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Case No. 8885-VCL

IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

IN RE ACTIVISION BLIZZARD, INC., STOCKHOLDER LITIGATION	))	Consolidated C.A. No. 8885-VCL

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF HIS MOTION FOR CLASS CERTIFICATION

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PRELIMINARY STATEMENT

Lead Plaintiff Anthony Pacchia ("Plaintiff") respectfully submits this brief in support of his Motion for Class Certification. Plaintiff and the claims he asserts satisfy the requirements of Court of Chancery Rule 23. Plaintiff, accordingly, respectfully requests that the Court issue an Order certifying this action as a class action under Court of Chancery Rules 23(a), 23(b)(1) and 23(b)(2) on behalf of a class (the "Class") defined as all holders of Activision Blizzard, Inc. ("Activision" or the "Company") common stock as of July 25, 2013, together with their successors and assigns, excepting defendants and their affiliates, which, in the present context, includes investors in ASAC II LP ("ASAC") and their affiliates.

On July 25, 2013, Activision, Vivendi, S.A. ("Vivendi"), and ASAC entered into a stock purchase agreement (the "Stock Purchase Agreement") pursuant to which, for a price of $13.60 per share, Activision agreed to purchase a Vivendi subsidiary that held 428,676,471 Activision shares and ASAC agreed to purchase 171,968,042 Activision shares from Vivendi (the "Restructuring"). $13.60 represented a 10% discount from the then-market price, which was expected to and did rise significantly upon the public announcement of the Restructuring, given, among other things, its accretive pricing. Activision Chief Executive Officer Robert Kotick and Activision Co-Chairman Brian Kelly control ASAC through a general partner that is entitled to preferred returns.

In the Restructuring, Kotick and Kelly obtained control over Activision. Upon the closing of the Restructuring, ASAC became the owner of 24.7% of Activision's outstanding shares. Other investors in ASAC include affiliates of FMR, LLC ("Fidelity"), which, through affiliates, separately owned an additional 8.6% stake in Activision (*see* Ex. A hereto), and affiliates of Davis Selected Advisors, L.P. ("Davis") that separately owned a 3.1% stake in Activision. A majority of the post-closing Board of Directors of Activision consisted of: Kotick; Kelly; Peter Nolan, managing partner of ASAC investor Leonard Green & Partners, L.P. ("Leonard Green"); and Elaine Wynn, a longtime close personal friend of Kotick's.

Kotick and Kelly engineered negotiations over the Restructuring so that they, through ASAC, could obtain control over Activision at a discount. They used their positions at Activision to solicit firms with close ties to Activision as investors in ASAC. They put forward ASAC as a potential purchaser of Vivendi shares, rather than working on behalf of Activision to solicit direct investment in the Company. They opposed the alternative of a public offering by Vivendi, and refused to support an equity or debt offering for a transaction that did not involve ASAC. They rejected voting limitations demanded by the Special Committee of directors and forced the disbandment of the Special Committee.

The Court summarized Plaintiff's case as follows:

> Through the transaction, Vivendi got the liquidity it needed, Kotick and Kelly got control of Activision, and their investment vehicle, ASAC, got

> to purchase shares of stock from Vivendi at a discount to the market price. The announcement of the transaction led to an increase in Activision's stock price. As a result of the transaction bump and the discounted price, ASAC had an unrealized gain of over $725 million as of the first day of public trading after the transaction closed. The Complaint alleges that faithful fiduciaries would have sought and obtained a transaction that generated greater value for Activision and its stockholders.

In re Activision Blizzard, Inc., 86 A.3d 531, 534 (Del. Ch. 2014). ASAC's unrealized gain as of today stands at approximately $1.1 billion.

Plaintiff's Third Amended and Verified Complaint (the "Complaint") seeks reformation of the Restructuring, disgorgement of gains, damages and enforcement of a Stockholders Agreement to require removal of Nolan and Wynn from the Board of Directors. Counts One through Five and Eleven are pled as class claims. Counts Six through Ten and Twelve are pled derivatively. Plaintiff moves for an order certifying a class consisting of:

> all stockholders of Activision Blizzard, Inc., as of July 25, 2013, including their legal representatives, heirs, successors in interest, assignees, and transferees of such foregoing holders, excepting defendants, investors in defendant ASAC II LP ("ASAC") and any stockholders affiliated with such investors (the "Class").

For the reasons stated herein, the Class satisfies the requirements of Court of Chancery Rule 23, and Plaintiff respectfully requests that the Court issue an order certifying this action as a class action under Rules 23(a) and 23(b)(1) and (2).

