IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

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Chancery Courtroom No. 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Monday, October 13, 2014
9:30 a.m.

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BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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ORAL ARGUMENT ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION and PARTIAL RULING OF THE COURT

CHANCERY COURT REPORTERS
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THE COURT: Welcome, everyone.

Mr. Friedlander, how are you, sir?

MR. FRIEDLANDER: Good morning, Your Honor. I'm well.

We're here this morning on a motion for class certification. I regret that a new issue got injected into the motion yesterday.

THE COURT: I saw your letter.

MR. FRIEDLANDER: Which I will explain in a minute. There are essentially two groups of issues: There's the class definition issues and adequacy issues. As for the class definition, there's three subissues to that. One would be whether ASAC investors and their affiliates belong in the class. Then whether buyers belong in the class and whether sellers belong in the class.

So to take the ASAC investors and their affiliates first, the class certification motion was filed on May 16th. So at that time there had been no depositions taken, there was no expert analysis had been done, and the complaint did not contain a class claim for monetary damages to the public stockholders. So the class definition was based on the control structure and those voting type issues. And in a

sense the class definition did not really have any practical import because there was no question of money to the class, you know, in the pleading as of that time.

Then, in conformity with the case scheduling order, we exchanged expert reports. And in connection with that, which Your Honor knows is shortly after fact discovery -- it's been a rather busy schedule over the summer -- and our expert report articulated arguments for class-wide damages. To take perhaps the simplest example out of the alternative transactions that we posited were feasible and superior to the actual transaction, one of them was a rights offering alternative. And the damages that were calculated by our expert on that are either 593.6 million or 641.6 million, depending on whether $500 million of additional debt was incurred in connection with that transaction. Because basically that would have given the public holders an opportunity to invest at the below-market price in lieu of ASAC, and the public stockholders would then capture that -- the benefit of the runup in the price. And if there was more debt, the company would be able to buy back more shares, or the public holders would be able to buy

more shares rather than ASAC buying the shares at that 13.60 price.

And, indeed, for each of the alternatives that we posit, each of them have this extra $500 million in debt component. And so for each of them, whether or not the others are viewed as derivative damages, for each of them there would be the opportunity for the company to redeem more shares for ASAC to buy fewer shares or -- well, I guess for anything, you know, compared to the actual deal we have. And, therefore, the company would be more valuable and the stock owned by the public holders would be more valuable by virtue of the fact that they've been able to redeem shares at a favorable price. So those are the class-wide damages we articulated.

Several days later, after we served our expert report, the defendants finally responded to our motion for class certification, which I should say was more than a month after Mr. Pacchia was deposed. And, indeed, defendants said, "We're waiting for your expert report to respond about the class certification."

And in connection, then, with the

rebuttal expert reports, we see there was this issue of, well, you know, how have we properly -- have we pled a claim that sort of fits -- that fits our class theory of damages. So we moved to amend. That motion to amend was granted on Friday. And the class claims that are pled now are based on two things: The defendants not pursuing or foreclosing alternative means to raise equity, as opposed to the ASAC transaction, and the defendants not incurring additional debt to redeem more shares. So that's now in the case as of Friday.

As it so happens, on Wednesday Fidelity's counsel reached out to me to talk about class definition but we were both out of town and we didn't speak until Friday. On Friday we had a lot of back and forth about whether Fidelity can participate in the class. And the more we thought about it and exchanged numbers about the shares at issue -- because essentially, just to give you those numbers, Fidelity funds in ASAC -- there's a bunch of separate Fidelity funds that invested in ASAC -- those particular funds owned 9.3 million shares outside of ASAC at the time the transaction closed. Other Fidelity funds owned about 52 million shares outside of ASAC at the time

the transaction closed. So there's about 61 -- 61 plus million shares at issue. The question was could they participate in the class.

THE COURT: All of them, or just the portions that were outside of ASAC?

MR. FRIEDLANDER: Well, so first we were looking at that and trying to think, you know, what's the right way to think about that. Do you count shares or do you count funds. And the more sort of back and forth, we said, you know what? We've got to research it. So we researched it on Saturday, Saturday night, Sunday morning. And thought, you know what? It actually makes sense for the Fidelity shares to be part of the class.

