IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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, and ACTIVISION, INC.,	:	
Defendants.	:	

OPENING BRIEF OF THE DEFENDANTS IN SUPPORT OF THEIR MOTION TO DISMISS

Edward P. Welch (I.D. No. 671)
Edward B. Micheletti (I.D. No. 3794)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899
Tel.: (302) 651-3000
E-mail: Edward.Welch@skadden.com

Attorneys for Defendants

Of the California Bar:
Harriet S. Posner
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
300 South Grand Avenue
Suite 3400
Los Angeles, California 90071
Tel.: (213) 687-5000

DATED: February 13, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

PRELIMINARY STATEMENT

On December 2, 2007, Activision, Inc. ("Activision" or the "Company") announced that it had entered into a Business Combination Agreement (the "BCA") with Vivendi, S.A. ("Vivendi"), pursuant to which Activision would combine its business with that of Vivendi Games, Inc. ("Vivendi Games") and Vivendi would gain majority control of Activision (the "Combination"). The Combination presented a unique and value-maximizing opportunity for Activision's shareholders by approximately doubling the size of Activision's business and facilitating Activision's expansion into the multi-player online games genre. Specifically, Activision's shareholders were provided with the opportunity to consolidate Activision's game publishing business with Vivendi's crown jewel, Blizzard Entertainment, Inc. ("Blizzard"), which contains an extremely valuable asset – *World of Warcraft* – the highly lucrative, world-renowned multi-player online game with millions of paid subscribers.

After the Combination was publicly announced and before the Revised Preliminary Proxy was even issued, Plaintiff brought this action seeking to enjoin the Activision shareholder vote on the Combination, because Plaintiff claimed, among other things, that the first preliminary disclosures were inadequate. Indeed, throughout this litigation, after each and every supplemental disclosure, Plaintiff invented new disclosure claims, and Defendants explained that they lacked merit (after which Plaintiff occasionally abandoned claims) and/or the claims became moot because they were disclosed in supplemental filings. After weeks of intensive discovery, Plaintiff found nothing to support any claims arising out of either the Activision board's process in

negotiating and approving the Combination or the disclosures made to Activision shareholders, and Plaintiff decided instead to rest its application for a preliminary injunction on three meritless disclosure-based claims.

On July 1, 2008, the Court determined, among other things, that none of Plaintiff's remaining three disclosure claims met the standard of materiality. Accordingly, the Court denied Plaintiff's application for a preliminary injunction and allowed Activision's shareholders to make their own informed decision about whether or not to approve the Combination. *See Wayne County Employees' Ret. Sys. v. Corti*, 954 A.2d 319, 335 (Del. Ch. 2008) ("*Corti*") (ruling that "[t]he July 8, 2008 meeting may proceed. GAME OVER"). Shortly thereafter, on July 8, 2008, Activision's shareholders overwhelmingly approved the Combination and related transactions. In fact, each of the shareholder proposals relating directly to the transactions at issue received at least 96% of the votes cast, with some receiving more than 98%. The Combination was subsequently consummated and "Activision Blizzard" was formed.

Nearly six months later, after sitting on its hands and doing nothing, Plaintiff filed a Second Amended Class Action Complaint (the "Amended Complaint") asserting the same meritless breach of fiduciary duty claims challenging the actions taken by the Activision board of directors (the "Board") and its Nominating and Corporate Governance Committee (the "NCGC") in negotiating and approving the Combination – claims Plaintiff had chosen not to pursue at the preliminary injunction hearing. Incredibly, the Amended Complaint also continues to assert the exact same three disclosure claims that the Court had previously rejected in denying Plaintiff's request for

a preliminary injunction. For the reasons already set forth by this Court, those disclosure claims should be dismissed for failure to state a claim upon which relief may be granted.

In addition, there are several reasons why the Amended Complaint should be dismissed in its entirety.

First, the Amended Complaint should be dismissed because it fails to state a claim with respect to the substantive terms of the Combination and the process by which the Board approved it. Most fundamentally, the Amended Complaint should be dismissed because it contains no well-pled facts supporting a reasonable inference that a majority of the members of the Board breached its fiduciary duties. The six outside directors that approved the Combination – Corti, Doornink, Isgur, Morgado, Nolan, and Sarnoff – have no interest whatsoever in Vivendi, and are not beholden to anyone. Despite having the opportunity to take discovery, Plaintiff has still conspicuously failed to allege any facts to the contrary in the Amended Complaint.

Moreover, Plaintiff's conclusory allegations challenging the disinterestedness of two former directors of Activision, Robert Kotick (Activision's former Chief Executive Officer and Co-Chairman) and Brian Kelly (Activision's former Co-Chairman), lack merit and fail to state a claim for a breach of the duty of loyalty under Delaware law. Plaintiff's theory that Messrs. Kotick and Kelly were allegedly conflicted because they entered into employment contracts prior to the closing of the Combination is belied by Plaintiff's failure to allege that these agreements were materially different, or otherwise caused Kotick and Kelly to favor Vivendi's interests over Activision's. (In fact, Kelly's amended employment agreement provides for a

substantially lower base salary.) (Am. Compl. ¶ 95). As this Court noted in its July 1, 2008 opinion, "[a]lthough plaintiff's theory of malfeasance appears to be that Kotick and Kelly betrayed Activision's shareholders in return for the promise of continued employment, there is no evidence in the record that Kotick and Kelly's jobs were ever in jeopardy. Moreover, Kotick and Kelly, combined, own roughly 7.5% of Activision's stock, thereby aligning their economic interests with those of the shareholders." *Corti*, 954 A.2d at 324.

Second, the Complaint fails to allege any facts suggesting that Activision's directors were uninformed about the value of the Company, or that a better alternative was available. Indeed, Plaintiff's Amended Complaint details the extensive arm's-length negotiation process the Board and the NCGC undertook with Vivendi, and demonstrates that the Activision Board members were well-informed and received regular updates on the progress of negotiations at every meeting, as well as detailed analyses from investment bankers, accountants, and other outside consultants.

Third, Plaintiff has since dropped its claims challenging the alleged "deal protection" features in the BCA, most likely because the deal terms were modest and well within the ranges of reasonableness for similar transactions. For example, the break-up fee was relatively low (*i.e.*, approximately 2% of the nominal value of the Combination).

Fourth, despite the modest deal protection features, no alternative bidder emerged in the more than seven months from when the Combination was announced until the shareholder vote, providing a strong indication that the Combination was the best value available for Activision's shareholders.

Fifth, because the Amended Complaint does not allege any particularized facts that, if true, would remove the directors' actions from the protections of Activision's exculpatory charter provision, Plaintiff cannot pursue damages claims.

Sixth, Plaintiff's facial challenges to certain provisions in the Activision Blizzard certificate of incorporation (the "Activision Blizzard Charter") are not ripe and lack merit under Delaware law.

For all of these reasons, this action should be dismissed in its entirety.

