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Case No. 3534-CC

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WAYNE COUNTY EMPLOYEES' RETIREMENT SYSTEM, individually, and on behalf of all those similarly situated Plaintiffs, v. 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.	C.A. No. 3534-CC

OPENING BRIEF IN SUPPORT OF DEFENDANTS VIVENDI S.A., VGAC LLC AND VIVENDI GAMES, INC.'S MOTION TO DISMISS SECOND AMENDED CLASS ACTION COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

NATURE AND STATE OF PROCEEDINGS

For almost four months, Vivendi S.A., VGAC LLC and Vivendi Games, Inc. (collectively "Vivendi") have been challenging the legal basis for Plaintiff's claim that Vivendi aided and abetted the Activision directors' alleged breach of their fiduciary duties to Activision's shareholders in connection with the sale of voting control of Activision pursuant to a Business Combination Agreement dated as of December 1, 2007.

Each time in response to Vivendi's motion to dismiss, Plaintiff has filed an amended pleading in order to avoid the Court's disposition of Plaintiff's sole claim against Vivendi. However, none of the amended pleadings, including the most recent Second Amended Complaint, addresses the fatal flaw in the pleading: Contrary to the requirements of Delaware law, the initial Complaint, the Amended Complaint, and now the Second Amended Complaint are entirely devoid of any specific facts demonstrating that Vivendi (1) knowingly participated in any breach of fiduciary duty; or (2) participated in anything other than an arm's-length negotiation with Activision. Instead, Plaintiff simply alleges the conclusion that "Vivendi knowingly encouraged and participated" in the directors' purported breaches. Second Amended Complaint, ¶ 169. This conclusory allegation is inadequate as a matter of established Delaware law. *See, e.g., In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del. 1995) (allegations that a defendant "had knowledge of" the director defendants' fiduciary duties and "knowingly and substantially participated and assisted" in the alleged breaches is insufficient to state a claim).

The Second Amended Complaint's allegations of alleged wrongdoing by the Activision directors remain insufficient to support an inference of aiding and abetting by Vivendi under any of the fact patterns for aiding and abetting previously recognized by Delaware courts. *In re Lukens Inc. S'holder Litig.*, 757 A.2d 720, 734-35 (Del. Ch. 1999) (at a minimum, plaintiff must plead facts from which the court can infer "knowing participation"). The lack of any facts demonstrating that Vivendi aided and abetted a breach is exemplified by the recently submitted Second Amended Complaint, which, after three attempts, adds nothing of substance with respect to the allegations against Vivendi, or for that matter, against Activision. Plaintiff's game of routinely filing a non-substantive amendment in response to a motion to dismiss needs to end now. Consequently, the Second Amended Complaint against Vivendi should be dismissed with prejudice.

STATEMENT OF FACTS

Vivendi vigorously disputes the Second Amended Complaint's material allegations; however, for purposes of this motion to dismiss, the well-pleaded factual allegations are accepted as true. *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

Plaintiff Wayne County Employees' Retirement System alleges that it is an Activision shareholder. Purporting to act on behalf of a class of Activision shareholders, Plaintiff seeks to enjoin Activision from holding a shareholder vote on whether to approve the Business Combination Agreement with Vivendi or, if approved by the

Activision shareholders, to rescind the transactions contemplated by the Business Combination Agreement.[1] 2nd Am. Compl., ¶ 12.

Defendant Activision, a publicly-traded company, is a leading international publisher of entertainment software, including the popular Guitar Hero® video game series, among others. Activision is organized under the laws of the State of Delaware with its principal place of business in Santa Monica, California. 2nd Am. Compl., ¶ 14. Eight individuals who serve as Activision's directors are also named as defendants (the "Director Defendants"). *Id*., ¶¶ 15-23. Defendant Vivendi S.A. is a French corporation with its principal place of business in Paris, France and the corporate parent of Vivendi Games, Inc. and VGAC LLC. *Id*., ¶¶ 24-26. Defendant Vivendi Games, Inc. is a Delaware corporation (*id*., ¶ 26) and is a global developer, publisher and distributor of multiplatform interactive entertainment including video games. Defendant VGAC LLC, the corporate parent of Vivendi Games, is a limited liability company organized under the laws of the State of Delaware. *Id*., ¶ 25.