THE COURT: All of them?

MR. FRIEDLANDER: I'm sorry? All of them. Excluding, of course, the Fidelity shares that are itself in ASAC.

THE COURT: Okay. I just wanted to make sure we were on the same page.

MR. FRIEDLANDER: Right. So -- and there's a similar issue for Davis, although we've never -- I haven't talked to Davis's counsel, we've never parsed the shares inside/outside ASAC. I mean,

we know roughly, you know, how many shares outside of ASAC, but in terms of separate funds being inside/outside ASAC, we haven't looked at that. But based on this approach that all shares outside of ASAC can be part of the class, it doesn't really matter what funds they're in.

So a couple of authorities we were looking to, we thought particularly instructive -- I'll just mention two -- were these 1940 Act regulations, because the question is should a limited partner -- you know, as for the funds in ASAC -- should a limited partner in a limited partnership defendant be deemed to be an affiliate of that limited partnership defendant. So we're just trying to go back to first principles. The standard class definition language is to exclude defendants and their affiliates so, we'll argue, the limited partners affiliates. For purposes of the '40 Act, there's a federal regulation saying a limited partner is not deemed an affiliate. If an investment company is -- if a limited partnership is an investment company, the limited partner is not deemed to be an affiliate of an investment company.

In the Philadelphia Stock Exchange

litigation, Chancellor Chandler allowed nondefendant individuals to share in the recovery through entities which were themselves affiliated with individual defendants. So again, it's not -- it's one step removed. It's a little different, because we're talking about entities that were affiliated with defendants. ASAC is itself a defendant. That's affiliates, but the idea is people who were invested in affiliates of defendants could participate in the class recovery. I think that logic would apply here.

And there's a couple other authorities we mentioned just about affiliate definitions generally and the basic concept that these ASAC limited partners are not exercising control over ASAC in terms of voting in the ordinary course, and ASAC and ASAC GP do not affirmatively, you know, direct the limited partners what to do. You know, in terms of -- we think there's a practical reality, from the perspective of the real world and whether third parties would run a proxy contest expecting Fidelity to go against ASAC, that that's not a plausible scenario. But there's no formal power of ASAC to tell Fidelity funds, you know, how to vote their shares.

So that, in a nutshell, is that issue.

And I fully recognize we haven't heard from the other side about this and we haven't given them an opportunity. And, you know, this issue has sort of been lurking in the back of our minds for a long time. And then it wasn't joined in opposition, but it did arise, and the more we thought about it, that's how we'd like to amend our motion for purposes of the class definition.

Now, if we can then proceed to the two issues on which we are joined, which issue has been joined on the class definition, one is whether buyers should be included in the class. And buyers, we're talking about people who just at any time since July 25 to the present have bought ASAC shares, whether those shares are part of the class.

Now, the arguments made of acquiescence, the two cases they cite are Kahn vs. Household Acquisition and Bershad, both of which stand for the unremarkable proposition that acquiescence can arise from either tendering shares or voting in favor of the transaction; and voting in favor, as Bershad qualifies, when an informed minority shareholder votes in favor.

So here, we submit, the buyers of the

shares were not informed of material facts about the transaction. They did not vote in favor of the transaction because they were not asked to vote. They did not tender their shares into the acquisition because there was no process or mechanism to do that. And on the flip side of that, they did not receive anything in the transaction. They were not issued, you know, new shares or cash.

Now, Exhibit 6 to our reply is a table depicting in practical terms the terms of the BKBK deal. And this goes to the question of whether stockholders were informed of material facts. The defendants say they were. Now, at the time of the acquisition, the only thing out there publicly, it says, Mr. Kotick and Mr. Kelly led an investment group that is buying a bunch of shares -- 172 million shares -- at 13.60 a share. That's the sum and substance. And like I say, the contract, the stock purchase agreement's out there elaborating on that in more detail.

