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Case No. 3534-CC

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

REDACTED VERSION

FILED JULY 1, 2008

WAYNE COUNTY EMPLOYEES' RETIREMENT SYSTEM, individually, and on behalf of all those similarly situated,	:	
Plaintiff,	:	
v.	:	Civil Action No. 3534-CC
ROBERT J. CORTI, RONALD DOORNINK, BARBARA S. ISGUR, ROBERT A. KOTICK, BRIAN G. KELLY, ROBERT J. MORGADO, PETER J. NOLAN, RICHARD SARNOFF, ACTIVISION, INC., VIVENDI, S.A., VGAC LLC, VIVENDI GAMES, INC., and SEGO MERGER CORPORATION,	:	
Defendants.	:	

ANSWERING BRIEF OF THE ACTIVISION DEFENDANTS IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

After weeks of intensive discovery, Plaintiff has decided to rest its application for a preliminary injunction on seven disclosure-based claims – each of which is without merit. Plaintiff has not shown a substantial likelihood that the allegedly omitted information would so alter the mix of information as to justify the extraordinary relief of a preliminary injunction. Indeed, an injunction at this point will very likely jeopardize the opportunity for Activision stockholders to decide for themselves whether to accept a transaction between Activision, Inc. ("Activision" or the "Company") and Vivendi Games, Inc. ("Vivendi Games") was negotiated and approved (the "Combination"), the only value-maximizing transaction on the table (given that no alternative suitor has emerged in the nearly seven months since the deal was announced).

Plaintiff has had three attempts to plead claims challenging the process followed by the Activision Board of Directors (the "Board") and its Nominating and Corporate Governance Committee (the "NCGC"). Not only has Plaintiff failed to plead a genuine process claim every time, but discovery has now confirmed that Plaintiff does not have a colorable claim. Plaintiff's original theory of the case – that Robert Kotick (Activision's Chief Executive Officer and Co-Chairman) and Brian Kelly (Activision's Co-Chairman) were allegedly conflicted and purposely kept the Board in the dark to line their pockets with lucrative employment contracts – has been gutted by the record evidence that proves otherwise:

- Activision's Board has a majority of disinterested and independent directors. The six outside directors – Corti, Doornink, Isgur, Morgado, Nolan, and Sarnoff – have no interest whatsoever in Vivendi, and are not beholden to anyone.

- The Activision Board, including the outside directors, was well-informed and received regular updates on the progress of negotiations at every meeting, as well as detailed analyses by investment bankers, accountants, and outside consultants.

- The transaction was negotiated at arm's length. The two officer directors, Messrs. Kotick and Kelly, were powerfully motivated to negotiate for the interests of Activision stockholders due to their own substantial equity interests in the Company – which together amount to approximately 7.5% of the outstanding shares.

- The "deal protection" features of the BCA are well within the range of reasonableness, and in fact, the break-up fee is relatively low (*i.e.*, approximately 2% of the nominal value of the Combination).

- Despite the modest deal protection features, no alternative bidder has emerged in the nearly seven months since the Combination was announced, providing strong evidence that the Combination is the best value available for shareholders.

- The employment agreements of Messrs. Kotick and Kelly were recently renegotiated by Activision – *not Vivendi* – and would have been regardless of whether or not the Combination occurred, as they were due to expire in March 2008. Mr. Kotick actually gave up being co-chair of the Company – a position he held since 1991 – and Mr. Kelly took a significant pay cut.

- The Activision shareholders effectively have a "shareholder veto" and the ultimate ability to make their own informed decision as to whether to approve the Combination.

In the end, Plaintiff's substantive theory of the case, which amounts to an argument that executives would knowingly damage the most valuable asset in their stock portfolios in order to keep jobs that were never in jeopardy, is simply without merit. Moreover, Plaintiff has come forward with nothing other than rhetoric to suggest that the Combination does not offer a value-maximizing opportunity for Activision and its stockholders. The record demonstrates that the Combination offers Activision stockholders a unique opportunity for building both short-and long-term value for their shares. As Mr. Kotick, the Company's single largest stockholder, explained during his deposition, what makes the transaction so valuable to Activision shareholders is the

opportunity to consolidate Blizzard (Vivendi Games' crown jewel) with Activision's game publishing business. Blizzard's best asset is the highly lucrative multiplayer online game "World of Warcraft," which has millions of paid subscribers -- making Blizzard "probably the most valuable single video game asset that exists." (Kotick 144) In fact, the marketplace has already acknowledged that the Combination offers significant value to Activision stockholders, as reflected in the current trading price of Activision stock (which closed today at over $35.00 per share). As one of Activision's independent directors explained, the current stock price reflects "[the] fundamental belief in the strength of this combination." (Morgado 347-48) Financial analysts agree, with one explaining recently that "investor interest has shifted away from Activision standalone and toward the pro forma combined company," and although "[t]he current share price is above the transaction price [of $27.50] . . . both Activision and Vivendi Games (which owns Blizzard) have performed better than was originally contemplated by the merger agreement, so we expect the deal to be approved." (*See, e.g.,* Transmittal Affidavit of Stephen D. Dargitz Exhibit 2 ("Dargitz Aff. Ex. __"))

For these reasons, it comes as no surprise that Plaintiff's application for a preliminary injunction is now limited to disclosure claims, some of which are asserted for the first time in Plaintiff's opening brief. This is now at least the third time Plaintiff has attempted to assert disclosure claims. Each time, Defendants have mooted Plaintiff's disclosure claims with supplemental disclosure. After every supplemental disclosure, Plaintiff has sought to peel back successive layers of the disclosure onion until there is nothing left to peel. To delay a vote on the Combination to require additional, non-

material information to be disclosed would serve no one's interests, and especially not those of Activision stockholders.

Not counting the financial statements and lengthy exhibits (which include all of the underlying transaction documents), Activision's definitive proxy statement filed on June 6, 2008 (the "Definitive Proxy") is more than 260 pages long. Among other material facts, the disclosures made in this substantial document include (i) a detailed description of the background of the Combination, (*see* D.P. at 59-69); (ii) the specific terms and conditions of the Combination (including the fact that, if approved, Vivendi will own a controlling stake in the Company), *see id.* at 3, 12-13, 97-119; (iii) a fair summary of the analysis performed by the Board's financial advisors, *see id.* at 74-85; and (iv) a fair summary of the risks associated with the Combination, including the potential risks associated with Vivendi's businesses, *see id.* at 31-51, 72-73.

Much of the disclosure Plaintiff currently demands already appears in the Definitive Proxy and a supplemental mailing sent to stockholders on June 24, 2008.[1] The rest is either not material or otherwise not required by Delaware law. Specifically, Plaintiff has not shown that an increasingly detailed map of paths not taken by the Activision Board, or an exhaustive recitation of data considered (or not) by Activision's advisors, would substantially alter the total mix of information already available to Activision's stockholders. Similarly, Plaintiff's negative spin about the process leading to the Combination is not material, and need not be disclosed.

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[1] The Definitive Proxy ("D.P.") was filed as Adams Aff. Ex. 1 (D.I. 109).

Plaintiff has itself admitted that the Combination could evaporate if an injunction is granted, and that there is no guarantee that Vivendi will still be interested in a transaction at the current price or any price. (Yee 111-13)[2] To risk jeopardizing this wealth-generating transaction over Plaintiff's captious criticism of the Definitive Proxy would do a great disservice to Activision and its shareholders (whom Plaintiff purports to represent). Far from facing imminent irreparable harm if the Combination is not enjoined, the Activision shareholders risk losing an incredible opportunity if an injunction is granted.

As explained below, Plaintiff's request for a preliminary injunction should be denied.

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[2] The deposition transcript of Ronald Yee is filed herewith as Dargitz Ex. 1.

NATURE AND STAGE OF PROCEEDINGS

In the Combination, a wholly owned subsidiary of Activision will merge with and into Vivendi Games (the "Merger") while, at the same time, Vivendi Games' sole stockholder, VGAC LLC, will purchase 62.9 million newly issued shares of Activision at a price of $27.50 per share (the "Share Purchase"). The Company will conduct a post-closing tender offer for up to 146.5 million of its shares at the same price of $27.50 per share (the "Tender Offer"). After the Combination, Vivendi Games' ultimate parent, Vivendi S.A. ("Vivendi"), and its subsidiaries are expected to own at least 52% of the stock of Activision. At the time the Business Combination Agreement (the "BCA") was executed in December 2007, Activision stock was trading at $22.14 per share. The Combination is subject to approval by Activision's shareholders.

On December 2, 2007, Activision announced that it had entered into the BCA with Vivendi. On January 30, 2008, Activision filed its first preliminary proxy statement with the Securities and Exchange Commission (the "SEC").

On February 8, 2008, well after the Combination had been publicly announced, Plaintiff filed its original complaint. (D.I. 1) On February 22, 2008, Plaintiff filed a motion for expedited proceedings. (D.I. 9) After oral argument on March 12, 2008, the Court declined to schedule a preliminary injunction hearing or allow Plaintiff access to broad discovery on an expedited basis. The Court held Plaintiff's motion for expedited proceedings in abeyance pending the filing of a revised preliminary proxy statement, which, the Court observed, had the potential to eliminate Plaintiff's disclosure claims. (D.I. 28 at 45, 47)

On April 30, 2008, Activision filed a revised preliminary proxy statement (the "Revised Preliminary Proxy") with the SEC. The Revised Preliminary Proxy contained substantial additional background about the Combination, and although the Activision Defendants believed that none of Plaintiff's earlier disclosure claims had merit, the Revised Preliminary Proxy mooted Plaintiff's disclosure claims in the original complaint. That same day, the Activision Defendants filed an opening brief in support of their motion to dismiss the original complaint. (D.I. 34) Attached as an exhibit to the brief was a chart that explained why each of Plaintiff's disclosure claims was without merit. (D.I. 34, Ex. B)

On May 8, 2008, Plaintiff filed an Amended Complaint. (D.I. 41) That same day, Plaintiff renewed its motion for expedited proceedings. (D.I. 42) On May 13, 2008, the Activision Defendants filed a motion to dismiss the Amended Complaint (D.I. 44, 45) and a brief in support, along with a motion to stay discovery. (D.I. 47) Along with these motion papers, the Activision Defendants provided the Court with another chart that explained why each of Plaintiff's new disclosure claims was without merit. (D.I. 45, Ex. B) On May 13, 2008, the Activision Defendants responded to Plaintiff's motion to expedite proceedings. (D.I. 49) On May 22, 2008, the Court scheduled a preliminary injunction hearing for June 30, 2008.