Plaintiff's theory of the case rests on the contention that the Director Defendants breached their fiduciary duties to Activision shareholders in connection with the negotiation of the Business Combination Agreement, the decision to enter into the

[1] The Second Amended Complaint alleges that the Business Combination Agreement results in Vivendi gaining economic and voting control of Activision. The combined company will remain a public company so that all shareholders can continue to buy and sell stock on the public market. Under the terms of the Business Combination Agreement, the shares of Vivendi Games will be exchanged for 295.3 million newly issued Activision shares, and a purchase by Vivendi of 62.9 million additional shares of $27.50 per share. 2nd Am. Compl., ¶ 72. Plaintiff asserts that this transaction will result in Vivendi receiving 52% of voting control of Activision. 2nd Am. Compl., ¶¶ 72-75.

Business Combination Agreement and the terms of the Agreement. 2nd Am. Compl., ¶¶ 35-112. In addition, Plaintiff challenges the disclosures contained in Activision's definitive proxy statement, filed with the SEC on June 6, 2008 (the "Definitive Proxy"), as materially misleading and incomplete. *Id.*, ¶¶ 11, 113-149, and 159-163. In the equivalent of a pleading "afterthought" consisting of two paragraphs, Plaintiff alleges that Vivendi aided and abetted the Director Defendants' breaches. *Id.*, ¶¶ 169-170.

The Second Amended Complaint describes a negotiation process beginning in November 2006 that resulted in a final approval by the Director Defendants of the Business Combination Agreement over one year later on December 1, 2007. 2nd Am. Compl., ¶¶ 45-72. Relying upon the factual background in the Definitive Proxy,[2] Plaintiff alleges that from June to September 2006, Activision considered various strategic opportunities for Activision. 2nd Am. Compl., ¶ 45. Beginning in November 2006, Activision started discussions with Vivendi on "a conceptual proposal" for combining Activision and Vivendi Games. *Id.*, ¶ 46. Four months later, in March 2007, Vivendi entered into a standard confidentiality agreement with Activision providing for

[2] A copy of the Definitive Proxy is attached as Exhibit A to the Affidavit of Elizabeth T. Sudderth ("Sudderth Affidavit"). The Definitive Proxy is incorporated by reference throughout the Second Amended Complaint. Accordingly, the Court may rely on the Definitive Proxy in considering the motion to dismiss. *See e4e, Inc. v. Sircar*, 2003 WL 22455847, at *3 (Del. Ch. Oct. 9, 2003) ("The Court may, however, 'consider for certain purposes [on a motion to dismiss], the contents of documents that are integral to or are incorporated by reference into the complaint.'") (footnote omitted). Moreover, the Court may take judicial notice of publicly-filed documents on a motion to dismiss. *In re Santa Fe Pac. Corporation. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995); *In re Wheelabrator Techs. Inc. S'holders Litig.*, 1992 WL 212595, at *12 (Del. Ch. Sept. 1, 1992); *Diceon Elecs., Inc. v. Calvary Partners, L.P.*, 772 F. Supp. 859, 861 (D. Del. 1991).

the exchange of non-public information.[3] *Id*. After April 30, 2007, there were numerous meetings and discussions between and among the Director Defendants, Activision management and Activision advisors as well as Vivendi's management, directors and advisors regarding a combination of the companies. Ultimately, the Activision board of directors authorized the Board's Nominating and Corporate Governance Committee ("NCGC") to

> (a) review, evaluate, respond to and negotiate with respect to the proposed transaction and any other alternative transaction, offer or expression of interest in a possible business combination with Activision, if made; (b) to recommend to the board of directors a course of action, business combination, or similar agreement in connection with the proposed transaction and any other proposal (noting that action by the entire board of directors would be required to pursue any course of action or enter into any business combination or similar agreement with any party); (c) to hire and retain, at the expense of Activision, such legal counsel as the NCGC deemed necessary and appropriate to advise the committee in furtherance of its responsibilities; and (d) to hire and retain, at Activision's expense, such financial advisors or experts as it deemed appropriate to advise the committee in furtherance of its responsibilities.

Id., ¶ 49. The Second Amended Complaint also identifies a bargaining process from May to December 2007 by which Vivendi increased the price to be paid to Activision shareholders as part of the transaction from $24.75 to the ultimate price of $27.50. *Id*., ¶¶ 68. Plaintiff acknowledges that the $27.50 price is a 25% premium to the closing market trading price of $22.15 per share of Activision on the trading day preceding the announcement of the merger. *Id*., ¶ 75.

Plaintiff contends that the Director Defendants breached their fiduciary duties by:

[3] A copy of the Confidentiality Agreement is attached to the Sudderth Affidavit as Exhibit B. Just as the Definitive Proxy, the Confidentiality Agreement is incorporated by reference throughout the Second Amended Complaint.