But it's not for another two months that there's a disclosure of what the BKBK deal is. You know, say, relative to the limited partners. The terms on which BKBK are buying shares. And that -- if

you look at that proxy description, it's very complex legally, and it's almost impossible -- it would be impossible, I think, in your head to sort of figure out this deal, that BKBK are buying preferred interest Class A common, Class B common, Class C common, Class D common in ASAC based on the internal rate of return in ASAC at any particular point in time, at the time ASAC's wound up, they will share in different percentages of what ASAC's return is. So whether they trigger -- you know, whether the Class D has value depends on whether they've reached an IR threshold of 22 percent. And there are other thresholds for the others. But it is possible, if you actually run the map and have it all plotted out, you can depict it in a table, pretty straightforward way. But that's not what happened.

And the simplest way I can think of to describe the BKBK deal in real terms is that if the stock price never moves from its post-announcement price, immediately post-announcement price, the day after announcement, they double their money. Actually, they more than double their money if they dissolve after one year, after two years, after three years. If they ride it all the way out to four years

and the stock price still hasn't moved, they make a little less than doubling their money. If the stock price doubles, goes from 17.46 to 35, they make about 9 times their money. So $100 million turns into about $900 million, depending on whether it's year 1, year 2, year 3, year 4. If the stock price drops by 20 percent, they break even.

And I think the only way to understand, hey, is this a fair deal, is this a sensible deal, is this a deal I support, is this a deal I object to, is to know those numbers. I don't think you can look at the proxy disclosure and make any sense of it. You'd have to tabulate this yourself. There's no document that spells it out.

And that's the deal. If you really want to have fair disclosure and full disclosure, you'd have to say, well, here's the table sort of depicting the deal. Oh, and by the way, these terms were not negotiated with anyone. I just want to let you know that we're not negotiating with the special committee, that we're not negotiating with Vivendi, we're not negotiating with the limited partners. The size of ASAC was negotiated, but the internal terms, the ones I just talked about, were not negotiated.

And you'd also have to disclose that this deal was not shopped to anybody else. When -- when Activision is looking, saying we'd like $100 million as part of a $2.3 billion of acquisition of Vivendi shares, no one else was offered this deal. It wasn't compared to any other deal. And you also have to disclose, oh, and by the way, BKBK refused to support certain alternative transactions. Oh. And you also should disclose that they were plotting a similar transaction like this on a bigger scale for six months before they told the independent directors.

So then, if you tell that, put that in the proxy statement, ask people to vote on it and people say, that's great -- oh, and make that a separate and distinct vote from the rest of the deal -- then maybe you have acquiescence. On this record, nowhere close to acquiescence. So I don't think that's a barrier to class certification for buyers of shares.

Now, in terms of sellers of shares, defendants want to exclude them as well. And this is more just a pure law contest. Anybody who sold shares between July 25 and the present. Now, what I just said about disclosure applies to sellers as well. If

you sold shares on July 26, July 29th, Monday, all the way to the present, you have not seen disclosure of the facts I just mentioned. Although you might have seen -- you know, we make reference in our complaint to maybe a couple of these concepts. But these individuals suffered the harms that are spelled out in the Atkins report, that it's those stockholders at the outset who were deprived of the benefit of an alternative transaction that was more palatable.

And a quirk of Delaware law, I dare say, is that there's a little disjunction between the way the Court of Chancery has been doing business in transactions for a long time about how, say, class settlements work, and I think what the Supreme Court articulated in Philadelphia Stock Exchange, both the first opinion and the second opinion, which is that in Philadelphia Stock Exchange the sellers participated in the settlement. And the Supreme Court actually said that for this breach of fiduciary duty claim, what this was was a highly dilutive transaction that the Philadelphia Stock Exchange did. A bunch of financial institutions put in new money and got lots of equity in the Philadelphia Stock Exchange. And that claim for dilution was deemed by the Supreme

Court to be a personal claim that did not travel with the shares.

For present purposes, for purposes of class definition, you know, if that's the law -- we'll say if that's the law, then arguably it's the sellers who would get the benefit of any recovery by a settlement or by a judgment for any class, if there is a class recovery for damages. But we don't need to reach that issue today because it is consistent, the Delaware Supreme Court and the Court of Chancery law is consistent completely with the concept that everybody's included in the class. Sellers are included in the class definition.

