letter indicates that the Proponent has withdrawn the Proposal and that the Company therefore withdraws its January 19, 2022 request for a no-action letter from the Division. Because the matter is now moot, we will have no further comment.

Copies of all of the correspondence related to this matter will be made available on our website at <https://www.sec.gov/corpfin/2021-2022-shareholder-proposals-no-action>.

Sincerely,

Rule 14a-8 Review Team

cc: Todd Mattley
CalPERS

DOUGLAS K. SCHNELL
Internet: dschnell@wsgr.com
Direct dial: (650) 849-3275

Client File No.: 51823.000

January 19, 2022

BY EMAIL (shareholderproposals@sec.gov)

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Shareholder Proposal of California Public Employees' Retirement System Submitted to Zynga Inc.

Ladies and Gentlemen:

Pursuant to Rule 14a-8(j) promulgated under the Securities Exchange Act of 1934, as amended, we are writing on behalf of our client, Zynga Inc., a Delaware corporation (the "Company"), to request that the Staff of the Division of Corporation Finance (the "Staff") of the Securities and Exchange Commission (the "Commission") concur with the Company's view that, for the reasons stated below, it may exclude the shareholder proposal and supporting statement (together, the "Proposal") submitted by California Public Employees' Retirement System (the "Proponent") from the proxy materials (the "2022 Proxy Materials") to be distributed by the Company in connection with its 2022 Annual Meeting of Shareholders.

In accordance with Section C of Staff Legal Bulletin No. 14D (November 7, 2008) ("SLB 14D"), the Company is emailing this letter to the Staff. Simultaneously, pursuant to Rule 14a-8(j), the Company is sending a copy of this letter to the Proponent as notice of the Company's intention to exclude the Proposal from the 2022 Proxy Materials. The Company will promptly forward to the Proponent any response from the Staff to this no-action request that the Staff transmits by email or fax to the Company. Also pursuant to Rule 14a-8(j), this letter is being filed no later than 80 calendar days before the Company files the 2022 Proxy Materials.

Rule 14a-8(k) and Section E of SLB 14D provide that shareholder proponents are required to send companies a copy of any correspondence that they elect to submit to the Staff or the Commission. Accordingly, the Company is taking this opportunity to remind the Proponent that if it submits correspondence to the Staff or the Commission with respect to the Proposal, a copy of that correspondence should concurrently be furnished to the undersigned on behalf of the Company.

1. The Proposal

The text of the resolution contained in the Proposal is set forth below:

Resolved: Shareholders of Zynga Inc. (“Company”) ask the board of directors (“Board”) to adopt, and present for shareholder approval, a “proxy access” bylaw. Such a bylaw shall require Company to include in its proxy materials prepared for a shareholder meeting at which directors are to be elected, the name, the Disclosure and the Statement (each as defined herein) of any person nominated for election to the board by a shareholder or group (“Nominator”) that meets the criteria established below. Company shall allow shareholders to vote on such nominee on Company’s proxy card.

A copy of the Proposal is attached as Exhibit A.

2. Bases for Exclusion

The Company requests that the Staff concur in its view that it may exclude the Proposal from the 2022 Proxy Materials pursuant to:

- Rule 14a-8(b) because the Proponent failed to provide the Company with a written statement regarding its ability to meet with the Company; and
- Rule 14a-8(i)(6) because the Company does not have the authority to implement the Proposal because the Company is a party to a binding merger agreement that restricts the Company’s ability, directly or indirectly, to modify its organizational documents.

3. Analysis

- (a) The Proposal does not comply with Rule 14a-8(b) because the Proponent failed to provide the Company with a written statement regarding its ability to meet with the Company.

Rule 14a-8(b)(1)(iii) requires that a proponent provide a written statement that the proponent is “able to meet with the company in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal.” This written statement must include the proponent’s contact information as well as business days and specific times that the proponent is available to discuss the proposal with the company. Rule 14a-8(f)(1) provides that a company may exclude a shareholder proposal if the proponent fails to satisfy the procedural requirements set forth in Rule 14a-8(b).

As of the date of this letter, the Proponent has failed to provide a written statement that complies with Rule 14a-8(b) regarding its ability to meet with the Company. The Proposal and associated cover letter did not include a written statement that complies with Rule 14a-8(b)

regarding the Proponent's ability to meet with the Company, and the Proponent has not supplemented its Proposal with the required written statement. Accordingly, the Proposal is not in compliance with Rule 14a-8(b) and may be excluded from the 2022 Proxy Materials.

- (b) The Proposal may be excluded pursuant to Rule 14a-8(i)(6) because the Company is a party to a binding merger agreement that restricts the Company's ability, directly or indirectly, to modify its organizational documents.