(1) allowing management to control the process of selling 52% of Activision's shares;

(2) not considering other potential bidders;

(3) agreeing to a coercive tender offer;

(4) not remaining disinterested as certain directors will retain their positions following the merger; and

(5) failing to disclose material information and making misleading statements in the Definitive Proxy. 2nd Am. Compl., ¶¶ 151-158, 160-163.

Plaintiff makes numerous allegations challenging the process employed by the Director Defendants, the terms of the Business Combination Agreement, and the disclosures made by Activision to its shareholders in anticipation of a shareholder vote. However, as explained in this opening brief, the Second Amended Complaint is fatally flawed with regard to the aiding and abetting claim against Vivendi because it does not allege any facts tying the conduct of Vivendi to any of the alleged breaches by the Director Defendants or showing that Vivendi did anything other than negotiate an arm's-length transaction.

ARGUMENT

I. THE APPLICABLE STANDARDS

In order to survive a motion to dismiss, a complaint must "plead enough facts to plausibly suggest that the plaintiff will ultimately be entitled to the relief she seeks. If a complaint fails to do that and instead asserts mere conclusions, a Rule 12(b)(6) motion to dismiss must be granted." *Desimone v. Barrows*, 924 A.2d 908, 928-29 (Del. Ch. 2007);

see also Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 893 (Del. Ch. 1999) ("Although Delaware has a notice pleading standard, that standard does not totally relieve a plaintiff of the burden to plead facts, not conclusions."). When ruling on a Rule 12(b)(6) motion, a court must accept all well-pleaded allegations as true, but should "ignore conclusory allegations that lack specific supporting factual allegations." *Ramunno*, 705 A.2d at 1034. "Conclusory allegations will not be accepted as true without specific supporting factual allegations." *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d at 65-66 (dismissing aiding and abetting claim).

In order to state an actionable claim for aiding and abetting breach of fiduciary duty, the Second Amended Complaint must state specific factual allegations showing the presence of four specific elements: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary relationship, (3) Vivendi's knowing participation in the breach, and (4) damages resulting from the concerted action of the fiduciary and the Vivendi Defendants. *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001). Without conceding that any element of the claim has been established, Vivendi, in its motion, asserts that the Second Amended Complaint in this case does not provide a single factual allegation to support the third element above – the knowing participation by Vivendi in any purported breach.

If the Director Defendants establish that there is no breach of fiduciary duty, then the aiding and abetting claim against Vivendi must also be dismissed. *Manzo v. Rite Aid Corp.*, 2002 WL 31926606, at *6 (Del. Ch. Dec. 19, 2002), *aff'd*, 825 A.2d 239 (Del. 2003) (TABLE) (dismissing a claim of aiding and abetting because the underlying

breach of fiduciary duty claim was dismissed). However, even if the alleged breach of fiduciary duty claim against the Director Defendants were to survive a challenge on the pleadings, Plaintiff's allegations against Vivendi are still insufficient to state a claim for relief against Vivendi and should be dismissed now. *See McGowan v. Ferro*, 2002 Del. Ch. LEXIS 3, at *7-*8 (Del. Ch. Jan. 11, 2002) (court can dismiss aiding and abetting claim even if it assumes that there was an underlying breach of fiduciary duty by the director).

II. THE COURT SHOULD DISMISS COUNT IV OF THE SECOND AMENDED COMPLAINT BECAUSE IT FAILS TO STATE A CLAIM

A. The Mere Conclusory Allegation That Vivendi Knowingly Participated In A Breach Of The Director Defendants' Fiduciary Duty Fails To Support A Claim For Aiding And Abetting Under Delaware Law.

The entirety of the Second Amended Complaint's aiding and abetting claim is set forth in just two paragraphs:

> As parties to the BCA, [Vivendi] and Merger Sub are necessary parties in this action, moreover they are liable for aiding and abetting the Individual Defendants in their breaches of fiduciary duty and Kotick and Kelly for their breaches of entire fairness and self-dealing. As participants in the proposed Merger, [Vivendi] was aware of the Individual Defendants' breaches of fiduciary duties and in fact actively and knowingly encouraged and participated in said breaches in order to obtain the substantial financial benefits that the Merger would provide at the expense of Activision stockholders.
>
> Prior to authorization by the Activision Board, or indeed, even before the Board of Activision was aware of any talks, Vivendi engaged in substantial negotiations and entered into a Confidentiality Agreement with Activision for the purpose of engaging in a purchase of control of Activision. Prior to the Activision Board's knowledge of the negotiations, Vivendi had established a basic framework for negotiations which required that Vivendi would obtain control of Activision. Indeed, when the independent directors attempted to assert themselves, Vivendi flatly rejected to negotiate on a basis other than that negotiated without the involvement of Activision's outside directors. Moreover, to secure the loyalty of Defendants Kotick and Kelly, Vivendi assured them with continued management of the combined Activision Blizzard during the negotiation process.