THE COURT: So I'll tell you I struggle with that. I struggle with the idea that that was a personal claim of the holder as opposed to a direct claim contrasted with a derivative claim. So when you're reading through that aspect of -- it's not really Philadelphia Stock Exchange. It's really the second one. Ginsburg, we'll call it.

MR. FRIEDLANDER: Right.

THE COURT: They seem to be contrasting direct versus derivative, but they throw in this language about personal claim. You know, I

struggle with the idea of the personal claim because the Delaware fiduciary duty claims are (b)(1) claims that we then will also sometimes certify under (b)(2) and, hence, travel with the shares.

Now it's always struck me that the reason we certify sellers in settlements is because we're not just releasing the Delaware breach of fiduciary duty claims. We're giving broad global releases that also encompass federal securities law claims and common law fraud claims, which is a claim personal to the holder of the property, is a claim personal to the seller. Not in the sense of direct versus derivative, but it's actually me. I sold property -- could have been my car, here it just happened to be my shares -- and I was defrauded, and that's something that is personal to me at that level.

So it always struck me that the reason we did that in the settlement context is because we were releasing not only what was covered by the Delaware case, but also in a big Matsushita encompassing release getting rid of these fraud claims as well. So you had to define the class, in that respect, to pick all that stuff up.

Here we're not at that stage. Here

you're just litigating the breach of fiduciary duty law claims. So am I not, as I think about it, in the situation where I am just focused on the Delaware law issues and what travels with the shares?

MR. FRIEDLANDER: I guess two things come to mind: One, we've always had this -- I mean, in the preclosing context, I think having sellers as part of the class is always -- I think it's consistent with this notion that they have an interest. But what's -- there's always been this idea people have an interest such that they're bound by the result, but the result only -- the recovery only goes to the people, the ultimate holders. So all those claims are being compromised but no one is actually getting anything for them, and that's deemed okay. And that's how I always understood black-letter Chancery practice to be, and to some extent still is black-letter Chancery practice.

But what the Delaware Supreme Court is saying about an economic dilution claim -- I mean, it's not -- it's not a federal securities fraud claim, it's not a common law fraud claim. It is a claim that you were diluted too much, that the board issued too many shares for too little value to a bunch of other

people. And it's hard -- it's just hard to see that distinction between lots of other fiduciary duty claims.

THE COURT: It is. And the dilution affects you in what capacity? Well, it affects you in your capacity as a holder of the shares. It doesn't affect you -- because theoretically, you know, again, if you're on the side where you're happy to get the dilution, you're not affected --

MR. FRIEDLANDER: Right.

THE COURT: -- in that shareholder capacity. So again, it almost seemed to me that even though they used the language "personal," it was more of a direct/derivative-type analysis. In this case, what practical effect does it have for you in terms of how you litigate this thing? Does it change the damages calculus? It seems to me that it's more that if -- if the defendant -- if you guys ever come to a settlement, right, this is one of these ones where the defendants are going to find themselves suddenly on the opposite side of the issue and they're going to find themselves in a be-careful-what-you-wish-for situation.

But in terms of the practical case

that I am actually litigating --

MR. FRIEDLANDER: Right.

THE COURT: -- that I am actually presiding over, that I am actually overseeing -- you're litigating, I'm presiding over -- why does it matter? How does it change the damages calculus if we exclude sellers?

MR. FRIEDLANDER: Well, if you -- the question, as I understand what the defendants are saying, is that only continuous owners are part of the class. So --

THE COURT: Assume buyers are in, because again --

MR. FRIEDLANDER: Okay. Let's assume buyers are in.

THE COURT: Look, you have Emerging Communications, you have historical law about transferring with shares. I mean, the idea that buyers wouldn't be in -- I mean, I'll hear from them, but that's a bold proposition.

MR. FRIEDLANDER: Right. I suppose as long as buyers are in, I guess the number of shares that are in is the same. Because for every seller there's a buyer, right?

THE COURT: Yeah.