Rule 14a-8(i)(6) provides that a company may exclude a shareholder proposal from its proxy materials if the company lacks the authority to implement the proposal. The Staff has consistently taken the position that "proposals that would result in the company breaching existing contractual obligations may be excludable under [R]ule 14a-8(i)(2), [R]ule 14a-8(i)(6), or both, because implementing the proposal would require the company to violate applicable law or would not be within the power or authority of the company to implement." Staff Legal Bulletin No. 14B (September 15, 2004) ("SLB 14B"). On numerous occasions the Staff has reinforced this analysis by concurring in the exclusion of shareholder proposals that, if implemented, would result in a company breaching its existing contractual obligations, including if those obligations are contained in a merger agreement. *AMC Networks, Inc.* (April 23, 2019) (concurring in the exclusion pursuant to Rule 14a-8(i)(6) of a shareholder proposal where the proposal required consent from the holders of the company's Class B Common Stock to amend certain provisions of the company's certificate of incorporation); *Twenty-First Century Fox, Inc.* (August 27, 2018) (concurring in the exclusion pursuant to Rule 14a-8(i)(6) of a shareholder proposal where the proposal required the company to amend its certificate of incorporation to reclassify its outstanding capital structure in violation of the interim operating covenants of a merger agreement to which the company was a party); *Cigna Corporation* (January 24, 2017) (concurring in the exclusion pursuant to Rule 14a-8(i)(6) of a shareholder proposal where the proposal functionally required the company to amend its bylaws to provide for a proxy access right in violation of the interim operating covenants of a merger agreement to which the company was a party). *See also Comcast Corporation* (March 17, 2010) (concurring in the exclusion pursuant to Rule 14a-8(i)(6) of a shareholder proposal where the proposal requested that the company adopt an equity holding requirement policy because such policy conflicted with existing contracts between the company and certain of its executives); *NVR, Inc.* (February 17, 2009) (concurring in the exclusion pursuant to Rule 14a-8(i)(6) of a shareholder proposal because the proposal would cause the company to breach existing compensation agreements and require the company to impose restrictions on transferability of shares already issued); *eBay Inc.* (March 26, 2008) (concurring in the exclusion pursuant to Rule 14a-8(i)(6) of a shareholder proposal where the proposal requested that the company adopt a policy prohibiting the sale of dogs and cats on an affiliated Chinese website because the company could not implement the proposal without the consent of its joint venture partner); *Bank of America Corporation* (February 26, 2008) (concurring in the exclusion pursuant to Rule 14a-8(i)(6) of a shareholder proposal where the proposal required disclosure of fees in an existing consulting agreement because such disclosure would violate the confidentiality provisions of the agreement).

In the Commission's 1998 release adopting amendments to Rule 14a-8(i)(6) (formerly Rule 14a-8(c)(6)), the Commission explained that, under this rule, "exclusion may be justified where implementing the proposal would require intervening actions by independent third parties." Amendments to Rules on Shareholder Proposals, Release No. 34-40018 (May 21, 1998) at note 20 (the "1998 Release"). The Commission distinguished such a proposal from one that "merely requires the company to ask for cooperation from a third party," which would not be excludable under Rule 14a-8(i)(6). 1998 Release (comparing *SCEcorp* (December 20, 1995) (concurring in the exclusion pursuant to the predecessor to Rule 14a-8(i)(6) of a shareholder proposal where the proposal would require unaffiliated fiduciary trustees to agree to amend voting agreements) with *Northeast Utilities System* (November 7, 1996) (declining to concur in the exclusion of a shareholder proposal that requested that the company send a letter to a third party asking it to coordinate annual meetings held by public companies)).

The Proposal requests that the Company's Board of Directors (the "Board") "adopt, and present for shareholder approval, a proxy access bylaw." To implement the Proposal, the Company would be required to amend its bylaws (the "Bylaws"). No corporate policy or other action of the Board could supersede rights provided by the Bylaws, making an amendment to the Bylaws the essential element to implement the Proposal.

On January 10, 2022, the Company announced that it had entered into a merger agreement to combine with Take-Two Interactive Software, Inc. ("Take-Two").¹ The merger agreement includes covenants that restrict the Company's ability to take certain actions, including amendments to its organizational documents (including the Bylaws). More specifically, Section 5.1(a) of the merger agreement contains the following restrictions:

Neither the Company nor any of its Subsidiaries shall ... between the execution of this Agreement and the earlier of the termination of this Agreement in accordance with its terms and the Effective Time, *directly or indirectly*, do any of the following *without the prior written consent of [Take-Two]* ... (ii) make any change in any of the Company's organizational documents; ... or (xv) commit or agree to do or authorize any of the foregoing (emphasis added).

