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Case No. 8885-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ACTIVISION BLIZZARD INC. STOCKHOLDER LITIGATION	))))	Consolidated C.A. No. 8885-VCL **PUBLIC VERSION EFILED SEPTEMBER 18, 2014**

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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September 11, 2014

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

RULES AND STATUTES

PRELIMINARY STATEMENT

This case concerns a corporate reorganization transaction announced on July 25, 2013, pursuant to which Activision Blizzard, Inc. ("Activision") gained independence from its then-61% controlling stockholder Vivendi S.A. ("Vivendi") by (1) Activision's repurchase of $5.8 billion of its shares (together with substantial NOLs) from Vivendi at a substantial discount to the market price and (2) a purchase of another $2.3 billion of Activision stock from Vivendi at the same discount by a group of investors led by Activision's senior management. The success of the transaction has been widely acknowledged by investors and analysts. Activision's share price has doubled since early 2013.

Plaintiff Anthony Pacchia ("Pacchia" or "Plaintiff") has brought direct and derivative claims challenging the transaction. He now moves the Court to certify a class of stockholders who owned Activision common stock as of July 25, 2013, along with their "successors in interest, assignees, and transferees" in connection with the direct claims for relief in Plaintiff's Verified Fourth Amended Class and Derivative Complaint (the "Complaint" or "Compl."). His motion should be denied, at least in substantial part:

First, Plaintiff's class definition is overbroad. The class cannot include purchases of Activision stock made after the transaction was publicly announced because those purchasers acquiesced in the new ownership structure of

Activision. Similarly, any holders of Activision stock who sold their shares after July 25, 2013, must be excluded from the class because the only class-wide harm that Plaintiff alleges is based on future, speculative events, such as a hypothetical change-of-control transaction or a proxy contest.

Second, Plaintiff is not an adequate class or derivative representative. He actively traded in Vivendi stock after his appointment as lead plaintiff, while regularly receiving information about the litigation from class counsel. His evasive deposition testimony evidences a lack of candor as well as bizarre decision making, such as selling stock because he was "pissed off." Plaintiff also has impermissibly abdicated control over this litigation to class counsel, not even bothering to remember if he voted his shares at Activision's 2014 annual meeting or what was presented for stockholder vote, even though his complaint challenges the election of board members at that election.

STATEMENT OF FACTS

A. The Relevant Allegations Concerning The Challenged Transaction

Plaintiff alleges that in mid-2012, Vivendi explored a sale of its majority stake in Activision to relieve Vivendi's debt and solve liquidity concerns. Compl. ¶ 26. When efforts to find a buyer failed, Vivendi planned to recommend to Activision's Board that Activision issue a special dividend to all stockholders. *Id*. ¶ 27. In January 2013, at the suggestion of senior Activision management, Vivendi agreed to consider selling its stake as an alternative to the dividend. *Id*. ¶ 29.

On February 28, 2013, the Activision Board formed a special committee of three independent directors (the "Special Committee") to evaluate a potential transaction involving Vivendi, Activision and Activision's Chief Executive Officer Robert A. Kotick and then co-Chairman Brian G. Kelly. *Id*. ¶ 34. After four months, negotiations deadlocked, the Special Committee disbanded, and Vivendi negotiated directly with Kotick and Kelly concerning a transaction that would result in the Company no longer having a controlling stockholder. *Id*. ¶¶ 38-75. On July 9, after further negotiations, Vivendi and ASAC II LP ("ASAC"), an investment vehicle formed by Kotick, Kelly and other investors, sent a term sheet to the Company outlining the terms of a potential transaction. *Id*. ¶ 78. On July 11, the Board reconstituted the Special Committee

and further negotiation ensued and, two weeks later, the parties executed the Stock Purchase Agreement. *Id*. ¶¶ 79, 82.