STATEMENT OF FACTS[1]

A. The Parties.

Plaintiff Wayne County Employees' Retirement System was purportedly a shareholder of Activision before the Combination and has allegedly held Activision shares throughout the relevant period. (Am. Compl. ¶ 5).

Defendant Activision, a Delaware corporation, was a leading international developer, publisher, and distributor of entertainment software and peripheral products covering diverse game categories, including action/adventure, action sports, racing, role-playing, simulation, first-person action, music-based gaming, and strategy. The Company's portfolio includes such well-known titles as *Guitar Hero*, *Call of Duty*, and the *Tony Hawk* series. (Am. Compl. ¶ 23). Following completion of the Combination, Activision changed its name to Activision Blizzard. (Am. Compl. ¶ 6).

Defendants Robert J. Corti, Ronald Doornink, Barbara S. Isgur, Robert A. Kotick, Brian G. Kelly, Robert J. Morgado, Peter J. Nolan, and Richard Sarnoff constituted the board of directors of Activision at the time of the Combination. (Am. Compl. ¶¶ 7-14). Other than Messrs. Kotick and Kelly, who are also officers of the Company, none of these individuals is alleged to have a personal interest in the Combination. (*Id.*).

---

[1] Unless otherwise indicated, the following facts are taken from the Second Amended Class Action Complaint and are assumed to be true for purposes of this motion only.

B. Activision's Strategic Planning.

In 2006, Activision's senior management engaged in a strategic planning process identifying 17 potential acquisition targets, of which eight were evaluated as potential entry opportunities into the massively multiplayer online game ("MMOG") market. (Am. Compl. ¶ 47). One of these eight potential entries was Vivendi Games, a "multiplatform" company that owned subsidiaries including Blizzard, which owned the enormously popular *World Of Warcraft* massively multiplayer online roleplaying game. (Am. Compl. ¶ 31). *World of Warcraft*'s climbing subscription base of over 11 million paid subscribers was an alluring complement to Activision's existing business. (*See* Am. Compl. ¶ 34 (alleging that *World of Warcraft* was performing in line with projections and that its subscriber base would climb to over 12 million paid subscribers)). Activision engaged in discussions with Vivendi beginning in late 2006. (Am. Compl. ¶¶ 46-47).

C. Preliminary Discussions With Vivendi.

On March 13, 2007, Activision and Vivendi executed an agreement providing for the exchange of confidential information. (Am. Compl. ¶ 48). On April 30, 2007, Activision's Board met to address the recent discussions with Vivendi and to review a preliminary proposal that Vivendi had delivered on April 12, 2007, to Activision's independent financial advisor, Allen & Company ("Allen & Co."). (Am. Compl. ¶ 49).

On May 11, 2007, the Board assigned the NCGC – made up of directors Messrs. Morgado, Corti, and Sarnoff – the task of reviewing any potential transactions with Vivendi 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. (*See* Am. Compl. ¶¶ 52-53). As it turned out, no such conflict ever arose, and, in fact, the substantial equity interest of Messrs. Kotick and Kelly aligned their interests perfectly with those of other Activision shareholders.[2] (*See* Am. Compl. ¶¶ 10-11). *See also Corti*, 954 A.2d at 324 (noting that "Kotick and Kelly, combined, own roughly 7.5% of Activision's stock, thereby aligning their economic interests with those of the shareholders"). From its very first meeting on May 16, 2007, the NCGC stated that its goals were to ensure shareholders a control premium and to protect shareholders from a downside risk in any transaction with Vivendi. (Am. Compl. ¶ 58).

Both the NCGC and the full Board met frequently during the next year, and received reports and analyses from Allen & Co. and other outside consultants and experts. At these meetings, the Board and NCGC received updates about discussions with Vivendi, analyzed financial and other analysis from its advisors, and provided guidance about how negotiations should proceed. (Am. Compl. ¶¶ 25, 52, 58-59, 62, 67, 69-71, 75).

---

[2] 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. (Am. Compl. ¶ 54). However, Plaintiff does not allege that the directors on the NCGC were negotiating against a controlling shareholder. 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). *See also Corti*, 954 A.2d at 325-26.

D. The NCGC And The Full Board Explore How To Guarantee A Value Transfer To Activision's Shareholders.

The NCGC discussed with Allen & Co. ways to reduce Activision's downside risk in any transaction with Vivendi. Among other things, the NCGC discussed the inclusion of a "top-up" provision, providing for an additional payment of cash contributed by Vivendi to Activision's shareholders if the post-closing market price was below the transaction price. (Am. Compl. ¶ 59).[3] However, Vivendi adamantly opposed any top-up provision and, on June 11, 2007, Vivendi's Chairman of the Board, Jean-Bernard Lévy, informed Mr. Kotick that he was inclined to discontinue negotiations because of this and other differences between the companies' proposals. (Am. Compl. ¶ 61).

A few days later, on June 15, 2007, the NCGC met to discuss Vivendi's response and advised Allen & Co. that any further negotiations should include, as a substitute to the top-up provision, a request for an increase in the post-closing tender offer to at least 50% of the outstanding shares. (Am. Compl. ¶¶ 62-63). When negotiations resumed, the parties reached 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 be determined at some point in the future, and Activision would make a post-closing tender offer at the same premium price (the "Tender Offer"). (*See* Am. Compl. ¶¶ 2, 64-65).

---

[3] Specifically, following the meetings with the NCGC, Allen & Co. presented an alternative proposal to Goldman Sachs, which valued Vivendi Games at $7.75 billion, provided for an Activision share price of $25.50, and called for a "top-up" right. (Am. Compl. ¶ 60).

On September 6, 2007, the NCGC met to discuss the terms of the draft documents. (Am. Compl. ¶ 67). However, negotiations once again broke down after the companies reached an impasse over material open issues, resulting in a "short-lived walk away" by Activision. (Am. Compl. ¶ 68).

From the end of September through October 2007, the full Board, on at least three separate occasions, received or met to discuss additional due diligence on Blizzard and the progress of discussions with Vivendi. (Am. Compl. ¶¶ 69-71). In November 2007, the NCGC met and determined, after receiving an update from Allen & Co. regarding Blizzard's potential value, that it made sense to continue negotiations with Vivendi. (Am. Compl. ¶¶ 74-75).

On December 1, 2007, the parties reached an agreement on price and a set of modest deal protection devices. (*See* Am. Compl. ¶ 76).[4] Specifically, the BCA provided for a Stock Purchase and Tender Offer at a per share price of $27.50, a negotiated increase in price from the initial offer of $24.75.[5] (Am. Compl. ¶¶ 2, 39). Before approving the Combination, the full Board met that same day, and received a presentation on the analysis underlying Allen & Co.'s fairness opinion.

