IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ACTIVISION BLIZZARD, INC. : CONSOLIDATED
STOCKHOLDER LITIGATION : C.A. No. 8885-VCL

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Chancery Courtroom No. 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Friday, June 6, 2014
10:05 a.m.

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BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

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ORAL ARGUMENT
DEFENDANTS' MOTIONS TO DISMISS THE VERIFIED THIRD AMENDED CLASS AND DERIVATIVE COMPLAINT, PLAINTIFF BENSTON'S MOTION FOR APPOINTMENT AS CO-LEAD PLAINTIFF AND FOR APPOINTMENT OF HIS COUNSEL AS CO-LEAD COUNSEL FOR THE PURPOSE OF BRINGING BROPHY-RELATED CLAIMS AND THE COURT'S RULINGS

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THE COURT: Welcome, everyone.

ALL COUNSEL: Good morning, Your Honor.

THE COURT: I assume someone wants to proceed.

Mr. Savitt is rising to the challenge.

MR. SAVITT: Good morning, Your Honor.

THE COURT: Good morning.

MR. SAVITT: William Savitt from Wachtell Lipton on behalf of the special committee defendants. Thanks for hearing us. It's always good to be with the Court. I'll speak for a bit on behalf of the special committee defendants and then you'll hear from my colleagues on behalf of the ASAC defendants and the Vivendi defendants.

In reviewing the papers preparing for this morning, Your Honor, I was struck by the extent to which the Court was confronted with very different approaches on the motion, at least insofar as the special committee defendants' motion is concerned. Not quite ships passing in the night but the briefs offer very different frames of reference. And what I thought might be useful what the time I had with the Court was to try to reconcile the two different

approaches and see how they lined up.

Let me start, if I might, by summarizing our theory of the case. The special committee's argument is really a simple one from first principles. What we argue to the Court in our papers is that a claim for fiduciary breach can't lie unless the pleadings show disloyalty or carelessness. And taking the facts pleaded as true, as, of course, we must, the allegations here just don't add up to a story of disloyalty or carelessness.

THE COURT: It seemed to me that that approach jumped over the threshold question of what is the standard of review. And pregnant in that approach was the assumption that the business judgment rule was the standard of review such that, in fact, it was the plaintiffs' burden to plead in the initial case exactly what you've just said. So why are you able to simply assume that the business judgment rule is the standard of review?

MR. SAVITT: The question of the standard of review, whether it's an entire fairness case or business judgment case or something else, is one that is discerned by looking at the pleadings as to the defendants and deciding whether a conflict is

alleged such that the entire fairness standard is implicated.

THE COURT: You think it could be business judgment rule for your folks but entire fairness for other people?

MR. SAVITT: I do, Your Honor. I do. And you've hit on a question that's very interesting. I think it is not elaborated in the cases oftentimes, which simply treat all the defendants together or sometimes don't have --

THE COURT: We don't treat them all together. It's just when we treat them separately. So in a nonbusiness judgment rule case, once we elevate, and there is some degree of substantive review of the transaction, we review the transaction first. We see if the transaction meets whatever the substantive standard is, reasonableness or fairness, and then we treat the defendants on a defendant-by-defendant basis. And we say, "Okay. Is there a basis for liability against this person? Did he or she act in care, good faith, loyalty?" We do it at that stage. So we always treat people on an individual basis. It's just when we do it.

MR. SAVITT: Fair enough.

And our reading of the cases is that even at the pleading stage, which is the stage we are here, the frame of analysis is it's not a transaction that's on trial. It's not a transaction that's the defendant. It's individuals who are defendants. And my clients, three special committee members, are members of a board of directors who are alleged to have breached their duty of loyalty. I think the duty of care has fallen out of the case given --

THE COURT: Implicit in your view is that there is no ab initio, there's never an ab initio.

MR. SAVITT: There is an ab initio with respect, of course, to controlling stockholders' squeeze-out transactions. And it's -- the Delaware Supreme Court has made clear, and we accept without controversy, that the standard of review in such a case is entire fairness. However, I think the question whether the standard of review is ab initio entire fairness does not resolve the question whether that is the standard of review as to all defendants in the case.

And it's there where I would push back, Your Honor, on the idea that I'm fighting ab

initio. I'm not. And my colleagues will speak to the Court about why the standard of review is an entire fairness to the transaction at all with respect to their clients. But our point really is that they have Delaware directors who are not alleged, accepting every pleaded fact as true, to have breached any duty of loyalty. They aren't alleged to have been interested. They aren't alleged to have -- they aren't alleged to have a lack of independence.

All that's alleged is that they were seeking to mediate an admittedly complex circumstance in the best interest of the company and, in Mr. Friedlander's view and Mr. Pacchia's view, didn't do as good a job as they might have. And our point is that that does not add up to a breach of fiduciary duty, of any fiduciary duty.

And what I was going to say, and I still -- I hope it will be useful to the Court, is our presentation focused on the lack of pleaded facts as to these directors that stated a claim under any cognizable breach of duty.

My friends on the other side undertook a very different approach. What they said was, "Well, this is a duty of loyalty case." There are three

reasons it's a duty of loyalty case, three doctrines, as they put it, that make it a duty of loyalty case and, without distinguishing as between the various defendants, simply said there was enough here. And I wanted to talk about each of them in turn to apply our framework, our frame of analysis, to the claims and theories that my friends on the other side have identified.

The first claim on the other side is corporate opportunity. And the theory, I think, is that the opportunity to buy Vivendi's block of stock was one that was properly Activision's and it was usurped by directors sitting on the Activision board. There's no objection, as I understand the claim, to that block of stock that was purchased by Activision. It's only the block of stock that was purchased by ASAC that is at issue; and that, I think, is set out quite clearly in plaintiffs' brief at Page 27.

Now, the Vivendi defendants are going to argue to the Court that as a matter of law, Activision can't be held to have had an interest or an expectancy in buying Vivendi shares; and we join in that argument. But our point is much simpler, and it's prefigured by the colloquy that we just had, and

it's this: Even assuming that a claim for usurpation of a corporate opportunity could lie here, the plaintiffs haven't alleged facts that show that it would lie against the special committee defendants.

And with respect, at a minimum, to the corporation opportunity, I don't think the cases stand for the proposition that if a corporate opportunity claim is such that it will be viewed from a fairness perspective as to some defendants, it need be against all defendants.

The plaintiffs here haven't alleged facts or presented argument or done anything that can support a claim against my clients. The special committee defendants didn't buy any of this stock. They didn't sell any of the stock. I wouldn't say they were strangers to the transaction. They were important players in the transaction seeking to make sure that it happened on terms optimal in the circumstances to the stockholders.

THE COURT: Yeah. I actually think when we were here for the injunction proceeding, you actually told me that part of the reason why I shouldn't grant the injunction was it was your fellows who made the decision and that Delaware law called for

deferring to your fellows who made the decision. So at least based on that, your guys weren't just part of the transaction.

I mean, your view at the time, at least -- I understand views change based on procedural posture and things like that, but at the time, at least, you said that's -- they were the decision-makers. That was the decision they got to make.

MR. SAVITT: Well, candidly, Your Honor, I don't know what I may have said when I was before the Court on that motion, but I'm not walking away from that. My clients are directors of Activision. They owe fiduciary duties to Activision and all of its stockholders and ultimately reached the view that the transaction that was on offer was the proper one.

And there's no part of my argument today that is in derogation of that idea. They have fiduciary duties, to be sure. The question, however, is whether the facts alleged amount to a claim that they breached them.

Now, with respect to the corporate opportunity, what it appears that plaintiffs mean to

say isn't that the special committee directors took a corporate opportunity or sold a corporate opportunity. It's rather that they facilitated someone else's usurpation of a corporate opportunity. And our point on this is that, on the facts as pleaded, that's not a tenable theory.

There is no fact alleged that shows that Morgado or Sarnoff or Corti, who are the special committee defendants, received any benefit in the buyback transaction. There's not even a suggestion here of interest. There is no allegation of a lack of independence. We made this pleading void a central point in our moving brief, and the answering brief really doesn't try to identify facts that fill it. And on these pleadings, the plaintiffs can't sustain, we would submit, a theory against the special committee on corporate opportunity.

And I wanted to talk a bit about one of the cases my friends cite which I think is very instructive on the point, the Kohls against Duthie case. Not in the section that the parties debated in their briefs or at least that the plaintiffs raised, Vice Chancellor Lamb's decision focuses on much the question that we've been talking about here, and it's

this: How should Courts think about whether a board member who didn't receive a benefit from a corporate opportunity answer as a defendant in such a case?

And what Vice Chancellor Lamb said in that decision was such a theory should survive only in what he called a highly unusual set of facts. And he went on to recite those facts, which were pleaded in that case and, I submit, Your Honor, aren't pleaded here. The pleadings there showed that the corporate opportunity was offered to all the directors before one usurped it. That was pleaded there. It is not pleaded here. It did not happen here.

The pleadings in that case, Vice Chancellor Lamb emphasized, showed that the nonusurping directors allowed the alleged usurpation without obtaining any competent financial or other advice. That was important to the Court there. It was not a fact at issue here.

The nonusurping directors accepted the challenged transaction without conducting any kind of a valuation, without effectively doing anything at all, a disregard that the Court held suggested an indifference to corporate interest. That is not even pled in this case.

And the other directors in that case sat by while one of their number achieved a windfall result with no benefit to the company and with no apparent justification from any stockholder facing interest. That is not so here.

Those were the unusual facts in Vice Chancellor Lamb's case that permitted the claim to survive there against the defendants, situated as my clients are here, and they are all manifestly absent here.

In fact, the facts, as pleaded, establish really the opposite. They establish that the special committee was confronted with a situation where it had a controlling stockholder with concerns respecting liquidity in circumstances where the governance arrangements restraining that controlling stockholder were set to fall away; creating an environment where the special committee was navigating between alternatives, including the status quo, all of which had virtues and vices, engaged over a long period of time with all the relevant parties; and achieved a transaction that was value enhancing in the face of many, many alternatives that were value destroying.

I do think that those facts are common ground on the pleading, and I don't think they can add up to a claim for corporate opportunity. The facts that allowed such a finding in the Kohls case are conspicuously absent here.

The second theory of liability that my friends identify is what they call entire fairness. And as the Court sort of suggested, entire fairness is a standard of review, not in my conception, at least, so much as a theory of liability. But what I believe plaintiff means is that entire fairness should apply as the standard of review in this case because of self-interest in the transaction.

That discussion does not appear to implicate the special committee director defendants at all. And when I say "that discussion," I mean plaintiffs' discussion of this issue in their papers. It focuses entirely on what plaintiff calls the self-interested negotiation between Vivendi and the BKBK group.

The only point even remotely related to the special committee is the charge that defendants failed to pursue alternatives to that transaction from the outset, from which I believe plaintiff means to

say there's a potential claim of breach of the duty of good faith here.

And the trouble with that argument is it doesn't work on the law or the facts. On the law, as the Court well knows, it's not enough to say that a disinterested director didn't do as much as a plaintiff might like to achieve the optimal transaction to state a good faith claim. The requirement is for a knowing disregard of a duty, an intentional dereliction of one. There is nothing like that pleaded here.

With respect to the immediate question that the plaintiffs put on this entire fairness point as to the special committee directors, the pleadings affirmatively show that the special committee did evaluate alternatives. The complaint pleads that the special committee asked its financial advisor to consider potential alternatives. Paragraph 57. That the special committee considered doing a buyback with Vivendi and disposing of the remaining shares in a secondary offering. That's at Paragraph 60. Also in that paragraph, that the special committee consider doing a buyback and seeking to restrict Vivendi's remaining stock with governance restrictions. And

that the special committee compared the transactional alternatives with the likely alternative in the event of no transaction and concluded that the transaction that it was ultimately able to achieve was superior to all the alternatives, which were either unavailable, as a practical matter, or inferior to the ASAC transaction or both.

So to the extent that what the plaintiffs are saying as to my clients is that entire fairness applies because the committee directors didn't consider alternatives, it's without support in the pleadings.

As I say, what the pleadings add up to is the idea that there was a majority stockholder here. There were liquidity issues that were putting pressure on a transaction that the directors thought was suboptimal, governance restrictions falling away, and faced with that scenario, the special committee negotiated for the best deal. And that matrix of facts does not add up to entire fairness.

And I appreciate, from the Court's remark at the beginning of our conversation, that perhaps what's relevant to the Court's thinking is whether the transaction itself is one that sustains

entire fairness as the standard of review. My friends will speak to that. I would argue, though, that each defendant in this Court is entitled, as it seeks to make a motion to be dismissed on the pleadings, to an evaluation of whether the pleadings do add up to a claim of breach as to that defendant.

There are cases that support that proposition. The DiRienzo case was an entire fairness case, but in that one, the special committee defendants were dismissed at the pleading stage. And that was a controller merger. And I guess the point I'm making is that while I very much join in the arguments of my codefendants, we believe we are differently situated because the pleadings don't add up and the precedents do not support the idea that a claim should remain even in those circumstances.

A quick word on failure to defend. This is the third theory that my friends offer in their answering papers and it's perhaps the theory that they think actually applies to the special committee defendants.

Invoking in that case the language of Unocal, plaintiff says that the board was confronted with three threats to corporate policy: Vivendi's

threat to issue a special dividend; Kotick and Kelly's threat to resign if the board pursued a secondary offering; and ASAC's attempt to acquire control of the company. That's taken from the plaintiffs' papers. And what my friends say is the board didn't do enough to answer these threats.

In their answering brief, they say the special committee defendants took no counterbalancing actions against Vivendi or Kotick. So here, again, what I think we have is a claim of bad faith. No self-dealing is alleged here, just a failure to take action when it was plainly required. But this just isn't what happened, Your Honor. And more importantly, for present purposes, it's not what the pleading says happened.