2nd Am. Compl., ¶ 169-170.

Delaware courts have routinely granted motions to dismiss aiding and abetting claims based upon conclusory allegations like that alleged here. *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d at 72 (finding that mere allegations that a defendant "had knowledge of" the director defendants' fiduciary duties and "knowingly and substantially

participated and assisted" in the alleged breaches, is insufficient to state a cause of action); *In re Lukens Inc. S'holder Litig.*, 757 A.2d at 734-35 (allegation that acquiror "approved and urged" the target's directors to approve the merger is inadequate to support knowing participation requirement). To establish a knowing participation by Vivendi, the Plaintiff must assert "some facts … that would tend to establish, at a minimum, knowledge by [Vivendi] that the [Director Defendants] w[ere] endeavoring to breach" their fiduciary duties to shareholders. *Greenfield v. Tele-Communications, Inc.*, 1989 WL 48738, at *3 (Del. Ch. May 10, 1989). The Second Amended Complaint here, however, is devoid of any such facts.

B. The Entire Second Amended Complaint Fails To Support A Reasonable Inference of Knowing Participation.

When the entire Second Amended Complaint is scrutinized, there are no allegations of the type that Delaware courts have recognized can support an inference that the acquiror aided and abetted the target company's directors' alleged breach of fiduciary duty. *In re Lukens Inc. S'holder Litig.*, 757 A.2d at 734-35 ("Knowing participation, though it need not be pleaded with particularity, must be reasonably inferred from the facts alleged in the complaint.") (emphasis added). Thus, Delaware courts have indicated that an aiding and abetting claim could be supported by facts that allow the court to infer (i) the acquiror's participation because the "terms of the transaction are so egregious … as to be inherently wrongful;" (ii) the acquiror used knowledge of a breach of fiduciary duty "to gain a bargaining advantage in the negotiations;" or (iii) the acquiror sought to induce the target's directors to breach their fiduciary duty, "such as through the offer of

side payments intended as incentives for the fiduciaries to ignore their duties." *See, e.g., In re Telecomms., Inc.*, 2003 WL 21543427, at *2 (Del. Ch. July 7, 2003).

1. The Terms Of The Business Combination Agreement Are Not Inherently Wrongful And Therefore Do Not Support A Reasonable Inference Of Knowing Participation.

The Second Amended Complaint cites to certain provisions of the Business Combination Agreement to which Plaintiff specifically objects: the no-shop provisions, a termination fee, voting and lock-up agreements by two of the directors and a tender offer. 2nd Am. Compl., ¶¶ 77-89. However, these objections do not amount to a viable contention that the provisions are "inherently wrongful" for the purpose of establishing "knowing participation." The "inherently wrongful" standard has been found to require an allegation that the action taken by the fiduciary was per se illegal. *See In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *24 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006).

Lock-up agreements, no-shop provisions, termination fees and tender offers have been expressly allowed by Delaware courts, and absent extraordinary features not present here, cannot be considered "inherently wrongful" or "per se illegal." *See e.g., Rand v. W. Airlines, Inc.*, 1989 WL 104933 (Del. Ch. Sept. 11, 1989) (holding that the granting of a lock-up and a no-shop clause is not an inherently wrongful activity, as lock-ups and no-shop clauses are permissible under certain circumstances). The no shop provision in the Business Combination Agreement as described in the Second Amended Complaint has the standard terms that permit Activision to consider and to accept a Superior Proposal if one is offered by a new acquiror. 2nd Am. Compl., ¶¶ 81-85. In its initial Reply Brief in

Support of Motion For Expedition, Plaintiff asserted that the three-day waiting period required in the Business Combination Agreement is onerous and hindered Activision's ability to explore other offers. However, Delaware courts have upheld similar "waiting" or "matching" periods. *See, e.g., In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 977 (Del. Ch. 2005) (allowing a no-shop provision that gave the acquiror three-business days to match a competing offer).