On June 3, 2008, Activision filed a second revised preliminary proxy statement.

On June 6, 2008, Activision filed the Definitive Proxy with the SEC. Once again, the Definitive Proxy mooted Plaintiff's remaining meritless disclosure claims.

On June 14, 2008, Plaintiff filed a motion for leave to file a Second Amended Complaint. (D.I. 90) On June 20, 2008, the Court denied Plaintiff's motion to compel unredacted minutes of Activision board and committee minutes. (D.I. 99)

On June 21, 2008, after expedited discovery, including the production of more than 250,000 pages of documents and depositions of two Activision board members and Activision's financial advisor, Plaintiff filed an opening brief in support of its motion for a preliminary injunction. (D.I. 108) In addition, on June 24, 2008, Activision mailed a supplemental disclosure to its shareholders describing Plaintiff's disclosure claims asserted in the proposed Second Amended Complaint and in Plaintiff's application for a preliminary injunction. (Supplemental Proxy or "Supp" Ex. A)

No other plaintiff has sought to challenge the Combination, and no other suitor for the Company has emerged in the nearly seven months since the Combination was publicly announced.

STATEMENT OF FACTS[3]

Activision's Strategic Planning

Activision is a leading international developer, publisher, and distributor of interactive entertainment software and peripheral products, including the current hits "Guitar Hero" and "Call of Duty." Activision has historically explored new ways of growing and diversifying its business, including through acquisitions of and combinations with other companies. (Morgado 95; D.P. at 59)[4] For example, since 2003, Activision has explored potential transactions with companies including Redacted Redacted (Morgado 89-93; Kotick 134-40; Smith 35-37) Activision also has held discussions with parties potentially interested in acquiring Activision, such as Redacted (Kotick 26-31; Smith 18-19; *see* Kotick 131)

More recently, in 2006, Activision's senior management engaged in a strategic planning process and identified 17 potential acquisition targets, of which eight were evaluated as potential entry opportunities into the massively multiplayer online game ("MMOG") market. (Kotick 14-16, 18-19; Dargitz Aff. Exs. 3-4; D.P. at 59) One of the eight potential entries was Vivendi Games, a "multiplatform" company that owns subsidiaries including Blizzard Entertainment, Inc. ("Blizzard") and Sierra Entertainment,

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[3] Because Plaintiff's preliminary injunction application is limited to a discrete number of disclosure claims, our Statement of Facts is drawn primarily from the Definitive Proxy, and also contains references to certain record cites where appropriate.

[4] The depositions were filed in the Transmittal Affidavit of Meghan A. Adams as Exhibits 2, 3, 4 and 5. (D.I. 110) Exhibits filed in said Affidavit will be referred to herein and cited as "Adams Aff. Ex. __ ." (D.I. 110 and 111)

Inc. ("Sierra"). (Dargitz Aff. Ex. 3; Ex. 4; D.P. at 14, 59) Blizzard is an industry leader with incredibly high margins, and owns the enormously popular "World Of Warcraft" massively multiplayer online roleplaying game ("MMORG"). (D.P. at 14) Over time, Activision saw that Vivendi Games was "the only company that was successful in this category and that they had such an enormous advantage over any other company given the success that they had that they would be the only company that we saw as having future potential for success in massively multi-player games." (Kotick 17-18) According to Mr. Kotick, Blizzard was "probably the most valuable single video game asset that exists." (Kotick 144) ("It's a company that . . . last year did $1.1 billion in revenue with a $560 million operating profit. That's more money then probably the entire video game publishing industry generated in operating profits.")

<u>Preliminary Discussions With Vivendi</u>

Beginning in late 2006 and continuing into early 2007, Mr. Kotick began having some informal conversations with Bruce Hack, the Chief Executive Officer of Vivendi Games, about the possibility of a business transaction between the two companies. (D.P. at 59; Kotick 36-37; Penisson 49; *see* Morgado 58) On March 13, 2007, the two companies executed an agreement providing for the exchange of confidential information, in order to avoid leaks and to protect the competitively sensitive nature of the companies' products.[5] (Kotick 41-42; Penisson 53, 56-57; Dargitz Aff. Ex.

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[5] Plaintiff weakly suggests that the confidentiality agreement with Vivendi somehow prevented the outside directors from receiving important information about Vivendi and the Combination (*see* Op. Br. at 9), but all record evidence is to the contrary, and shows that, in fact, the outside directors were extensively involved, directing senior management and receiving regular reports.

5; D.P. at 59; *see* Smith 16) Thereafter, on March 29, 2007, representatives of Activision and Vivendi also met informally for dinner, but there was "[a]bsolutely" no discussion of valuation issues. (Penisson 60-63; D.P. at 60)

On April 12, 2007, Vivendi delivered a preliminary proposal to Activision's financial advisor, Allen & Company ("Allen & Co."), for a potential transaction with Activision in which Activision would acquire its subsidiary (Vivendi Games) with Activision stock and Vivendi would become the majority shareholder of Activision. (Kotick 47; Smith 57; D.P. at 60; *see* Penisson 80) Vivendi made clear that it was interested *only* in a transaction in which it would become Activision's majority shareholder, and where a substantial amount of stock would remain in the hands of public shareholders. (Penisson 31-33; *id.* at 33 ("[T]hat was always Vivendi's position."); Kotick 38-39) On April 20, 2007, Allen & Co. raised with Vivendi the possibility of whether Vivendi would contribute cash to the transaction in addition to the stock of Vivendi Games. (Morgado 75-76; Smith 67-68; Dargitz Aff. Ex. 6; Kotick 51-52; D.P. at 60)

<u>Activision's Board Decides To Pursue Negotiations</u>

On April 30, 2007, the Company's board of directors (the "Board") met to address the recent discussions with Vivendi. (D.P. at 60-61) Among other things, the Board received a detailed presentation from senior management and the Company's advisors about the discussions with Vivendi, including a summary of Vivendi's April 12 proposal. *(Id.*; Morgado 63-65; Kotick 52-53; Smith 75-77; Adams Aff. Ex. 21) The Board determined, after consulting with its advisors, that discussions with Vivendi should continue and that the most effective way of eliciting competing offers from other parties

would be to announce a proposed transaction with Vivendi Games, if one were reached. (Morgado 94; Kotick 54-57, 62-63; D.P. at 61)

On May 11, 2007, the Board assigned the NCGC -- made up of directors Robert Morgado (the Chairman of the NCGC), Robert Corti, and Richard Sarnoff -- the task of reviewing any potential transaction so that, if a conflict with management were to arise, the NCGC would be in a position to continue negotiations on behalf of the Company. (Morgado 100; Kotick 61; Adams Aff. Ex. 15; D.P. at 61-62) As it turned out, no such conflict ever arose, and the substantial equity interest of Messrs. Kotick and Kelly aligned their interests perfectly with those of other Activision shareholders.[6] (Morgado 121-23, 159, 183-84) Ultimately, the NCGC acted as a "sounding board" and "facilitated the board's consideration of the transaction as it began to reach different stages of . . . development." (Morgado 113)

Among other things, the NCGC advised Allen & Co. as to how negotiations should proceed. (Smith 92, 274) The members of the NCGC helped to articulate and form conceptual components "that were crucial to the deal." (Morgado 104) The NCGC also directed that negotiations with Vivendi and its representatives be

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[6] Plaintiff suggests that it was somehow improper for the NCGC to use the same advisors already retained by management, or to meet with members of management. (Op. Br. at 8-10) A majority of the Board was disinterested and independent throughout the process. The directors on the NCGC were not negotiating against a controlling stockholder, which Plaintiff admits. (Yee 109) Thus, it is irrelevant that the NCGC met with Messrs. Kotick and Kelly, or used the same professional advisors as the full Board. *See Shingala v. Becor W. Inc.*, C.A. Nos. 8858, 8859, 1988 WL 7390, at *5 (Del. Ch. Feb. 3, 1988).

conducted by Nancy Peretsman and Ian Smith of Allen & Co., along with Mr. Kotick.[7] (Morgado 171, 176, 198, 200-02; Smith 92, 274, 279; *see* D.P. at 62-63, 65, 67). Mr. Morgado also thought it was important to have Mr. Kotick attend various meetings of the NCGC "to describe the status of our transaction and then to receive direction from the board as to how to proceed." (Kotick 64; *see* D.P. at 61-62). Indeed, as Mr. Morgado explained, for a transaction of this magnitude, he believed it was important for the NCGC to "receive the input of all the staff as well as its outside advisors." (Morgado 121)

From its very first meeting, the NCGC emphasized that Activision shareholders should receive enhanced value for their shares. (Morgado 114, 117-18; D.P. at 62; Adams Aff. Ex. 22; *see* Smith 98-99) "[I]n the beginning, in the middle and at the end," the NCGC focused on preserving a premium for the Activision shareholders. (Morgado 150) However, the NCGC did not feel compelled to recommend a transaction at all, and was always prepared to walk away from negotiations if necessary. (Morgado 179-80)

Both the NCGC and the full Board met frequently during the next seven months, and received reports and analyses from Allen & Co. and other outside consultants and experts. (D.P. at 62-69) For example, the NCGC met to discuss the proposed Combination on May 11, 2007 (Adams Aff. Ex. 22), May 16, 2007 (Adams Aff.