The complaint pleads -- the facts in the complaint show that the special committee did not do nothing. It retained financial and legal advisors. It asked them to consider alternatives. It considered doing a deal without Kotick. It considered doing deals other than the ones that Kotick was sponsoring, other than the ones that Vivendi was sponsoring. And it ultimately negotiated at length for the best transaction that could be achieved for the public.

That's what the complaint pleads. It does not plead that the special committee didn't know what was going on. It didn't plead that the special committee didn't care what was going on. It didn't even plead that the special committee was asleep at the switch or didn't try to do its job.

It doesn't even plead and couldn't that the special committee didn't achieve anything, because it did. It achieved a transaction that was value maximizing and important governance restrictions, which, while perhaps not as robust as my friends would like, certainly are different from nothing at all.

THE COURT: Why do I know it was value maximizing?

MR. SAVITT: If the Court is asking the question how can you be sure that, in the universe of transactions that could have been achieved, was it the one to achieve the most value, I can't answer the question. What I meant to say --

THE COURT: That's what I understand the term to mean.

MR. SAVITT: It was value enhancing. It's a fair point.

THE COURT: I won't quibble with you on value enhancing.

MR. SAVITT: And the point I would want to lay stress on is the facts, as pleaded, show the directors reviewing a significant number of alternatives, concluding that none of the ones that were in prospect, at least as far as they, as mere mortals, advised by their mortal advisors, could see, were inferior.

So this is a group of people that looked at every alternative they could find and determined, on substantial deliberation after a substantial consideration of record and a lot of negotiation, that it was the best they could do.

THE COURT: Now it sounds like you're testifying.

MR. SAVITT: Fair enough. I hear you, Your Honor.

Although I really think that's what the complaint says. Because the complaint shows months and months of meetings, months and months of looking at board decks, pushing back with respect to different sorts of transactional alternatives. It says conclusorily that the special committee didn't

consider alternatives. But when you look at the pleadings, that's not true.

It makes perfectly clear, Paragraph 82, they considered doing a deal without Kotick. Paragraphs 68 to 83, considered doing all sorts of other deals.

I don't want to testify. What I want to say is, when the Court reviews these pleadings and considers it from the perspective as to what's alleged to the special committee defendants, the only reasonable inference is they were looking at everything that was possibly in front of them and deciding what was the best deal they could do. That's the inference that jumps out from the pages of the complaint.

THE COURT: Why isn't a fair inference at this stage of the complaint that the special committee started out doing that, they started out and they did a good job starting out doing that, but then they hit the "disband you" situation, and when the deal came back, they understood at that point where the power lay. And so at that point, they were in, at least -- again, this may not prove to be true, but they were inferably in go-along mode. Get some

cosmetic improvements. Get a little change here and there, but hold your nose and go along because these guys are ramming this thing through.

MR. SAVITT: I think the answer to the Court's question is that there are -- and I'll say a little more specifically about this -- there are no facts pleaded that support that inference. There are two specific things that my friends averred to in this neck of the woods. They say with respect to the disbandment that the special committee acquiesced in it, I think seeking to convey much the inference that the Court is asking me about. But the complaint expressly pleads the following facts with respect to that issue: "The committee had reached the conclusion that" -- I'm quoting now from the complaint -- "there was no actionable transaction available and the committee was not in a position to propose an alternative." That was the state of the world for the committee.

And what they say in their answering briefs is much the same but even more pointed, I think. The special committee was unwilling to accept Kotick's and Kelly's terms. It was unwilling to accept these terms but was in no position to pursue

possible alternatives. That's from Page 18 of the answering brief. That was the state of the world. There was nowhere to go. There was nothing to do that was acceptable under the resolutions that created the special committee. There was no reason for it to continue. As soon as a potential deal was back on the table, the special committee was reconstituted.

Now, I would say, first of all, there is no breach of duty in that, that is to say the matter of the disbandment and reconstitution of the breach of the special committee. But moreover, in response to the Court's question, a month before the special committee was reconstituted, the special committee had this to say, from the plaintiffs' papers. "There is no deal available. We're not going to accept Kotick's terms. We're not in a position to pursue alternatives." And they went away. There is nothing that is alleged that explains why they were willing to do a transaction whose terms were unacceptable a month later. There is no fact pleaded. There is just none. And it is not a reasonable inference, given what's said.

THE COURT: It seems to me to be a reasonable inference, at least at the pleading stage,

but eventually, people wear down. And when you've got people on one side of a deal who are actually getting something, and not just getting something but getting a lot, they are highly motivated to push. They are relentless. They keep after you. And when you are an independent person even acting in totally good faith, et cetera, you can get deal fatigue and eventually just say, "You know what? I'm going along." That's one, at least, possible inference. And, you know, if that ultimately were proven, that could amount, in theory, to conscious abdication, conscious disregard of duty.

Look, I'm not saying that your guys lose. I'm just saying that at the pleading stage, they may well have done a great job for 80, 90 percent of the time, whatever it may have been, but you still end up with this situation where the complaint at least suggests that at the end, there's an inference of concession.

MR. SAVITT: Your Honor, I hear what you're saying, and I'm going to let the point go, but I'm going to make one more quick run at you on it.

And look, we understand the burden on a motion to dismiss, we understand the rules, and we

completely appreciate what the Court is saying.

There are two things I'd like to draw to the Court's attention that I think make that inference chain less plausible here than it would be in the normal case. The one is --

THE COURT: I don't like to use that word. Can you say "less reasonably conceivable"?

MR. SAVITT: Less reasonably conceivable. There you go.

First of all, you have here very shortly before the issues in question the special committee saying, "No, we're not doing it," and then going away. Now, it could have been worn down, but there isn't a single fact pleaded that supports that inference. There is no fact pleaded. It's true at the end there are these conclusions that sort of say everyone got tired. I'm not even sure they say that. But there is no fact pleaded that allows that inference. That's one.

And that's unusual. It's unusual to have the recognition that very shortly before the relevant decision, after months of going at it, they say, "We're not doing it," and then, when a significant number of revisions to the transaction

were made, some of which were very much in the favor of the special committee, they said, "We will do it." The inference that that is attributable to being worn down, without any facts, I would submit, is not reasonable.

Second --

THE COURT: Again, I know -- I don't want to prevent you from making your argument. I guess all I would say is, I do think that's a fair inference. The fair inference is these guys tried their best. They got what they could get. They did their best to represent the stockholders, and they ultimately signed off on a deal in good faith. I think it's one possible inference. But I think there is another possible inference.

And so I'm not -- do not hear me saying to you, "Mr. Savitt, your inference is not even reasonably conceivable." I get that it's reasonably conceivable. But I also see a reasonably conceivable inference coming the other way.

Anyway, you were about to make what I'm sure is an insightful second point.

MR. SAVITT: I want to make one other point that bears on this, and I think it's important.

The scenario, the wear-down-the-directors scenario in this case, takes place in a slightly different context than the one that one traditionally thinks of. Here's why. There was a controlling stockholder in this company.

It appears, from the face of the pleadings, at any rate, the facts in the pleadings are that absent a transaction, what was going to happen was Vivendi was going to cause the issuance of a special dividend. Any of the governance matters, the governance restrictions, had fallen away by the time the special committee had come back. So this isn't a circumstance where stalwart directors, miraculously immune from fatigue, could say no and there would be no consequence. Here, the status quo was not truly the status quo. It was a radical change that the special committee directors believed -- and the pleadings are clear on this -- the special committee directors believed that no transaction was going to have adverse consequences.

And given that, that that was apparently the alternative, it isn't reasonable to think that the reason the directors, the special committee directors, opted for the transaction that

they approved was because they were worn down. It's much more reasonable -- I would say only reasonable -- to infer that they did it because it was better than all the alternatives, including doing nothing. And I think that really does distinguish this case from the average one.

And on that point, my friends say, well -- and it's part of the same cluster of concerns. They say the committee didn't even try to negotiate a temporary stay of Vivendi's contractual power to assert control on July 9th. The plaintiffs don't say a word about how the committee could have achieved such a result. The committee had no leverage to procure such a result. Why would Vivendi consider giving up established contractual reasons -- established contractual rights for no reason? The special committee might as well have asked for money for nothing and things for free. It's not a reasonable request. It can't be a breach of duty to ask for things in a negotiation that you have no leverage to achieve. Otherwise, there would be a breach of duty all the time.

THE COURT: The nice thing about having great counsel is that you're not always in dire

straits.

So you can find things like noisy withdrawals, creative use of rights plans. I don't know. Again, I hear you. And if it ultimately proves out as you're saying, I get it. I get it.

MR. SAVITT: I think the Court understands the point I'm trying to make, and I'll leave it there. But there isn't a fact pleaded that suggests that a unilateral request for one side to give stuff up would have been granted. And I do not think there is a case that says the failure to ask for something to which one has no entitlement and no reasonable likelihood of achieving can possibly amount to a breach of duty. It would be a very peculiar rule of law.

And let me -- I'm not going to trouble the Court much longer, but I did want to talk about two of the main cases on this subject that the plaintiffs rely on. One is the Fertitta case. I think that's my friends' real authority and I think the only one for the idea that the committee is liable or could be for failure to implement defensive measures. That case is miles away from this one.

That is one in which the company, as

the Court knows, entered into a merger transaction with a large stockholder. The directors sat by and did nothing while they watched and knew that the large stockholder was buying up a position that took it from large stockholder to controlling stockholder, and then let the controlling stockholder wiggle out of its merger agreement obligations, achieving nothing in the balance. That was a situation in which the pleading showed that the directors forfeited benefits for the public without doing anything when there was a fairly obvious set of possible things they could have done.

And what the Court said, it's never an easy case when you're talking about the breach of the duty of good faith because the bar is -- and to be clear, that's what we're talking about with respect to my clients -- that the pleadings permitted the conceivable inference there that there was an intentional failure.

And I guess what I would say is that it's sensible enough to think that it could have been found possible in those facts, but the pleadings here don't permit that inference. They say the special committee was on the job; that it was negotiating; that the transaction agreed to was beneficial to the

stockholders; that it was superior to the ones, the alternatives, that were apparently in view.

And in Fertitta, of course, the stockholder wound up buying control of the company, buying a majority stake in the company. That can't happen here because the special committee, when it came back and was reconstituted, made a condition of any transaction getting a cap on ASAC's stockholdings at 24.9 percent, conspicuously missing in the Fertitta case. Indeed, it is the failure of such a protection that allowed the --

THE COURT: Your view here is that they plead your guys did something and, indeed, you would say they plead your guys did quite a lot.

MR. SAVITT: That's exactly right. And if we're arguing about whether it was enough, we're not arguing about a duty -- a good faith claim.

And the other case I want to just say a word about was the Alidina case. It's an interesting one. I'll confess it was not a case I had studied before my friends cited it, so I was grateful for the opportunity.

They point to it as one that excuses their failure to plead facts that show a lack of

disinterest or lack of independence. And I think my friends on the other side like this case because it's one in which independent directors were held answerable for a transaction that benefited insiders at the expense of the public.

And this a little bit relates to the conversation I had with the Court at the beginning and I think is a different proposition than the DiRienzo case that I cited to the Court. While in that sense, that decision might bear a passing resemblance to this situation, when the Court scratches the surface, it will see that it's really very different in ways that matter for disposition.

What Chancellor Chandler made clear there is that the facts supporting the claim were that "The board's act was so" -- I'm quoting now -- "The board's act was so egregious that it must have been the product of disloyalty or bad faith. The decision must lack any rational business purpose."

And the facts there conceivably met that standard because they showed value leaking from the public to the insiders with the acquiescence of the independent directors and with no necessity to consider the challenged transaction at that time. And

for reasons we've talked about, we would submit that there was a necessity to consider the transaction at this time.

Now, we don't have that here. We have a massive benefit to the public stockholders. We can argue about whether it could have been more, but it's all conceded. We have pleadings themselves showing that the available alternatives, including the status quo, were likely worse for the public stockholders.

And it can't be said, therefore, that this transaction lacked any rational business purpose and that it must have been the product of good faith. That was the pleading standard that Chancellor Chandler, we would submit, suggested in that case.

There's a perfectly rational business purpose for this deal. It was value enhancing. I mean, it was alleged in the Alidina case that the independent directors knew, knew, that the CEO was diverting company funds and they knew that there was a breach of duty afoot. It was that knowing aspect that justified the good faith claim there. And it's that knowing aspect that is missing here. So we would say that the --

THE COURT: If this really is a

diversion, the knowing aspect can't be missing.

MR. SAVITT: I'm sorry, Your Honor?

THE COURT: If this really is a diversion, the knowing aspect can't be missing. Your guys signed off on it. So if the ASAC part of the transaction is indeed a diversion, then knowing is met.

MR. SAVITT: I think I'd resist that. Plainly, my clients knew what the terms of the transaction were. Okay. So we're on common ground on that. However, whether the transaction structure as a whole -- and having in mind that the vast bulk of the stock didn't go to the ASAC group. The vast bulk of the stock went to Activision. Whether my clients understood that that transaction structure as a whole, irrespective of whether one wants to ultimately characterize the buyback by ASAC as a diversion, I don't think that sustains the idea that it was a knowing dereliction of duty. And that's the relevant question.

And that's, I think, why this flunks the good faith test and, therefore, flunks the loyalty test and, therefore, flunks the pleading test, at least as to the special committee directors.

So I think I've gotten out most of the points I wanted to make. If the Court has no further questions, we'll rest on our papers.

THE COURT: Thank you, sir.

MR. SAVITT: Thank you, Your Honor.

MR. SACKS: Good morning, Your Honor. Robert Sacks, Sullivan & Cromwell --

THE COURT: Good to see you.

MR. SACKS: How are you doing, sir?

-- for Mr. Kotick, Mr. Kelly and ASAC.

I'm going to address a few different points, Your Honor. I am not going to address the standard of review applicable for purposes of the motion we've made. We've assumed for this purpose that entire fairness is the standard of review. We've assumed that you will not determine today who has the burden of proof on that. You can assume for purposes of this motion that the defendants have that.