The termination fee payable to Vivendi in the event that Activision accepts a Superior Proposal from a third party is $180 million. 2nd Am. Compl., ¶ 85-88. The termination fee represents approximately 1.98 % of the total value to be paid by Vivendi in the transaction, a figure Delaware courts have found well within the range of reasonableness.[4] *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d at 1017 (noting that a termination fee is "a common contractual feature that, when assented to by a board fulfilling its fundamental duties of loyalty and care for the proper purpose of securing the high value bid for the stockholders, has legal legitimacy"); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 506 n.65 (Del. Ch. 2000) ("[a]s long as no-shop and termination fee …

[4] Vivendi is contributing Vivendi Games, valued at $8.121 billion and acquiring approximately 62.9 million newly issued shares from Activision at $27.50 per share, resulting in a total consideration of $9.852 billion. 2nd Am. Compl. ¶¶ 72-75. The termination fee falls well within the percent range which Delaware courts have consistently upheld as reasonable. *See In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1000 (Del. Ch. 2005) finding that a termination fee of 3.75% is reasonable); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 505-06 (Del. Ch. 2000) (holding that 3.5% termination fee was within the range of reasonableness); *Goodwin v. Live Entm't, Inc.*, 1999 WL 64265, at *23 (Del. Ch. Jan. 25, 1999) (finding that a 3.125% termination fee is "within the range of reasonableness"), *aff'd*, 741 A.2d 16 (Del. 1999) (TABLE).

provisions are non-preclusive, non-coercive, and otherwise within the bounds of reason, Delaware law generally recognizes them as valid").[5]

Delaware law also permits including a combination of deal protection provisions, such as a termination fee, "no-shop" provision and "lock-up" provision, in the Business Combination Agreement. *See In re IXC Commc'ns, Inc. S'holders Litig.*, 1999 WL 1009174, at *9-10 (Del. Ch. Oct. 27, 1999) (finding that a combination of a termination fee, a no-solicitation provision, and payment of a premium to the largest shareholder in return for the shareholder's approval of the merger, without showing disloyalty or lack of care by the corporation's directors, are "business judgments" and granted deference). Specifically, this Court has found that the combination of a "lock-up" option, a break up fee, and a "no-shop" provision, is not "inherently wrongful" and merely alleging a combination of deal protection provisions will not support a claim for aiding and abetting breach of fiduciary duty. *See Lewis v. Leaseway Transp. Corp.*, 1990 WL 67383, at *4-*8 (Del. Ch. May 16, 2000). In *Lewis v. Leaseway*, the terms of the merger agreement contained numerous deal protection provisions, including a multi-million dollar break-up fee, an advance of $5 million for contingent expenses to the acquiror, a "no-shop"

[5] *See In re J.P. Stevens & Co. S'holders Litig.*, 542 A.2d 770, 782-84 (Del. Ch. 1988) (explaining that when a termination fee is "negotiated in good faith by a board with no apparent conflict, that is well-advised and follows a responsible, deliberate procedure, I am at a loss as to know what basis exists for declaring such a provision a violation of shareholders' rights"). *See also Matador Capital Mgmt. Corp. v. BRC Holdings, Inc.*, 729 A.2d 280, 291 (Del. Ch. 1998) ("[c]ontrary to plaintiffs' suggestion, these measures [in particular, a no-shop provision] do not foreclose other offers, but operate merely to afford some protection to prevent disruption of the Agreement by proposals from third parties that are neither bona fide nor likely to result in a higher transaction"); *Ace Ltd. v. Capital Re Corp.*, 747 A.2d 95, 106 (Del. Ch. 1999) (a no-shop provision prohibiting a board of directors from "play[ing] footsie with other potential bidders or . . . stir[ring] up an auction . . . is perfectly understandable, if not necessary, if good faith business transactions are to be encouraged").

provision, and a "lock-up" option allowing the acquiror to purchase up to 18% of the common shares at a premium. *Id*. at *3. In granting the defendants' motion to dismiss, this Court held there was nothing in the complaint, including the numerous deal protection provisions of the merger agreement, that was so "inherently" wrongful as to support the plaintiff's conclusions that the acquiror aided and abetted the purported breaches by the Leaseway directors. *Id*. at *8.

Plaintiff alleges that as a result of the Business Combination Agreement, the Director Defendants will permit a "coercive" tender offer. 2nd Am. Compl. ¶¶ 77-78. According to Plaintiff, Activision Blizzard will make a tender for 146.5 million Activision shares for $27.50 per share. Plaintiff contends that although the shareholders will receive a premium for the tendered shares (as compared to Activision's stock price at the time the Business Combination Agreement was entered into), the tender is coercive because it will leave non-Vivendi shareholders in a unfavorable minority position in the combined company. Plaintiff also alleges that the tender price of $27.50 per share is inadequate because it does not capture an adequate control premium. *Id*. At the close of the market on Friday, June 20, 2008, Activision's stock price was $35.85. Consequently, if the price remains that high at the close of the tender, it is likely that a number of the shareholders will not tender at all.