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[7] Contrary to Plaintiff's claim, it is not uncommon or untoward for a Chief Executive Officer, along with the company's financial advisors, to lead negotiations with a potential merger partner. *Parnes v. Bally Entm't Corp.*, C.A. No. 15192, 2001 WL 224774, at *10 (Del. Ch. Feb. 23, 2001) (concluding that board had acted appropriately where throughout negotiations conducted by CEO, directors were "kept apprised of all progress made between" the CEO and potential acquirors, and "directors were individually briefed on the potential transaction with [the acquiror] both orally and with written materials"), *aff'd mem.*, 788 A.2d 131 (Del. 2001).

Ex. 17), May 22, 2007 (Adams Aff. Ex. 23), June 15, 2007 (Adams Aff. Exs. 18 and 26), September 6, 2007 (Adams Aff. Ex. 19), and November 16, 2007 (Adams Aff. Exs. 20 and 33). (*See* D.P. at 62-67) The full Board also met on May 11, 2007 (Adams Aff. Ex. 15), July 12, 2007 (Dargitz Aff. Exs. 9 and 10)), September 27, 2007 (Dargitz Aff. Ex. 11 and Adams Aff. Ex. 30)), October 8, 2007 (Adams Aff. Exs. 31 and 12), October 30, 2007 (Dargitz Aff. Exs. 12-14), and December 1, 2007 (Adams Aff. Ex. 6). (*See* D.P. at 60-69) At each and every one of these meetings, the Board and NCGC received updates about discussions with Vivendi, analyzed detailed financial and other analysis from its advisors, and provided guidance about how negotiations should proceed.

The NCGC Explores How To Guarantee A Value Transfer To Activision Shareholders.

On May 16, 2008, the NCGC met. Among the issues discussed with Allen & Co. were ways to reduce Activision's downside risk in any transaction with Vivendi. (Morgado 170-71; Adams Aff. Ex. 17; Smith 95, 106-08, 114-15; *see* Kotick 71)

On May 22, 2007, the NCGC met to discuss recent proposals exchanged between the parties. (Morgado 169-71; Adams Aff. Ex. 23; D.P. at 62) The NCGC believed that Activision should ask Vivendi to include a "top-up" provision as part of any deal. (Smith 114-15; Adams Aff. Ex. 23 at ACT 605; D.P. at 62) On May 30, 2007, Allen & Co. – having been directed by the NCGC to raise the "top-up" provision with Vivendi's financial advisor, Goldman Sachs ("Goldman") – informed the NCGC that Goldman disfavored the top-up approach. (*See* Smith 117-120; Adams Aff. Ex. 24; Dargitz Aff. Exs. 15 and 16; Kotick 71)

On June 11, 2007, Vivendi's Chairman of the Board, Jean-Bernard Lévy, informed Mr. Kotick that he was inclined to discontinue negotiations. (Kotick 72-73;

D.P. at 63; *see* Penisson 89-91; Morgado 188-89) A few days later, on June 15, the NCGC met and discussed Vivendi's rejection of the "top-up" concept and its decision to discontinue negotiations. (Morgado 186-89; Adams Aff. Exs. 18 and 26; D.P. at 63) By this time, the NCGC had already seen presentations indicating that a merger with Vivendi Games would be highly accretive to earnings. (Morgado 195-96) The NCGC advised Allen & Co. that any further negotiations should include a request for an increase in the post-closing tender offer to at least 50% of the outstanding shares. (Morgado 198-200; Kotick 76-77; Smith 145; D.P. at 63) The NCGC believed that in addition to providing downside protection, a self-tender for less than all of the outstanding shares would give Activision shareholders the flexibility of not tendering, if they were able to achieve a higher price in the market or wanted to hold their shares for the long term. (Morgado 199-202; D.P. at 63)

Vivendi's financial advisor suggested that Activision could demonstrate that it was serious about restarting negotiations with a high level visit by the Company's senior management, and Allen & Co. encouraged such a visit. (Morgado 204) The NCGC agreed. (Morgado *See* Morgado 203-05) Accordingly, Messrs. Kotick and Kelly traveled to Paris and met with Vivendi's senior management on June 27 and June 28, 2007. (Kotick 78; Penisson 110-12; Dargitz Aff. Ex. 18; D.P. at 63; *see* Adams Aff. Ex. 27)

On July 12, 2007, the full Board met to discuss certain basic structural terms that were still subject to due diligence. (Morgado 218-20; Dargitz Aff. Exs. 9 and 10; D.P. at 64) The parties had reached by this time a conceptual understanding that in addition to contributing the stock of Vivendi Games at a fixed ratio through the Merger,

Vivendi would make a share purchase at a significant premium to a current price to be determined at some point in the future. (Smith 160-61; Dargitz Aff. Exs. 19 and 20; D.P. at 63; *see* Morgado 220-21) In addition, Activision would make a post-closing tender offer at the same premium price, using a combination of Activision's cash on hand, the cash Vivendi was contributing, and, potentially, a line of credit. (Smith 160-61; D.P. at 63) Thus, the NCGC had achieved downside protection for Activision shareholders in the event that the Company's stock price declined after a transaction was announced.

As of the NCGC's September 6, 2007 meeting, the final price was still not determined, and open issues included governance questions relating to such issues as how the Company would be operated managerially and what consents would be required for transactions. (Morgado 228-30; Adams Aff. Ex. 19; D.P. at 65) Activision wanted to ensure that after the Combination, it could continue "to act as an effective, efficient, singular entity rather than – than really a bifurcated, merged company." (Morgado 231-32) Activision viewed the latest proposal made by Vivendi related to the structure of the post-transaction Company as unworkable and potentially value-inhibiting because, among other things, it called for the Activision and Blizzard business units each to be managed by separate boards of directors. (Morgado 231, 237; Smith 167, 180-81) As a result of this impasse, Activision broke off talks, which resumed after Mr. Kotick and Michael Morhaime of Blizzard met for dinner to discuss how the new company would be organized and operated. (D.P. at 65) (Dargitz Aff. Exs. 21 and 22)

Activision Learns More About Vivendi Games

At a meeting on September 27, 2007, the full Board discussed presentations that included discounted cash flow valuations by Allen & Co. of the

Blizzard business. (Morgado 239-45; Dargitz Aff. Ex. 11; Adams Aff. Ex. 30) (Morgado 249-50; Kotick 128; see Dargitz Aff. Exs. 23 and 24) At this meeting, the Board learned that Blizzards' upside potential was even more positive than they previously believed. (Kotick 128) At this time, the parties still had not decided on the final price of the Share Purchase and the post-closing Tender Offer. (Morgado 246-47)

The full Board later received, in October 2007, a binder containing more than 200 pages of detailed due diligence analysis of Vivendi by McKinsey & Company and KPMG, as well as two update memos concerning the Combination. (Dargitz Aff. Ex. 25) At a meeting on October 8, 2007, the Board met to receive a presentation about due diligence findings. (Morgado 260-61; Adams Aff. Exs. 31 and 12; D.P. at 66) The Board also met on October 30, 2007 to receive an update about the negotiations with Vivendi. (Dargitz Aff. Exs. 12-14; D.P. at 66)

On November 7, 2007, the NCGC met to determine if it made sense to renegotiate terms with Vivendi. (Morgado 290-94; Adams Aff. Ex. 32; D.P. at 67) At that time, Allen & Co. informed the NCGC that, as a result of due diligence, it was drawing increased comfort that Blizzard could be valued at up to $9.5 billion. (Morgado 295-96; *see* Smith 198, 204-05) After discussion, the NCGC determined that the "most fruitful" negotiation path was not to revisit the amount of stock to be contributed by Activision to acquire Vivendi Games. (Smith 200-04; see Kotick 114-15) On November 16, 2007, Vivendi informed Activision that it was willing to increase the per share price of the Share Purchase and Tender Offer from $24.75 to a range of $26.25 to $26.75. (Morgado 302-03; Adams Aff. Exs. 20 and 33; D.P. at 67; *see* Kotick 116-17) Activision

countered by asking Vivendi to raise the per share price to a range of $29 to $30. (Morgado 304-05)

The Activision Board Approves A Value-Generating Transaction

On December 1, 2007, the parties reached an agreement on price and a set of modest deal protection devices.[8] (D.P. at 68-69) Specifically, the BCA provided for a Stock Purchase and Tender Offer at a per share price of $27.50, a substantial premium to the pre-announcement trading price. (Dargitz Aff. Ex. 26). In addition, the contribution of Vivendi Games through the Merger resulted in the transfer of value from Vivendi to Activision shareholders: *i.e.*, a non-cash control premium. (Smith 106) ("[T]he Activision shareholders were getting a transfer value control premium for their stake and the – through the issuance of shares at a significantly above-market rate for assets that were worth their fair value.")

Before approving the Combination, the full Board met on December 1, 2007, and received a comprehensive presentation on the analysis underlying Allen & Co.'s fairness opinion. (Adams Aff. Exs. 40 and 6; D.P. at 68) After using a variety of analyses, including a comparative company analysis, a comparative precedent transaction analysis, and a discounted cash flow analysis, Allen & Co. opined that based on the facts known to it as of December 1, 2007, the proposed Combination was fair, from a financial point of view, to Activision and its shareholders. (Smith 222; Adams Aff. Ex. 6; D.P. at 68. 74-88, Annex D)

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[8] The "deal protection" features identified in the Amended Complaint are in fact quite modest, and well within the range of reasonableness for transactions of this sort. (*See* Op. Br. at 28 n.16) Indeed, Plaintiff has previously conceded that these features are not per se invalid. (Plaintiff's Reply in Support of Expedited Proceedings, p. 18 n.15, D.I. 21).