So I'm going to address first the fact that what I would second that Mr. Savitt said is that you need to look at the facts that are actually pleaded in this complaint, not all the conclusory assertions of wrongdoing that fill the briefs and the complaint, but the actual facts that relate to this

transaction, which began when Vivendi said, "We need liquidity; we own 61 percent; our restrictions are going to come off," and the defendants tried to sell the company and were unsuccessful in selling the company. This is all pleaded in the complaint.

And so these transactions were negotiated in the face of a controlling stockholder who was going to get liquidity by doing something adverse to the company and under circumstances where the effort to do the value-maximizing thing, potentially, which would be to sell the company, was unsuccessful. Those efforts were made. That's pleaded.

So I'm first going to address the issue of the standard of review of the entire fairness claim. And our argument is that no claim is stated, looking at the complaint, accepting it under the standard of review, which is largely ignored by Mr. Friedlander in their opposition brief, which addresses this point for two pages and never addresses what the applicable standard of review of an entire fairness claim is by the Court.

Second, I'm going to address two unrelated points: the issue of whether any of the

claims assert direct claims. They've asserted twelve claims here. The first ten are breach of fiduciary duty claims: five direct, five derivative. Only the derivative claims -- these, if they state claims at all, would only state derivative claims.

And finally, I'm going to address briefly the breach of contract claims added in Counts 11 and 12 against my clients. Those do not come anywhere near close to stating a claim. I presume they're added for some color about the facts that are in them, but they are not even colorably claims.

So let me first address the standard of entire fairness here. This Court and other Courts have talked about what the standard of reviewing the transaction for entire fairness is. There are two elements of it: fair process and fair substance, or fair price, as it's called in most instances. But you evaluate that by looking at the transaction and what you had before and what you had after.

This Court, in Trados and Rosenblatt, has set forth the standard. You evaluate the circumstances before. You evaluate the circumstances after. And if the corporation is better off after than before, the transaction is entirely fair, taking

into account the entirety of the transaction and the circumstances that led to the transaction.

In this particular -- that is not an objective standard. There's a lot of substance and subjectivity in making that assessment. But it is a standard. It's not anything under the sun to determine whether you like the transaction or don't like the transaction.

The allegations that my clients profited, while they provide a lot of color and emotion to it, largely are beside the point as they relate to this transaction for reasons that are very clear in the other allegations of this complaint, which is, one, Vivendi never offered to sell and would not sell to Activision for a penny less than the price that was negotiated here; and, two, Activision was not in a position to buy any more shares.

And there is no suggestion that my clients in particular had any impact and said "Don't buy the maximum possible." Indeed, the allegations of the complaint are that my clients tried to get Activision to buy as much as it could prudently buy, as determined by the special committee here.

So if you look at entire fairness

here, the allegations of the complaint -- and again, look at the allegations, not the conclusions here -- make very clear that this transaction is fair under that standard.

If that standard is not applied, what is the standard that is going to be applied? That is the standard that Delaware has made clear is applicable to reviewing entire fairness.

Mr. Friedlander's complaint is effusive -- it's bizarre in a sense -- in the benefits to the corporation of this transaction. Everything he says about my client and the benefit my clients received from buying the shares that the company was not able to buy applied to the benefits that the company received from this transaction.

It got rid of the specter of the 61 percent shareholder. It got rid of the specter of what would happen to the company in the event that that shareholder acted in its interest. It enabled the company to buy shares because Vivendi was not prepared to sell itself down to a position where it was no longer in control. It needed to sell enough of its stock. Unfortunately, Activision wasn't in a position to buy enough so that somebody had to buy

more shares. If it wasn't my clients, it would have been someone else. But that's not injury to Activision. That's not injury about which Mr. Friedlander has any standing to complaint in this particular case.

The price, as indicated, was a complete home run in every respect. Nobody would possibly suggest it was not. The complaint indicates that it was below every conceivable valuation that was there.

The company received the NOLs. It eliminated a 61 percent controlling stockholder. So from the perspective of control, before and after, the company was far better off after than it was before. We can all debate whether there could, in theory, have been some other actionable transaction that would have involved disbursing shares to the market, whether that would or would not have been better, but that would have had no impact on Activision itself.

And the question of whether that was better or worse or actionable is not presented by this complaint because there was no such transaction that was available. And the only way the company could buy the shares from Activision at a discount was with a

second aspect of it to get rid of Activision's additional shares.

So from a control perspective, they were better off. The transaction had a negotiated 24.9 percent cap on ASAC. And in addition, Mr. Kelly and Mr. Kotick waived something between 45 and $67 million in change of control payments that they may have been entitled to by virtue of the resignation of the Activision directors.

Courts have recognized that even in an entire fairness case, and even if the burden is on the defendants, you can dismiss it on a 12(b)(6) motion because they haven't pleaded facts to sustain it. At best, what they've pleaded here is a breach. I don't think they've pleaded it, but at best what they've done is pleaded a breach of -- not even a breach. What they've done is raised questions about the process that was followed here but not about the substance of the transaction from a fairness perspective.

And when you look at process, process alone doesn't sustain a claim. You have to look at it in the context of process as it relates to the ultimate substance. And this is not a case like the

cases that go out on the facts where somebody concealed facts, somebody hid facts, somebody lied about facts. This was all out in the open. The special committee was here. Everyone knew what Kotick and Kelly were negotiating for. That's why there was a special committee. They were put up against them. They did what they were supposed to do in this case.

The process that was followed was the right one. Nobody is under any illusion that when they were negotiating, they were negotiating in their self-interest from this transaction. That's why the special committee was there. They were negotiating against Vivendi. They weren't giving a gift to people. They wouldn't have bought stock if they didn't perceive that they could get a benefit by doing so in ASAC.

So the specter here or the situation here and the context here was set up as it should be. There was no missed disclosure, nondisclosure, hidden disclosure. And so you have to look objectively -- or not objectively. You have to look, ultimately, at the substance of the transaction and apply the Court's test. There is no other test to be applied. That is the law. That's the test. Are you better off

afterwards?

And looking at the complaint here, Your Honor, I think there is no question and there are no facts alleged to indicate that this is anything but entirely fair under these circumstances.

Plaintiffs don't cite any cases to the contrary. They don't cite any cases that indicate a different standard for evaluating entire fairness. They ignore that. They give you a page and a half in their brief or two pages in their brief to this entire issue. Don't even address the Trados discussion of the standard or the discussion of the standard that appears in Rosenblatt. They just don't even cite them or discuss them. But that is the standard.

And I believe, Your Honor, based upon that, you can dismiss and should dismiss these claims, and they should be dismissed against everybody.

Let me deal with direct derivative briefly, Your Honor, if you don't have any questions about that. Direct -- I think this is clearly a case where the claims, to the extent they assert claims at all, are derivative claims. Again, they basically take a pass on this in their brief. It's addressed in the last two pages of their brief. They don't really

address the Tooley test. They cite two pre-Tooley cases for it. The test is really one of who suffered the harm and who receives the benefit.

All the claims in this case are classic claims that are brought by shareholders. I mean -- sorry -- brought by the corporation. Right? If you look at what they allege the harm to be, they allege the same harm in their direct and their derivative claims.

The case that largely disposes -- I mean, almost everything here is an allegation that Courts have, time and time again, talked about usurping a corporate opportunity. Corporate claim. Preventing the company from buying additional shares. Corporate claim. Foisting a new control structure, say what you will about that. It's a corporate claim because it's a claim that, effectively, that the company didn't receive enough money or, in this case, didn't receive any benefit for allowing this to come into place. Again, a classic, classic derivative claim; in no way a direct claim.

The case that -- the Agostino case, I would suggest, Your Honor, is the case that most closely addresses the only issue that they seem to

raise here because it only seems to be the issue that there's some future voting right that they suggest that they have that could possibly give rise to a direct claim; that the allowance of a 24.9 percent stockholder under these circumstances therefore will affect the value of the stock and their ability to vote their stock.

Agostino largely disposed of that particular claim in various ways. One, it's effectively a corporate mismanagement claim that is a direct wrong to the corporation. So if it's a claim at all, it's derivative. But number two, it's speculative injury because there is no issue about somebody voting. You can't presume that somebody is going to misuse their voting power at some future date on some unknown future event that has never occurred, isn't in the offing, and isn't even a gleam in anyone's eyes. And so that doesn't even give rise to a cognizable claim in the first place.

But to the extent that it is a claim of giving somebody some elements of voting without a premium, it's a direct -- it's not a direct claim. It is a claim of right to the company.

If you have no questions about that,

I'll pass on that.

Finally, Your Honor, the last claim, the breach claim. These claims against ASAC, which were thrown in at the last minute, should be dismissed, and there are four reasons why. First, the plaintiff lacks standing to bring a direct claim for breach of a contract on behalf of the corporation. That's the end of their direct claim. Plaintiff is not a party to the stockholder agreement. The corporation is. The stockholder agreement has an express no third-party beneficiary claim.

Second, there is a complete absence of facts to state a claim against ASAC, direct or derivative, here. The obligations under this contract came into effect on October 11, 2013. They don't allege a single act by ASAC on or after October 11, 2013 relating to this contract or otherwise. They don't allege anything was done relating to the appointment of Ms. Wynn or Mr. Nolan to the board by ASAC on or after that date. And so it's unclear on what basis they are alleging a breach by ASAC of any obligation that could ever exist.

They seem to speculate that Mr. Kelly and/or Mr. Kotick must have done something to do with

the decision that was made by others to appoint Ms. Wynn and Mr. Nolan to the board, but it doesn't say what that is, and it doesn't suggest that that could have occurred at a time that this contractual obligation was in effect anyway because it alleges that the nomination of them to the board by written consent occurred immediately following the closing of the transaction, which was the time -- the first time the contractual obligation would have ever come into effect.

THE COURT: So assume I were to allow them to replead this count to include references to material that were discussed in the counsel selection process.

MR. SACKS: Would not matter, Your Honor.

THE COURT: Why not?

MR. SACKS: Because all of that occurs before the contractual obligation is in effect. All of that precedes October 11, 2013. There was no contractual obligation before that time.

So let's assume hypothetically that Mr. Kotick and/or Mr. Kelly both said to other directors, I think you should -- I think Elaine Wynn

and Peter Nolan would be very good nominees to the board. They had every right to do that. They certainly had every right to do it before October 11, 2013, because there was no contractual restriction against them doing that. But -- and this is the next thing -- even after October 11, 2013, they had the right to do that because the contract doesn't cover that.

The contract prohibits the stockholder, ASAC, from acting to seek representation on or to control or influence the management, company, board, or policies of the company, or obtain representation on the company board of directors, et cetera. It deals with ASAC in exercising its rights as a stockholder.

It could not be construed the way Mr. Friedlander construes it because it would prevent Mr. Kotick from doing anything as a director, doing anything as the CEO of the company. If his conduct was -- implicated this provision, he acts as a director. He couldn't act as a director. He couldn't act as a manager of the company because this provision precludes ASAC from doing anything to influence the management or control of the company.

THE COURT: Maybe it was a problem for him.

MR. SACKS: Well, no, because that's not the way the contract could reasonably be construed, Your Honor. But you don't have to even get to that, Your Honor, because there is not -- the complaint itself says, contemporaneously with the closing of the transaction, these people were appointed to the board. Contemporaneously with the -- prior to the closing of the transaction, ASAC had no conceivable contractual obligations. They cannot state a claim. There are no facts on which they could state a claim. You can allow them to throw all those e-mails in that they want. They don't implicate any contractual obligation because no contractual obligation existed prior to that time.

Thank you.

THE COURT: Thank you.

MR. FARHANG: Good morning, Your Honor. Michael Farhang, Gibson, Dunn & Crutcher, on behalf of the Vivendi defendants.

Your Honor, I just want to go back to something we highlighted in our papers.

Mr. Friedlander at the leadership

hearing in this matter made, I think, a very telling statement about my client, Vivendi, when he was talking about the lay of the land of this case. He said Vivendi was a differently situated defendant. It is, in my experience, rare to have a plaintiff counsel make a statement like that. And what Mr. Friedlander said was that when you look at profit, when you look at unjust enrichment that's alleged in this case, it's not with Vivendi.

And Your Honor I think made a very astute observation that it's really the inferences in the complaint that are going to judge the outcome of these motions. What I would submit to Your Honor is that --

THE COURT: I don't know if it was terribly astute. I think it's the requisite pleading standard.

MR. FARHANG: Absolute right, Your Honor. I want to focus on it, though, because I think it actually is of assistance to my arguments here today.

What you see when you look at the facts pleaded about Vivendi, Your Honor, is an inference that just doesn't fit. You have

Mr. Friedlander and Mr. Pacchia's allegations about a majority outside stockholder that is using its power to disadvantage the company and minority stockholders. But what you have when you look at Mr. Friedlander's pleadings is a story that doesn't fit with that conclusion.

You have a story that a $5.8 billion sale by Vivendi to Activision of its shares in Activision, even with a majority control of Activision's board, looking good to plaintiffs. In fact, they call at a highly favorable deal. There is no challenge to it. There is no claim for rescission of that deal. There is no request anywhere in this case that Vivendi give back that money.

You have a below-market sale by a majority outside stockholder. Vivendi is a French company. It had an ownership stake. It sold its stock back to Activision, not just below market but below fair value, by plaintiffs' own allegations.

You had, as a result of the sale by Vivendi of its majority control in Activision, a complete termination of Vivendi's current control, future control, and even potential for future control.

A majority stockholder in this case,

according to plaintiffs' own allegations, agreed to contractual restrictions on its ability to ever have representation on the board. It agreed that every single one of its designees would immediately leave the Activision board, never to return. And you had all sorts of other restrictions regarding its ability to ever attempt to influence Activision's governance again or obtain representation on the board.

Mr. Friedlander in his papers and plaintiff in the complaint seek to present conclusory statements about a powerful fiduciary majority stockholder pushing around the company, but there are no allegations in the complaint that suggest anywhere that the party to whom Vivendi sold in the challenged part of this deal was colluding with them.