---

[4] Plaintiff previously conceded that these deal protective terms were not per se invalid, and has since abandoned any claims in the Amended Complaint challenging them. (Plaintiff's Reply in Support of Expedited Proceedings, 18 n.15, D.I. 21). In fact, these deal terms were quite modest, and well within the range of reasonableness for transactions of this sort.

[5] At the time the BCA was executed in December 2007, Activision's stock was trading at $22.14 per share. *See Corti*, 954 A.2d at 327 (noting that the $27.50 per share deal price represented a "significant" premium over Activision's pre-announcement stock trading price).

(Am. Compl. ¶ 25). 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. (Am. Compl. ¶¶ 87-90).

On April 29, 2008, the Board met to consider whether it should continue to recommend the deal to shareholders in light of the performance of the Company since December. (Am. Compl. ¶ 104). After hearing a report prepared by Allen & Co., the Board determined that there was no need to change its December 1, 2007 recommendation. (*See id.*).[6]

E. Activision Negotiates New Employment Agreements With Messrs. Kotick And Kelly.

At the same time the negotiations over the Combination were taking place, Activision negotiated new employment contracts with Messrs. Kotick and Kelly. (Am. Compl. ¶¶ 91-96). The new agreements replaced existing agreements set to expire March 31, 2008, and were negotiated by Activision's Compensation Committee, not Vivendi. (*See* Am. Compl. ¶¶ 91-92). Pursuant to these agreements, Messrs. Kotick and Kelly agreed to waive, in connection with the Combination, certain benefits to which they would otherwise have been entitled. (Am. Compl. ¶ 93). In fact, Mr. Kelly's salary was reduced by over $400,000. (Am. Compl. ¶ 95). As this Court noted in its July 1, 2008

---

[6] Plaintiff previously admitted in its Reply Brief In Support Of Its Preliminary Injunction that the information provided to the Board in connection with the April 29 meeting indicated that Vivendi Games was "performing generally in line with expectations." (Pl.'s Reply Br. at 14, 18-19, D.I. 135).

ruling, "there is no evidence in the record that Kotick and Kelly's jobs were ever in jeopardy," and their economic interests were directly aligned with that of the Activision shareholders. *See Corti*, 954 A.2d at 324.

F. The Combination Is Announced And Plaintiff Commences Litigation.

On December 2, 2007, the Combination was announced. Because the deal required an affirmative vote by Activision's shareholders before it could be implemented, the Combination could not commence unless it received shareholder approval at the special meeting on July 8, 2008. Thus, the Activision shareholders effectively had a right to veto the Combination and the ultimate ability to make their own informed decision. The Company filed a preliminary proxy statement with the Securities and Exchange Commission on January 30, 2008.

On February 8, 2008, over two months after the deal had been announced, Plaintiff filed its first complaint claiming, among other things, that the preliminary disclosures filed on January 30, 2008 were inadequate. (D.I. 1). On April 30, 2008, Activision filed a revised preliminary proxy statement (the "Revised Preliminary Proxy") with substantial additional background information about the Combination. (Am. Compl. ¶ 44). Even though 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, Defendants filed an opening brief in support of their motion to dismiss the original complaint. (D.I. 34). One exhibit to the brief was a chart that explained why each of Plaintiff's disclosure claims was without merit. (D.I. 34, Ex. B).

Rather than respond to the motion to dismiss, on May 8, 2008, Plaintiff filed an Amended Complaint. On May 13, 2008, Defendants again moved to dismiss Plaintiff's claims and also filed a motion to stay discovery pending resolution of the potentially dispositive motion. (D.I. 41, 44-45, 47). 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 June 3, 2008, Activision filed a second revised preliminary proxy statement and, on June 6, 2008, Activision filed its Definitive Proxy with the SEC which, once again, mooted Plaintiff's remaining meritless disclosure claims. A copy of the Definitive Proxy is attached as Exhibit A.[7]

Indeed, not counting the financial statements and lengthy exhibits (which include all of the underlying transaction documents), Activision's Definitive Proxy was more than 260 pages long. Among other material facts, the disclosures made in this substantial document included (i) a detailed description of the background of the Combination (*see* Definitive Proxy at 59-69); (ii) the specific terms and conditions of the Combination (including the fact that, if approved, Vivendi would 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

---

[7] The Court may take judicial notice of a corporation's public filings. *See In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170-71 (Del. 2006). The Definitive Proxy is also incorporated by reference throughout the Second Amended Complaint. Accordingly, the Court may rely on the Definitive Proxy in considering the motion to dismiss. *See Midland Food Servs., LLC v. Castle Hill Holdings V, LLC*, 792 A.2d 920, 925 n.5 (Del. Ch. 1999).

the risks associated with the Combination, including the potential risks associated with Vivendi's businesses (*see id.* at 31-51, 72-73).[8]

G. This Court Denies Plaintiff's Motion For A Preliminary Injunction.

On June 30, 2008, after expedited discovery – including the production of more than 250,000 pages of documents and depositions of two Activision board members (including the Chief Executive Officer, Mr. Kotick), Activision's financial advisor, and a representative of Vivendi – and after full briefing on Plaintiff's motion to enjoin a vote on the Combination, the Court heard oral argument on Plaintiff's motion for a preliminary injunction. That same day, the Court also granted the stipulated dismissal without prejudice of claims against Vivendi Games, Inc., VGAC LLC, and Vivendi, S.A. (D.I. 136).

By this time, Plaintiff's disclosure claims were mooted by Activision's disclosures, abandoned by Plaintiff, and/or shown to be without merit. The three remaining disclosure claims argued by Plaintiff in its motion for a preliminary injunction pertained to: (1) Vivendi Games' management projections, (2) the Activision Board's decision to continue its recommendation to approve the Combination, and (3) information regarding the fixed price ratio.

---

[8] In response to Defendants' then pending motion to dismiss, Plaintiff moved on June 14, 2008 for leave to file a Second Amended Complaint. On June 24, 2008, Activision mailed a supplemental disclosure to its shareholders describing Plaintiff's disclosure claims asserted in its then proposed Second Amended Complaint and in Plaintiff's application for a preliminary injunction. A copy of the supplemental disclosure is attached as Exhibit B.

On July 1, 2008, the Court denied Plaintiff's motion for a preliminary injunction. The Court observed that:

> *Plaintiff's disclosure claims have been, to put it mildly, a moving target.* First, as noted above, plaintiff has amended its complaint on two occasions, initially in response to a new filing by the Company and later in response to a motion to dismiss. Second, plaintiff's most recent complaint purports to state well over ten material omissions, but by the time plaintiff filed its reply brief in support of its motion, plaintiff's claims had been whittled down to three.

Corti, 954 A.2d at 330-31 (emphasis added). The Court then concluded that these remaining three disclosure claims were without merit, noting that "[P]laintiff has failed in every respect to establish the materiality of the alleged omissions." *Id.* at 331. Specifically, the Court held that certain projections of Vivendi Games were not material in light of disclosures contained in the Definitive Proxy, *id.* at 333, that the Activision Board's reasons for recommending the transaction were adequately disclosed, *id.*, and that the Definitive Proxy disclosed the rationale for accepting a fixed ratio. *Id.* at 334.