In performing its discounted cash flow analysis on Activision, Allen & Co. believed it was appropriate to use Wall Street estimates through 2010, rather than the Company's projections prepared by management, for several reasons. (Smith 223; D.P. at 79, 85-87) First, Activision had updated its earnings guidance as recently as November 27, 2007, and the consensus estimates of Wall Street analysts had already impounded that information and predicted that Activision would slightly outperform its guidance.[9] (Smith 224-25; Adams Aff. Ex. 36; Dargitz Aff. Ex. 27) Second, although the guidance given by Activision on November 27 tracked its "revised upside" case, those revised numbers existed only through a short stub period ending in March 2008. (Smith 224, 234) Allen & Co. had older "upside" and "stretch" case projections prepared by the Company's management that extended for a longer period of time, but those projections did not take into account Activision's recently improved performance and were actually less rosy than Wall Street estimates. (Smith 224-25; D.P. at 86-87) Thus, Allen & Co. determined that using projections derived from analysts' estimates, which gave results somewhere between the "revised upside" and "revised stretch" cases, most accurately reflected Activision's prospects. (Smith 235-36; D.P. at 79, 86-87) Allen & Co. also conferred with Activision's Chief Financial Officer, Thomas Tippl, who confirmed that using Wall Street estimates in the analysis was most appropriate. (Smith 225; D.P. at 79)

Allen & Co. advised Activision that the premium Activision shareholders would receive was substantially higher than a conventional premium because of the value

[9] Plaintiff incorrectly states that the revised upside case given to Vivendi was higher than Wall Street estimates. (Op. Br. at 23)

contribution from Blizzard, which is "probably the most valuable single video game asset that exists." (Kotick 127-29, 144; *see also* Morgado 132; Morgado 269-72) Under the circumstances, it was the Board's view that the Combination "would represent the greatest opportunity for value creation for our shareholders of any transaction we consider." (Kotick 147) Accordingly, the Board "determined that it is advisable and in the best interests of the Company and its stockholders for the Company to consummate the Transactions upon the terms and subject to the conditions set forth in the Business Combination Agreement." (Adams Aff. Ex. 41 at ACT 997)

Although Allen & Co. has not been asked to provide a new fairness opinion and has not updated its analysis since December 1, 2007, Ian Smith testified that "[t]here are no indications to me that there are any things that a stockholder should think other than that this is a great deal for stockholders." (Smith 262)

<u>Activision Negotiates New Employment Agreements With Messrs. Kotick and Kelly</u>

At the same time as the negotiations over the Combination were taking place, Activision was negotiating new employment contracts with Messrs. Kotick and Kelly. (D.P. at 63) The new agreements replaced existing agreements set to expire March 31, 2008, (Morgado 211; *see* Dargitz Aff. Ex. 28 at ACT 688 ("If Project Freeze did not move forward . . . the Company would need to negotiate employment agreements with each of Messrs. Kotick and Kelly as their current agreements would expire in early 2008."), and *were negotiated at arm's length by Activision's current Compensation Committee*, not Vivendi, which did not even want to be involved in the negotiations. (*See* Dargitz Aff. Ex. 29; D.P. at 63, 66-68) Pursuant to these agreements, Messrs. Kotick and Kelly have agreed to waive, in connection with the Combination, certain benefits to which they would otherwise have been entitled.[10] (Adams Aff. Ex. 42 at ACT 869)

It is not as though an alternative bidder existed that wanted to replace Mr. Kotick with its own CEO – the only bid on the table was the Vivendi bid.[11] Moreover, Vivendi viewed Mr. Kotick as an important asset of the Company, and a key assumption from the very beginning of negotiations was that he would remain with the new

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[10] Moreover, Mr. Kelly's salary was reduced by approximately 50% after FY08. (Adams Aff. Ex. 42 at ACT 868).

[11] There is no basis for Plaintiff's claim that Messrs. Kotick and Kelly were "necessarily" self-interested in the Combination simply because they would continue to be employed by Activision. (Op. Br. at 10) The cases cited by Plaintiff in footnote five of their brief do not support such a proposition and are readily distinguishable because they all involved private equity deals. *But cf. Guttman v. McGinnis*, C.A. No. 3450-VCL, trans. at 26 (Del. Ch. Jan. 14, 2008) (noting that dealing with strategic buyers "assuages, rather than heightens, concerns about managers' conflicts of interest" that are allegedly present in private equity deals).

Activision. (Penisson 75, 78-79; Kotick 83-84; Smith 58-59) Moreover, the jobs of these two individuals with Activision were admittedly never in jeopardy, with the business performing extremely well. Thus, Mr. Kotick's choices were: reject the Vivendi bid and keep my job, or accept the Vivendi bid and keep my job. Because Mr. Kotick would have been employed in either situation, it is not even debatable that he had no motive to favor a transaction with Vivendi other than the transaction's economic merit, which concerned him greatly as a significant holder of approximately 4.5 million shares of Activision stock, with options to buy more than 8.8 million shares.[12] (D.P. 214)

The Combination Has Already Transferred Value To Activision Shareholders (Before It Is Even Consummated)

The market reaction to the announcement of the Combination was overwhelmingly positive. Activision stock no longer trades in tandem with the industry, "indicating a fairly positive sentiment towards the deal." (Morgado 355) Though Activision has exceeded guidance in 2008, Blizzard has also performed well above expectations since December (Kotick 150, 152), and the premium that Activision shareholders will receive is approximately $4 billion higher than when negotiations began.[13] (Kotick 127; *see* Kotick 143 ("The institutional investor basically has already given us $4 billion dollars of credit for the effects of the combination.").[14]

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[12] Moreover, the employment agreements of Messrs. Kotick and Kelly are fully disclosed in the Definitive Proxy. (D.P. at 89)

[13] We do not understand Plaintiff's suggestion that a control premium must be paid in cash (*see* Op. Br. at 28), a notion having no support either in the record or Delaware law. In the end, the policy reason behind Revlon's directive to seek the best alternative reasonably available to shareholders is "the single aim of maximizing the present value of the firm's equity," so that shareholders receive added value in exchange for relinquishing control. *Equity-Linked Investors, L.P. v. Adams*, 705 A.2d

(cont'd)

In the nearly seven months since the Combination was announced, despite ample opportunity to do so, no alternative bidder has emerged to offer Activision greater value than is provided by the BCA.

On April 29, 2008, the Board met and considered a report prepared by Allen & Co. and presented by the Company's Chief Financial Officer, Thomas Tippl, about Blizzard's recent financial performance. (Morgado 340-41; Adams Aff. Ex. 13) Before mailing the Definitive Proxy, the Board reviewed its reasons for undertaking the proposed transaction and determined there was no need to change its December 1, 2007 recommendation to Activision's stockholders. (Kotick 150; Ex. A)

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1040, 1059 (Del. Ch. 1997). Where a board "conclude[s] in good faith that the corporation's interests [are] best served by a transaction that [the board thinks will] maximize potential long-run wealth creation," the board satisfies its duties of care and loyalty by pursuing "the highest achievable present value" for the corporation's stock. *Id.* A transaction such as this one, which has increased the enterprise value of Activision exponentially, easily meets that standard.

[14] Analysts agree. *See, e.g.*, June 9, 2008 UBS report (Dargitz Aff. Ex. 32 at ACT-E-64 ("We are reiterating our Buy rating as we believe that ATVI's stock still has upside post the merger with Vivendi Games"); June 11, 2008 Wedbush Morgan report (Dargitz Aff. Ex. 2 at ACT-E-00005914 ("The current price is above the transaction price, but both Activision and Vivendi Games have performed better than was originally contemplated by the merger agreement, so we expect the deal to be approved.")); May 9, 2008 Lehman Brothers report (Dargitz Aff. Ex. 33 at ACT-E-00005943 ("Our more positive outlook on Activision reflects a belief the transforming merger with Vivendi Games fits our archetype for a successful third-party publisher."); May 13, 2008 Morgan Stanley report (Dargitz Aff. Ex. 34 at ACT-E-00005953 ("Higher conviction that the momentum of the two companies combined may make our initial, base-case ... conservative.")).

ARGUMENT

A preliminary injunction "will never be granted unless earned." *Lenahan v. Nat'l Computer Analysts Corp.*, 310 A.2d 661, 664 (Del. Ch. 1973). The moving party must prove: (1) a reasonable probability of success on the merits at a final hearing; (2) that the failure to issue a preliminary injunction will result in immediate and irreparable injury; and (3) that the balance of hardships weighs in its favor. *Unitrin v. Am. Gen. Corp.*, 651 A.2d 1361, 1371 (Del. 1995); *Next Level Commc'ns, Inc. v. Motorola, Inc.*, 834 A.2d 828, 845 (Del. Ch. 2003) (plaintiff's failure to establish any one component ends the analysis).

A preliminary injunction is a "'drastic,' 'extraordinary . . . remedy'" that is granted sparingly. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *see also Van de Walle v. Unimation, Inc.*, C.A. No. 7046, 1983 WL 8937, at *1 (Del. Ch. Feb. 14, 1983) (such relief "is always to be avoided, if possible, because controversies should only be determined after all the parties have had a full opportunity to present the facts"). It is granted "'only upon a persuasive showing that it is urgently necessary, that it will result in comparatively less harm to the adverse party, and that, in the end, is unlikely to be shown to have been issued improvidently.'" *Next Level Commc'ns,* 834 A.2d at 845 (quoting *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998)). Indeed, as the Supreme Court has noted, "the Court of Chancery did not become the nation's premier business trial court by issuing preliminary injunctions on 'flimsy grounds.' *Emerald Partners v. Berlin*, 726 A.2d 1215, 1227 n.18 (Del. 1999) (citations omitted).