In fact, some of Mr. Friedlander's recent filings in this case make clear that I don't even know that the plaintiffs believe that anymore, that there was really any kind of unity of interest to do anything to harm the company or its stockholders.

So I think, just to begin, I would like to submit to Your Honor that the allegations in the complaint -- and that's really the only thing that we are here to discuss today -- really simply don't

fit an allegation of self-dealing by Vivendi, which is what plaintiffs will need both to invoke entire fairness and it's what plaintiffs will need to plead and state claims against Vivendi and the Vivendi designees.

As we laid out in our papers, Vivendi, as a majority outside stockholder, has the same right that every other stockholder has to sell its shares. And the case law is clear. We cited cases, Jedwab and Synthes and other cases, that clarify that a majority stockholder does not need to compromise its own interests to benefit the minority in a sale of its stock. There is no due diligence to self-sacrifice.

And here, Vivendi was actually self-sacrificing. It was selling its stock for below fair value. The price that was used for the only transaction in this case that is under challenge, which is the sale to ASAC, was no better than the price given to the company and all of the stockholders of the company.

The only exception that plaintiffs could invoke to a sale by a majority stockholder in this case would be the looter exception. You can't, as a majority stockholder, sell to a party that you

know is going to loot and destroy the company. That is not alleged here and plaintiffs have never suggested that the management of the company were going to destroy the company. It's not a situation, as you've had in some cases with a sale to a strategic buyer, that is going to break apart the company. This was management. And the market, by plaintiffs' very own allegations, reacted very favorably.

So in looking at the claims, Mr. Savitt did a very good job, I think, of laying out what the issues are. There are really two prongs that relate to my clients. There is the corporate opportunity theory and there is the entrenchment and control theory.

I don't believe that plaintiffs have really given an adequate response to the issue raised in the Vivendi defendants' brief about where is the enforceable corporate opportunity here? What plaintiffs would have the Court believe is that when Vivendi, as a majority stockholder, decides to sell its interest, it's somehow required not just to sell to Activision only or give a right of first refusal to Activision but to give the same profitable deal to Activision that it would give to anyone else. Vivendi

doesn't have a choice in that matter. It must offer the same terms to the company.

And even if that were the case, that's what happened here, Your Honor. There is no allegation by plaintiffs that Vivendi colluded with another party to secrete or conceal or steal a corporate opportunity that the company didn't have an opportunity to consider. The allegations of the complaint are that the company considered and didn't take it. Are plaintiffs suggesting that Vivendi should have forced Activision to take that opportunity or held onto its stock and not sold it to anyone because Activision didn't take the opportunity?

So I think that the allegations in the derivative claims, Your Honor, simply don't fit the law. There is no enforceable contractual right that plaintiffs point to. There is no long-standing corporate policy requiring those affiliated with the company to offer their stock to the company first.

This happened to be a very profitable deal for the company that came out of an opportunity that was presented to the company and that the company took advantage of. But, really, there is no law to support any claim that Vivendi did something wrong by

not selling 100 percent of its stock to Activision. There is no fraud alleged here. There is no allegation that ASAC and the insiders got something for free, acquired stock for no consideration.

And the class claims for entrenchment present the same question, Your Honor. How is it that plaintiffs can claim that Activision and its stockholders are worse off as a result of this transaction, even the sale to ASAC, when, as a result of the very sale to ASAC, Your Honor, Vivendi stock gained a majority stockholder in the company and every single minority stockholder after that deal was done was faced with the removal of a majority control of the company, was faced with a higher stock price, was faced with contractual restrictions on that outside stockholder, was faced with a board no longer dominated by that outside stockholder, and in this case, in the end, the result was actually better?

Finally, Your Honor, the business judgment issue -- we've cited the Sinclair case -- I think really is pertinent to the question of the standard of review here. So in Sinclair, as the Court knows, the Supreme Court set up the standard that when you judge an outside majority stockholder or

controlling stockholder's transaction with a subsidiary, the real question is did that outside majority stockholder benefit to the exclusion or detriment of the minority stockholders.

And cases like Sinclair, Synthes, a recent decision, and Jedwab and other cases we've cited make clear that, ab initio, the simple fact of a parent/sub transaction does not, in itself, determine that entire fairness applies.

THE COURT: So what did you guys get in the transaction?

MR. FARHANG: Well, Your Honor, what Vivendi really got was an exit from its majority position.

THE COURT: No. What did you get?

MR. FARHANG: Well, liquidity is what plaintiffs alleged --

THE COURT: You got money.

MR. FARHANG: That's right, Your Honor.

THE COURT: What did the other stockholders get?

MR. FARHANG: They had the opportunity, the same opportunity to get liquidity

that Vivendi had, at a higher price, and without any restrictions. So when Vivendi sold its stock, it was selling at a worse price than plaintiff got when he sold his stock, which is something that's already been presented to this Court by plaintiff, and any other minority stockholder on the open market could have got.

THE COURT: It wasn't selling on the market.

MR. FARHANG: That's right, Your Honor.

THE COURT: Is selling on the market part of this transaction?

MR. FARHANG: Well --

THE COURT: Let's focus on the transaction. What did the stockholders get in the transaction?

MR. FARHANG: Your Honor, if we look at the question --

THE COURT: I'd like you to answer my question, please. What did the stockholders get in the transaction?

MR. FARHANG: I understand, Your Honor.

THE COURT: But you weren't answering me.

MR. FARHANG: The stockholders received a higher share value for the same stock.

THE COURT: They got to stay where they were. Right?

MR. FARHANG: Yes. No --

THE COURT: No change.

MR. SAVITT: No restrictions on voting, no change on --

THE COURT: What did your client get again?

MR. FARHANG: My client got a below-fair-value price for the stock that it sold.

THE COURT: Cash. Is cash the same as getting to stay the same?

MR. FARHANG: Cash for stock?

THE COURT: No, no. So I'm sitting up here. I'm going to hand you cash for your pencil. I'm still sitting up here. You get cash. I get a pencil, and I sit up here. Have we gotten the same thing?

MR. FARHANG: Your Honor, I respectfully would submit --

THE COURT: Have we gotten the same thing?

MR. FARHANG: Stock has a value.

THE COURT: What's the answer to my question, counsel?

MR. FARHANG: Your Honor, cash is different from stock.

THE COURT: What is the answer to my pencil question? It may seem obvious to you, but you actually have to answer my questions.

MR. FARHANG: You've received cash, Your Honor.

THE COURT: No, you've received cash. I've got your pencil.

MR. FARHANG: Correct.

THE COURT: So you're so busy trying not to answer my question that you actually forgot my question.

MR. FARHANG: I apologize, Your Honor, and I take the Court's point. It is correct that the minority stockholders did not get cash the way that Vivendi got cash.

The only point I'm trying to make regarding the transaction is the minority stockholders

had the opportunity, the same opportunity Vivendi had, to get stock.

THE COURT: It's not the same opportunity at all. Your point is they could sell in the market.

MR. FARHANG: Correct, Your Honor.

THE COURT: That's not part of the transaction.

MR. FARHANG: Yes, Your Honor, that's true, but there is no difference in terms of the ability to get cash for stock between selling in the market and selling to a willing buyer, which is effectively what happened here.

And the secondary part of the transaction, the secondary offering, the plaintiffs suggest in their complaint, would have been a sale in the market.

So I take your point, Your Honor, and I'm sorry for taking a long time to answer the question, but the only submission that I want to make on that point is that the opportunities were the same for both. Vivendi did not change minority stockholders' rights, voting rights, liquidity rights, anything like that.

And again, as Mr. Sacks argued regarding the entire fairness question, really, again, it breaks down to fair price. Fair dealing is obviously an issue, but it is not the determinative question. In the end, what the stockholders got in the form of what was sold to Activision was a fair price. Plaintiffs have not alleged that the price paid by Activision for Vivendi stock was not fair.

We've made our arguments regarding the special committee issue. I think that the pleadings and the complaint make clear that at least before the decision Mr. Savitt referred to of the special committee to propose its own disbandment, Vivendi had essentially said, "We're open to whatever transactions management and the special committee want to have."

And the allegation that Vivendi disbanded the committee wasn't in the first round of pleadings and it was changed, but the facts weren't changed.

Regarding the dividend issue, Your Honor, that dividend was going to be a pro rata dividend shared with all stockholders. There was an allegation that this was going to be a special bonus to Vivendi. All stockholders would have made pro rata

the same thing that Vivendi would have made.

And because the arguments about Vivendi's self-dealing and self-interest I think govern both the pleading of the claims and also the standard of review, the directors, who are Vivendi designees, are in the same position, Your Honor. There's no allegation that any directors --

THE COURT: You don't have to elaborate on that point. It's pretty obvious.

MR. FARHANG: Okay, Your Honor.

Unless the Court has any other questions, I will submit.

THE COURT: Thank you.

MR. FARHANG: Thank you, Your Honor.

MR. FRIEDLANDER: Good morning, Your Honor.

I'd like to begin with what I take to be the defendants' central argument, at least the BKBK defendants' central argument, but I think all the defendants' central rhetorical point, that the challenged transaction indisputably benefited the company, all the company's stockholders are better off. And the citation invoked for that, that that is dispositive, is Trados. And Your Honor's decision in

Trados actually was a quote from Sterling versus Mayflower.

THE COURT: Like I said, I didn't create that.

MR. FRIEDLANDER: Yes, well, it was duly in quotation marks. I'm not suggesting otherwise.

THE COURT: I'm often accused of coming up with new things, so I want to make sure that nobody thinks I came up with that one on my own.

MR. FRIEDLANDER: It was a partial quote, so let me give the full sentence so no one is under any illusions what the proposition is.

The full sentence from Sterling versus Mayflower, which was a cash-out merger case -- or a merger case, I should say -- not only is the case of no assistance to plaintiffs, but implicit in it is approval of the test of fairness, which we think the correct one is that upon a merger, "the minority stockholder shall receive the substantial equivalent in value of what he had before."

So we're talking about what stockholders, minority stockholders, get in a merger. And I think that's illustrative of how the defendants

fail to grapple with the unique features of the challenged transaction; in particular, Vivendi's sale of 172 million Activision shares to ASAC as part of a board-approved recapitalization of Activision.

Now, what happened was Robert Kotick and Brian Kelly, which I'll just refer to as BKBK for short, as the parties themselves do, for a $100 million investment in the general partner of ASAC, which is a special purpose vehicle, which I'll abbreviate to SPV, that's otherwise funded by firms with close ties to Activision, in exchange for putting $100 million into the general partner of SPV, they get, I submit, voting control of a company worth over $16 billion and a massive preferred levered return on the entire $2.3 billion paid by the SPV to buy Activision shares at a discount, at a significant discount to the market price and their fair value.

I think the defendants also slight the circumstances by which this transaction came about. BKBK devised the SPV structure as a means to buy control from Vivendi. They insisted on the SPV structure as a condition for Activision buying indirectly a large block of Activision shares from Vivendi at a favorable price. BKBK refused to accept

voting limitations on the shares held by the SPV and voted by BKBK. They refused to support Vivendi's proposed alternative of a public equity offering of the Activision shares in question.

Their obstinance triggered the disbandment of the special committee that had been established to negotiate a transaction on Activision's behalf. And they exposed the company to an imminent harmful alternative, which is that if the board said no, Vivendi would exercise its control and declare an extraordinary dividend in a magnitude that the company's financial advisors believed to be excessive and damaging to Activision.

Now, the defendants' dismissal motions necessarily turn on what I think is an impossible proposition of law, which is that if a manager sees a valuable opportunity for a corporation to exploit, the manager can demand and receive a share of the opportunity for himself or herself as a condition for causing the corporation to exploit it, and that all fiduciaries who approve the transaction in that arrangement are immune from liability.

I'd like to imagine a hypothetical. Let's say that BKBK and the outside directors and

their financial advisors had put together a plan for how best to effectuate the repurchase of control from Vivendi. Let's say they figure out the maximum number of shares that Activision can purchase by itself and they then devise a marketing plan for how to place as many shares as possible, as broadly as possible, in block transactions at prices that are otherwise unavailable for purchases in the market.

So they might say, "Well, there's certain blocks of shares we think can be placed with the company's strategic partners in China. There are certain blocks of shares we think can be placed with the company's large institutional stockholders. And we think there is a block of shares that can be placed with a private equity firm managed by a former director of Activision. And then whatever remaining shares not retained by Vivendi, not done in these block trades, those will be offered to the public."

Now, imagine, then, that BKBK insisted that, as part of that arrangement, they wanted to invest $100 million in Activision shares at below-market prices. Now, could the board agree to confer on BKBK that profit opportunity which is unavailable to the public, that the CEO and cochairmen

get that particular profit opportunity?

Now, the reason I think that particular hypothetical is instructive is because the challenged transaction is so far more problematic and egregious. BKBK assembled equity investors well known to Activision into a personal SPV. The SPV took on significant debt so that it could spend over $12.3 billion buying 172 million Activision shares at below-market prices for which BKBK would get a preferred return on the total $2.3 billion invested by the SPV in below-market shares, below-market-price shares.

Activision spent over $5.8 billion repurchasing sufficient Activision shares from Vivendi so that the SPV shares represented 25 percent of the shares outstanding post-transaction. That's what we mean when we say that Activision helped finance BKBK's acquisition of control. By Activision spending $5.8 billion, we're now talking about this 25 percent block purchased by the SPV that are being voted by BKBK, and the investors in that SPV include large equity investors in Activision that separately own in excess of 10 percent of the company.

BKBK caused two new directors to be

appointed, creating a seven-person board with a new four-person majority consisting of Kotick and Kelly, the managing partner of a $300 million investor in the SPV, Peter Nolan of Leonard Green, and one of the two members of what Mr. Kotick has publicly referred to as his second set of parents.