The terms of the transaction, including prices, ownership percentages and governance rights were fully and accurately disclosed to the public on July 25, 2013. Activision purchased approximately 429 million shares from Vivendi for about $5.83 billion, or $13.60 per share. ASAC purchased approximately 172 million shares (also at $13.60 per share) for about $2.34 billion. The result of the transaction was the removal of Vivendi as a controlling stockholder. Vivendi's ownership dropped from 61% to 12% with contractual restrictions on even that level of ownership. ASAC now owns about 24.7% of Activision's common stock. ASAC's shares also are subject to significant contractual restrictions. The float belonging to stockholders unaffiliated with Vivendi or Activision management increased from 39% to 64%.

Plaintiff alleges that the Court should combine the shares owned by ASAC, Kotick, Kelly and the other ASAC investors to view them as a control block that would make it "more difficult for the Class to receive a future control premium or to participate in a future proxy contest." Compl. ¶ 124. This allegation of control and its potential impact on future events are the only grounds that Plaintiff provides for his class claims:

> The basis for classifying the claims as direct is that ASAC's purchase from Vivendi of the post-Restructuring

> 24.7% block, coupled with shares owned by ASAC investors, effected a transfer of control to ASAC's investors, despite the availability of alternatives that would have allowed for control to rest in the public stockholders, thereby depriving public stockholders of the economic value and voting power associated with the realistic ability to participate in a proxy contest and accept a takeover premium. Such harms are individual in nature.

Op. Br. at 6 (footnotes omitted).[1]

Activision's share price rose throughout 2013 as rumors of a potential transaction began to circulate in the market. It traded in the $10 to $13 range in 2012 and closed at $15.18 before the transaction was announced in July 2013. After the transaction was announced, the stock price increased immediately by 15% and has steadily climbed since then, never dropping below $16 per share and closing at $23.86 on September 9, 2014, which is more than double the price of Activision stock at the beginning of 2013. *See* Activision Blizzard, Inc., *Google Finance*, at http://www.google.com/finance?cid=353353 (last visited September 10, 2014).

B. Plaintiff's Ownership Of Activision Stock

Pacchia has owned shares of Activision stock since at least 2009. Affidavit of Anthony Pacchia, Nov. 8, 2013, ¶ 3 ("Pacchia Aff.") (Exhibit A);

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[1] References to "Op. Br." refer to Plaintiff's Opening Brief in Support of His Motion for Class Certification filed on May 16, 2014 (Dkt. No. 220).

Pacchia Dep. 65:3-21 (Exhibit B). He follows media reports about the Company and reads its filings with the U.S. Securities and Exchange Commission and, in 2013, had been closely following the reports of Activision's negotiations with Vivendi about a potential transaction. Pacchia Dep. 77:5-21, 90:16-24, 96:22-24, 100:4-7, 104:4-5. When he learned of the transaction, he described it as "nice" and immediately sold 3,000 of his 7,472 shares on the ensuing price rise. Pacchia Dep. 104:11-107:6, 110:14-23; Pacchia Dep. Ex. 8 at PAC000081 (Exhibit C). Three days later he sold another 2,000 of his remaining 4,472 shares as the price rose further. Pacchia Dep. 110:24-111:5. A week later, after learning about this lawsuit challenging the transaction, he contacted counsel at Bragar, Eagel & Squire, P.C., about being a Plaintiff in this case. *See* Pacchia Aff. ¶ 6.

Pacchia's testimony about his dealings in Activision stock is disturbing at best—and inconsistent with a fiduciary making rational decisions on behalf of the class of stockholders he represents. Pacchia sold 67% of his stock to take advantage of a transaction that he now challenges as unfair. His convoluted and utterly strange testimony on this topic is not indicative of a trustworthy representative plaintiff:

> Q. And so, as you sit here today, you don't know why you made the decision to sell some of your shares but not all of your shares?
>
> MR. EAGLE: Objection as to form.
>
> Q. Is that right?

A. I sold some of the shares because I was pissed off.

Q. That's why you sold them?

A. That's correct.

Q. No other reason?

A. No.

Q. No profit taking involved?

A. It was nice to have a profit when you're angry.

Q. Why didn't you sell them all?

A. I don't know, honestly.

Q. So, as you sit here today, you don't know why you sold some of your shares and not all of your shares?

A. I know why I sold 5,000.

Q. You owned 7,000 and – 7,500 or 7,400?

A. Something like that --

Q. Okay.

A. -- at the announcement and I had owned more prior to that.

Q. Correct. But you don't know why you held onto 2,400 shares?

A. Not specifically.

Q. Generally?

A. I believe the company's worth more.

Q. Then why did you sell any shares?

A. I was pissed off. You know, you do things out of emotion.

Q. Is that the reason you sold many more thousands of shares throughout the first half of 2013 because you were pissed off?