To establish a claim for actionable coercion, plaintiff must allege that the selling shareholders were wrongfully induced by some act of the defendants to sell their shares for reasons unrelated to the economic merits of the sale. *Lieb v. Clark*, 1987 Del. Ch. LEXIS 442, at *12 (Del. Ch. June 1, 1987). An offer that is "economically 'too good to

resist' as compared to the alternative of not tendering, would not, for that reason alone, be actionably coercive." *Id*. Transactions found to be actionably coercive have included a tender offer structured so as to afford shareholders no practical choice but to tender for an unfair price, and an offer by a corporation for a fair price, but structured and timed so as effectively to deprive stockholders of the ability to choose a competing offer, also at a fair price, that the shareholders might have found preferable. *Ivanhoe Partners v. Newmont Mining Corp.*, 533 A.2d 585, 605 (Del. Ch. 1987), *aff'd*, 535 A.2d 1334 (Del. 1987).

In *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611 (Del. Ch. 1999), GM issued GMH stock, which represented rights in equity and assets in the parent company, GM, but which tied dividends to the financial performance of Hughes, a GM subsidiary. GM informed GMH holders that a vote to approve the GMH stock issuance transaction would have the effect of waiving any possible application of certain covenant amendments contemplating GMH remedies upon a recapitalization. GMH shareholders alleged that they were actionably coerced by having to choose between giving up recapitalization covenants intentionally tied to an affirmative vote or blocking the transactions and squandering potentially enhanced values realized from those transactions. *Id*. at 620. The Court held, however, that this was not an actionable claim as neither allegation stated a claim that the coercive actions were "unrelated to the merits of the Hughes Transactions"; *see also Cantor Fitzgerald, L.P. v. Cantor*, 2001 Del. Ch. LEXIS 137, at *32 (Del. Ch. Nov. 5, 2001) (exchange offer coupled with vote for amendments that would reduce economic protections to non-tendering holders was found

not to be coercive even though there were "compelling economic incentives for participating in the Exchange Offer").

In this case, no facts have been alleged that demonstrate how the tender can be considered coercive. It is unlike the case of *Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051, 1056-1057 (Del. Ch. 1987), where a coercive tender offer was found. In Eisenberg, the terms of the transaction provided that after the partial tender was completed, the company intended to delist the shares of shareholders who did not tender, thereby locking them into the company without an exit. *Id*. at 1062. In *Eisenberg*, shareholders were basically told that they would have no reliable market for their shares if they did not tender. *Id*. In the Business Combination Agreement, there is no such term and Plaintiff has not alleged otherwise; in fact, the one express condition of the tender offer is that the tender offer cannot result in the delisting of the Activision shares from NASDAQ, or to become eligible for deregistration under the Securities Exchange Act of 1934, as amended. *See* Definitive Proxy at p. 101. After the tender, shareholders will still be able to buy and sell shares in a public, regulated market place.

2. There Are No Facts Alleged From Which To Infer That Vivendi Had Knowledge Of The Director Defendants' Alleged Breaches And Used That Knowledge To Gain Advantage In The Transaction.

The Second Amended Complaint does not attempt in any manner to allege facts that Vivendi had knowledge of the Director Defendants' breaches and used that knowledge to gain advantage in negotiating the transaction. *Cf. Zirn v. VLI Corp.*, 1989 WL 79963, at *6 (Del. Ch. July 17, 1989) (acquiror aided and abetted seller's directors'

breach of fiduciary duty related to losing a patent, failing to disclose their culpability in the loss to shareholders and then selling the company for an unfair price where acquiror knew of directors' breach and failure to disclose).

Nor does the Second Amended Complaint allege any facts from which this Court can infer that Vivendi had *knowledge* of the Director Defendants' breaches. That Vivendi entered into a standard confidentiality agreement seeking to maintain the confidentiality and use of the materials to be exchanged by the parties does not create any inference that Vivendi somehow had knowledge of the Director Defendants' alleged breaches. A confidentiality agreement is typical in business transactions of this nature. Such agreements properly seek to safeguard the confidentiality of non-public documents, the orderliness of distribution of non-public documents, and defines the dissemination of the non-public information. As this Court stated: "[b]y agreeing not to disclose confidential information [the acquiring party] undertook certain contractual duties, but these duties in no way affected the underlying third-party relationship of the entities. Parties to confidentiality agreements in the context of corporate takeovers often remain strident adversaries with clearly defined, independent interests." *Zirn v. VLI Corp.*, 1989 WL 79963, at *8 (Del. Ch. July 17, 1989); *see, e.g.*, *Braunschweiger v. American Home Shield Corp.*, 1991 Del. Ch. LEXIS 7, at *7 (Del. Ch. Jan. 7, 1991) (prior to informing the outside directors of discussions concerning a leveraged buyout, the CEO and COO entered into a confidentiality agreement concerning due diligence for the transaction).