I. PLAINTIFF HAS NOT SHOWN A REASONABLE LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiff's application for a preliminary injunction is based entirely on a limited number of disclosure claims. Those claims, however, must be considered not in isolation, but in the context of a 265-page document (not counting the BCA and other appendices). The Definitive Proxy makes full, comprehensive, detailed disclosure that, among other things, describes the lengthy, arm's length negotiations between Activision and Vivendi and the Board's careful consideration of risks and benefits, summarizes the work performed by Allen & Co., and outlines specific terms of the Combination. Notably, the cover of the Definitive Proxy clearly discloses that Vivendi is expected to own majority control after the Combination.

Plaintiff has made several attempts to find omitted facts in earlier drafts of the Definitive Proxy. Each time, in addition to pointing out that the requested disclosure either already existed or was not required, Activision further refined its disclosures and included Plaintiff's claims, thereby mooting them. (D.P. at 93-96) Most recently, Activision mailed to its shareholders a supplemental disclosure that describes the disclosure claims on which Plaintiff has based its application for a preliminary injunction (many of which were raised for the first time in Plaintiff's opening brief in support of its motion).[15] (Ex. A)

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[15] *See, e.g.*, Op. Br. at 39 ("The Proxy Statement should clearly disclose concurrent adjustment made by Allen [in November, 2007] to the value of Games and the basis therefore."); Op. Br. at 39 ("[T]he Definitive Proxy should also disclose the specific factors from the McKinsey due diligence report upon which Allen relied in increasing its valuation of Games."); Op. Br. at 40-41 ("[T]he Definitive Proxy does not disclose the limited nature or timing of [managements'] contacts . . . ."); Op. Br. at 44-45

(cont'd)

Plaintiff has failed to meet its burden of demonstrating the materiality of any of these added disclosures it seeks. *See In re Siliconix, Inc. S'holders Litig.*, C.A. No. 18700, 2001 WL 716787, at *9 (Del. Ch. June 19, revised June 21, 2000). The Court may disregard those disclosure claims not addressed by Plaintiff in its application for a preliminary injunction. *Pfeffer v. Redstone*, C.A. No. 2317-VCL, 2008 WL 308450, at *7 (Del. Ch. Feb. 1, 2008).

A. Defendants Have Mooted Plaintiff's Disclosure Claims

By abandoning so many of its original disclosure claims, Plaintiff tacitly admits that these claims were mooted in subsequent drafts of the Proxy Statement. Tacit admissions aside, Plaintiff expressly acknowledges that many claims in its complaints are now moot because, among other things, the Definitive Proxy affirmatively discloses:

- that Activision evaluated 17 potential acquisition targets, 8 of which were evaluated as potential entry opportunities into the MMOG market (SAC ¶ 45);
- that Kotick and Kelly attended the May 16, May 22, June 15, and September 6, 2007 NCGC meetings (SAC ¶¶. 53, 54, 59, 61);
- that at an October 8, 2007 presentation to the Board, McKinsey & Company considered upside and downside scenarios with respect to the potential growth in Blizzard Entertainment's business and subscriber base, taking into account various factors (SAC ¶ 66);
- Activision's management projections provided to Vivendi (SAC ¶¶ 114, 116);
- the terms of Allen & Co.'s engagement, SAC ¶ 128;
- that the Company and its Compensation Committee retained separate counsel on employment matters, as did directors Kotick and Kelly, SAC ¶ 129;
- additional information about the negotiation of Kotick and Kelly's new employment agreements, SAC ¶ 130;
- further explanation about the comparables used by Allen & Co. in its analysis, SAC ¶ 137;

(cont'd from previous page)

("The Definitive Proxy misleadingly omits that the NCGC did not retain independent advisors . . . did not participate in and direct discussions or negotiations, [and] relied completely on reports from Activision management and its advisors . . . .").

- separate multiples for interactive entertainment and general entertainment companies, SAC ¶ 137;
- projections used by Allen & Co., and further explanation of the different models used for the Company and Vivendi Games, SAC ¶ 139; *see also* SAC ¶ 146 (describing Allen & Co.'s approach as "academically sound," but quibbling with results);
- further explanation as to the different discount rates used by Allen & Co. in its DCF analysis, SAC ¶ 145; and
- that Allen & Co. was not asked to and did not update its opinion to take into account changes since December 1, 2007, SAC ¶ 148.

Such disclosure renders moot any and all of Plaintiff's disclosure claims. *See, e.g., Norberg v. Young's Market Co.*, C.A. Nos. 11208 & 11253, 1989 WL 155462, at *1 (Del. Ch. Dec. 19, 1989) ("Defendants have agreed to make further disclosures which, as I understand it, effectively moots the disclosure claims in both lawsuits."); *Lewis v. LFC Holding Corp.*, C.A. No. 7974, 1985 WL 11554, at *5 (Del. Ch. Apr. 4, 1985) ("Virtually all of plaintiff's disclosure claims have been mooted by the Supplement.").

In addition, Activision has summarized and disclosed all of Plaintiff's disclosure claims raised throughout this litigation – regardless of their merit. (*See generally* D.P. at 93-96; *See also* Supp. Ex. A). For purposes of satisfying disclosure obligations, simply reporting the existence of a dispute to stockholders is sufficient to moot a disclosure claim. Thus, the United States District Court for the Southern District of New York held that a defendant made sufficient corrective disclosure by amending its Schedule 13D to include: (i) a summary of the plaintiff's complaint and (ii) statements asserting defendant's intent to deny the material allegations of the complaint. *Avnet, Inc. v. Scope Indus.*, 499 F. Supp. 1121, 1123-24 (S.D.N.Y. 1980); *see also Weeden v. Continental Health Affiliates, Inc.*, 713 F. Supp. 396, 398-400 (N.D. Ga. 1989) (holding

that defendant cured any alleged disclosure violations by attaching copy of plaintiffs' complaint as amendment to its public filing, thereby revealing parties' disputes, and rejecting plaintiffs' argument that to correct alleged disclosure violations, "defendants would have to disclose the facts themselves, not merely the existence of a dispute concerning the facts").[16]

B. Plaintiff Cannot Prove Viable Disclosure Claims

Notwithstanding Activision's increasingly detailed iterations of the proxy statement and near verbatim recitation therein of all of Plaintiff's disclosure claims, Plaintiff's claims fail for the independent reason that it has failed to meet its burden of establishing the materiality of the requested information.

Under Delaware law, "directors need only disclose information that is material, and information is material only 'if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote.'" *In re CheckFree Corp. S'holders Litig.*, C.A. No. 3193-CC, 2007 WL 3262188, at *2 (Del Ch. Nov. 1, 2007) (citation omitted). *See, e.g., Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994) (citing *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)); *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (adopting *TSC Indus.* standard as law of Delaware); *Abrons v. Marée*, 911 A.2d 805, 815 (Del. Ch. 2006)

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[16] *Accord D&N Fin. Corp. v. RCM Partners Ltd. P'ship*, 735 F. Supp. 1242, 1249-52 (D. Del. 1990) (holding that defendants cured any false and misleading statements in their proxy solicitation materials by sending a letter to inform stockholders of plaintiff's complaint and the allegations contained therein); *West Point-Pepperell, Inc. v. Farley Inc.*, 711 F. Supp. 1088, 1094 (N.D. Ga. 1988) (only good faith disclosure of disputed issue required); *City Capital Assocs. L.P. v. Interco, Inc.*, 696 F. Supp. 1551, 1556 (D. Del.) (same), *aff'd*, 860 F.2d 60 (3d Cir. 1988).

("Only when minor details alter the total mix of information by implying a significantly higher value, or a critical flaw in the process used, can they be material.").

"It is not sufficient that information might prove helpful; to be material, it must 'significantly alter[ ] the total mix of information made available.'" *CheckFree*, 2007 WL 3262188, at *2 (footnote omitted); *see Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000); *In re Siliconix Inc. S'holders Litig.*, C.A. No. 18700, 2001 WL 716787, at *9 (Del. Ch. June 19, revised June 21, 2001) ("Delaware law does not require disclosure of 'all available information' simply because available information 'might be helpful.'") (citation omitted). Critically, disclosure requirements "are not boundless [and the] burden of demonstrating a disclosure violation and of establishing the materiality of requested information lies with the plaintiffs." *CheckFree*, 2007 WL 3262188, at *2.

Significantly, a plaintiff does not state a disclosure claim by criticizing the actions taken by directors, and asking them to describe those actions pejoratively, as Vice Chancellor Lamb previously explained in *Lukens* when addressing disclosure claims similar to those asserted here by Plaintiff:

> [T]he questions posed by the plaintiffs, by and large, do no more than reflect the plaintiff's substantive allegations of wrongdoing. It is well understood that directors are not required to engage in 'self-flagellation' by disclosing their alleged breaches of duty. Plaintiffs claim that these questions do not require admissions of wrongdoing, but rather information about the *process* of selling the Company. I disagree. . . . [T]hat process is described in considerable detail in the proxy statement. To have added information explaining why the Director Defendants did not take other steps or follow another process was not required.

In re Lukens Inc. S'holders Litig., 759 A.2d 720, 736 (Del. Ch. 1999) (emphasis in original), *aff'd sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000).

As explained further below, each of Plaintiff's disclosure claims is without merit.

1. Plaintiff does not state a claim by seeking additional disclosure about the reasons for Allen & Co.'s use of analysts' estimates

Plaintiff contends that the Definitive Proxy does not explain why Allen & Co. believed it was appropriate to use Wall Street estimates, rather than management projections, in its DCF analysis of Activision. Op. Br. at 36-37. Plaintiff fails to state a claim for several reasons. *First*, as even Plaintiff's brief reveals, the supposedly undisclosed facts are disclosed:

> Allen & Company's DCF approach was based upon certain financial projections and estimates, as set forth in the chart below, for Activision through the year 2013 that were derived from Wall Street analyst reports, which reports included financial projections and assumptions that Allen & Company and Activision's management believed were appropriate for such analysis and incorporated Activision's updated guidance issued at the end of November 2007.