A. I was.

> Q. You were pissed off throughout the first half of 2013?
>
> A. I was generally unhappy with the way the investment was going.
>
> Q. And so investment was going in a positive direction for you, wasn't it?
>
> A. When?
>
> Q. In the first half of 2013.
>
> A. No, I think some of the shares I sold, I had a break even or so and it wasn't going the way it should have been going.
>
> Q. So you sold them because you were pissed off too?
>
> A. Yes.

Pacchia Dep. 62:13-64:16.

Later in his testimony, Pacchia disclaims any memory of why he sold or purchased Activision stock. *Id.* at 78:4-7. He does not know why he sold 5,000 shares and kept 2,400 shares. *Id.* at 84:13-86:21. Although he had disclaimed *any* memory of why he sold, Pacchia nonetheless denied selling his stock because the price rose. *Id.* at 87:3-12.

Most troubling, Pacchia also has traded in Vivendi stock since bringing this lawsuit. At the time he submitted his affidavit in support of his application to be appointed lead counsel in this action in November 2013, Pacchia and his wife collectively owned 8,613 shares of Vivendi stock. Pacchia Aff. ¶ 4. Since submitting that affidavit, however, Pacchia and his wife (for whom Pacchia made all investment decisions) sold a total of 4,000 Vivendi shares from December

2013 and February 2014. *See infra* n.2. During that time period, Pacchia was consulting with his attorneys on a weekly basis—often twice a week—about his claims in this action, which obviously included discussions about the strength and weaknesses of his claims against Vivendi in this action. Pacchia Dep. 114:6-25.

Finally, in this action, Plaintiff purports to complain about the appointment of Elaine Wynn and Peter Nolan to the Activision board, and their subsequent reelection by Activision's stockholders at the June 2014 annual meeting by an overwhelming vote. However, Pacchia testified that he did not even know whether he had voted his shares at the 2014 annual meeting and did not know what matters were up for stockholder vote at that meeting. Pacchia Dep. 149:17-23, 150:15-151:2.

ARGUMENT

For a claim to proceed on a class basis, Delaware Court of Chancery Rule 23(a) requires that a plaintiff establish that the class meets four requirements:

- *Numerosity*: The class is so numerous that joinder of all members is impracticable;
- *Commonality*: There are questions of law and fact common to the class;
- *Typicality*: The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- *Adequacy*: The representative parties will fairly and adequately protect the interests of the class.

Del Ct. Ch. R. 23(a); *see Marie Raymond Revocable Trust v. MAT Five LLC*, 980 A.2d 388 (Del. Ch. 2008); *Prezant v. De Angelis*, 636 A.2d 915, 920 (Del. 1994).

Plaintiff's motion should be denied for two reasons: *First*, even if Plaintiff (or some other individual) could serve as an adequate class representative, neither stockholders who purchased after the transaction was announced on July 25, 2013, nor those who sold after that date, should be included in any class definition. *Second*, Plaintiff is in any event not an adequate representative of any class or for any derivative claims. He has made irrational investment decisions, given bizarre deposition testimony, acted to profit from the transaction he challenges, and, most disturbingly, while required to act as a fiduciary, he has traded in shares of Vivendi stock while he was receiving confidential advice from

his attorneys about the claims against, among others, Vivendi. He also has inappropriately relinquished control over this litigation to his counsel.