The Plaintiff's exaggeration of the relevance of this confidentiality agreement is illustrative of the lack of any facts to support an inference of knowledge. The Second

Amended Complaint does not and cannot state that the confidentiality agreement somehow restricted the transaction or created undue obligations between the parties with respect to the transaction – the confidentiality agreement expressly states the opposite. *See* Ex. B, Conf. Agrmt. ¶ 7. While Plaintiff seeks to create the illusion that the agreement precluded anyone, other than Messrs. Kotick and Kelly, from having access to confidential materials, by its own terms, information could be disseminated and shared with representatives of Activision, including its "affiliates, directors, officers, employees, advisors, agents, representatives." Ex. B, Conf. Agrmt. ¶ 1 (emphasis added). Finally, the extensive involvement of the directors described by the Second Amended Complaint shows that the confidentiality agreement did not prevent the board of directors from obtaining regular reports on the negotiations and being actively involved in the process. 2nd Am. Compl. ¶¶ 46, 49, 51, 53-54, 57-59, 61, 65-66, 70-71.

Similarly, the allegation that preliminary negotiations were handled by Messrs. Kotick and Kelly, who are alleged to be conflicted, is unavailing. The argument Plaintiff seeks to advance here was expressly rejected by this Court in *In re MONY Group Inc. Shareholder Litigation*.

> This 'lone wolf' theory, as described at oral argument, cannot stand up against the record, and fails as a matter of law. A board appropriately can rely on its CEO to conduct negotiations, and the involvement of an investment banker is not required.

In re MONY Group Inc. S'holder Litig., 852 A.2d 9, 20 (Del. Ch. 2004). The holding in *In re MONY* is equally applicable here.

3. There Are No Facts Alleged From Which To Infer That Vivendi Sought To Induce The Director Defendants To Breach Their Duties To Activision Shareholders.

There is no basis in the Second Amended Complaint for inferring that Vivendi sought to induce the Activision directors to breach their fiduciary duty, such as through the offer of side payments intended as incentives for the fiduciaries to ignore their duties. Although Plaintiff alleges that Defendants Kotick and Kelly's employment agreements were negotiated with assistance from outside counsel and approved on December 1, 2007 (the same date as the Business Combination Agreement was announced), Plaintiff does not and cannot allege that they received "grossly excessive" payments for the purpose of inducing a breach. *See In re Lukens, Inc. S'holder Litig.*, 757 A.2d at 735 (acquiror's acquiescence in target's employment agreements was not evidence that supports aiding and abetting claim).

In *McGowan v. Ferro*, 2002 Del. Ch. LEXIS 3 (Del. Ch. Jan. 11, 2002), the Court faced an allegation of breach on substantially more compelling facts than those alleged in the Second Amended Complaint here, but nevertheless held them inadequate to support an inference of aiding and abetting. In *McGowan*, the acquiror contracted to purchase the target's riverboat casinos for $609 million. *Id*. at *3. The merger was conditioned upon obtaining state regulatory approvals. *Id*. The approvals had not been obtained as of the termination date, but the target's board agreed to an extension of time to close the merger. *Id*. at *4. Plaintiff shareholder complained that the decision to extend the time to close the merger, without demanding a higher purchase price, was a breach of the directors' fiduciary duty because the value of the riverboat casinos had increased by $230

million. *Id*. The plaintiff alleged that the acquiror aided and abetted the breach by offering employment agreements to the target's directors to induce their compliance. *Id*. at *5-*6.

The *McGowan* court rejected the aiding and abetting claim and granted the motion to dismiss. Recognizing that merger agreements include conventional collateral agreements involving the continued employment of some of the targets' officers and directors, the court analyzed whether the agreements reflected grossly excessive payments. Contrasting the facts in its case with three cases involving clearly grossly excessive payments,[6] the Court explained:

> . . . the Complaint in this case does not allege that the collateral agreements between Horseshoe and the director-defendants were so 'grossly excessive' as to be 'inherently wrongful' or that those agreements were unfair to [the target]. Nor does the Complaint disclose the value of the collateral consulting and service agreements between [the buyer] and the director-defendants, or the percentage of the total transaction value they represent. [Plaintiff] also advances no claim that the collateral agreements were intended, or used, to induce the director-defendants to breach their fiduciary duties.