In summary, there's a huge gain and effective voting control being conferred on BKBK. Activision stockholders are being deprived of the benefits associated with widely dispersed ownership and voting power, and Activision itself is deprived of any economic benefits it could have accrued if there had been an alternative structure.

For example, what if Activision had created its own SPV managed by Activision and had dispersed interest in that SPV to the exact same investors and taken a share for itself of the difference between the market price or the fair value price and the price that Vivendi was willing to take for its block?

THE COURT: And your friends seem to say that not only is that option not available, but there simply was no other way to do the deal. And that because there was no other way to do the deal,

you're out of luck.

MR. FRIEDLANDER: Well, there was no other way to do the deal because of the conduct of the fiduciaries, starting from the fact that nobody seemed to mind that BKBK are out on their own, thinking about ways to deal with the Vivendi problem, long before a special committee is being created. The special committee directors, before there was a special committee, are sitting in on a meeting in which that's floated. The whole idea of an SPV or pipe investment is being floated by JPMorgan on behalf of Activision to Vivendi. And it's not until after the special committee was formally created that they went and retained counsel that then did some things.

But on that particular point about the disbanding of the special committee, which is after Kotick threatened to resign, threatened to have the board fire him because he refused to go along with an alternative that was actually on the table, which was the public offering by Vivendi, the special committee members themselves suggested that the special committee be disbanded even though the authorizing resolutions said the special committee will remain in place until the board concludes that the existence of

the special committee is no longer required or that a potential transaction is not likely to occur. So that's Paragraph 47 about the authorizing resolutions, Paragraph 87 that the special committee suggested their own disbandment.

It is alleged in detail in the complaint about how what that meant was that BKBK and Vivendi then were encouraged to negotiate together to come up with a proposed deal to the special committee which is what the special committee, once they retained Wachtell, tried to avoid, which was like getting expanded powers to insert themselves into the negotiating role on behalf of Activision so that they were then presented with a transaction upon the recreation of the special committee in which all the economic terms had been worked out and it was just a question of corporate governance after BKBK had refused over a period of months to have any limit on the voting power of the SPV. And which was not limited. In fact, the full -- they received full -- the SPV had full voting power.

And there was no noisy withdrawal. There was no resignation in disgust, even after the fact and after Vivendi went away and the harms were,

you know, and the alleged harms were mitigated. They're sitting on the board now.

Now, there are several doctrines of law that negate the notion that managers can impose self-interested conditions on the corporation's pursuit of a favorable business opportunity. One -- I'll call them the side-deal cases.

Now, I must confess I was unaware of Alidina myself, but it's not a stand-alone case by Chancellor Chandler who was talking about Parnes versus Bally Entertainment, which is a well-known case, Crescent Mach I Partners versus Turner, which I guess may be not as well known.

THE COURT: It's up there.

MR. FRIEDLANDER: And what Aldina said was a board's acquiescence to a diversion of the funds from the company to the CEO that's beyond the bounds of reasonableness can lead to an inference at the pleading stage that the board likely could not have approved the transaction in good faith.

And I think that line of cases, that proposition of law, would be enough to dispose of the motions to dismiss on their own. Because here we have a similar diversion of an economic opportunity. And

by the way, it was found -- that was a merger transaction. It was found to be the best transaction available. It was -- of the possible ways to acquire that company, it was the high bid that was taken by the company. So maybe all the directors thought they were doing a wonderful thing taking the high bid. But what they acquiesced to was that a subsidiary is being sold to the CEO at an unfair price. So it's pretty close. There are other cases that are pretty close here as well, other doctrines of law. Here we have a diversion of voting power to BKBK and the co-investors in the SPV.

The next category I'll call the Guth v. Loft cases, because they include not just the corporate opportunity cases but also Venoco versus Eson, as well as -- there's a bunch that just directly cite Guth v. Loft that pertain to those as well, which reflects the well-settled principle that fiduciaries are not allowed to act in their own interests antagonistic to the corporation's interests.

And there, directors were found to have violated their duty of loyalty because they were acting in their interests. They were stockholder directors who were acting in their interests as

stockholders. They got themselves elected to the board and were currying favor with a large stockholder in that effort in a way that was adverse to the interests of the corporation.

Here, it's contrary to Activision's interests for BKBK to impose a transaction structure in which they assemble a control block and take for themselves a preferred return on an investment in below-market shares.

Another case I've put under this category is Agranoff versus Miller, where the corporate opportunity doctrine was applied not just to shares subject to a right of first refusal but also to warrants. It was represented that 35 percent of the company was being held by BT. And the corporation had an interest in not seeing those warrants get bought by a third party and had expressed an effort to try to negotiate an extension of the warrants and get a right of first refusal on the warrants. And an insider helped a third party get control of those warrants.

And what's interesting about it and applicable here, it was that even if the corporation didn't have the money or the cash to buy up those warrant shares for itself, what was an alternative

that was being violated was the ability for the corporation to arrange to facilitate the pro rata purchase of those shares from the existing stockholders of the company.

And again, that's very similar to here, a very clear corporate policy being enunciated by the special committee directors, and that first phase of the special committee, about not having any -- not creating a new shareholder group or creating a group with control or elements of control. And that was frustrated here by the ultimate structure of the transaction, and which BKBK undermined that corporate policy by blocking alternatives to their own proposal.

Kohls versus Duthie, it's referred to as a particularly striking opportunity and peculiar facts. I submit we have similarly peculiar facts. And every case is different, but this is also a particularly striking opportunity for the SPV and for BKBK, and a lost opportunity here for the corporation to arrange for a widely dispersed stockholder base.

The third category of cases would be the entire fairness cases. Frankly, I did not expect the liquidity interest of Vivendi to be a

controversial point. In our brief, we cited McMullen versus Burris and Synthes. We could have cited other cases, which I regret. We could have cited infoGROUP in which --

THE COURT: There's a lot you could have cited.

MR. FRIEDLANDER: In Re Answers, Southern Peru. But for infoGROUP, liquidity was a benefit unique to Gupta, the large minority stockholder, I think 34 percent holder; and it was reasonable to infer that he suffered a disabling interest when considering how to vote in connection with the transaction that would provide him with over $100 million in cash.

Here, what Vivendi received, just to be clear on the record, they received over $8 billion in cash, which they desperately needed to maintain their debt rating and to pay their dividends, which otherwise were being funded out of a revolving credit facility, and the company was under much distress in the marketplace.

In terms of cases we cited on entire fairness, what I thought was particularly apt was the Dairy Mart case, which similarly involved a

restructuring transaction, a buyback of interest held by a controller, but then done in such a way that the insiders got voting control.

And what Chancellor Chandler wrote was that to the extent the plaintiffs' position is that entire fairness review requires the Court to strictly scrutinize all aspects of a transaction to ensure fairness, I think that plaintiff is right.

THE COURT: What do you think of Mr. Savitt's view that Dairy Mart was a do-nothing case, and because, based on your pleadings, this is at least a done-something case, his folks get out of the pleading stage?

MR. FRIEDLANDER: Dairy Mart is a very close analog to this case because what it was, in terms of do-something, do-nothing, was you had a controller, Mr. Nirenberg, a former founder, who wanted to assert control in a certain way, and the company then did a buyout transaction a certain way, which then got restuctured in a certain way that insiders benefited in a certain way.

And the special committee directors thought this was the greatest thing in the world. Look, we got rid of the threat from Mr. Nirenberg. We

did this.

But the point being made on the entire fairness point was that we said you have to look at what the insiders got: something for nothing in that case. Every case is a little bit different. Here, it's not something for nothing. It's a preferred return on a $2.3 billion investment for $100 million.

THE COURT: Your view is it's really great stuff for something.

MR. FRIEDLANDER: Yeah. Right. For the opportunity to invest in below-market securities. Yeah.

So this was a do-something, just like that -- just like Dairy Mart was a do-something.

But let's turn to look at category four of cases, which I call the defending against threats to corporate control. There were some arguments in the briefs that somehow this is all discretionary. Well, you may defend -- the board may defend, if they choose to, but they don't have to, except for this Fertitta case, which has very unusual facts which are not identical to those here, so we can't have them, so therefore, it's subject to a motion to dismiss --

THE COURT: You're going to rise to the "not a passive instrumentality" line?

MR. FRIEDLANDER: Your Honor, I have the quote in front of me from Unocal.

THE COURT: I could hear it coming. I could hear the crescendo building. I could.

MR. FRIEDLANDER: In Unocal "... the board's power to act derives from its fundamental duty and obligation to protect the corporate enterprise, which includes stockholders, from harm reasonably perceived, irrespective of its source." And then it continues on.

And that was at issue in Fertitta. If I may invoke the recent Sotheby's case, creeping accumulation of control by a stockholder acting alone or with others, without paying a control premium, is a cognizable threat from which people can defend.

And so it makes sense, the special committee was pushing very hard to reduce or to lower the voting power of the SPV, but they gave up. They just -- frankly, in the face of Kotick and Kelly's intransigence, they just conceded the point and conceded not only the 25 percent vote but also the power to vet investors in the entity.

And you'd think if there was anybody you would want to vet, it would be Fidelity, owning over 7 percent, or Davis owning 3-1/2 percent. So they gave in.

Also, on the defendants' point, there is a waiver of Section 203. Defendants proclaim to be mystified that we don't say more about it or that it's only mentioned once in the complaint, I think was the allegation, that it wasn't repeated more often. But what it rebuts is the notion that a controller has an unfettered right to confer voting control on others by selling stock; that this is in the hands of the board.

And if you want to cite cases from 50 years ago, you have got to realize, the law has changed in certain significant respects, including the passage of a statute called 203, which is why you generally don't see a lot of these transactions and why the decision of all the directors to waive 203 is subject to entire fairness, just like the rest of the transaction is subject to entire fairness, and what real governance restrictions got put in place.

Here, I think we can talk on whether they were breached or ineffective corporate governance restrictions or both. As far as the composition of

the board, Kotick and Kelly got who they got to be new directors of the board. The stockholder agreement was, I think, attached to the stock purchase agreement and it was back in July. It didn't take effect until October 11th. But it's in place and it's a flat limit on ASAC putting anybody else on the board. And it's very -- directly or indirectly, with the exception of Kotick or Kelly. And -- I mean, so the question of whether it ties up Kotick or Kelly as directors or managers, yes. And I think that's what it was meant to do.

THE COURT: I think your friends say they skated in under the wire.

MR. FRIEDLANDER: I don't think they get the benefit of that because of the use of the word "indirectly." These are not concurrent. They are sequential. The transaction closed, the stockholders agreement took effect, and then these two individuals were added to the board.

If there is repleading, I would not just want to put in the e-mails of what happened in September, but these people are being put up again, and I think it's the same problem. Because there is no exemption for acting as a director, acting as a

CEO.

And also, you got to wonder how much was disclosed to the special committee folks about who Elaine Kotick [sic] was, since they say we speculated in our complaint that she had known Kotick since he was a college sophomore and that everything we cited in our brief was just about Mr. Wynn, not about Ms. Wynn.

So in terms of what's hidden or not from the special committee, I think there's some aspects of this case which were hidden from the special committee.

But from a fiduciary-duty perspective, I think it's important, this issue of do BKBK have control. And in Cysive which, I think everybody agrees, is the case most on point --

THE COURT: We got Sotheby's now. Some very able advocates made arguments there about what constitutes effective control.

MR. FRIEDLANDER: Right. Sotheby's is on point as well.

And Vivendi talks about the voting restrictions on themselves, which are important to this, because they've been removed from the running as

a block of stock that can be used to counterbalance the 35 percent held by either ASAC or people in conscious parallelism or whether or not the people form a 13G group or not. It's a problem.

You have to look at the practical realities of the situation, is what Cysive says. Look at the practical realities of the voting power. And in that case, on those particular facts, it was, quote, "... the natural inference from the record is that they" -- the two other individuals -- "are close allies of ... [the CEO] who have benefited in material ways from his managerial control ...."

Certainly from Fidelity's perspective and Davis' perspective, Leonard Green's perspective, I think they would think they benefited from the managerial control of Mr. Kotick and Mr. Kelly.

Also in Cysive, we were talking about the chairman and CEO of the company who was also the company's creator, and it was also -- his practical control of the company was evidenced by the presence of two of his close family members in executive positions in the company. The fact that Elaine Wynn is put on the board I think is further evidence of the control exercised by Kotick and Kelly over the company

through ASAC and just through their other capacities as CEO and chairmen.

There is a footnote argument in the reply brief that Kotick and Kelly gave up 30 million to $45 million in payments. Generally, on motions to dismiss, I don't think you get to rely on footnote arguments in reply briefs on facts that aren't in complaints. But what they did put in, which they say is public record, is these employment -- these waiver letters, these letters acknowledging they've given up certain funds to which they were entitled. But the predicate for that is to establish the entitlement.

The entitlement would be in the employment agreements, which are not in the record, which I'm certainly not willing to admit that these two individuals had entitlement to those change of control payments on the facts of this transaction.

But let's just indulge the assumption and say they were, arguendo. What we're talking about, then, is Mr. Kotick was one of the highest compensated CEOs in the country, who also is standing to benefit 30 million and Kelly 45 million from a change of control. Why can't they be asked by the board of directors, "Let's put together the best

transaction possible for the company to bring about a change of control from Vivendi back to the public." And that just never happened. And it looks like Kotick and Kelly had different kinds of magnitude of numbers in mind about what they wanted to achieve out of that transaction.

I don't have much more, Your Honor, but on the class/derivative, certainly a lot of the case is derivative. I think the control aspects are class, because the question is whether all the claims, all the aspects of the transaction, are exclusively derivative. So is there no class relief possible?

I'm just -- I would think if you're going to say two cases have been overruled by Tooley, In Re Gaylord Container and Carmody versus Toll Brothers, which both are about 15 years old, you might try to find a case that says that. And instead, I'm told that they're relying principally on a case, Agostino versus Hicks, which cites Gaylord approvingly for what the standard is, and says on the facts of that case, it wasn't met.