(D.P. at 79)

Second, Plaintiff has introduced no evidence contradicting this disclosure, and all record evidence supports that the Wall Street estimates were based on the most recent financial guidance from management, while management's projections had not yet been updated beyond the end of FY08. As Mr. Smith (of Allen & Co.) explained at his deposition:

> The company released updated earnings guidance on November 27th, and . . . as kind of their original projections that had been provided to Vivendi, they had a base, an upside, and a stretch case, and they updated to the Street their best view of how they thought the business would perform over the ensuing four months, basically through March of 2008. They did not go ahead and do a revised estimate for 2009 and 2010. So the 2009 and 2010 numbers didn't reflect how the business was performing in the end of the third quarter of 2007, so the end of the fiscal '08 period.

> So they gave their update to the Street of $2.3 billion of revenue, and 85 cents. The Street then – the consensus estimate as of the time of this estimate was actually higher than what management had put out as . . . their best point estimate for how the business would perform.
>
> What the Street then did was grow 2009 and 2010 off that base. So as we were looking for forward projections to run a discounted cash flow analysis . . . it was our view, in discussions with the Activision CFO, that it was a conservative measure to use Street estimates for '08, because they were, in fact, higher than Activision's internal estimates, and the numbers for 2009 and 2010 grew off that higher base.
>
> So the view was that . . . those were the most appropriate numbers to use in our evaluation of the business.

(Smith 224-25) Thus, because Wall Street estimates reflected the most reliable and up to date information at the time (as Allen confirmed with Activision management), [17] the use of such estimates was not misleading.[18] *See In re BEA Sys., Inc. S'holder Litig.*, C.A. No.

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[17] Plaintiff's suggestion that it was somehow improper for Allen & Co. to have confirmed with management that the set of estimates it used accurately reflected the Company's prospects, Op. Br. at 25-26, is specious. *See e.g., CheckFree*, 2007 WL 3262188, at *3 (observing that company's financial advisor, Goldman Sachs, had to interview members of senior management to ascertain the risks that threatened the accuracy of certain financial projections prepared by management, and that such projections were not material and could, in fact, be misleading).

[18] To the extent Plaintiff seeks an even longer explanation, Delaware courts have held repeatedly that a board need not disclose specific details of the analysis underlying a financial advisor's opinion. *See Siliconix*, 2001 WL 716787, at *9. Rather, stockholders need only receive a "fair summary of the substantive work performed by the investment bankers upon whose advice the recommendations of their board as to how to vote on a merger or tender rely." *CheckFree*, 2007 WL 3262188, at *2 (quoting *In re Pure Res. S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002)); *accord Globis Partners, L.P. v. Plumtree Software, Inc.*, C.A. No. 1577-VCP, 2007 WL 4292024, at *11 (Del. Ch. Nov. 30, 2007); *Abrons v. Marée*, 911 A.2d 805, 815 (Del. Ch. 2006) ("Only when minor details alter the total mix of information by implying a significantly higher value, or a critical flaw in the process used, can they be material."); *In re JCC Holding Co. S'holders Litig.*, 843 A.2d 713, 722 (Del. Ch. 2003). Shareholders have received a fair summary of Allen & Co.'s work.

3298-VCL, Trans. at 95-96 (Del. Ch. Mar. 26, 2008) ("The record reflects that the street estimates used in the Goldman presentation were the ones taken from after the November 15th date on which the company brought its financial statements up-to-date and the analysts revised their estimates. Since those were based on complete information, their inclusion in the Goldman presentation could not have been misleading.").

Third, implicit in Plaintiff's claim is that it was wrong for Allen & Co. to use Wall Street estimates in its DCF analysis, and that this should be disclosed to stockholders. Such a disclosure would amount to self-flagellation, and need not be made. *Lukens,* 759 A.2d of 736. Moreover, Plaintiff's "quibble with the substance of a banker's opinion does not constitute a disclosure claim." *JCC Holding Co.*, 843 A.2d at 721.

Fourth, even though we do not believe this information is material, Activision has disclosed Plaintiff's claim in its supplemental disclosure to shareholders, and it has been added to the total mix of information. (Ex. A)

For all of these reasons, this claim is without merit and the Court should reject it.

2. Plaintiff does not state a claim by seeking disclosure of current management estimates

Plaintiff next argues that the Definitive Proxy should also disclose the current Activision management estimates even though they were not used to negotiate the December 1, 2008 BCA, or used by Allen & Co. in forming its fairness opinion of December 1, 2008. Op. Br. at 38, 39. Plaintiff suggests that the requested information is material because Allen & Co. has not updated its fairness opinion since December 1, 2007. Op. Br. at 31-32, 38. Plaintiff fails to state a claim for several reasons.

First, and most important, the Definitive Proxy *does* disclose Activision's recent management estimates (as of April 2008). (D.P. at 88) These same estimates were shared with Vivendi at that time. (*Id.*) In addition, the Definitive Proxy discloses that on May 8, 2008, Activision publicly announced actual results for the fiscal year ending March 31, 2008. (*Id.*) Also in May 2008, following the completion of Activision's annual operating plan for fiscal year 2009, Activision provided, among other things, updated earnings and revenue guidance to the public about fiscal year 2009. (*Id.*) For these reasons, Plaintiff's disclosure claim should be rejected.

Second, a plaintiff does not state a disclosure claim under Delaware law simply by requesting "current management projections" without, at the very least, demonstrating the materiality and reliability of those projections. *See, e.g., CheckFree,* 2007 WL 3262188, at *3 (finding management projections immaterial where investment banker and management concluded certain risk factors threatened accuracy of "raw, admittedly incomplete [management] projections"); *Globis Partners, L.P. v. Plumtree Software, Inc.,* C.A. No. 1577-VCP, 2007 WL 4292024, at *13 (Del. Ch. Nov. 30, 2007) (finding no disclosure violation where management projections, which were not used by investment banker because banker thought them unreliable, were not disclosed); *McMillan v. Intercargo Corp.*, C.A. No. 16963, 1999 WL 288128, at *6 (Del. Ch. May 3, 1999) ("[t]here is no *per se* duty to disclose financial projections furnished to and relied upon by an investment banker. To be a subject of mandated disclosure, the projections must be material *in the context of the specific case.*") (emphasis added).

Here, Plaintiff has not shown that any additional projections are either material or reliable, or would significantly alter the conclusion that the Combination is

fair from a financial point of view. Instead, Plaintiff appears to be contending that the Definitive Proxy is misleading simply because the Activision Board did not commission an updated fairness opinion. (Op. Br. at 38) As this Court noted in *Lewis v. Leaseway Transportation Co.*, where the Court dismissed a nearly identical disclosure claim, there is no "*per se* rule that [a fairness opinion] must be updated after a certain time. If there were such a rule, I doubt it would include documents, such as those before me, that are only six months old." C.A. No. 8720, 1990 WL 67383, at *7 (Del. Ch. May 16, 1990). This is especially true here, where the Definitive Proxy already discloses the (i) updated projections shared with Vivendi in April 2008, (ii) actual results for fiscal year 2008, and (iii) revised guidance for fiscal year 2009 (D.P. 88), and discloses that the Board met on April 29, 2008, and "determined there is no need to change its December 1, 2007 recommendation to Activision stockholders." (D.P. 88; Supp. at 4); *see Emerald Partners v. Berlin*, C.A. No. 9700, 2003 WL 21003437, at *26 (Del. Ch. Apr. 28, 2003) ("The board had kept itself well informed about the business developments at both companies, and they had a reasonable basis to conclude in good faith that no 'material adverse change' in the relative value of the two businesses had occurred."), *aff'd*, 840 A.2d 641 (Del. 2003). Accordingly, Plaintiff's claim fails because, among other things, it "does not allege how updating the fairness opinion . . . would have altered the total mix of information provided." *Lewis,* 1990 WL 67383, at *7.

Third, implicit in Plaintiff's claim is its view that the Activision directors somehow breached their fiduciary duties by failing to request an updated fairness opinion that takes into account management projections over the last few months. Plaintiff's pejorative spin amounts to nothing more than a request for self-flagellation and does not

require disclosure. *See Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1997). (holding that board is not required to engage in "self-flagellation" and "negative inferences or characterizations of misconduct or breach of fiduciary duty need not be articulated"); *Lukens*, 759 A.2d at 736; *Nomad Acquisition Corp. v. Damon Corp.*, C.A. Nos. 10173, 10189, 1988 WL 96192 (Del. Ch. Sept. 20, 1988) (noting well-settled proposition that management not required to draw negative inferences, engage in "self-flagellation," or speculate as to alleged improper motives).[19]

Finally, even though we do not believe this information is material, Activision has disclosed Plaintiff's claim in its supplemental disclosure to shareholders, and it has been added to the total mix. (Ex. A).

For all of these reasons, this claim is without merit and the Court should reject it.

3. Plaintiff does not state a claim by seeking additional disclosure about the Merger's exchange ratio.

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[19] To the extent Plaintiff is contending that there is any confusion as to when Allen's fairness opinion was rendered or what financial information that opinion was based on, such information is fully disclosed in the Definitive Proxy. (*See* DP. at 76; Annex D). Activision stockholders are also fully on notice that "Allen & Company was not asked to, and did not, update its opinion to take into account changes since December 1, 2007." (*Id.*) "With such disclaimers one cannot say that the opinion is misleading even though one might consider it of little value." Ince & Co. v. Silgan Corp., C.A. No. 10941, 1991 WL 17171, at *6 (Del. Ch. Feb. 7, 1991). In any event, Smith also expressed his view that, even accepting the limitations on Allen & Co.'s fairness opinion, "just wearing a general business hat, both businesses have significantly over-performed and that, generally, leads me to believe that this is still a very good deal for Activision stockholders." (Smith 263).