As a result of the merger agreement, the Company is not permitted to unilaterally amend the Bylaws, and any action by the Board to amend the Bylaws will breach the merger agreement, an outcome that could have significant consequences to the Company and its shareholders. In addition, the Company has committed to not, directly or indirectly, make any change to the Bylaws. Including the Proposal in its current form in the 2022 Proxy Materials would constitute an indirect action by the Company to amend the Bylaws, or at least an action proposing to do so. Similar to *Twenty-First Century* and *Cigna*, including the Proposal in the 2022 Proxy Materials so long as the merger agreement is in effect would cause the Company to breach the merger agreement.

¹ The merger agreement is included on a Current Report on Form 8-K filed with the Commission on January 10, 2022.

Office of Chief Counsel
January 19, 2022
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The terms of the merger agreement were part of a package of contractually bargained for provisions as a means of restricting the Company's non-ordinary course operations during the pendency of the transaction with Take-Two. To deviate from these terms *requires* the affirmative consent of Take-Two. There is nothing in the course of conduct between the parties that would suggest that Take-Two would provide any such consent.

The Company cannot implement the Proposal unilaterally without breaching its obligations under the merger agreement. The Company also cannot implement the Proposal without the consent of Take-Two. Accordingly, and consistent with the 1998 Release, SLB 14B and longstanding Staff precedent, the Proposal is properly excludable from the 2022 Proxy Materials pursuant to Rule 14a-8(i)(6).

4. Conclusion

The Company requests that the Staff concur with its view that, for the reasons stated above, it may exclude the Proposal from the 2022 Proxy Materials.

Very truly yours,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

/s/ Douglas K. Schnell

Douglas K. Schnell

Enclosures

cc: Zynga Inc.
Phuong Phillips
Matt Tolland
Samir Najam

California Public Employees' Retirement System
Todd Mattley ([REDACTED])

Wilson Sonsini Goodrich & Rosati, Professional Corporation
Steven V. Bernard

Exhibit A
(see attached)



Investment Office
P.O. Box 2749
Sacramento, CA 95812-2749
Telecommunications Device for the Deaf - (916) 795-3240
Phone: (916) 795-3400

December 3, 2021

VIA OVERNIGHT MAIL

Zynga Inc.
699 8th Street
San Francisco, CA 94103
Attn: Corporate Secretary

Dear Corporate Secretary:

The purpose of this letter is to submit our shareowner proposal for inclusion in the proxy materials regarding the company's next annual meeting pursuant to SEC Rule 14a-8.¹

Our submission of this proposal does not indicate that CalPERS is closed to further communication and negotiation. Although we must file now to comply with the timing requirements of Rule 14a-8, we remain open to the possibility of withdrawing this proposal if we are assured that our concerns with the company are addressed.

Please alert Todd Mattley, Associate Investment Manager at [REDACTED] or via email at [REDACTED] if any additional information is required for this proposal to be included in the company's proxy and properly heard at the next annual meeting. Please let us know if you have any questions concerning this proposal.

Sincerely,

A handwritten signature in black ink, appearing to read "Simiso Nzima".

SIMISO NZIMA
Investment Director, Global Equity
CalPERS Investment Office

Enclosures

¹ CalPERS is the owner of shares of the company. Acquisition of this stock has been ongoing and continuous for several years. Specifically, CalPERS has owned shares with a market value in excess of \$25,000 continuously for at least the preceding year. (Documentary evidence of such ownership is enclosed.) Furthermore, CalPERS intends to continue to own such a block of stock at least through the date of the annual shareowners' meeting and attend the annual shareowners' meeting, if required.



December 03, 2021

Zynga Inc.
Attn: Corporate Secretary
699 8th Street
San Francisco, CA 94103
800-762-2530

Re: CalPERS, Mailing Address [REDACTED]

State Street Bank and Trust, as custodian for the California Public Employees' Retirement System, to the best of our knowledge declares the following:

State Street Bank and Trust performs master custodial services for the California State Public Employees' Retirement System.

In addition, as of December 03, 2021, and continuously for at least the immediately preceding eighteen months, California Public Employees' Retirement System is and has been the beneficial owner of shares of common stock Zynga, Inc. having a market value in excess of \$25,000.

Such shares beneficially owned by the California Public Employees' Retirement System are custodied by State Street Bank and Trust through the electronic book-entry services of the Depository Trust Company (DTC). State Street is a participant (Participant Number [REDACTED]) of DTC and shares registered under participant [REDACTED] in the street name of [REDACTED] are beneficially owned by the California Public Employees' Retirement System.

Signed this on the 03rd day of December at Sacramento, California.

STATE STREET BANK AND TRUST
As custodian for the California Public Employees' Retirement System.