THE COURT: I think I just did the radical maneuver since briefing of relying on Gaylord.

MR. FRIEDLANDER: Excuse me?

THE COURT: I think I actually in the past month relied on Gaylord in a derivative/direct situation.

I mean, look, what Tooley said was "this concept of special injury was really confusing," but they then went on to say, you know, "but all those cases that applied it, they got it right." So it's basically a terminology thing. We don't like this terminology of "special injury" because people couldn't apply it consistently and it was cognitively difficult to grasp, but they basically said, "Look, the underlying principles, we're still running with them."

MR. FRIEDLANDER: Right. And here, part of the relief we're seeking is reformation of the --

THE COURT: Someone said in the briefing all you asked for is money damages, and I looked at your prayer for relief, and that was not an accurate representation.

MR. FRIEDLANDER: Unless Your Honor has any questions, I have nothing more.

THE COURT: In deference to our court reporter, I'd like to take 10 minutes, and we'll come

back at 10 of. We'll stand in recess until then.

(Recess taken)

THE COURT: Welcome back, everyone. Please be seated.

Time for reply.

MR. SAVITT: Thank you, Your Honor.

We will try to be brief, appreciating that there is much on the Court's docket.

I did want to make a few remarks, though, in reply, trying to pick up on some of my friend's comments and observations.

The first thing Mr. Friedlander said was that the key point, the overarching point from the perspective of the defendants, is that the deal increased stockholder value to Activision. And I want to say that, at least with respect to the special committee, that is not the key point of our motion. It is a relevant fact and it's, of course, pleaded, but it's not the point at all.

Our key point is that the pleadings don't show that anyone was careless. They concede they were not. They don't show disloyalty and they don't show good faith. And the good faith point is the important one, because I don't perceive any

dispute from my friends on the other side that what we're talking about is whether the case, as pleaded, makes out a claim of bad faith. And the real question is whether there are pleadings here sufficient as to the special committee defendant that amount to a failure of good faith. And that is a high pleading burden, and we would submit, for the reasons that we talked about, that it is not met.

It is, of course, relevant that the transaction that the committee ultimately authorized was one that enhanced stockholder value and was not destructive of it, as were nearly all of the cases that my friend cites, but it is not really the point. The point is that if you take all the facts as true as to my clients, they don't add up to a fiduciary breach.

And I do think the cases that Mr. Friedlander cites tend to illustrate the point. And I want to say a word on his argument in general in those cases and then just talk briefly about a couple of them specifically. I want to emphasize the point that Your Honor and I talked about earlier.

In this case, the special committee was faced with a situation where no arrangement would

be value destructive. That is pleaded. That was not the case in any of the precedents that Mr. Friedlander has cited to the Court. In every one of those situations -- and they're distinguishable on many grounds -- but in every one of them, the independent directors, had they the power, could have said, "Don't do it."

Now, these special committee directors could have said, "Don't do it," but the result in that case would have been the destruction of stockholder value. That was not alleged in any of the cases that my adversary cites.

And we'd submit that it fundamentally distinguishes this case from those because that difference means that in those cases, a Court looking at these facts could say, "Well, if you undertook a transaction that had problems, and you didn't have to, can't I infer from that that there is a good faith problem?" Conceivably, maybe I can. I'll let the claim go. But that inference doesn't work in this case.

And Mr. Friedlander never responds to how proving the best deal available in circumstances where doing nothing is a destructive alternative, a

value-decreasing alternative, can amount to bad faith. And that, we'd submit, is the test.

I won't take the Court through each of the cases that you spoke with Mr. Friedlander about. I do want to say a couple of words about them. As I say, none of them involve situations where a special committee or independent directors were faced with a status quo ante that was going to be harmful to the company if there was no movement from it.

I also don't believe, with -- it's very difficult to tell, in some of these cases, whether the people who were not interested in any of the transactions were named and whether the claims survived against them.

So I believe that there is, with the exception of the Kohls against Duthie case -- and I brought that to the Court's attention because it specifically addressed the question, well, how do you decide when the people not directly implicated have had a claim stated against them or not? That issue is pretty much never ventilated in the cases, and it is the issue in front of the Court here.

I mean, the cases that Mr. Friedlander cited are really miles away from this one with

respect, at any rate, to my clients.

Agranoff, for example, that is a situation in which it was alleged that the defendants clandestinely funneled information to corporate insiders to facilitate a selfish motive with no corporate justification in circumstances where it did no corporate good. It is not our case.

Parnes against Crescent was not cited in my friend's papers. And I would say to them that that involved, at least in the Parnes case, unlawful activity that was known to be unlawful by the independent directors who facilitated inside transactions, again, with no benefit to the company and in circumstances where doing nothing was an entirely acceptable alternative. That stated a claim. That doesn't remotely suggest that this case states a claim.

And its cousin cases that Mr. Friedlander cites, Crescent and the Alidina cases, same basic objection there. They don't support the proposition that the directors, situated as the committee members here are, have violated their duty of good faith. And that is, indeed, the pleading requirement.

Mr. Friedlander drew attention to the meeting involving JPMorgan before any special committee process. And that is the subject of a few paragraphs in the complaint. We responded to it in our papers. And I will add only that the special committee here was formed as soon as there was anything like a concrete proposal to spend time working on.

The fact that the special committee directors, knowing of Vivendi's coming liquidity issues and the expiry of the governance restrictions, heard advice from JPMorgan about potential transactional alternatives, is not a breach of duty. It doesn't support an inference of breach of duty.

And the fact that a special committee in those circumstances was not immediately formed, we would submit, only shows that there was not a reaction in circumstances where it wasn't required. There isn't any question but that the special committee was formed as soon as there was anything like a transaction prospect. And the entire process unfolded with the special committee constitutes similarly moving from the initiation of the company to its disbandment.

Mr. Friedlander said that the resolutions establishing the committee called for its dissolution when a transaction was not likely to occur. I would submit that the complaint itself, plaintiffs' answering brief itself, expressly says that those were the circumstances when the committee was dissolved. It was said that they weren't going to do any of the deals that were on the table. Folks had walked away from the negotiating table, and the special committee was not in a position to propose anything else.

We would submit that under those circumstances, it can't be argued that the resolution that says the thing should be dissolved when the transaction isn't likely to occur was in any sense disrespected.

When the transacting parties came back to the table, now after the Vivendi governance restrictions had fallen away, the committee was reconstituted, and at that point didn't simply accept the transaction that had been proffered to it but negotiated the governance restrictions, the holding cap, the standstill agreement, that were ultimately baked into the stockholders agreement.

And while Mr. Friedlander and his client certainly are well within their rights to believe that those governance restrictions were not sufficiently robust, and while many would have preferred that they be more robust, the rule of law is not that giving in on a negotiating point, particularly when failing to strike a deal is highly, highly risky, is a claim for bad faith. And in a sense, that is the legal rule that my friend is sponsoring, and that just can't be the law.

And I should say, there is talk of the unremitting duties of the directors and the fact that they ought not be passive instrumentalities. Well, we take that on board. These directors weren't passive instrumentalities.

It is said grandly that they should have done things. But what? What? A poison pill wouldn't have done a thing here. Moreover, they didn't have the power to put it in. This wasn't a board majority. It was three special committee directors with a limited mandate.

And there isn't any argument that they stood by idly and did nothing. There is just no pleading to support that idea. The only thing we've

heard about what they could have done was say to Vivendi, "Stay your governance authority."

And as I said earlier, and I know the Court wasn't 100 percent with me, but I'll say it again, it isn't a breach of duty, a failure of active engagement as a board member, not to demand from a counterparty something that is not plausibly in prospect, something that is not due to be given.

And the cases going to the proposition that the enforcement of contractual obligations don't amount to a fiduciary breach -- and I'm thinking, for example, of the Sirius case and Superior Vision in this connection -- I think they bear on this point. Vivendi had its contractual rights. It doesn't compute under our law to say that because the special committee didn't say, without authority, "give up those rights," that they therefore committed a breach.

Just a quick word on the Dairy Mart decision. I wanted to point out that, because I think it's important, that was a Unocal case. It was an unusual set of circumstances. Mr. Friedlander said it was analogous to this one. Here again, insofar as my clients are concerned, we really have to beg to differ.

That was a situation where a deal was struck and then it was changed, and it was changed in a way that helped certain insiders and had no justification from a corporate or stockholder facing perspective, and was justified, nevertheless, as a defensive measure in the Unocal framework.

I would argue, Your Honor, that that isn't remotely like this case. This isn't being justified as a defensive measure. This isn't a circumstance where it's even alleged that the special committee directors who approved this didn't achieve something of value for the corporation. Moreover, as I've said, there was risk if no action was taken. Not so there.

And the situation in that case really involved whether people who, on both sides of the transaction, were going to be answerable to it in circumstances where there was no justification for the deal. Not the case with the special committee, with the special committee directors.

At the risk of being a broken record, I'll say with Section 203, which my friend has raised, that that harm, whatever its merits might be as to other directors and other defendants, cannot lie

against the special committee directors. We addressed that point and the authorities relevant to it in our papers, and we will rest on them, unless the Court has further questions.

And I'll stop there in general unless Your Honor should have anything more for me.

THE COURT: Thank you, Mr. Savitt.

MR. SAVITT: Thank you.

MR. SACKS: Thank you, Your Honor. Hopefully, I'll be brief as well.

I want to go back to the facts as alleged, not to Mr. Friedlander's spinning of hypothetical what-ifs, maybe-ifs. And it's clear that he's focused today on benefits that my client has supposedly received, which only reinforces the benefits that the company received by this transaction multiple times over.

But let's go back to what's alleged in this complaint, not what's being spun now. Because what is being spun are not inferences from the facts that are alleged.

First, the company could not buy enough shares to satisfy Vivendi's desire. That's what gave rise to this problem. It's not that my

client came in and said, "I want a benefit from you." This was presented to the company to buy shares. The company could only buy so much. It only had certain capacity.

Mr. Savitt's clients, with experts, determined the maximum amount they could buy. But the situation that existed was somebody had to deal with the remainder of the shares that Vivendi needed to get rid of, because it would not sell to the company just the limited amount of shares that the company could buy because it would have left them in a situation where they sold themselves down below control of the company with no exit strategy to get rid of the remainder, so they had to get rid of the remainder.

So that was the situation people found themselves in, not a situation where my client went in and said, "Give me some benefit and you buy less." There are no facts in the complaint that support that. That's not what's alleged here.

What is the test for entire fairness? What does it require, Your Honor? What is the standard? Mr. Friedlander never addressed that issue. There are tests. He talked about Trados and how that was a merger case. Absolutely, it was a merger case.

But it set forth a test, a standard, for evaluating whether something meets the standard of entire fairness. Are shareholders better off after -- is the company better off afterwards than they were before? That's the standard. It's the standard in the merger case. I suggest it's the standard in any transaction that the Court is looking at in the context of entire fairness, because it is fair to somebody if they are better off than they were before.

Look at what happened in Trados, Your Honor. That was a post-trial decision, obviously, not a motion to dismiss, but Your Honor concluded that even though there was not fair dealing in that particular case, and even though the plaintiffs got zero in that case, it was still entirely fair because they had no legal right to get anything in the first place.

So when you look at it in that case, they were no worse off than they were before because they had no legal right to it. The fiduciary could have negotiated a transaction that would have given them a benefit, but they had no legal right to it. They were as well off afterwards as they were before. That's a test. It's a standard.

And I suggest it's the standard Your Honor ought to apply in this particular case in looking at this transaction on the pleadings because they do not plead anything that gets beyond that standard, because they concede that, under that measure, this transaction was entirely fair to Activision.

The record -- the allegations are there is no transaction that is identified as being better for these stockholders. This isn't a case where there is a discernible alternative transaction that was rejected that was better for the stockholders that my client blocked because it was better for the stockholders.

What was unfair about this transaction? Not the price. Not the number of shares, because it was the maximum that the record and even the allegations indicate that the company could repurchase.

And what alternatives did my clients supposedly block? Even all inferences aside, the only thing that they supposedly objected to was this very same transaction where the second part of it would be a secondary market sale by Vivendi of its shares.

Well, that wouldn't have been a benefit to Activision. Activision wouldn't have gotten the benefit of those shares. That money wouldn't have gone to Activision. It would have gone to other third parties who would have gotten it.

Now, even if you assume that that transaction was achievable, and even, again, go through five steps of mental gymnastics to assume that that's the case, that doesn't give rise to a claim that this transaction wasn't entirely fair because Activision would not have benefited anymore by that.

One of the things that I think keeps getting lost in Mr. Friedlander's sort of generalized way of looking at this and generalized way of attacking my clients for supposedly getting a financial benefit, for which, frankly, they don't have to apologize, and there is not necessarily anything wrong with it, is there is no stockholder opportunity doctrine. And we need to look at this not in just sort of general notions but under the settled law of Delaware. There is a corporate opportunity doctrine.

And the facts pleaded here indicate that that was satisfied, even assuming that the opportunity to repurchase stock is a corporate

opportunity, which I concede for purposes of this motion, that opportunity was presented to the corporation in the way it should have been.

Now, once the corporation determined what it could and would have bought, it was up to the -- these shareholders had a right to do that. They didn't owe duties to other stockholders, not to themselves, to take advantage of an opportunity to buy stock. There is no legal right to that. And so as we, again, look at this from the perspective of Activision, this transaction was entirely fair.

Let me say a word about -- again, so I just urge Your Honor to apply the legal standards, not just the general sense of my client supposedly got a benefit so, therefore, there should be some remedy to the public stockholders, because the public stockholders here got a significant benefit as well. It facilitated a transaction.

And Your Honor, you asked Mr. Farhang the question about your pencil and what did they get. Vivendi got cash. What did the stockholders get? Did they get a pencil? What they got in this particular case in return for cash was they had a higher percentage interest in a corporation. That percentage

interest increased more than it was before because the reduction of the percentage was at a below-market price. So they benefited significantly.