MR. FRIEDLANDER: So in that sense there is no practical consequence. Certainly at this stage there's no practical consequence, because all we're doing is defining the class. We're not saying who gets the money.

THE COURT: Right.

MR. FRIEDLANDER: But at the end of the day -- for instance, in Philadelphia Stock Exchange -- if there is an end of the day and we're talking about dividing up money, then it would -- it wouldn't matter.

THE COURT: But that was, again, that was a settlement context where it was expansively broad. Here, if I certify a class that just has shares as of the date plus successors --

MR. FRIEDLANDER: Right.

THE COURT: -- and carves out sellers -- again, if. You know, you got to win. There's a lot of steps before we get to this problem.

MR. FRIEDLANDER: Right.

THE COURT: I may never even have to think about this stuff.

MR. FRIEDLANDER: The one practical

consequence I'll point out -- and I'll call it Philadelphia Stock Exchange by shorthand -- is that those people could then sue somewhere else and say that "I have an interest."

THE COURT: See, that's the difference between a settlement, right, and an adjudication. So it may very well be that, you know, I'm only adjudicating -- I can't adjudicate federal securities law claims -- and I don't know if there are federal securities law claims -- but it might well be that there are sellers out there, there's a class of seller that has a federal securities law and common law fraud claim based on disclosures. And certainly the federal securities law claim, I can release it. I can't try it.

MR. FRIEDLANDER: What I'm talking about, what if there's a breach of fiduciary duty claim for the sellers. Like the exact counterpart of this economic dilution. It may have been my grasp of the distinction Your Honor is drawing between the sellers, on one --

THE COURT: I'm seeing that claim as passing. So I think when you're a seller and you decide to sell your shares, the attributes of those

shares pass to the buyer.

MR. FRIEDLANDER: Right.

THE COURT: And one of the things that passes to the buyer is your right to benefit from breach of fiduciary duty claims that have affected the value of your shares. You know, one of which would be -- and that's why I think Philadelphia Stock Exchange makes sense to me if it's using "personal" in the sense of direct -- one of those would be a direct injury to your shares. That would pass.

And so the seller at that point, from a Delaware corporate law fiduciary duty standpoint, they're out of the game. They're still in the game in a common law fraud standpoint. They're still in the game in a federal securities law fraud standpoint. Just as anybody who has been defrauded, regardless of what their property is, has a personal claim unrelated to the property. It's like you defrauded me. You lied to me.

Again, if the defendants were to settle globally and want to foreclose those other types of fraud claims, I understand why the class would pick up sellers as part of the goal of giving the defendants this complete-piece option.

MR. FRIEDLANDER: Right. Well, that's -- here's the distinction, and this is what troubles me.

THE COURT: Yeah.

MR. FRIEDLANDER: It's truly legal. I'm not sure it has a lot of practical import. But if you look at Philadelphia Stock Exchange opinion 1 and opinion 2, the Supreme Court seems to be very strongly saying actually the only people who have claims are the sellers, not the buyers. And that's why the money, to the extent the money goes to the buyers, it was for a completely different claim. It was for this contract claim, a violation of the charter, which was found to travel.

THE COURT: Uh-huh.

MR. FRIEDLANDER: But it was that weighting of the relative strength of the two claims -- one that traveled with the class, the other one that didn't -- that weighted the ultimate outcome.

So for the Delaware Supreme Court saying that there's an economic dilution breach of fiduciary duty -- call it direct claim, but a direct claim that's a class claim. And they're the people who should be compensated ultimately. If there's a

class order put in place today or tomorrow and -- you know, I don't know what stops someone from, you know, suing in California or somewhere else and saying under Philadelphia Stock Exchange I represent a bunch of people who were owed fiduciary duties and their interests, for whatever reason, are not being litigated in Chancery. So, therefore, I get to litigate them somewhere else and seek a recovery.

So I think that is the practical thing, is that if it's all done at the time of release -- and let's say, Your Honor, I think we can just punt on this one safely and say, well, that's what's figured out later. But if people are carved out now, then they have claims that can be litigated.