I. ANY CLASS CANNOT INCLUDE STOCKHOLDERS WHO PURCHASED OR SOLD ACTIVISION SHARES AFTER JULY 25, 2013.

Plaintiff proposes a class consisting of "all stockholders of Activision Blizzard, Inc., as of July 25, 2013, including their legal representatives, heirs, successors in interest, assignees, and transferees of such foregoing holders, excepting defendants, investors in defendant ASAC II LP ("ASAC") and any stockholders affiliated with such investors." Op. Br. at 3. This definition is overbroad for two reasons: (1) the class cannot include purchasers after the transaction was announced on July 25, 2013, as those stockholders bought with full knowledge of the change in ownership structure; and (2) the class definition cannot include persons who sold Activision stock after July 25, 2013, because the only direct claim Plaintiff has alleged is conditioned on owning Activision shares at some point in the future when a control premium or proxy contest might be affected by changes in ownership that resulted from the transaction.

A. Any Class Cannot Include Stockholders Who Purchased After The July 25, 2013 Announcement Of The Transaction.

As a threshold matter, it is not clear whether Plaintiff intends, by the use of the words "assigns" and "transferees," to include purchasers of Activision

shares after July 25, 2013 in the class definition. To the extent that Plaintiff intends to include purchasers after July 25, 2013, those purchasers bought knowing full well the terms of the transaction and therefore acquiesced to those terms when they purchased those shares. *See, e.g.*, *Kahn v. Household Acquisition Corp.*, 591 A.2d 166, 177 (Del. 1991) (accepting the benefits of a transaction, even though the conduct in question is a breach of some duty owed to the stockholder, may bar the stockholder from obtaining equitable relief); *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 848 (Del. 1987) (when informed minority stockholder either votes in favor of the merger or accepts benefits of the transaction, he or she cannot thereafter attack its fairness). Indeed, to the extent that such subsequent purchasers were not stockholders as of July 25, 2013, Defendants did not owe them any fiduciary duties at that time.

B. Any Class Cannot Include Stockholders As Of July 25, 2013 Who Sold After The Announcement Of The Transaction.

Stockholders as of July 25, 2013, who sold their shares of Activision after that date have no connection to the only class injury that Plaintiff has attempted to allege. Plaintiff alleges that the putative class was harmed because the transaction will make "it more difficult for the Class to receive a *future* control premium or participate in a *future* proxy contest." Compl. ¶¶ 137, 141, 145, 149, 152; *see* Op. Br. at 6 (emphasis added). But those harms are conditioned on a

hypothetical future event—that there might be a transaction in the future that would allow stockholders to receive a "takeover premium" or that that there could be a future proxy contest. Op. Br. at 6. Consequently, only *current* stockholders have any chance of suffering that harm, or of benefiting from any remedy designed to prevent that harm.

Plaintiff's Motion does not contend that either of these alleged harms has materialized since the transaction was announced. To the contrary, Plaintiff testified that, "in terms of the ability to obtain a control premium, minority stockholders were better off after this transaction than they were before" (Pacchia Dep. 136:23-137:2), and that he was not "aware of [a potential sale transaction] opportunity for Activision" occurring since July 25, 2013. *Id*. at 137:9-20. Similarly, Plaintiff admitted that there is "no current proxy contest . . . at Activision." *Id*. at 138:21-23. Only current stockholders could receive a control premium or vote in a future proxy contest. Therefore, for any seller of shares since July 25, 2013, there was never a potential sale transaction that could have given that seller a hypothetical control premium nor was there a proxy contest in which that seller could have participated.

In short, the only class that could even arguably meet the requirements of Rule 23 would include only those stockholders who currently own Activision shares and who have held their shares continuously since July 25, 2013.

II. PLAINTIFF IS AN INADEQUATE REPRESENTATIVE PLAINTIFF.

Plaintiff is inadequate to represent any class the Court might certify or Activision with respect to the derivative claims. To be an adequate class representative, there must be an "absence of conflict between the class representative and the class members" and Plaintiff must at least "possess a basic familiarity with the facts and issues involved in the lawsuit." *N.J. Carpenters Pension Fund v. infoGROUP, Inc.*, 2013 WL 610143, at *4 (Del. Ch. Jan. 17, 2013) (quoting *PaineWebber R&D P'rs, L.P. v. Centocor, Inc.*, 1997 WL 719096, at *6 (Del. Super. Ct. Oct. 9, 1997), and *In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126, 127 (Del. Ch. 1999)). In addition, as a fiduciary acting for the benefit of others in a court proceeding, a representative plaintiff must act honestly and rationally—at least in his dealings related to the claims at issue and the court proceedings. *See, e.g.*, *In re Amsted Indus., Inc. Litig.*, 521 A.2d 1104, 1108 (Del. Ch. 1986) (explaining that a class representative must proceed "in good faith" and also must proceed "competently").