Id. at *12-*13 (footnotes omitted).

Similar to the complaint in *McGowan*, the Second Amended Complaint in this case does not allege that any agreement with the Director Defendants amounts to grossly

[6] *In re USACafes, L.P. Litig.*, 600 A.2d 43 (Del. Ch. 1991) (target's directors and officers received nearly 24% of transaction's value in side payments by acquirer); *Jackson Nat'l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 392 (Del. Ch. 1999) (defendant acquiror provided financial incentives totaling 20% of transaction's value to target's directors in order to induce breaches); *Crescent/Mach I Partners, L.P. v. Turner*, 2000 Del. Ch. LEXIS 145 (Del. Ch. Sept. 29, 2000) (target's fiduciary stated that he would not consent to any transfer of business unless he and his affiliates received special treatment in the transaction).

excessive compensation or was offered as a quid pro quo for the director's breach of their fiduciary duties.

4. There Are No Allegations That Vivendi Had Any Role In The Alleged Misleading Or Incomplete Disclosures In The Definitive Proxy.

Plaintiff alleges that Activision and the Director Defendants made misleading and incomplete disclosures in the Definitive Proxy. 2nd Am. Compl., ¶¶ 9, 113-149, and 160-163. However, at no point in the Second Amended Complaint does Plaintiff allege that Vivendi aided and abetted the purported disclosure violations. The alleged disclosure violations by Activision and the Director Defendants cannot substantiate an aiding and abetting breach of fiduciary duty claim against Vivendi.

C. The Amended Class Action Complaint Concedes the Arm's Length Negotiations Between Vivendi and Activision Which Is Inconsistent With An Aiding and Abetting Claim.

A claim of aiding and abetting is negated by evidence of arm's-length negotiations because such evidence "precludes a showing that the defendants knowingly participated in the breach by the fiduciaries." *In re Frederick's of Hollywood, Inc. S'holders Litig.*, 1998 WL 398244, at *3 n.8 (Del. Ch. July 9,1998); *see also In re Shoe-Town S'holders Litig.*, 1990 WL 13475, at *8 (Del. Ch. Feb. 12, 1990) (dismissing complaint against alleged aider and abettor because the "complaint describes classic arm's length bargaining").

The Second Amended Complaint fails to allege a single fact which states or from which the Court could infer that Vivendi "interjected [itself] into the process" by which Activision and the Director Defendants approved the transaction. *See In re Gen. Motors*

(Hughes), 2005 WL 1089021, at *27 (Del. Ch. May 4, 2005).[7] On the contrary, the Second Amended Complaint dedicates numerous pages to describing a negotiation lasting over one year and supports the view that Vivendi negotiated with Activision at arm's-length. Ultimately, the negotiation process resulted in Vivendi raising its share price offer by $2.75 per share, resulting in a 25% premium over the closing trading price the day before announcement of the transaction. 2nd Am. Compl. ¶¶ 44-68, 75. Such evidence of an arm's-length negotiation directly negates claims for aiding and abetting breach of fiduciary duty under Delaware law. *See In re Frederick's of Hollywood*, 1998 WL 398244, at *3 n.8 ("evidence of arm's-length negotiation with fiduciaries negates a claim of aiding and abetting, because such evidence precludes a showing that the defendants knowingly participated in the breach by the fiduciaries.") Accordingly, Plaintiff has failed entirely to allege a cause of action for aiding and abetting breach of fiduciary duty by both failing to provide any facts which support Vivendi's knowing participation in the purported breaches and by detailing the arm's-length negotiation process between Vivendi and Activision.

[7] There are no allegations that Vivendi participated in the decisions of, or conspired with the Director Defendants during the negotiation process. Delaware courts have been quick to dismiss cases which do not allege that a defendant third party played a role in the seller's decision making process. *See Malpeide v. Townson*, 780 A.2d 1075, 1098 (Del. 2001) (affirming dismissal of where "there is no indication in the amended complaint that [the buyer] participated in the board's decisions, conspired with the board, or otherwise caused the board to make the decisions at issue"); *see also In re Sea-Land Corp. S'holders Litig.*, 1988 Del. Ch. LEXIS 65, at *12 (Del. Ch. May 13, 1988) (finding that the complaint did not allege the defendant played a role in the board of directors' decision to accept a per share merger price and thus, the complaint failed to state a legally cognizable claim against the defendant for aiding and abetting).

CONCLUSION

After three attempts, Plaintiff has not stated a claim for relief against Vivendi for aiding and abetting. Count IV should be dismissed now with prejudice.

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