THE COURT: I hear what you're saying. That's a good point. And, you know, as to the federal securities claims/fraud claims, my reaction to that is, okay, well, that's not breach of fiduciary duty claims. I'd actually agree with that, they could go litigate them elsewhere. But I do think you're right, I do have the same reaction that it would be odd if those sellers could go litigate the seller breach of fiduciary duty claim somewhere else. Which again, in its own sense is a strange concept.

MR. FRIEDLANDER: So that's really why we're flagging it. But I think -- and then, you know, down the road -- if there is a down the road -- there could be allocation questions. And, you know, I don't think you're expanding the pie. I think there's always -- I don't -- you know, I don't think there's -- Delaware law has a standing recognition of the concept of getting multiple recoveries like a federal securities claim for every separate holder, but it would seem to me that there's a sufficient interest to support them being in the class for present purposes. And those are the three class definition issues.

Then we have the adequacy of class representation issues. There are three of those. I only really plan on talking about one of them, unless Your Honor has any questions, and that's the sale of Vivendi stock by Mr. Pacchia, and at a time in which there's no allegation -- no evidence and no allegation that Mr. Pacchia had access to confidential information. In the infoGROUP case -- the most recent case on this, 2013 -- the Court talked about that the reason we have proscriptions against selling is the concern intended to address and preclude trading on

nonpublic information obtained through discovery. And in that case there was no issue as to adequacy because there was no evidence to suggest -- or even an allegation by the defendants -- that the fund traded on the basis of nonpublic information. I'd say that applies equally, squarely, right here.

In Your Honor's opinion in Occam there were three groups of trades. There was Mr. Chen's trading before a confidentiality order, and Your Honor didn't seem to raise any issue with that. Then there was the post-confidentiality order trades for which there were big issues with that. But then there was also a third group which was after the preliminary injunction hearing, where you said "I'm not going to" -- it would -- "I'm not going to punish Mr. Steinhardt for trades made after all these issues have been aired publicly." So three time frames. So it all depends on the time frame. And I think all the law that's discussed is the problem is anybody who trades on the basis of information obtained through discovery or nonpublic information obtained through litigation.

Here we're talking about late 2013, very late 2013, very early 2014. So there were 220

documents, but -- and we tried to cull anything interesting out of the 220 documents and put them in our public complaint. Two versions of that. We had an open leadership conference argument. We had that argument -- I mean, that article that ran in Bloomberg. All those facts, anything interesting about those facts from those materials, were aired publicly. And then there was no confidentiality order until a couple months after that.

And, you know, in the -- there was limited discovery up front. You know, Vivendi, for instance, really didn't produce much of anything, and we were here about that. And the affidavit is clear that there was no discussion, no communication of nonpublic information to Mr. Pacchia prior to entry of the confidentiality order when he actually was entitled to have access to whatever thoughts or information we had based on nonpublic information.

So I think the law is pretty clear that this is all pretty safe. And it would be -- I don't like to say ironic. It would be deeply ironic if the only person on planet Earth who cannot trade is Mr. Pacchia, but the general counsel for Activision can trade, the CEO and chairman of Activision can

trade. We don't know how many people of Vivendi are trading because they don't have Form 4's in France or the EU. But somehow Mr. Pacchia and only Mr. Pacchia can't sell any of Vivendi's shares, Vivendi being a defendant with a market cap at the time of something like $30 billion, or I forget what the number is. It's in the papers. A big, big company. And this would be deemed material nonpublic -- it's not even nonpublic. It would just be information which someone would be punished for trading on.

There are two other arguments. There's the testimony about Mr. Pacchia's sale of Activision stock. There's an argument about his knowledge of litigation, his role in litigation. I frankly don't understand either argument. We tried to address them as fully as we could in the papers. And I'd just like to reserve time for rebuttal if defendants want to press those issues.

THE COURT: Thank you.

MR. FRIEDLANDER: Unless Your Honor has any questions ...

THE COURT: I appreciate it.

MR. SCAGGS: Good morning, Your Honor.

THE COURT: Good morning, Mr. Scaggs.

How are you, sir?

MR. SCAGGS: I'm very good, thank you.

THE COURT: Good.