THE COURT: I agree with you on that, but it's indisputable that that's not cash.

MR. SACKS: Absolutely. It was not --

THE COURT: That's what Mr. Farhang couldn't get a handle on.

MR. SACKS: Okay. Absolutely. There is no question that you weren't trading cash for cash. You were trading cash for something else. The value of what they got was arguably better than the cash, was worth more than the cash that was paid for it, if you will.

Let me just -- on Gaylord, Your Honor, yes, Gaylord was a pre-Tooley case, but that's not the only reason Gaylord doesn't apply. Gaylord is different. And let's look at Agostino, which discusses Gaylord, not with approval but distinguishing it. And the distinction is what's entirely appropriate in this particular case.

Gaylord was a rights plan case, Your Honor. And what it was was a case that interfered -- it affected the voting rights of stockholders by

impairing those rights. It changed those rights. Whereas before, they had a right of one out of ten, they suddenly had a different percentage right. They no longer had the right. And it was coupled with supermajority provisions and other amendments that effectively deprived them of rights to vote.

Contrast that with Agostino, which distinguishes that, because what Gaylord was is it changed the rights of certain stockholders and not others. Agostino was simply a case where there was a sale of stock and it didn't change anyone's voting rights. All it did was change the shareholder composition of the company, but it had no impact on those rights in and of themselves. Maybe the change in composition would affect the outcome of a vote, hypothetically, in the future, if something were to arise.

Again, in that particular case, the Court found that it was hypothetical and not actionable and otherwise. But if it were, again, the Court went through, even assuming it was ripe, even assuming you could bring the claim, because all it did was affect whether the company got the right consideration for selling those additional shares,

that affected the corporation. That's what this claim is. That was a derivative claim in that case in Agostino.

And it distinguished Gaylord and Carmody on the basis, Carmody being a dead-hand pill case, on the basis that what those cases did was it changed the voting rights of stockholders. We don't have that here. We have Agostino in this particular case.

And that's the only aspect of this I think at this point that Mr. Friedlander is still continuing to argue is potentially a direct claim. I think he essentially is conceding the remainder of his claims are all derivative, but that claim is derivative as well, Your Honor.

Finally, on the contract claim, Your Honor, again, a lot of what-ifs, and maybe somebody should be bound by a contract before the contract obligates them to be bound. No. You don't become obligated by a contract until you're obligated by that contract. And everything that's been identified, accepting everything as you want, predates the time that contract came into effect. If nothing else, that claim has to be dismissed, Your Honor.

Thank you very much, unless you have any questions.

THE COURT: I don't, thank you.

MR. SACKS: Thank you.

MR. FARHANG: Your Honor, I'll be very brief. One point I just wanted to emphasize, my friend on the other side, in his arguments, is arguing from the entire fairness standard. In the briefs, we put as one of our central propositions that the Sinclair case and all of the progeny up until two years ago which called Sinclair a sound case says that the standard for a majority stockholder transaction with a subsidiary is really look at whether there's self-dealing and look at whether there's a benefit obtained to the exclusion and detriment of the minority stockholders.

The one point I want to make, Your Honor, is that the pleadings in this case, in order to take the case over the motion to dismiss hurdle, really needs to get beyond that. The arguments that we made in our briefing and, you know, what I want to make here today is that the allegations don't amount to a specific benefit to the majority stockholder that's to the exclusion of and detriment of a

minority.

In a case like Sinclair, you have a parent imposing huge dividends on a subsidiary, and the Court talked a lot about the effect that this had on the subsidiary. There were negative ramifications for that in terms of preventing expansion plans, all sorts of other things, but the Court focused on the benefit, and was that to the exclusion of and detriment of the minority stockholders.

I would submit that the facts, as pleaded here, do not indicate that whatever Vivendi got -- and I take Your Honor's point about the cash -- that was not to the exclusion of and detriment of the minority.

And that's the point I wanted to make, Your Honor.

THE COURT: Thank you.

What I think I'd like to do is go ahead and give you my thoughts on this motion now and then we'll move on to the counsel dispute.

This part of the hearing is so that I could consider the motions to dismiss that have been filed in C.A. No. 8885. For the reasons I'm going to give you, with one small exception, I am denying the

motions to dismiss.

I'm going to skip over the factual background. It's discussed in the complaint. We're at the pleading stage. Everyone is limited, whether they like it or not, to the allegations of the complaint. We also discussed this transaction a lot when we were all together previously in the injunction phase hearing. So I'm going to get right to the analysis.

The pleading standards under Rule 12(b)(6) are minimal. That's the Central Mortgage case. When considering a motion to dismiss, a trial court, like me, has to accept all well-pleaded factual allegations, even vague ones, if they provide the defendant with notice of the claim. I have to draw all reasonable inferences in favor of the plaintiff and deny the motion unless the plaintiff couldn't recover under any reasonably conceivable set of circumstances susceptible to proof. That's all a paraphrase of Central Mortgage.

For purposes of analysis, I'm going to break the claims into three categories. First is the breach of fiduciary duty claims. Those are Counts 1, 2, 3, 4, 6, 7, 8, and 9. And these are framed

differently to be analytically helpful to the defendants and the Court so that they can understand the theories raised, but these are basically different ways of saying that the defendants breached their fiduciary duties under Delaware law. So it's really a fiduciary duty analysis.

As Mr. Friedlander suggested, and I agree with him, the central theme of the defense is that Activision stockholders were better off after the transaction than they were before; and hence, everything is fine and there is nothing to litigate here. This case, the defendants say, should be dismissed on the pleading stage essentially on that ground alone.

Well, if you're an adherent of the beliefs of that noted political philosopher George W. Plunkitt, that probably works.

Now, to remind you, George Plunkitt was a New York legislator in the early 1900s who served as part of Boss Tweed's regime in Tammany Hall. He is best known for the concept of honest graft. What he distinguished between was the concept of honest graft and dishonest graft.

Dishonest graft is where you do

something solely for your self-interest, where you take a bribe or you do something simply for a self-interested purpose. Honest graft is where you do something that's good for the state, good for the government and good for yourself.

What he argued quite strenuously is he made all his money through honest graft. So he would learn about a transaction. For example, the city was going to buy new property or was thinking about buying a property. He would go out and buy that property, and then he'd resell it to the city. Well, the city got its property so the city was better off. And you know what? He was better off, too. And as he said, "That's fine." He's best noted for his quote, "I seen my opportunities and I took 'em."

So that's pretty similar to what is alleged to have happened here. Alleged. I stress this. I am at the pleading stage. The defendants make very good arguments as to why, ultimately, on the merits, various defendants are differently situated. They make very good arguments as to why, ultimately, the special committee in particular may well have been presented with an impossible situation and did the best it could. Similar theories apply to Vivendi.

But we're at the pleading stage.

Yeah, it's possible to say that Activision stockholders were better in a sense, but it's really not clear to me at the pleading stage whether a better transaction, namely, this type of secondary offering or even some other opportunity, wasn't, in fact, available.

And in my view, a secondary offering, as opposed to the BKBK transaction, would have conferred a clear and obvious benefit on Activision and the public stockholders. Namely, there wouldn't be a new controller aligned with management or essentially functioning as management.

This is not inconsistent with the what-you-had-before test. What the stockholders had before was shares that included a range of possible expectancies. Even in the nonfiduciary context, we recognize claims when people tortiously interfere with business expectancies.

Here you had a fiduciary, Vivendi, come to Activision with a need. That was a need that could be used and potentially exploited to benefit the corporation. And what is alleged is that fiduciaries, instead, worked out a transaction that worked to the

great benefit of certain of them.

Now, again, I am not suggesting that this is necessarily a lay-down case and the defendants are going to lose, but I have to judge the allegations and figure out whether there is a reasonably conceivable theory on which the plaintiff could recover.

I don't think the fact that you may be able to show that there was a benefit in the stock price and that, in some grand sense, you're better off than you were before, means there is a license to skim. I certainly don't think it means there is a license to grab. And what's alleged here isn't just skimming. It's grabbing.

So I don't believe, at least at the pleading stage, that the, "Hey, there's nothing to see here" because the stockholders necessarily benefited inherently means that there's no claim.

What I think I have to do is ask, initially, "What is the standard of review?" I don't think I can analyze a claim for breach of fiduciary duty before I know what the standard of review is. Why? Because it's different standards that you use to judge the claim.

So as I suggested to Mr. Savitt, I think the special committee here is briefing this as if the rabbit is already in the hat and this is a business judgment rule case. Certainly, if this is a business judgment rule case, then the complaint has to do things like rebut the presumption that directors acted with due care. They have to rebut on a director-by-director basis the presumption that directors acted loyally and in good faith.

When the standard elevates to, for example, entire fairness, the threshold question is whether the transaction was entirely fair. One then looks at the directors and asks on an individual basis, did they act for an improper motive?

Now, at times, it may be so clear that at the motion phase, one can determine the second-level question before the first-level question, but that is a tough lift.

Here, I think, entire fairness, at least based on the allegations of the complaint, is the standard of review. This is a challenged transaction that confers a benefit on a controlling stockholder that was not shared with the rest of the stockholders. That benefit was liquidity. Vivendi's

need for liquidity, as I said, was an opportunity that certainly could have been and may, in part, have been successfully exploited here for the benefit of the corporation, but it also created a situation. It created a dynamic. Vivendi's threats created a dynamic. They created an environment in which fiduciaries had to act. And based on its threats -- and again, perhaps those threats led to a transaction that was ultimately fair to everyone -- but based on its threats, Vivendi got a unique benefit; namely, liquidity.

I do think it is accepted in our cases that differential liquidity is a unique benefit that creates self-interest. That's McMullen. That's Answers. That's New Jersey Carpenters Pension Fund against infoGROUP. That's TeleCorp.

I'm going to digress a moment to address the you-can-sell-to-anyone defense. Yeah, it may be that you can sell to anyone, but you didn't here. What you did here was you actually chose to sell to the party to whom you owe fiduciary duties. And you chose to sell to the party to whom you owe fiduciary duties in a transaction in which you cut in other fiduciaries for private benefits.

Now, again, that all may prove out to be fair, but it takes two to tango. Here, it takes three to tango. And the question is the degree of tangoing. What Mr. Savitt wants to say is, "We didn't tango. We even told those guys we didn't want to dance. We told them we're definitely not tangoing. We want to do this in an entirely different way," et cetera. But after the threats and disbandment, et cetera, it is alleged there was a different method of proceeding at the special committee level.

Likewise with Vivendi. Vivendi wants to say, "Hey, we just wanted to sell. We didn't have anything to do with this. We sold below market. Look at somebody else." That may be true. You may ultimately prove that. But at least at the pleading stage, we have a transaction in which three people, three sides, Vivendi, BKBK and ASAC, and the special committee, were tangoing.

I don't see any structure here that would take this transaction out of the entire fairness test. This certainly isn't an MFW arm's-length equivalency set of protective devices such as a committee and a majority-of-the-minority vote. Vivendi didn't agree to things up front. There wasn't

the back-end protection. And at least as alleged, there were threats made against the committee.

Now, to talk a little bit more about the special committee, I do think that there is a lot in the complaint -- and I think the complaint is appropriately and commendably candid about this -- that the committee seems to, particularly early in the process, have tried to do some very good things.

The better inference may well be that the committee did all it could do, but at this stage of the case, I'm not permitted to say what is the better inference and what is the worse inference. Part of the reason why I'm not permitted to say what is the better inference and what is the worse inference, particularly in a controller context, is because, as Chancellor Allen admonished in Kahn v. Tremont, these controller transactions present the greatest risk of favoritism and coopting of a committee. They create that risk and they create a potential for a transaction where everything looks fine on the surface but, in fact, there are actually problems lurking beneath.

Here, I think we have an exceptional transaction. I think these are quite exceptional

facts. This is not a situation where, again, I believe that the special committee members can be dismissed at the pleading stage. I think this is a case where the facts as alleged in the complaint require further factual development.

And I would say that the same analysis, albeit to a lesser degree, applies to Vivendi. I say "a lesser degree" because I think that because Vivendi clearly got something it needed badly, namely, liquidity, and thereby essentially created the opportunity for the dynamic that the plaintiffs allege that certain fiduciaries were able to exploit, there is a need for and a greater, stronger inference of Vivendi's involvement in a problematic way that survives a pleading-stage motion and requires discovery to develop.

Now let's shift to the aiding and abetting claims. The standard here is a familiar one. A third party may be liable for aiding and abetting a breach if the third party knowingly participates in the breach. For purposes of a motion to dismiss, knowledge of an officer or director is imputed to the entity.

I think for ASAC, this is an easy one.

There is an alleged breach of duty that survives the motion. For purpose of the motion, Kotick's knowledge is imputed to ASAC. I think the complaint sufficiently alleges, as I've indicated, potential remediable harm.

Let me focus in briefly -- and I've done this out of order, and I apologize, but one of the species of fiduciary duty claim that is alleged is this corporate opportunity claim. And it is contended that it is never the case that a corporation can have an interest in purchasing its own stock.

Perhaps there is a conflict in Delaware law as to this issue, but I think there certainly are -- I don't think it's an absolute rule. I think there certainly are times when a corporation can have an interest in purchasing its stock. Indeed, I think part of the premise of Brophy is that the corporation has the confidential information and the corporation is entitled, should it wish to, exploit it by, if it wants to, purchasing its own stock. And as we all know, the Kohlberg case reinstated Brophy in its full glory. So I am not convinced at all that this is a situation where one can say that there was no corporate opportunity

involved whatsoever.

Now, there is this argument made, "Hey, it was presented. They did everything that they could," et cetera. That, to my mind, is a factual position. Perhaps it will prove out. If it proves out, so be it. But it is not, I do not believe, a factual position that I can embrace at this stage, given the allegations of the complaint.

In terms of the breach of contract claim, I'm going to dismiss this with leave to replead. I do so on the idea that the contract actually became effective after the breaching conduct took place.