Plaintiff next argues that the Definitive Proxy should have added additional information about the exchange ratio and Allen & Co.'s basis for its valuation of Vivendi Games. Op. Br. at 38-39. This fails to state a claim for at least three reasons.

First, the Definitive Proxy fully describes the arm's length negotiations between the parties, including the negotiations over the exchange ratio. (D.P. 59-68). Indeed, the Definitive Proxy discloses that Vivendi would receive a fixed number of Activision shares in exchange for all shares of Vivendi Games, as well as the implied values the parties initially proposed for Vivendi Games. (D.P. at 62). Moreover, the Definitive Proxy describes in detail the basis for Allen & Co.'s valuation for Vivendi Games and its determination that the exchange ratio of the Combination is fair from a financial point of view to Activision and its stockholders. (D.P. at 79-82).[20] Plaintiff has not shown why any additional information would assume actual significance in the deliberations of an Activision stockholder. *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1173 (Del. 2000) (holding that to state a disclosure claim, a plaintiff "must allege that

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[20] For example, the Definitive Proxy discloses that as of December 1, 2007, Allen & Co. calculated an implied value range for Vivendi Games that would translate into Vivendi receiving 362,266.79242 Activision shares on the low end and 424,694.59760 shares on the high end. (D.P. at 82) (No evidence in the record suggests that this value range is not accurate). The Definitive Proxy further discloses that the BCA's "exchange ratio," which the BCA defines as the number of shares of Activision stock to be received by Vivendi, was 369,136.36364. (D.P. at 82) The Definitive Proxy's Letter to Stockholders also discloses the implied value that the BCA places on Vivendi Games, $8.121 billion. (D.P. at 1).

facts are missing from [proxy] statement, identify those facts, state why they meet the materiality standard and how the omission caused injury").[21]

Second, everything else identified by Plaintiff amounts to Plaintiff's own spin on whether or not a fixed ratio made good business sense,[22] and a request for a self-flagellating statement that the ratio resulted in a value transfer to Vivendi. *See Loudon*, 700 A.2d at 143. Such information need not be disclosed.

Third, even though we do not believe this information is material, Activision has disclosed Plaintiff's claim in its supplemental disclosure to shareholders, and it has been added to the total mix. (Ex. A)

For all of these reasons, this claim is without merit and the Court should reject it.

4. Plaintiff does not state a claim by seeking additional disclosure about the April 30, 2007 meeting of the board of directors.

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[21] For this same reason, Plaintiff's suggestion that additional Blizzard projections or "specific factors from the McKinsey due diligence report" should be disclosed in order for stockholders to understand Allen & Co.'s valuation of Vivendi Games (Op at 39), is without merit. The Definitive Proxy already discloses those projections derived from McKinsey's analysis that Allen & Co. used in its DCF analysis, (D.P. at 80; *see* Morgado 239-44; Kotick 128), and also describes other work done by McKinsey generally. (D.P. at 64 (disclosing "assessment of Blizzard Entertainment's subscriber base and its business model"), 66 ("The consultants considered both upside and downside scenarios with respect to potential growth in Blizzard Entertainment's business and subscriber base taking into account various factors.")) Moreover, The Definitive Proxy contains more than forty pages of disclosure about Vivendi Games' business, including risk factors. (D.P. at 217-62; *id.* at 37-39) To disclose anything more would go well beyond a "fair summary" of the advisors' work. *See CheckFree*, 2007 WL 3262188, at *2.

[22] Plaintiff has proffered no evidence that the value of Activision during this period increased by a greater rate than the increase in value for Vivendi Games, and the record does not appear to support that proposition. (Kotick 114-15)

Plaintiff suggests the Definitive Proxy should state that at their April 30, 2007 meeting, the outside directors relied on Mr. Kotick for information concerning other alternatives, and Mr. Kotick's information was based on informal contacts that were dated and not completely within his recall. Op. Br. at 39-41. Plaintiff fails to state a disclosure claim for at least four reasons.

First, "[i]t is difficult to understand how the identities of the companies that did *not* express an interest in purchasing [the company] and that did *not* make an offer could be significant to [the company's] stockholders considering whether or not to accept the only offer . . . on the table." *McMillan*, 1999 WL 288128, at *9 (emphasis added). Delaware law does not require disclosure of every alternative ever considered or not considered. *See, e.g., In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 67 (Del. 1995) (dismissing disclosure claims and holding that additional information comparing and contrasting merger with alternative hypothetical merger was not material and would have yielded little benefit at cost of added complexity); *Lukens*, 757 A.2d at 736 ("requiring disclosure of every material event that occurred *and every decision not to pursue another option* would make proxy statements so voluminous that they would be practically useless") (emphasis added). *See also TCG Sec. Inc. v. S. Union Co.*, C.A. No. 11282, 1990 WL 7525, at *7 (Del. Ch. Jan. 31, 1990) ((finding no need to disclose "the miscellaneous items, that are various parts of the process . . . . These items concern specific aspects of the process leading up to the merger agreement as well as disclosure of the motivation behind some of the results of the process. . . . The simple fact of the matter is that a reasonable line has to be drawn or else disclosures in proxy solicitations will become so detailed and voluminous that they will no longer serve their purpose.").

Second, to the extent that Plaintiff is arguing that the directors must disclose a negative, *e.g.*, that they did not canvass the market or contact certain bidders, the law is to the contrary. *See In re Vitalink Commc'ns Corp. S'holders Litig.*, C.A. No. 12085, 1991 WL 238816, at *14 (Del. Ch. Nov. 8, 1991) (stating that "non-canvassing [i]s immaterial and d[oes] not have to be disclosed" where "a board has a reliable body of evidence with which to evaluate the fairness of a transaction"), *aff'd mem. sub nom. Grimes v. John P. McCarthy Profit Sharing Plan,* 610 A.2d 725 (Del. 1992).

Third, Plaintiff fails to state a disclosure claim by contending that facts contained in the Definitive Proxy statement do not also appear verbatim in the minutes of the April 30, 2007 Board meeting, where the Board determined that the best way to elicit alternatives was to publicly announce a transaction with Vivendi. Op. Br. at 40. A proxy statement is not intended to be "a record of what took place in the board meetings, but is a legal document assembled . . . to meet [the] obligation to share information gathered from various sources with the shareholders." *Brown v. Perrette,* C.A. No. 13531, 1999 WL 342340, at *10 (Del. Ch. May 14, 1999). *See also TCG Sec.*, 1990 WL 7525, at *7. Unless the proxy is somehow inconsistent with the underlying factual record, that statements in the proxy are not reflected in corporate minutes does not state a disclosure claim. In fact, all record evidence supports the statements in the Definitive Proxy, (*see, e.g.*, Morgado 94), and Plaintiff cites nothing to the contrary. Plaintiff's insinuation that the statement is inaccurate amounts to a request for self-flagellation. *See Loudon,* 700 A.2d at 143.

Plaintiff also asserts that the Definitive Proxy does not disclose the specific alternatives considered by the Board at its April 30, 2007 meeting. Op. Br. at 42.

Delaware law does not, however, require increasingly detailed disclosure of confidential information. *See, e.g., TCG Sec.*, 1990 WL 7525, at *7; *Siliconix*, 2001 WL 716787, at *9 ("Delaware law does not require disclosure of 'all available information' simply because available information 'might be helpful.'"). Where, as here, an "'arm's-length negotiation has resulted in an agreement which fully expresses the terms essential to an understanding by shareholders of the impact of the merger, it is not necessary to describe all the bends and turns in the road which led to that result.'" *Van de Walle v. Unimation, Inc.*, C.A. No. 7046, 1991 WL 29303, at *15 (Del. Ch. Mar. 7, 1991) (quoting *Repairman's Serv. Corp. v. Nat'l Intergroup, Inc.*, C.A. No. 7811, 1985 WL 11540, at *8 (Del. Ch. Mar. 15, 1985)). Plaintiff never explains the materiality of these details and, as explained above, they would not assume actual significance in the deliberations of a reasonable stockholder.

Fourth, even though we do not believe this information is material, Activision has disclosed Plaintiff's claim in its supplemental disclosure to shareholders, and it has been added to the total mix. (Ex. A)

For all of these reasons, this claim is without merit and the Court should reject it.

5. Plaintiff does not state a claim by seeking additional disclosure about the December 1, 2007 meeting of the board of directors.

Plaintiff next faults the Definitive Proxy because it states that at the December 1, 2007 meeting, "[t]he Activision board also considered that the transaction represented the best value available for the stockholders for a sale of Activision," while the language used in the resolution for that meeting is that "[t]he Board has determined that it is advisable and in the best interests of the Company and its stockholders for the

Company to consummate the Transactions upon the terms and subject to the conditions set forth in the Business Combination Agreement." (Op. Br. at 42-43; *see* Adams Aff. Ex. 41 at ACT 997) This fails to state a claim for at least three reasons. *First*, not only is this a semantic distinction without a difference, the corporate resolution tracks the language of 8 *Del. C.* § 251. The Board's finding, made pursuant to Delaware law, necessarily implies that the transaction represented the best alternative reasonably available.

Second, the Definitive Proxy clearly discloses exactly what happened. (Kotick 142) No record evidence suggests that the disclosure is inaccurate. To the contrary, the two directors whose depositions were taken by Plaintiff testified that as of December 1, 2007, they believed that the Combination was the best alternative:

> Because it would result in our having an opportunity to consolidate Blizzard with our business. And Blizzard is probably the most valuable single video game asset that exists. It's a company that . . . last year did $1.1 billion in revenue with a $560 million operating profit. That's more money than probably the entire combined video game publishing industry generated in operating profits.

(Kotick 143-44; *see* Morgado 347-48; *see also id.* 335-36) Adding more information would not significantly alter the total mix of information available. *Brown*, 1999 WL 342340, at *10.