H. The Shareholder Vote.

With full and fair disclosure, on July 8, 2008, the Activision shareholders overwhelmingly approved the transactions at issue in this litigation. Other than a proposal relating to possible adjournment (which received more than 91% of the votes cast), each of the shareholder proposals relating to the transactions at issue in this

litigation received at least 96% of the votes cast, with some receiving more than 98%. A copy of the certified voting results is attached as Exhibit C.[9]

I. Plaintiff Again Moves To Amend Its Complaint.

After doing nothing for months after the Combination had been approved and consummated, Plaintiff filed a proposed Second Amended Class Action Complaint on December 23, 2008,[10] effectively raising the same breach of fiduciary duty claims that it had chosen not to pursue six months earlier in its preliminary injunction application. (D.I. 145). Plaintiff even asserts the *same* three disclosure claims that this Court concluded were not material as a matter of Delaware law. (Am. Compl. ¶ 104); *Corti*, 954 A.2d at 335.

As explained below, Plaintiff has failed to state a claim upon which relief can be granted, and the Amended Complaint should be dismissed.

---

[9] The Delaware Supreme Court has held that a court may properly take judicial notice of the outcome of the shareholder vote in considering a motion to dismiss. *See In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 171 (Del. 2006) (holding that on motion to dismiss trial court properly took judicial notice of fact that owners of corporation's stock voted overwhelmingly to approve the transaction where there was no reason to dispute outcome of vote).

[10] Plaintiff suggests that this is their "Second" Amended Complaint, but in fact this is really the third time that it has moved to amend its complaint. Specifically, Plaintiff filed its original Complaint on February 8, 2008, its Amended Complaint on May 8, 2008, and its Second Amended Complaint on June 14, 2008. (*See* D.I. 1, 41, 91). For each complaint filed by Plaintiff, Defendants filed a motion to dismiss. Specifically, Defendants filed briefs in support of motions to dismiss the original Complaint on March 6 and April 30, 2008, the Amended Complaint on May 13 and May 14, 2008, and the Second Amended Complaint on June 21, 2008. (*See* D.I. 22, 34, 45, 52, 103).

ARGUMENT

I. STANDARD OF REVIEW

Court of Chancery Rule 12(b)(6) requires dismissal of a complaint that fails to allege well-pled facts that would entitle the plaintiff to relief against the moving party. Ch. Ct. R. 12(b)(6); *see, e.g., In re CompuCom Sys., Inc. S'holders Litig.*, C.A. No. 499-N, 2005 WL 2481325 (Del. Ch. Sept. 29, 2005). In considering a motion to dismiss, the Court assumes the truthfulness of all well-pled allegations of fact in the complaint. However, "'neither inferences nor conclusions of fact unsupported by allegations of specific facts [upon which the inferences or conclusions rest] are accepted as true.'" *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999) (citation omitted), *aff'd mem. sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000); *see also In re Telecomms., Inc. S'holders Litig.*, C.A. No. 16470-NC, 2003 WL 21543427, at *1 (Del. Ch. July 7, 2003) (explaining that, in ruling on a motion to dismiss under Rule 12(b)(6), "conclusory statements – those unsupported by well-pled factual allegations – are not accepted as true"). "Moreover, a trial court is required to accept only those 'reasonable inferences that logically flow from the face of the complaint' and 'is not required to accept every strained interpretation of the allegations proposed by the plaintiff.'" *In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (citation omitted).

II. THE ACTIVISION SHAREHOLDERS WERE FULLY INFORMED WHEN THEY VOTED TO APPROVE THE COMBINATION AND RELATED TRANSACTIONS.

There can be no doubt that Activision's shareholders were fully informed when they voted overwhelmingly in favor of the transactions at issue in this litigation.

First, Activision issued several proxy statements and supplemental disclosures, including a more than 265-page Definitive Proxy (not counting the BCA and other appendices), which made full, comprehensive, detailed disclosure. Among other things, the Definitive Proxy described the lengthy, arm's-length negotiations between Activision and Vivendi and the Board's careful consideration of risks and benefits, summarized the work performed by Allen & Co., and outlined specific terms of the Combination.[11] Indeed, the Amended Complaint contains *nineteen* bullet points expressly describing and conceding disclosures made to Activision's shareholders prior to the vote. (Am. Compl. ¶ 45).

Second, all of Plaintiff's disclosure claims have been abandoned by Plaintiff,[12] were already disclosed in these proxy disclosures, and/or have already been deemed meritless by the Court. *Corti,* 954 A.2d at 330-31. Plaintiff now attempts to pursue money damages for the *exact same three disclosure claims* it pursued in its motion

---

[11] The Court may take judicial notice of a corporation's public filings. *See supra* note 7.

[12] The Court may disregard those disclosure claims not addressed by Plaintiff in its application for a preliminary injunction, which have also been dropped from the Amended Complaint. *See, e.g.*, *Weiss v. Rockwell Int'l Corp.*, C.A. No. 8811, 1989 WL 80345, at *4 (Del. Ch. July 19, 1989) ("For a contention to rise to the status of a claim that will be considered on a motion to dismiss, it must be alleged in the complaint."), *aff'd mem.*, 574 A.2d 264 (Del. 1990).

for a preliminary injunction. (Am. Compl. ¶ 104). This is unbelievable, given that the Court denied Plaintiff's motion for a preliminary injunction because these disclosures were not material and did not need to be disclosed. Specifically, the Court ruled that "[P]laintiff has failed to demonstrate how any of the alleged omissions would significantly alter the total mix of information that is already available in the nearly 300-page definitive proxy released by the Company." *Corti*, 954 A.2d at 323 (holding that "plaintiff has failed in every respect to establish the materiality of the alleged omissions"). Thus, the Court should find that these disclosure claims lack merit (again), and should dismiss these claims in their entirety. *See, e.g.*, *Zirn v. VLI Corp.*, C.A. No. 9488, 1994 WL 548938, at *2 (Del. Ch. Sept. 23, 1994) (holding that "[o]nce a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears"); *see also Taylor v. Jones*, C.A. No. 1498-K, 2006 WL 1510437, at *5 (Del. Ch. May 25, revised May 26, 2006) (finding that legal issues decided by court in summary judgment opinion should be adopted by same court in later proceedings without relitigation); *May v. Bigmar, Inc.*, 838 A.2d 285, 288 n.8 (Del. Ch. 2003) (holding that determinations made in summary judgment opinion precluded those issues from being relitigated in same case under "law of the case" doctrine), *aff'd mem.*, 854 A.2d 1158 (Del. 2004).