Pacchia is an inadequate representative for multiple reasons. He sold Vivendi shares during the pendency of this litigation, which is "conduct unbecoming a potential class representative." *N.J. Carpenters*, 2013 WL 610143, at *5. Furthermore, his testimony concerning his trading in Activision shares is bizarre and illogical, indicating a lack of competence to act as a fiduciary. Lastly,

he lacks familiarity with even the most basic details of this case and "has completely abdicated control over the case to counsel." *Id.* at *4; *see id.* at *3 n.24.

A. Plaintiff's Recent Sales Of Vivendi Stock During The Pendency Of This Litigation Disqualify Him As A Representative Plaintiff.

"When a stockholder of a Delaware corporation files suit as a representative plaintiff for a class of similarly situated stockholders, the plaintiff voluntarily assumes the role of fiduciary for the class." *Steinhardt v. Howard-Anderson*, 2012 WL 29340, at *8 (Del. Ch. Jan. 6, 2012). Moreover, "trading by plaintiff-fiduciaries on the basis of information obtained through discovery undermines the integrity of the representative litigation process. Consequently, it is unacceptable for a plaintiff-fiduciary to trade on the basis of non-public information obtained through litigation." *Id.*

Plaintiff here has traded in Vivendi stock since the announcement of the challenged transaction and also while prosecuting this lawsuit. Despite stating (in connection with his motion to be appointed lead plaintiff and before discovery began) that he was "willing to sell [his] shares of Vivendi if [he was] appointed a lead plaintiff," Pacchia Aff. ¶ 4, no sale occurred upon his appointment. To the contrary, Plaintiff admitted that he sold 3,500 shares between December 2013 and

February 2014 and that an additional 500 shares were sold from his wife's account (which he controls) in January 2014.[2] Pacchia Dep. 112:13-22, 115:6-11.

Plaintiff further admitted that when he sold those Vivendi shares, he was "consulting on a regular basis with [his] lawyers," about a "couple times a week." *Id.* at 114:10-16. And, contrary to Delaware law, when asked whether he "consider[ed] whether it was appropriate to be trading in your Vivendi stock during the pendency of this lawsuit," Plaintiff simply answered that he "didn't consider it to be inappropriate." Pacchia Dep. 113:23-114:3; *see Steinhardt*, 2012 WL 29340, at *8; Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 9.03[b][1], at 9–159 (2012) ("As fiduciaries to the class, representative plaintiffs are generally prohibited from trading in the defendant company's securities while litigation is pending. Representative plaintiffs often have access to confidential, nonpublic information during the course of discovery. Counsel for representative plaintiffs should specifically instruct their clients to refrain from buying or selling a defendant company's securities during litigation.") (citing cases).

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[2] *See* PAC000503-24, at 506 (sale of 1,000 shares on December 19, 2013) (Exhibit D); PAC000563-584, at 580 (sale of 1,500 shares on February 14, 2014 and 1,000 shares on February 18, 2014) (Exhibit E); PAC000663-668, at 667 (Plaintiff's wife; sale of 500 shares on January 17, 2014) (Exhibit F).

Plaintiff has not attempted to "make any effort to establish an internal ethical wall or otherwise segregate litigation responsibility from trading responsibility." *Steinhardt*, 2012 WL 29340, at *10. Instead, he "personally made the decision to sell" his Vivendi stock (*id.*), testifying that he did not "consult with anyone about [his sale of Vivendi stock]." Pacchia Dep. 114:4-5. Plaintiff's "I just need to show up" attitude toward his duty as a fiduciary, as primarily evidenced by his improper trading in Vivendi stock, should disqualify him from serving as a Plaintiff, as it makes him an inadequate derivative or class representative.

B. Plaintiff's Lack Of The Basic Attributes Needed to Serve As A Fiduciary, As Seen By His Inability to Make Rational Investment Decisions, Disqualifies Him As A Representative Plaintiff.