By:

Name: Jeanie A. Smith
Title: Assistant Vice President

RESOLVED: Shareholders of Zynga Inc. ("Company") ask the board of directors ("Board") to adopt, and present for shareholder approval, a "proxy access" bylaw. Such a bylaw shall require Company to include in its proxy materials prepared for a shareholder meeting at which directors are to be elected, the name, the Disclosure and the Statement (each as defined herein) of any person nominated for election to the board by a shareholder or group ("Nominator") that meets the criteria established below. Company shall allow shareholders to vote on such nominee on Company's proxy card.

The number of shareholder-nominated candidates appearing in proxy materials shall not exceed the larger of 2 or one quarter of the directors then serving. This bylaw, which shall supplement existing rights under Company bylaws, should provide that Nominator must:

- a) have beneficially owned 3% or more of Company's outstanding common stock continuously for at least three years before submitting the nomination;
- b) give Company, within the time period identified in its bylaws, written notice of the information required by the bylaws and any Securities and Exchange Commission rules about (i) the nominee, including consent to being named in the proxy materials and to serving as director if elected; and (ii) Nominator, including proof it owns the required shares (the "Disclosure"); and
- c) certify that (i) it will assume liability stemming from any legal or regulatory violation arising out of Nominator's communications with Company shareholders, including the Disclosure and the Statement; (ii) it will comply with all applicable laws and regulations if it uses soliciting material other than

Company's proxy materials; and (c) to the best of its knowledge, the required shares were acquired in the ordinary course of business and not to change or influence control at Company.

Nominator may submit with the Disclosure a statement not exceeding 500 words in support of the nominee (the "Statement"). The Board shall adopt procedures for promptly resolving disputes over whether notice of a nomination was timely, whether the Disclosure and the Statement satisfy the bylaw and applicable federal regulations, and the priority to be given to multiple nominations exceeding the one-quarter limit.

SUPPORTING STATEMENT

We believe proxy access is fundamental to a sustainable system of governance that fosters director accountability and long-term value creation.

The CFA Institute's 2014 assessment of pertinent academic studies and the use of proxy access in other markets similarly concluded that proxy access:

- Would "benefit both the markets and corporate boardrooms, with little cost or disruption."
- Has the potential to raise overall US market capitalization by up to \$140.3 billion if adopted market-wide.¹

A growing number of companies continue to adopt the provision – rejecting the common corporate assertion that proxy access is costly, distracting, and favored primarily by special interests.

We urge shareholders to vote FOR this proposal.

¹ <http://www.cfapubs.org/doi/pdf/10.2469/ccb.v2014.n9.1>

DOUGLAS K. SCHNELL
Internet: dschnell@wsgr.com
Direct dial: (650) 849-3275

Client File No.: 51823.000

February 1, 2022

BY EMAIL (shareholderproposals@sec.gov)

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Shareholder Proposal of California Public Employees' Retirement System Submitted to Zynga Inc.

Ladies and Gentlemen:

In a letter dated January 19, 2022, we requested that the Staff of the Division of Corporation Finance concur that our client, Zynga Inc. (the "Company"), could exclude the shareholder proposal and supporting statement (the "Proposal") submitted by California Public Employees' Retirement System (the "Proponent") from the proxy materials to be distributed by the Company in connection with its 2022 Annual Meeting of Shareholders.

Attached as Exhibit A is a letter from the Proponent withdrawing the Proposal. In reliance on that letter, we withdraw the January 19, 2022 no action request.

If you have any questions, please do not hesitate to contact me at the telephone number above.

Very truly yours,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

/s/ Douglas K. Schnell

Douglas K. Schnell

Enclosures

cc: Zynga Inc.

**WILSON
SONSINI**

Office of Chief Counsel

February 1, 2022

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Phuong Phillips
Matt Tolland
Samir Najam

California Public Employees' Retirement System
Todd Mattley (engagements@calpers.ca.gov)

Wilson Sonsini Goodrich & Rosati, Professional Corporation
Steven V. Bernard

Exhibit A
(see attached)



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Sacramento, CA 95812-2749
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Phone: (916) 795-3400

January 28, 2022

VIA OVERNIGHT MAIL

Zynga Inc.
699 8th Street
San Francisco, CA 94103
Attn: Corporate Secretary

Re: Withdrawal of Shareowner Proposal

Dear Corporate Secretary:

The purpose of this letter is to formally withdraw the CalPERS shareowner proposal on proxy access, which had previously been submitted for inclusion in proxy materials connected to the company's 2022 annual meeting (pursuant to SEC Rule 14a-8). The basis of the withdraw is due to the pending M&A activity with Take-Two.

Please alert Todd Mattley, Associate Investment Manager at (916) 795-0565 or via email at Engagements@calpers.ca.gov if you have any questions or additional information is required.

Sincerely,

A handwritten signature in black ink, appearing to read "Simiso Nzima".

SIMISO NZIMA
Investment Director, Global Equity
CalPERS Investment Office