Third, the disclosure claims should be dismissed because Plaintiff's pursuit of money damages for these claims is directly contrary not only to Delaware law, but the position Plaintiff took at the May 20, 2008 teleconference on Plaintiff's Renewed

Motion for Expedited Proceedings. In response to the Court's observation that under Delaware law, money damages do not compensate for disclosure violations, Plaintiff's counsel stated:

> First of all, I want to make clear for Your Honor that there should be no mistake about the remedy sought with respect to the disclosure claims here. . . . [I]t is certainly misreading the plaintiff's intention, that it be believed that we think the disclosures can be remedied with money damages. And we agree with Your Honor that that's not the state of the law in this state, and never has been as far as I know.

(May 20, 2008 Trans. at 34-35, D.I. 137).[13] Therefore, it is entirely inappropriate for Plaintiff now to seek money damages for these very same disclosure claims. (Am. Compl. ¶ 104). *See In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 350 (Del. Ch. 2008) (barring plaintiff's post-merger disclosure claims because it was "too late" to remedy any disclosure violations).[14]

Accordingly, the Court should hold that the Activision shareholders were fully informed when they voted in favor of the Combination and its related transactions,

---

[13] Similarly, Plaintiff stated in its opening brief in support of its Motion For Preliminary Injunction that "[n]o remedy besides injunctive relief would be effective to redress [Plaintiff's disclosure claims]" (*See* Motion for Preliminary Injunction Opening Brief at 46-47 (D.I. 114)).

[14] Furthermore, there are a number of alternative reasons why Plaintiff's disclosure claims should be dismissed. *First*, as noted in *Transkaryotic*, Plaintiff lacks standing to bring disclosure claims. 954 A.2d at 362 n.55. Specifically, the alleged injury, *i.e.*, an infringement on the shareholders' right to cast an informed vote, is no longer redressable. Moreover, the Combination has been consummated and "'the metaphorical merger eggs have been scrambled.'" *Id.* at 362 (citing *McMillan v. Intercargo Corp.*, 768 A.2d 492, 500 (Del. Ch. 2000)). Additionally, Plaintiff's disclosure claims amount at most to duty of care claims for damages, which are barred by Activision's exculpatory charter provision under Section 102(b)(7) of the DGCL. *Id.*

and dismiss Plaintiff's disclosure claims.[15] *See, e.g.*, *In re General Motors (Hughes) S'holder Litig.*, C.A. No. 20269, 2005 WL 1089021, at *13 (Del. Ch. May 4, 2005) (dismissing disclosure claims), *aff'd*, 897 A.2d 162 (Del. 2006).

III. PLAINTIFF FAILED TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST ACTIVISION'S DIRECTORS.

Plaintiff's allegations fail to state a claim that the Activision directors, a majority of whom are disinterested and independent, breached their fiduciary duties by agreeing to the Combination. As discussed below, directors are not obligated to conduct a corporate auction before any transaction in which a transfer of control is contemplated. Moreover, the rather modest "deal protection" features in the BCA are of the sort that this Court has previously recognized within the range of reasonableness. Thus, it is not surprising that Plaintiff has since dropped its claims challenging these deal terms. Finally, the charter amendments proposed in connection with the BCA are consistent with Delaware law and cannot form the basis for a claim.

---

[15] The Delaware Supreme Court held last month that shareholder ratification will not, by itself, restore the protections of the business judgment rule to corporate actions that require shareholder approval as a matter of statutory law. *Gantler v. Stephens*, No. 132, 2008, 2009 WL 188828, at *14 & n.55 (Del. Jan. 27, 2009). Although, as a result of *Gantler*, the overwhelming approval of the Combination by Activision's shareholders may no longer be reason in itself to dismiss this action, the Court may nonetheless take judicial notice of that fact in assessing whether the allegations in the complaint are too conclusory to rebut the presumption of the business judgment rule. *See In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170-71 (Del. 2006) (holding that Court of Chancery properly took judicial notice of overwhelming vote to approve transaction). *See also Pfeffer v. Redstone*, No. 115, 2008, 2009 WL 188887, at *6 (Del. Jan. 23, 2009) (holding that Court of Chancery correctly dismissed claim based only on conclusory allegations).

A. Plaintiff Has Not Adequately Alleged That A Majority Of Activision's Board Was Interested Or Lacked Independence.

Because the Amended Complaint fails to allege facts demonstrating that a majority of Activision's eight-member Board was interested in the Combination or related transactions, lacked independence or was in any way conflicted, Plaintiff cannot prevail on a duty of loyalty claim. [16]

The Amended Complaint is virtually silent as to the six outside director defendants.[17] Instead, Plaintiff alleges in a conclusory fashion that the two former

---

[16] As discussed further below, Activision's existing certificate of incorporation, which is attached as Exhibit D, bars any claims for money damages based on the duty of care. Certificate of Incorporation, Article Sixth(A). *See* 8 *Del. C.* § 102(b)(7). The Delaware Supreme Court has held that exculpatory charter provisions, which are a matter of public record, provide a basis for dismissal at the pleading stage. *See, e.g.*, *Malpiede v. Townson*, 780 A.2d 1075, 1090 (Del. 2001).

[17] Plaintiff suggests in paragraph 114 of the Amended Complaint that some of the outside directors were not independent and disinterested because they retained their board seats in the combined company, and that Defendant Doornink was a paid company consultant. These bare-boned conclusory allegations are insufficient as a matter of law. First, this Court has stated that "the fact that several directors would retain board membership in the merged entity does not, standing alone, create a conflict of interest." *Krim v. ProNet, Inc.*, 744 A.2d 523, 528 n.16 (Del. Ch. 1999); *accord Day v. Quotron Sys., Inc.*, C.A. No. 8502, 1989 WL 150773, at *7 (Del. Ch. Nov. 20, 1989). Second, the Amended Complaint fails to allege facts from which the Court could reasonably conclude that Doornink's purported consulting fee was material, so as to taint his judgment, or would even continue after the Combination. *See, e.g.*, *Highland Legacy Ltd. v. Singer*, C.A. No. 1566-N, 2006 WL 741939, at *5 (Del. Ch. Mar. 17, 2006) (finding that allegations that director was paid consulting fees failed to challenge disinterestedness because "the complaint [did] not even allege that these fees were unusually large or material to [the director]"); *In re Freeport-McMoRan Sulphur, Inc. S'holders Litig.*, C.A. No. 16729, 2001 WL 50203, at *5 (Del. Ch. Jan. 5, revised Jan. 11, 2001); *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 360 (Del. Ch. 1998) (noting lack of allegations that "consulting fees [were] even material to [defendant]"), *aff'd in part, rev'd in part sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

officer-directors, Messrs. Kotick and Kelly, were "interested" because they entered into amended employment agreements. (Am. Compl. ¶¶ 91-96). Even assuming that these two directors were considered "interested" (which they were not), this still does not impugn the business judgment of the six other directors who approved the Combination. *See In re Lukens Inc. S'holders Litig.*, 757 A.2d at 728 (dismissing complaint and holding that "[w]hat is missing is any allegation of fact that a majority of the Director Defendants either stood on both sides of the merger or were dominated and controlled by someone who did"); *see also Blackmore Partners L.P. v. Link Energy LLC*, C.A. No. 454-N, 2005 WL 2709639, at *7 (Del. Ch. Oct. 14, 2005) (holding that "[t]he protections of the business judgment rule . . . insulate a board decision from challenge so long as a majority of the directors approving the transaction remain disinterested").[18]