A representative plaintiff has fiduciary responsibilities to the proposed class or other stockholders. *See Steinhardt*, 2012 WL 29340, at *8. Pacchia's sworn testimony raises serious questions about his honesty and competence to serve as a fiduciary. He testified that he does not know why he purchased Activision stock or why he sold it. Pacchia Dep. 60:13-21, 63:3-17, 83:23-84:15, 86:15-21, 71:18-74:4. He claimed—in defiance of common sense—that his reasons for selling Activision stock after the transaction was announced did not include the fact that the price rose. *Id.* at 62:13-63:2. He also claims that he

simply does not know why he kept some (about one-third) of his Activision stock, but sold the rest. *Id.* at 63:3-4.

According to Pacchia's own testimony, he made his investment decisions based solely on emotion. Indeed, Plaintiff testified that after the transaction was announced on July 25, 2013, and the stock price jumped up 15%, he sold 5,000 of his Activision shares "because [he] was pissed off" and that "you do things out of emotion." Pacchia Dep. 62:13-21; 63:20-21.[3] He was not clear about the reasons why he was "pissed off" or how that testimony can be squared with his contemporaneous statement describing the transaction as "nice."[4]

Plaintiff also testified that he sold thousands of shares in 2013 *before* the announcement of the transaction—at prices ranging from $11.50 to $15.18—because he was "pissed off" and that he "was generally unhappy with the way the investment was going." Pacchia Dep. 63:23-64:6. Notwithstanding the clear inconsistency between these two statements, if both are indeed true, they destroy

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[3] Plaintiff sold 3,000 shares on July 26, 2013 at $17.43 per share and 2,000 shares on July 29, 2013 at $17.91 per share. *See* Pacchia Dep. Ex. 4 at PAC000416 (Exhibit G); Pacchia Dep. Ex. 5 at PAC000429-431 (Exhibit H).

[4] If he harbors malice toward Activision managers, such as Kotick, he is not an appropriate representative plaintiff. Vindictiveness has no place as a motive for representative fiduciaries. *N.J. Carpenters*, 2013 WL 610143, at *3, n.24. Regardless of the underlying resentments, representative fiduciaries cannot be allowed to make decisions based on animus or other emotions. By analogy, if a corporate director made a decision to sell an asset solely because he was "pissed off," his conduct would not pass even business judgment review.

any confidence in Plaintiff's ability to make rational and fair decisions related to Activision. A fiduciary cannot properly make decisions about high-dollar claims affecting a vast number of people based on emotion.

C. Plaintiff's Abdication Of Control Of This Case To Counsel Also Disqualifies Him As A Representative Plaintiff.

A representative plaintiff also cannot completely abdicate control over the case to class counsel. *See N.J. Carpenters*, 2013 WL 610143, at *4. Pacchia agreed at deposition that his only "skin in the game is simply that [he has] to show up from time to time." Pacchia Dep. 56:22-57:4. He struggled at deposition with the basic theories of the case, testifying at one point that Activision should have repurchased more stock from Vivendi but when asked "how much," Plaintiff responded that "I'm not going to give you an answer." *Id*. at 129:24-130:9. Most remarkably, despite his claim that Mr. Nolan and Ms. Wynne should not be allowed to remain as directors and his repeated protestations to the Court that this case must be resolved in preparation for the 2015 Annual Meeting, Pacchia could not even remember whether he voted his shares at the 2014 Annual Meeting (including on the nominations of Mr. Nolan and Ms. Wynn to Activision's board of directors) and testified that he had "no way of determining it." *Id*. at 149:17-25.

When considered together, Pacchia's improper trading activity, his bizarre decision making, and his lack of interest in this case or the governance of Activision disqualify him from acting as a class or derivative representative.

CONCLUSION

For the foregoing reasons, Plaintiff's motion should be denied as any class should include only persons who have held Activision stock continuously since July 25, 2013. In any event, Pacchia should be dismissed from this case as a representative plaintiff because he is unfit to serve as a fiduciary for either the class or derivative claims alleged in this case.

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