STATEMENT OF FACTS

A. The Parties

Plaintiff is an individual investor who, through his retirement account has, at all relevant times, been a stockholder of Activision. Plaintiff owns 2,472 shares of Activision, and he has been a shareholder continuously since 2009. Plaintiff is an attorney who has served in a fiduciary capacity on public and private boards of directors, and as a court appointed examiner, plan administrator or liquidating trustee. (*See* November 8, 2013 Affidavit of Anthony Pacchia (D.I. No. 62)).

Defendants are Kotick, Kelly, ASAC, its general partner, ASAC II LLC ("ASAC GP"), Vivendi, its director designees, Philippe G.H. Capron, Frederic R. Crepin, Regis Turrini, Lucian Grainge, Jean-Yves Charlier and Jean-Francios Dubos, and the members of the Special Committee, Robert J. Corti, Robert J. Morgado and Richard Sarnoff.

B. The Claims

Plaintiff alleges that the director defendants and Vivendi each breached their duty of loyalty in various ways. To serve its liquidity needs, Vivendi threatened to harm Activision by issuing a debt-financed extraordinary dividend. Kotick and Kelly used their positions and corporate information to assemble a personal acquisition vehicle that would buy corporate control from Vivendi at a discount, and undermined all efforts to explore or implement an alternative transaction that would allow Activision and its public stockholders to reap the benefit of buying back control from Vivendi. The

Special Committee members acquiesced to the threats made by Vivendi, Kotick and Kelly, failed to take defensive action, and allowed Kotick and Kelly to buy control at a discount. ASAC and ASAC GP aided and abetted Kotick and Kelly.

The Complaint pleads that (i) ASAC purchased a 24.7% block of Activision stock from Vivendi for $13.60 per share, a price that was a discount to market and a further discount to both the expected post-Restructuring stock price and the *pro rata* intrinsic value of Activision's shares, (ii) the 24.7% block, when combined with the Activision shares directly owned by ASAC's investors and the managerial power exercised by Kotick and Kelly as senior officers, effected a transfer of control to Kotick and Kelly, (iii) the Restructuring would not have been approved absent threats made by Vivendi and Kotick, (iv) Kotick and Kelly used corporate resources, corporate relationships, and confidential information to raise money for ASAC and acted furtively in doing so, (v) there existed feasible alternatives to ASAC's purchase of the 24.7% block that the Company could have pursued from the outset, in lieu of allowing ASAC to buy the block, and (vi) the Special Committee did not defend against obvious threats to corporate policy or take any defensive measures. (*See, e.g.*, Compl. ¶¶ 7, 16, 39, 56, 58, 87, 89, 90, 96-98, 104-106.)

All of the counts of claimed wrongdoing have been pled as both direct and derivative, on the theory that claims that are not exclusively derivative may be brought

directly.[1] None of the defendants have moved to dismiss any of the claims for failure to make demand pursuant to Court of Chancery Rule 23.1. The basis for classifying the claims as direct is that ASAC's purchase from Vivendi of the post-Restructuring 24.7% block, coupled with shares owned by ASAC investors, effected a transfer of control to ASAC's investors, despite the availability of alternatives that would have allowed for control to rest in the public stockholders, thereby depriving public stockholders of the economic value and voting power associated with the realistic ability to participate in a proxy contest and accept a takeover premium.[2] Such harms are individual in nature.[3] To rectify this individual harm, Plaintiff seeks to "Reform[]

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1 *See Gatz v. Ponsoldt*, 925 A.2d 1265, 1268 (Del. 2007).

2 The Class definition therefore properly excludes defendants as well as non-defendant investors in ASAC and their affiliates, since participants in the control group have not suffered the same type of injury as the Class. *See, e.g.*, *Barbieri v. Swing-N-Slide Corp.*, 1996 WL 255907, at *6 (Del. Ch. May 7, 1996) (approving class certification which excluded non-defendant parties who were insulated from the injury to the Class) (Ex. A hereto).

3 *See, e.g.*, *In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 84 (Del. Ch. 1999) (challenge to poison pill and charter and bylaw amendments is individual, because when a board takes actions "that diminish the ability of non-management stockholders to elect a new slate of directors, entertain sales proposals, and to amend the corporation's charter and bylaws, the resulting injury to the non-management stockholders is independent of and distinct from any injury to the corporation" and "is to the stockholders within the corporate structure that have lost relative power, not to the corporation as an entity."); *Carmody v. Toll Bros., Inc.*, 723 A.2d 1180, 1189 (Del. Ch. 1998) (challenge to adoption of dead hand poison pill is individual because it involves claimed wrongful interference "with the shareholders' right to elect a new

the Stockholders Agreement so as to deprive Kotick and Kelly of their control over the Company through ASAC." (Compl. at 45.)

board" and "the right to vote is a contractual right and an attribute of the Toll Brothers shares").