Moreover, as Plaintiff concedes in the Amended Complaint, the new employment agreements were negotiated with Activision, not Vivendi, and replaced then existing employment agreements that were set to expire on March 31, 2008. (Am. Compl. ¶ 92). 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. (Am. Compl. ¶¶ 93, 95). In addition, Mr. Kelly agreed to a

---

[18] *See also McMillan v. Intercargo Corp.*, 768 A.2d 492, 496 (Del. Ch. 2000) (dismissing complaint where allegations about directors were "sparse at best," and holding that "the complaint alleges no facts suggesting that the independence and disinterestedness of these five directors were in any way compromised"); *In re Frederick's of Hollywood, Inc. S'holders Litig.*, C.A. No. 15944, 2000 WL 130630, at *7 (Del. Ch. Jan. 31, 2000) (dismissing duty of loyalty claim because plaintiff alleged that only one of four directors was interested and because the challenged merger was approved by a majority of disinterested directors).

reduction in his salary of over $400,000. (Am. Compl. ¶ 95). Thus, it is unclear how these employment agreements have tainted the judgment of these two defendants. As the Court observed on July 1, 2008, in its opinion denying Plaintiff's motion for a preliminary injunction, "there is no evidence in the record that Kotick and Kelly's jobs were ever in jeopardy. Moreover, Kotick and Kelly, combined, own roughly 7.5% of Activision's stock, thereby aligning their economic interests with those of the shareholders." *Corti*, 954 A.2d at 324.[19]

The Amended Complaint also implies that the other directors cannot claim the protections of the business judgment rule because they allowed negotiations to occur through Messrs. Kotick and Kelly, who were said to be conflicted. (*See* Am. Compl. ¶ 41).[20] That very same theory, however, has been rejected before. *See, e.g., In re MONY Group Inc. S'holder Litig.*, 852 A.2d 9, 20 (Del. Ch. 2004). In fact, the Court has held that there is nothing wrong with a board of directors enlisting the efforts of the company's officers in the negotiating process. Indeed, it is an unusual merger that entirely excludes a chairman or chief executive officer from negotiations. *See, e.g., In re Pennaco Energy, Inc. S'holders Litig.*, 787 A.2d 691, 706 (Del. Ch. 2001) (finding no

---

[19] Plaintiff also seems to suggest that Messrs. Kotick and Kelly "controlled and dominated" the outside directors (Am. Compl. ¶ 56); however, there are absolutely no specific factual allegations in the Amended Complaint to support this conclusory allegation. *See, e.g., In re CompuCom Sys., Inc. S'holders Litig.*, C.A. No. 499-N, 2005 WL 2481325 (Del. Ch. Sept. 29, 2005) (dismissing claims based on similar conclusory allegations).

[20] Plaintiff also asserts that Messrs. Kotick and Kelly "commenced exclusive non-public negotiations . . . for a sale of control of Activision to Vivendi" in late 2006. (Am. Compl. ¶ 46). Even if Plaintiff supported that bare statement in any way – and it does not – a year-long negotiation would not suggest a rushed or haphazard process.

fault with the CEO discussing a combination with the buyer, meeting with the buyer's executives a month later and then finally bringing the offer to the board).

In *MONY*, as here, the plaintiff argued that because the directors relied on an allegedly conflicted CEO to explore alternatives and negotiate with an unrelated third party, they had breached their fiduciary duties. The Court categorically rejected the argument:

> 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.

MONY, 852 A.2d at 20. *See also 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).

Further, the facts alleged in the Amended Complaint belie an inference that the Board and the NCGC were not fully involved in the process of negotiating or approving the Combination. As alleged in the Amended Complaint, the Board and the NCGC received regular reports, were active in the negotiation process, retained professional advisors, and considered several facts and analyses in reaching a decision to approve the Combination. (*See, e.g.*, Am. Compl. ¶¶ 25, 52, 58-59, 62, 67, 69-71, 75) (describing meetings of NCGC and/or full Board in 2007 on May 16, May 22, June 15, September 6, September 27, October 8, October 30, November 16, December 1, and in

2008 on April 29 and May 11 and noting the Board's retention of professional financial and legal advisors, as well as outside consultants).

Accordingly, for all of the foregoing reasons, the Amended Complaint should be dismissed because it does not allege sufficient facts to overcome the presumption of the business judgment rule. *See In re CompuCom Sys., Inc. S'holders Litig.*, 2005 WL 2481325, at *10 (granting defendants' motion to dismiss, holding that "the plaintiff is merely expressing its disagreement with the business judgment of the members of the . . . board regarding the merits of the Merger Agreement. This does not provide a basis for liability").

B. Plaintiff Failed To State A Claim Under *Revlon*.

Plaintiff's second-guessing, in hindsight, of the Board's decision to approve the transaction with Vivendi does not state a *Revlon* claim under Delaware law. Delaware law provides that there is "no single blueprint" that a board must follow in the context of a sale of a company in order to fulfill its fiduciary duties. *See Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989). "Rather, a board's actions must be evaluated in light of relevant circumstances to determine if they were undertaken with due diligence and in good faith. If no breach of duty is found, the board's actions are entitled to the protections of the business judgment rule." *Id.*

For example, this Court has not hesitated to dismiss *Revlon* claims when, as here, "even assuming . . . that *Revlon* duties were triggered . . . no facts are alleged that support a cognizable claim that those duties were breached." *In re Wheelabrator Techs.*

Inc. S'holders Litig., C.A. No. 11495, 1992 WL 212595, at *8 (Del. Ch. Sept. 1, 1992).

The Court explained:

> [E]ven if there occurred a "fundamental change of corporate control" that triggered *Revlon* duties under *Barkan*, the plaintiffs have not alleged that WTI's directors were *so uninformed about WTI's value* that they violated their *Revlon* duties by not conducting an active survey of the market, or "market check."
>
> What the plaintiffs do allege is that WTI's directors failed to conduct a market check to assure themselves that there were no superior alternative transactions. That, without more, is insufficient. Under *Barkan* the plaintiffs must allege that WTI's directors *did not have adequate information about the value* of WTI. Here, *the complaint says nothing about what the directors did (or did not) know about WTI's value*.