Third, even though we do not believe this information is material, Activision has disclosed Plaintiff's claim in its supplemental disclosure to shareholders, and it has been added to the total mix. (Ex. A)

For all of these reasons, this claim is without merit and the Court should reject it.

6. Plaintiff does not state a claim by seeking additional disclosure about the consideration of confidential acquisition targets

Plaintiff suggests that the Definitive Proxy should disclose the names of seventeen potential acquisition targets specifically evaluated by Activision in September 2006, including eight potential entries into the MMOG market.[23] Op. Br. at 43-44. This fails to state a claim for at least three reasons. *First*, as explained above, Delaware law does not require increasingly detailed disclosure of confidential information. *See, e.g.*, *TCG Sec.*, 1990 WL 7525, at *7; *Siliconix*, 2001 WL 716787, at *9. Nor does Delaware law require the disclosure of every alternative ever considered by anyone, regardless of whether or not it was rejected or even presented to the board. *See Lukens*, 757 A.2d at 736. *Second*, the Definitive Proxy discloses a significant amount of background information, and Plaintiff gives no explanation as to why an even more granular level of detail would be material. As explained by the opinions cited above, adding more information would not significantly alter the total mix of information available.

Third, even though we do not believe this information is material, Activision has disclosed Plaintiff's claim in its supplemental disclosure to shareholders, and it has been added to the total mix. (Ex. A)

For all of these reasons, this claim is without merit and the Court should reject it.

7. The Definitive Proxy adequately describes the process of the NCGC.

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[23] Plaintiff also suggests that the Definitive Proxy should disclose that the 2006 strategic planning process "focused on M&A opportunities for acquisitions by Activision, not a potential sale of control of the Company," perhaps overlooking that the Definitive Proxy describes the consideration of seventeen "*acquisition targets*." D.P. at 59 (emphasis added))

Plaintiff's next group of disclosure challenges is based on negative inferences it has drawn from disclosures that actually appear in the Definitive Proxy regarding the operation of the NCGC, and urges the Court to require disclosure of a series of negatives.[24] Op. Br. at 44-45. This fails to state a claim for a number of reasons.

First, the Definitive Proxy accurately discloses why the NCGC was assigned certain tasks and how it operated in the absence of a conflict, including the attendance of Kotick and Kelly at various meetings and the use of Allen & Co. to deliver proposals. (*See, e.g.*, D.P. at 62 ("After discussion, the NCGC authorized Allen & Company to present a revised proposal to Goldman Sachs.")) (*See also* Morgado 121-23, 159, 183-84) (*See generally* D.P. at 61-68) *Second*, Defendants are not required to disclose what the NCGC did not do, and Plaintiff's requested spin amounts to nothing more than self flagellation.[25] *See Loudon*, 700 A.2d at 143. *Third*, Plaintiff makes no

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[24] That Activision assigned a committee certain tasks does not, as Plaintiff suggests, trigger entire fairness review, especially because the full Board, consisting of a majority of independent and disinterested directors, approved the Combination after concluding that it was in the best interests of Activision and its shareholders. Indeed, "[e]ven taking all the evidence in the light most favorable to the plaintiff, the court [should] conclude[] that the Special Committee, created to reinforce the independence of a majority independent board, operated with sufficient independence to merit the cloak of business judgment protection." *See Blackmore Partners, L.P. v. Link Energy LLC*, C.A. No. 454-N, 2005 WL 2709639, at *7 (Del. Ch. Oct. 14, 2005). Thus, Plaintiff relies in error on cases where, unlike here, a committee was formed to counter the influence of a controlling shareholder or a majority of interested directors and failed to carry out its mission.

[25] The record does not support Plaintiff's characterization of NCGC members as passive observers. The NCGC met to receive information and discuss the proposed Combination on May 11, 2007, May 16, 2007, May 22, 2007, June 15, 2007 September 6, 2007, and November 16, 2007 (Adams Aff. Exs. 22, 17, 23, 18, 26, 19, 20 and 33, respectively). The members of the NCGC helped to articulate and form

(cont'd)

attempt to explain why any of this spin is even material. The Definitive Proxy discloses all material facts. Adding more information would not significantly alter the total mix of information.

Fourth, even though we do not believe this information is material, Activision has disclosed Plaintiff's claim in its supplemental disclosure to shareholders, and it has been added to the total mix. (Ex. A)

For all of these reasons, this claim is without merit and the Court should reject it.

II. PLAINTIFF HAS NOT SHOWN IRREPARABLE HARM

To demonstrate irreparable harm, "a plaintiff must present an injury 'of such a nature that no fair and reasonable redress may be had in a court of law' and must show that 'to refuse the injunction would be a denial of justice.'" *In re Aquila, Inc. S'holders Litig.*, 805 A.2d 184, 194 (Del. Ch. 2002) (quoting *Kohls v. Duthie*, 765 A.2d 1274, 1289 (Del. Ch. 2000)). We do not dispute that a proper disclosure claim, if proven, can establish irreparable harm. *See In re Transkaryotic Therapies, Inc.*, C.A. No. 2776-CC, 2008 WL 2462767, at *10 (Del. Ch. June 19, 2008). However, here, because Plaintiff has failed to prove any material way in which Activision shareholders are not fully informed, it cannot show immediate irreparable harm. *See McMillan v. Intercargo Corp.*, C.A. No. 16963, 1999 WL 288128, at *4 (Del. Ch. May 3, 1999) (concluding that

(cont'd from previous page)

conceptual components "that were crucial to the deal." (Morgado 104) The NCGC gave Allen & Co. their views as to how negotiations should proceed. (Smith 92, 274)

because plaintiffs had not shown probability of success on merits of their disclosure claim, they had failed to establish element of irreparable harm).

Indeed, Plaintiff has identified no reason to wrest the fate of the Combination from the hands of the Activision shareholders. *See Kohls v. Duthie*, 765 A.2d 1274, 1289 (Del. Ch. 2000) ("Because I cannot now conclude that [plaintiffs] are being asked to make decisions regarding the transaction on the basis of improper disclosures, there is no irreparable harm in putting them to the decision of how to respond to the proposed transaction."); *In re IXC Commc'ns, Inc. S'holders Litig.*, C.A. Nos. 17324, 17334, 1999 WL 1009174, at *7 (Del. Ch. Oct. 27, 1999) ("Absent convincing evidence that the board skewed the process in order to prevent a shareholder from voting knowledgeably and intelligently on the merger agreement, no court should apply an artificial barrier to market consideration of that business judgment."). As a result, Plaintiff's request for a preliminary injunction should be denied.

III. THE BALANCE OF THE EQUITIES WEIGHS AGAINST AN INJUNCTION

As noted above, this Court has repeatedly held that "in the absence of a competing offer a plaintiff seeking to enjoin a premium transaction for a corporation's shares must make a particularly strong showing on the merits to obtain a preliminary injunction because an injunction in such circumstances risks significant injury to shareholders." *Next Level Commc'ns*, 834 A.2d at 845. *See also In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 557 (Del. Ch. 2003) (denying injunction because it threatened more harm than good in absence of higher bid); *In re Ocean Drilling & Exploration Co. S'holders Litig.*, C.A. No. 11898, 1991 WL 70028, at *7 (Del. Ch. Apr. 30, 1991) (holding that issuance of "an injunction will cause the destruction of the

considerable structure now in place to accomplish the tender offer" and delay deal which target company and all of its shareholders were eager to consummate).

Indeed, there is a real risk in this case that an injunction would cause serious, irreparable injury to Activision's shareholders, and do so almost immediately.[26] There is no record evidence that the current offer will be increased or even remain in the face of an injunction. *See McMillan*, 1999 WL 288128, at *9; *Hecco Ventures v. Sea-Land Corp.*, C.A. No. 8486, 1986 WL 5840, at *5 (Del. Ch. May 19, 1986) (denying preliminary injunction in part for lack of irreparable harm where "there is no showing that an injunction would cause a different bidder or a higher bid to materialize"). Nor is there record evidence that a competing bidder has come forward, or will come forward. The market is extremely favorable to the deal, and has added $4.5 billion to the portfolios of Activision investors before the Combination has even been consummated. A market "correction" resulting from an injunction of the Combination would be devastating to those same investors. Even Plaintiff acknowledges that it has no guarantee that if the transaction is enjoined, Vivendi will be still interested at the current price or any price, or that another company is waiting in the wings, and, therefore, the deal could possibly disappear if an injunction is granted. (Yee 111-13)

The balance of the equities, especially given that the shareholders are adequately informed about the Combination, overwhelmingly favors denying Plaintiff's request for a preliminary injunction. *See In re BEA Sys., Inc. S'holders Litig.*, C.A. No. 3298-VCL, trans. at 101 (Del. Ch. Mar. 26, 2008) ("[I]t would take a strong case to lead

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[26] Article VII, Section 7.1(d) of the BCA prevents the Combination from being consummated if an injunction is present.

me to enter relief in the context of this transaction and the current marketplace . . . . [E]ven if I thought there was some colorable merit to [plaintiff's claims], there's no question in my mind the threat of injury that could flow from the entry of an injunction is much more powerful and immediate than any injury that an injunction might remedy."). Activision's shareholders, and not Plaintiff,[27] should determine whether to approve or reject the Combination. Because the balance of equities favors denying the injunction in the absence of a competing alternative, the Court should deny Plaintiff's motion.

CONCLUSION

For all of the foregoing reasons, the Activision Defendants respectfully request that the Court deny Plaintiff's application for a preliminary injunction.

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[27] We also note that Plaintiff's trading in Activision stock is difficult to reconcile with the allegations in its Complaint. For example, Plaintiff sold shares after the announcement of the Combination below the deal price of $27.50 per share, despite its allegation that $27.50 is an unfair and inadequate price to current Activision shareholders. (Yee 56) Plaintiff's 30(b)(6) designee was unable to explain this inconsistency. (Yee 107)