ARGUMENT

I. PLAINTIFF SATISFIES THE REQUIREMENTS OF DELAWARE COURT OF CHANCERY RULE 23(a)

Court of Chancery Rule 23(a) establishes the threshold requirements that must be satisfied for an action to proceed as a class action:

> 1. The Class is so numerous that joinder of all members is impracticable;
>
> 2. There are questions of law and fact common to the class;
>
> 3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> 4. The representative parties will fairly and adequately protect the interests of the class.

Ch. Ct. R. 23(a). If Rule 23(a) is satisfied, at least one of the subsections of Rule 23(b) must be satisfied for the action to be maintained as a class action. Thus, class certification is appropriate if the action satisfies the four requirements of Rule 23(a), and fits "within the framework provided for in subsection (b)" of Rule 23. *Nottingham Partners v. Dana*, 564 A.2d 1089, 1094-95 (Del. 1989); *accord Prezant v. De Angelis*, 636 A.2d 915, 920 (Del. 1994). Plaintiff satisfies the requirements of both Rule 23(a) and 23(b).

A. Rule 23(a)(1): The Class Is So Numerous that Joinder of All Members Is Impracticable

The Class easily satisfies the numerosity requirement of Rule 23(a)(1). As of September 30, 2013, there were approximately 1,124 million shares of Activision stock issued and outstanding. *See* Activision Prelim. Proxy dated September 30, 2013 available at www.sec.gov/Archives/edgar (an excerpt of which is attached hereto as Ex. C). Even after giving effect to the Company's repurchase of 428,676,671 shares of Activision as a result of the Restructuring, there are close to 700 million shares of Activision common stock outstanding. *See id.* Where, as here, a class is comprised of the common shareholders of a publicly traded corporation, the numerosity requirement of Rule 23(a)(1) is satisfied. *See, e.g., In re Lawson Software, Inc. S'holder Litig.*, 2011 Del. Ch. LEXIS 81, at *4 (Del. Ch. May 27, 2011) ("[T]he numerosity requirement is satisfied by recognizing that the Company's common stock is owned by thousands of shareholders. Joinder is impracticable.").

B. Rule 23(a)(2): Questions of Law and Fact Are Common to the Class

Rule 23(a)(2) requires that there be at least one question of law or fact common to all members of the class in order to certify the class. This requirement is satisfied, for example, "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *Leon N. Weiner & Assocs. v. Krapf*, 584 A.2d 1220, 1225 (Del. 1991).

Here, Plaintiff's claims are predicated on defendants' breaches of fiduciary duty and aiding and abetting of the same, which turn on facts that affect all class members similarly. The resolution of the Action for all proposed Class members rests upon the answers to the following factual and/or legal questions, among others:

1. whether the director defendants and Vivendi, as a then-controlling shareholder, breached their fiduciary duties in connection with the approval of the Restructuring;
2. whether ASAC breached the Stockholders' Agreement by causing the appointment of Nolan and Wynn as directors; and
3. whether the Class is entitled to equitable relief or damages to remedy the individual harm caused by the current control structure.

Since "the Complaint alleges breaches of fiduciary duty that implicate the interests of all members of the proposed class of shareholders. … there are 'questions of law [and fact],' common to the class." *In re Lawson Software*, 2011 Del. Ch. LEXIS 81, at *4 (internal quotation marks omitted).

C. Rule 23(a)(3): Plaintiff's Claims Are Typical of the Claims of the Class

The typicality requirement is satisfied where the named representatives' interests "arise[] from the same event or course of conduct that gives rise to claims [or defenses] of other class members, and the claims are based on the same legal theory."

Weiner & Assocs., 584 A.2d at 1226; *Youngman v. Tahmoush*, 457 A.2d 376, 380 (Del. Ch. 1983). In the context of a challenged corporate transaction, "[a]ll claims grow out of the same events and courses of conduct and the same legal theories would apply. As one regularly finds in challenges to the conduct of fiduciaries in the merger context, the typicality requirement is satisfied here." *In re Lawson Software*, 2011 Del. Ch. LEXIS 81, at *6.