Id. at *8-9 (emphasis added; citation and footnote omitted).[21]

Here, as in *Wheelabrator*, the Amended Complaint fails to allege that Activision's directors lacked adequate information about the Company's value before entering into the BCA. To the contrary, the Amended Complaint makes clear that the full Board and the NCGC, along with its independent financial advisor, Allen & Co., met frequently for several months, continually evaluated financial reports and analyses, and were well-informed about the value of Activision and Vivendi. (Am. Compl. ¶¶ 25, 52, 58-59, 62, 67, 69-71, 88-89). Further, Plaintiff's claim that the Activision shareholders

---

[21] Further, to the extent that Plaintiff is arguing that the Board should have auctioned the Company, that does not state a *Revlon* claim under Delaware law. *See Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286-87 (Del. 1989); *Herd v. Major Realty Corp.*, C.A. No. 10707, 1990 WL 212307, at *9 (Del. Ch. Dec. 21, 1990) (dismissing claim that directors breached their fiduciary duties by failing to employ an auction or market check mechanism); *Freedman v. Restaurant Assocs. Indus., Inc*., C.A. No. 9212, 1990 WL 135923, at *6 (Del. Ch. Sept. 19, revised Sept. 21, 1990) (dismissing *Revlon* claim that directors breached their fiduciary duties by failing to hold an auction).

did not receive any value for selling control to Vivendi is without merit because Activision received lucrative assets from Vivendi, including Vivendi Games. (Am. Compl. ¶¶ 35, 39). Indeed, Plaintiff concedes in the Amended Complaint that the crown jewel that the Board was able to secure for its shareholders – Vivendi Games' *World of Warcraft* – is performing in line with projections and its paid subscriptions are continuing to climb. (Am. Compl. ¶ 34 (alleging that *World of Warcraft*'s paid subscriptions have surpassed 11 million)); *see also Corti*, 954 A.2d at 321-22 (noting that *World of Warcraft* "entices millions of paying subscribers" and has "made an extraordinary amount of money").

In addition, tellingly, Plaintiff has since abandoned any claim based on the BCA's "deal protection" features. This is most likely because those features were in fact quite modest, and well within the range of reasonableness for transactions of this sort. For example, the termination fee was $180 million, plus $15 million in expenses, which amounted to only approximately 1.98% of the consideration to be paid by Vivendi.[22] Despite this rather modest termination fee, no alternative transaction emerged offering greater value to Activision's shareholders in the more than seven months from when the Combination was publicly announced until the shareholder vote, nor does Plaintiff allege that such a transaction existed. *See also Barkan*, 567 A.2d at 1287 ("[W]hen it is widely

[22] The Court has found substantially higher termination fees to be reasonable. *See, e.g.*, *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1000 (Del. Ch. 2005) (finding termination fee of 3.75% to be reasonable); *McMillan v. Intercargo*, 768 A.2d at 505-06 (holding that 3.5% termination fee was within the range of reasonableness); *Goodwin v. Live Entm't, Inc.*, C.A. No. 15765, 1999 WL 64265, at *23 (Del. Ch. Jan. 25, 1999) (finding that a 3.125% termination fee is "commonplace" and "within the range of reasonableness"), *aff'd mem.*, 741 A.2d 16 (Del. 1999).

known that some change of control is in the offing and no rival bids are forthcoming over an extended period of time, that fact is supportive of the board's decision to proceed.").

Accordingly, Plaintiff's *Revlon* claims are without merit and should be dismissed.

IV. ACTIVISION'S CHARTER BARS PLAINTIFF'S DAMAGES CLAIM.

Critically, Plaintiff's claims – all of which are premised, at most, on alleged breaches of the duty of care and seek to recover money damages – are barred by Activision's Section 102(b)(7) exculpatory charter provision. (Ex. D, Activision's Charter, Article Sixth(A)).[23] *See also* 8 *Del. C.* § 102(b)(7). Because Plaintiff has not alleged facts sufficient to suggest that the directors of Activision acted disloyally or in "bad faith," this action should be dismissed as a matter of law.[24] *See, e.g.*, *McPadden v. Sidhu*, C.A. No. 3310-CC, 2008 WL 4017052, at *1 (Del. Ch. Aug. 29, 2008) (dismissing duty of care claims against defendant directors because company's charter had exculpatory provision and explaining that "a board of directors may act 'badly' without acting in bad faith"); *In re Lear Corp. S'holder Litig.*, C.A. No. 2728-VCS, 2008 WL 4053221, at *10 (Del. Ch. Sept. 2, 2008) (holding that directors were protected by

---

[23] "The court may take judicial notice of the certificate in deciding a motion to dismiss." *See In re Baxter Int'l, Inc. S'holders Litig.*, 654 A.2d 1268, 1270 (Del. Ch. 1995) (taking judicial notice of the company's Section 102(b)(7) provision in its certificate of incorporation).

[24] As discussed above, allegations concerning the employment agreements of Kotick and Kelly fail to state a claim.

company's exculpatory charter provision and that plaintiffs did not come close to alleging facts suggesting "strong showing of misconduct" necessary to plead "bad faith" claim).[25]

V. PLAINTIFF'S CHALLENGE TO THE ACTIVISION BLIZZARD CHARTER AMENDMENTS IS NOT RIPE AND OTHERWISE LACKS MERIT.

The Amended Complaint alleges incorrectly that certain provisions in the Activision Blizzard Charter are facially invalid under Delaware law. (Am. Compl. ¶¶ 97-103, 121-124). Specifically, the first challenged provision, Section 8.3, is a standard corporate opportunity provision that is expressly authorized by Section 122(17) of the DGCL. (Am. Compl. ¶ 100); Definitive Proxy at B-6 – B-7; 8 *Del. C.* § 122(17)). The second challenged provision, Section 9.3, is a limited liability provision that provides in part that, "[t]o the fullest extent permitted by law," Vivendi and its officers and directors shall not be liable to Activision and its shareholders for actions made in "good faith"

---

[25] Moreover, to the extent that Plaintiff is requesting that the Court should rescind the Combination and related transactions, that relief should be denied. First, the Activision shareholders (whom Plaintiff purports to represent) overwhelmingly approved the Combination and related transactions. Second, under Delaware law, "it is generally accepted that a completed merger cannot, as a practical matter, be unwound." *McMillan v. Intercargo Corp.*, 768 A.2d at 500 (refusing to undo consummated merger); s*ee also In re Prime Hospitality, Inc. S'holders Litig.*, C.A. No. 652-N, 2005 WL 1138738, at *8 (Del. Ch. June 15, 1995) (pointing out "the reality that the challenged transaction has closed and neither injunctive relief nor rescission is available," where completed merger was challenged); *Arnold v. Soc'y for Sav. Bancorp, Inc.*, C.A. No. 12883, 1995 WL 376919, at *3 (Del. Ch. June 15, 1995) (finding that consummated merger could not be undone because "[t]he equities in [the] case do not justify the extraordinary remedy of rescission. Rescission of the merger would unduly harm the acquiror . . . who has relied on the finality of . . . the merger"), *aff'd*, 678 A.2d 533 (Del. 1996). Third, rescission would be a particularly inappropriate remedy here because Plaintiff had an opportunity to raise other issues at the preliminary injunction hearing, and chose to pursue only three disclosure claims.

when exercising its contract rights with the Company. (Am. Compl. ¶ 102); Definitive Proxy at Annex B-8). Plaintiff's claims challenging these provisions fail for several reasons.