Now, it's interesting. I think it was Rabkin where the contract right was going to expire. The controller waited. The controller did the squeeze right after the contract expired. The contract right expired. The Supreme Court said, "Hey, that's a breach of duty." Does that apply on the front end? But that's a breach of fiduciary duty claim. It's not a contract claim.

So I think to the extent this currently pleads a contract claim, it needs to be dismissed, but I will dismiss it with leave to replead

so that the allegations relating to timing can perhaps be better fleshed out.

In terms of the arguments about whether these claims are derivative or direct, I think under the Tooley test, as particularly illustrated by first then-Vice Chancellor now-Chief Justice Strine's decision in Loral, which the Delaware Supreme Court subsequently affirmed, these claims are both. Probably both. The one exception is the breach of contract claim.

The breach of contract claim is actually what Hawes v. Oakland was talking about when we originally developed all this stuff about derivative claims. That's what people used to do back then. They would try to get federal jurisdiction by suing the corporation to cause the corporation to assert its contract claims against another party. That was the original type of derivative claim. It wasn't a claim against directors or officers for breach of duties of the corporation. It was, "Hey, enforce your rights against third parties." So I think that one is classically derivative.

These others, I think, have aspects of both, and I'm not going to attempt to parse them at

the pleading stage for two reasons. First of all, I think that to the extent they are derivative, demand is futile. And then, further, I think that to the extent that the parsing would happen at this stage, it would potentially limit the scope of this Court's remedial discretion, or at least there would be arguments that this Court was thereby limited to some remedy solely related to money back to the company.

I think Loral teaches that this Court is not so limited. What the Chief Justice did in Loral was he fixed a problem by addressing rights at the stockholder level. It seems to me that that type of remedial relief is potentially in play here. I'm not saying it's going to happen, but I'm also not going to rule it out. And so I'm not going to say that these claims are exclusively derivative. I do think there are aspects of the harm that are direct.

So for all those reasons, with that one exception, namely, the breach of contract claim, I am denying the motions to dismiss. Given the nature of this transaction, the involvement of the controlling stockholder, the allegations of rather large diversions of consideration to insiders, and the consideration of what was allegedly a high-pressure

situation, first by one fiduciary of Vivendi and subsequently by other fiduciaries, namely, Kotick and Kelly, this is not a situation where the various fiduciaries' involvement can be parsed at the pleading stage. I think the complaint states a claim and it will go forward.

Movants, any questions?

MR. SAVITT: No, Your Honor.

MR. SACKS: No, Your Honor.

MR. FARHANG: Nothing, Your Honor.

THE COURT: Anything from you, Mr. Friedlander?

MR. FRIEDLANDER: No, Your Honor.

THE COURT: All right. Let's move on to the counsel dispute.

MR. JENKINS: Good afternoon, Your Honor. And may it please the Court, David Jenkins for Mr. Benston.

I know that the Court does not like to hear these disputes. You've heard one already in this case. That was probably one more than enough. So I don't come here lightly. We think this is important. If this was a minor matter of we just didn't agree with the way Mr. Friedlander was going forward, we

wouldn't be here, but this issue is important, and it is in the best interests of Activision to bring the claim here we seek to bring.

We tried to resolve it; couldn't do so. I'll leave that there. We have limited the motion as much as possible. We are not seeking to displace Mr. Friedlander and his group as co-lead counsel, for obvious reasons. They've done a great job so far, including today. All we want to do is add the Brophy insider trading claim. If Your Honor agrees with us, I am confident that Mr. Friedlander and I can work out the details.

Your Honor knows the Brophy claims better than I do. You've written on it a number of times.

THE COURT: I thought I knew them. I thought I understood them. But now we're -- I didn't get it. So but now, I follow Kohlberg, so I guess I do understand them.

MR. JENKINS: And I am attempting to follow Kohlberg as well, Your Honor. The elements are simple. We only need two. We need a corporate fiduciary who possessed material nonpublic company information and we need to have a corporate fiduciary

who used that information improperly by making trades motivated by what they knew. And Kohlberg Kravis says that. Brophy goes back to say it. We have a number of decisions on that. We have both here.

At least for purposes of today, we have alleged that Messrs. Kotick and Kelly had material nonpublic company information in two respects. They knew about Vivendi wishing to sell its stock at a below-market price. Secondly, they also knew about the fact that the company's stock was likely to take off because they were showing very good results. And they obviously used this as a basis for their trading. They didn't start to seek investors in ASAC until they knew about the Vivendi situation, so it's obvious what they did here.

This is a potentially significant claim. We checked out the market prices yesterday. Mr. Kotick's and Kelly's paper gains to date are approximately 1.2 billion. I get that by 178 million shares times approximately $7 a share. I could be off a little bit one way, but this is a big claim. As I understand the Supreme Court's pronouncements in this case, under a Brophy claim, you can potentially get disgorgement.

THE COURT: Whether or not it's proven on the facts, that's what I understand the law to be. If Brophy, then full disgorgement is available.

MR. JENKINS: Right. Again, for today's purposes, I think we have to assume that we get there. But we could get full disgorgement. That's 1.2 billion. That's a lot.

Mr. Pacchia did not bring it. He brought many things and I'm happy he survived. It's in the best interest of the class and the company to do so. But he didn't bring this one. "We tried. Didn't work out." And he's acknowledged that he didn't bring it. We attached the letter. We've put in -- in his answering brief, he said his considered decision not to add a claim based on alleged insider trading is no basis to alter the leadership structure.

I know Mr. Friedlander. I'm sure he looked at this carefully and just made a contrary conclusion. With respect, I think it has to be added.

Mr. Pacchia does try to downplay the importance of the Brophy claim by arguing that it requires an innocent counterparty. Cites to Oracle on that. With respect to Oracle, it does not stand for

it. And even if it did, the Supreme Court has now made crystal clear what the requirements are. There are two. We've alleged them both.

Let me go to -- that's the substance of our argument. Your Honor, I'm sure, understands that better than I do.

Let me go to two other points that were made. One is delay and one is the practicalities. On the second one, practicalities, I was not here at the last counsel dispute but I've read the transcript. And Your Honor had questions: Okay. How is this going to work out? And I'm going to attempt to answer them.

On the delay, Mr. Friedlander says, "Why didn't you file last fall?" Perhaps, in retrospect, we shouldn't have made a 220 demand, but that's something I normally suggest. Make the 220 demand. The Supreme Court has told us many times, use the tools at hand. So we made the 220 demand. At the time of the leadership structure, we didn't have the documents. We've since gotten them.

We could not, in good faith, I thought -- this was my decision -- file the complaint at that time still with the 220 demand out there. So

we couldn't do it. In retrospect, would it have been better that we didn't file the 220 demand? Sure. But I had to go based on what I knew at the time; and what I knew at the time was contrary. So that is the reason why we weren't here last November.

I've also -- Mr. Pacchia also raises that it's taken a while to get here. Here we are, June, and we have a trial date coming up. I will get to that in a minute. We filed our complaint back in March. There was -- some of the intervening time was we tried to work this out. Both Mr. Friedlander and I know how little the Court wants to decide these things. We tried. We couldn't do it.

There are practicalities here. We recognize that we are walking into an existing situation. So, as we said in the papers, we will abide by the current trial date. We will coordinate discovery. Those are the two big issues, so that we don't lose the favorable trial date and the defendants aren't bothered by different discovery demands.

If Your Honor agrees with us, Mr. Friedlander and I, I am confident, can work the rest of it out.

That's my pitch, Your Honor. If you

have questions, I'm happy to try to answer them.

THE COURT: No. Thank you.

MR. JENKINS: Thank you, Your Honor.

MR. FRIEDLANDER: I'm never one to shy away from a leadership fight generally, but I think it might have been better in this case if my opponents had stood down on this one.

I don't want to make it personal. I don't want to make it emotional. They accused us of inadequate representation in their papers but now they say we did a great job, so I'll call that even.

Whether it's the Hirt factors, whether it's cause, as required in the case we cited, to come in late and disturb a structure, it's got to be something big like inadequate representation. They had a claim, and it's not our job to play defendants and defend against the claim, but it's our job to assert claims that make sense. As plaintiffs' lawyers, we do it all the time. Does this claim make sense? And we heard their claim, and it seems to have two problems with it.

Now, I know we're all prophesying about the future of Brophy law because Brophy law is a common law doctrine, and it's subject to change and

it's flexible and depends on the facts and the circumstances and it depends on our Supreme Court. And it's hard to ignore that the Chief Justice of the Supreme Court wrote not just once but wrote it twice, and the second time he quoted what he said the first time and he italicized it, and said, Brophy stands for the proposition that "directors who misuse company information to profit at the expense of innocent buyers of their stock should disgorge their profits."

We said that's a bit of a problem here because who are the innocent buyers of their stock here when you have a transaction between two fully informed sets of fiduciaries?

And then we raised a practical problem, rhetorical question, saying how would this rule apply in other circumstances? I said imagine you have a corporation with three stockholders, two of whom are cofounders, comanagers, coowners co-everything, and there was another stockholder. One of the coowners, cofounders wants to sell. One of the coowners, cofounders, comanagers wants to buy. Can the transaction happen? Or can the third person say, "Aha, that was a transaction between -- using confidential information."

And I would submit that I don't know what percent of the Delaware corporations on this, still under -- who are paying their franchise taxes, are probably more of the two- or three-stockholder corporations versus the multibillion-dollar widely disbursed shareholder corporations, but if you're going to come up with a rule and say it's so clear that this is the rule and you say it always applies and it's a summary judgment thing and you don't even need to take any discovery and you can go ahead and do your thing and try to prove up what happened over the course of a year and we just got our silver-bullet theory that's going to get judgment, I think it's got to be a rule that makes some sense. And I haven't heard a defense of it.

Confident we can work out the details? No. I'm not confident we can work out the details, Your Honor. To be co-lead counsel is a big deal. To be co-lead counsel in a significant case is a big deal. And I think the Court wants the right team leading the charge, making decisions about everything and for how the case is litigated and how the case -- not even just how it's resolved. How everything happens. How do depositions happen?

And I think this would just be a complete and utter distraction. And I think the best they can hope for from their perspective is that they plead a complaint, they plead something, motions go forward, and they would hope the case resolves while the motions are pending before their claim is dismissed. Then they would say, "We're co-lead counsel."

I don't think it should be indulged, Your Honor.

THE COURT: Thank you.

Mr. Jenkins, reply?

MR. JENKINS: Three things. I don't recall criticizing Mr. Friedlander's leadership in our motion. If I did so, I apologize. We have a dispute over this, but that's different than criticizing his leadership.

Two, I heard him say, I think, well, it sounds like Brophy is going to be overruled in the Delaware Supreme Court. I don't read any of Chief Justice Strine's pleadings that way. But, in any event, I think we have to deal with the law as it is right now and not guess as to what might change.

THE COURT: Certainly, I do.

MR. JENKINS: Right. And Mr. Friedlander says he's not confident we can work out the details. I don't know how to answer that. I am.

So those are my only three comments. If Your Honor has questions, I will attempt to answer them.

THE COURT: No, that's fine. Thank you.

MR. JENKINS: Thank you.

THE COURT: I appreciate Mr. Jenkins' efforts on behalf of his client. I am going to deny his motion.

Mr. Jenkins is an excellent litigator. He is somebody who gets results. He's somebody who has won contested leadership fights before. He certainly has credibility with the Court. But in this situation, I don't see any reason to upset the existing leadership structure. I think the existing leadership team has been functioning certainly adequately, which I do think is the standard.

The plaintiffs' Bar overuses the adjective "vigorous." They use the adjective "vigorous" where there is an entire absence of vigor

in what they've done. But in this case, I would actually say that "vigor" is probably a pretty decent adjective.

I think that it is within the judgment of lead counsel to determine what claims to assert. As with any type of exercise of fiduciary authority, there are potentially limits on that. So if there were some reason to think that Mr. Friedlander was not exercising informed judgment or, for some reason, had some conflict as to a particular claim or ideas along those lines, I think one could certainly imagine a Court wanting to take that into account and, under those circumstances, potentially limiting the judgment of lead counsel. Under the circumstances presented, however, I see no reason to do so.

In terms of evaluating the Brophy claim, all I will say is that I do believe that Brophy is a subset of breach of fiduciary duty law. It's breach of fiduciary duty law applied to specific circumstances. I think what Mr. Friedlander's complaint pleads, among other things, is breaches of fiduciary duty. So I do not believe that the absence of a claim particularly and specifically titled "Brophy" materially alters the risk/reward profile of

this case in such an extreme fashion that it would cause me to see a need to second-guess the judgment of the current leadership team. So I will deny the motion on that basis.

What I don't want to happen -- and I would like to find out from Mr. Jenkins about this -- what I would be very disappointed to have happen is for there suddenly to be a second front opened in some other jurisdiction. Having come here, subjected yourself to this Court's jurisdiction, and represented to this Court that you are acting for the benefits of the company and the class and not for your own benefit, I think one could question if suddenly there appeared a new front somewhere else.

So what I would like to know is if that is something that is potentially in the offing, or if there is an undertaking that you can offer that that won't happen so that I don't have to think about addressing it in some form of relief.

MR. JENKINS: It never occurred to me to do so, and I will represent we will not be involved in that.

THE COURT: All right. Great. I appreciate that, Mr. Jenkins. I just wanted to -- it

was something that I'm sure was on the defendants' minds. And since it does happen very often, it's something that I wanted to flesh out so there weren't any misunderstandings. Sometimes people think that I've given them leave to go do things, and I didn't want you to think that I was implicitly giving you leave to go open another front someplace else.

All right. Thank you, everyone, for your time today. I appreciate it.

We stand in recess.

(Court adjourned at 12:54 p.m.)

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CERTIFICATE

I, JEANNE CAHILL, RDR, CRR, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 136 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, Delaware, this 6th day of June, 2014.

/s/ Jeanne Cahill

Official Court Reporter
of the Chancery Court
State of Delaware