D. Rule 23(a)(4): Plaintiff Will Fairly and Adequately Protect the Interests of the Class

Rule 23(a)(4) is satisfied where, as here: (i) the named Plaintiff's interests are not antagonistic to other members of the class; and (ii) Plaintiff's attorneys are qualified, experienced, and generally able to conduct the litigation. *Emerald Partners v. Berlin*, 564 A.2d 670, 673-74 (Del. Ch. 1989). Rule 23(a)(4) does not require that the named party be "the best of all representatives" but merely that such party is "one who will pursue a resolution of the controversy in the interests of the class." *Price v. Wilmington Trust Co.*, 730 A.2d 1236, 1238 (Del. Ch. 1997) (quoting *Ross v. A.H. Robins Co.*, 100 F.R.D. 5, 6 (S.D.N.Y. 1982)).

Plaintiff Pacchia and his counsel have already shown that they will fairly and adequately protect the interests of the Class. As a current stockholder, Plaintiff's economic interests do not conflict with the interests of the Class. Through their vigor in litigating this actions, Plaintiff and his counsel have more than adequately satisfied Rule 23(a)(4).

II. CERTIFICATION IS APPROPRIATE UNDER BOTH RULE 23(b)(1) AND (b)(2)

"Delaware courts have traditionally viewed 'actions challenging the propriety of director conduct in carrying out corporate transactions [as] properly certifiable under both subdivisions (b)(1) and (b)(2).'" *In re Lawson Software, Inc.*, 2011 Del. Ch. LEXIS 81, at *2 (quoting *In re Cox Radio, Inc. S'holders Litig.*, 2010 Del. Ch. LEXIS 102, at *28 (Del. Ch. May 6, 2010), *aff'd*, 9 A.3d 475 (Del. 2010)).

A. Rule 23(b)(1) Is Satisfied

Rule 23(b)(1) provides for class certification where:

> The prosecution of separate actions by or against individual members of the class would create a risk of:
>
> (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

This is a case where certification is appropriate under Rule 23(b)(1)(A) and (B). As a result of defendants' breach of their fiduciary duties, the Class is entitled to injunctive relief seeking to remove Nolan and Wynn from the board of directors. Clearly, such injunctive relief can only be granted to the Class as a whole. Similarly, to the extent that the Stockholders Agreement is reformed, there can be only one reformed control structure that applies to all Class members.

Finally any monetary remedy will be calculated on a per share basis. *Turner v. Bernstein*, 768 A.2d 24, 35 (Del. Ch. 2000) (certifying quasi-appraisal action under Rule 23(b)(1)); *Wacht v. Continental Hosts, LTD*, 1994 Del. Ch. LEXIS 171, at *31 (Del. Ch. Sept. 16, 1994). "Rule 23(b)(1) clearly embraces cases in which the party is obligated by law to treat the class members alike . . . [,]' including claims seeking money damages." *Turner*, 768 A.2d at 32 (citation omitted). Here, Rules 23(b)(1)(A) and (B) are satisfied because if separate actions were commenced by members of the Class, Defendants would be subject to the risk of inconsistent or varying adjudications that would establish incompatible standards of conduct and would, as a practical matter, be dispositive of the interests of other Class members. Thus, Rule 23(b)(1) certification is appropriate because multiple lawsuits could follow if certification were denied, which would be prejudicial to non-parties and inefficient. *In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1095 (Del. Ch. 2001).

B. Rule 23(b)(2) is Satisfied

Certification pursuant to Rule 23(b)(2) is also warranted. Rule 23(b)(2) permits an action to be maintained as a class action if:

> (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .

Where, as here, the action involves breach of duty by corporate fiduciaries and the particular facts of any stockholder would have no bearing on the appropriate

remedy, Rule 23(b)(2) certification is appropriate. *See Hynson v. Drummond Coal Co., Inc.*, 601 A.2d 570, 575-77 (Del. Ch. 1991). Rule 23(b)(2) is satisfied because, in insisting upon, or acceding to, the Kotick and Kelly proposal, defendants engaged in a single course of conduct that affects all members of the Class, and the damages flowing from violation of fiduciary duties owed equally to all Class members are appropriate with respect to the entire Class. *See In re Celera Corp. S'holder Litig.*, 2012 WL 1020471, at *18 (Del. Ch. Mar. 23, 2012) (holding that Rule 23(b)(2) is applicable to claims for damages where "the monetary relief flows directly from a finding of liability to the class as a whole"), *aff'd in part and rev'd on other grounds,* 59 A.3d 418 (Del. 2012). Indeed, "Delaware courts repeatedly have held that actions challenging the propriety of director conduct in carrying out corporate transactions are properly certifiable under both subdivisions (b)(1) and (b)(2)." *Celera*, 2012 WL 1020471, at *17 (internal quotation marks omitted).

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that this Court certify this action as a class action pursuant to Chancery Court Rule 23.

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