First, Plaintiff's facial challenges to Sections 8.3 and 9.3 of the Activision Blizzard Charter are not ripe. Critically, Plaintiff does not challenge the use of or any specific action taken under these provisions. Rather, Plaintiff seeks broad, declaratory relief, relying on arguments that are "hypothetical, speculative and based upon no concrete situation giving rise to a justifiable attack upon the provision[s]." *Ackerman v. Stemerman*, 201 A.2d 173, 176 (Del. 1964) (refusing to conduct a "speculative inquiry upon a hypothetical basis" where plaintiffs challenged the validity of a stock option provision under which no action had been taken); *see also Energy Partners, Ltd. v. Stone Energy Corp.*, C.A. No. 2402-N, 2006 WL 2947483, at *10 (Del. Ch. Oct. 11, 2006) (denying declaratory relief where party challenging merger agreement provision failed to "identify[y] any contemplated conduct or specific [action]" under provision); *Cantor Fitzgerald, L.P. v. Cantor*, C.A. No. 18101, 2001 WL 1456494, at *8 (Del. Ch. Nov. 5, 2001) (declining to determine whether certain amendments to partnership agreement were valid where amendments had not been "applied in specific factual settings").[26]

Therefore, the Court should decline to rule on the validity of these provisions in the Activision Blizzard Charter where no specific action or particularized allegations exist to create a controversy ripe for adjudication. *See Stroud v. Milliken*

---

[26] This was also the Court's reaction when Plaintiff initially raised these arguments at a scheduling conference on March 12, 2008. (Transcript at 43-44, 48, D.I. 28).

Enters., Inc., 552 A.2d 476, 480 (Del. 1989) (stating that Delaware courts will "decline to render hypothetical opinions . . . dependent on supposition" where a controversy is not ripe); *Bebchuk v. CA, Inc.*, 902 A.2d 737, 745 (Del. Ch. 2006) (explaining that Delaware courts will "refrain from issuing a purely advisory opinion" where "relevant events requiring the court's review may never occur").

Second, Plaintiff's challenges to Sections 8.3 and 9.3 of the Activision Blizzard Charter fail on their own merits. The first challenged provision, Section 8.3, is a standard corporate opportunity provision that allows Vivendi's directors and officers to pursue corporate opportunities for Vivendi except when those opportunities are offered to them in their capacity as directors and officers of Activision. (Am. Compl. ¶ 100; Definitive Proxy at Annex B-6 – B-7). Far from violating Delaware law, this charter provision is expressly authorized by Section 122(17) of the DGCL.[27] 8 *Del. C.* § 122(17). Plaintiff asserts that Section 122(17) "does not change the level of scrutiny" applicable to a renunciation of interest (Am. Compl. ¶ 101), but fails to explain how the proposed

[27] Specifically, Section 122(17) provides that:

> Every corporation created under this chapter shall have the power to . . . [r]enounce, in its certificate of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation of 1 or more officers, directors, or stockholders.

8 *Del. C.* § 122(17).

charter amendment, which is contemplated by the statute and the legislative history, could possibly be illegal, either on its face or as applied.

The second challenged provision, Section 9.3, limits the liability of officers and directors of Vivendi and its affiliates for certain breaches of their duties to Activision and its shareholders only "[*t]o the fullest extent permitted by law*," and where an officer or director acts "in good faith." (Am. Compl. ¶ 102; Definitive Proxy at Annex B-8 (emphasis added)). Thus, the provision cannot possibly be found to facially violate Delaware law. Further, Section 9.3 provides in part that officers and directors of Vivendi shall not be liable to Activision and its shareholders "by reason of the fact that Vivendi, its Controlled Affiliates or an officer or director thereof in good faith takes any action or exercises any rights or gives or withholds any consent in connection with any agreement or contract between Vivendi and its Controlled Affiliates, on one hand, and the Corporation, on the other hand." (Definitive Proxy at Annex B-8). This charter provision simply evidences the intent of Activision to be bound by current Delaware law, which provides that a controlling shareholder (Vivendi) does not breach its fiduciary duty merely by exercising its contract rights. *See, e.g., Odyssey Partners, L.P. v. Fleming Cos.*, 735 A.2d 386, 415 (Del. Ch. 1999) (stating that when parties' obligations are not "derive[d] from any fiduciary relationship, the law will not impress upon them special limitations that pertain to the conduct of fiduciaries"); *Solomon v. Pathe Commc'ns Corp.*, C.A. No. 12563, 1995 WL 250374, at *5 (Del. Ch. Apr. 21, 1995) ("A controlling shareholder is not required to give up legal rights that it clearly possesses; this is certainly

so when those legal rights arise in a non-stockholder capacity."), *aff'd*, 672 A.2d 35 (Del. 1996). [28]

For these reasons, Section 8.3's standard corporate opportunity provision and Section 9.3's limitation on the liability of Vivendi's officers and directors are in no way contrary to Delaware law, and Plaintiff has failed to demonstrate otherwise. Accordingly, the Court should dismiss these claims.

---

[28] Similarly, Plaintiff's claim that this provision is somehow contrary to Section 102(b)(7) of the DGCL is equally without merit. (Am. Compl. ¶ 123). First, Section 102(b)(7) allows a corporation to include a provision in its certificate of incorporation providing that its *own* directors will not be personally liable to the company in certain circumstances. 8 *Del. C* § 102(b)(7). The provision at issue here involves Activision agreeing to limit liability of Vivendi and its officers "to the fullest extent permitted by law" for acting in good faith when implementing contracts between the companies. Second, this Court recently noted that limited liability granted to directors of one corporation (such as Vivendi) by shareholders of another corporation (such as Activision) due to a merger agreement "arises under contract law and is outside the restrictions of statutory corporate law." *See Louisiana Mun. Police Employees' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1180 n.8 (Del. Ch. 2007) (holding that where shareholders of one corporation offer to indemnify directors of another in a merger agreement, it could be argued that "Delaware statutory law puts no direct limitation on such beneficence").

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff's Second Amended Complaint.

/s/ Edward B. Micheletti
Edward P. Welch (I.D. No. 671)
Edward B. Micheletti (I.D. No. 3794)
Rachel J. Barnett (I. D. No. 4876)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899
Tel.: (302) 651-3000
E-mail: Edward.Welch@skadden.com

Attorneys for Defendants

Of the California Bar:
Harriet S. Posner
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
300 South Grand Avenue
Suite 3400
Los Angeles, California 90071
Tel.: (213) 687-5000

DATED: February 13, 2009