MR. SCAGGS: The plaintiff bears the burden here, Your Honor, of providing this Court with the information or evidence to certify a class. And we respectfully suggest that when addressing a challenged corporate transaction, this Court should not, as plaintiffs suggest, simply wave its hand at critical aspects of that certification and push the case on to trial, perhaps with some idea that some of it could be settled later.

We submit that the defendants are entitled to before trial -- certainly deserve -- a fairly precise and logical class definition, so they know what they're trying, and a rational and responsible class representative. And that could bear on a lot of things: how the case gets tried, how settlement negotiations go, who is in the class. So we would ask that Your Honor not just push this aside.

THE COURT: No, I'm not going to. I mean, look, part of what you guys -- or I guess Mr. Friedlander really gets credit for it. We're supposed to have class certification as promptly as

practicable, and often we don't. So I think that you-all get kudos for actually bringing this to a head, as opposed to keeping it on the back burner, as often happens.

MR. SCAGGS: And he did the motion, we did try to move up on it, Your Honor.

THE COURT: Before you get into the depth of the two issues, or two sets of issues that we are focusing on today, how do you want to proceed on the Fidelity issues? Do you want a chance to put something in on that, or are you fine with it? What's your take on how you want to handle that late-breaking development?

MR. SCAGGS: Yes, Your Honor. We need time.

THE COURT: Okay. That's fine.

MR. SCAGGS: We need time. We need time. Having just received it yesterday, and it obviously being important and related to ASAC, we just haven't had any time to do the research that plaintiff talked about, and talk to the right people.

So I'll just go to the two issues, then, related to the class definition. First, in our view, the class should not include stockholders who

purchased after July 25, 2014. Now, what's happened here is plaintiffs have indiscriminately, we believe, and inappropriately barred the class definition from settlement cases. In those cases the holders and transferees end up in the class, but that class ends on merger consummation. At that time they are very similar, particularly if you hold to Your Honor's views you just articulated that the attribute of the claim passes with the stock. But it ends. Their stock is exchanged for some consideration.

THE COURT: Yes. It's converted out of existence.

MR. SCAGGS: Converted out of existence. And that doesn't happen here. And, by the way, we start with, I think, the clear definition that the class starts only with persons who own on the date the agreement is executed. It doesn't have to do with what's -- with closing. That's where you start with. And that's in re Celera, citing the Beatrice cases.

THE COURT: Okay.

MR. SCAGGS: Here, of course, stockholders did not lose their stock on the closing date, as they would in a merger. Trading has continued since July 25, 2013, to the present. So

under the class definition here the class has not ended, and will not end, apparently, which would leave -- which presents a lot of problems.

First, with respect to potential purchasers, the board doesn't owe potential purchasers fiduciary duties. Don't. That's clear enough under Malone v. Brincat. They're not a stockholder, and doesn't have the fiduciary duties. So the only potential theory is this theory which Your Honor talked about from Emerging, that perhaps it passes with the stock. And so those purchasers certainly -- there's no duty there, at least under any principle of fiduciary duty.

So why are those people included in settlements? Your Honor put your finger exactly on it, which is what I was going to point out. Settlements are different. The claims are broader, so those folks are included. So that goes beyond dispute.

THE COURT: But it seems like the premise that you're postulating would result in the incredible shrinking class. And not only would you have the incredible shrinking class but because, you know, we know that these stocks turn over the entire

flow -- you know, turn over, effectively, multiple times, if you measure the trading volume -- not only are you dealing with the incredible shrinking class, you're dealing with the incredible negative class. I mean, it ends up like the class is less than zero because it will have turned over more than the total number of shares originally in the class. And obviously that's some shares selling multiple times, I get that. But still, it's just shrinking almost to the point of oblivion and beyond, as you guys envision it.

MR. SCAGGS: Well, there could be a class of those people who were holders on July 25.

THE COURT: And you want that to be individuals?

MR. SCAGGS: And that -- and that --

THE COURT: Flesh-and-blood people?

MR. SCAGGS: That would be -- or funds, or whoever those holders were, that snapshot on July 25. And that wouldn't shrink. That's one theory. And that appears to be -- and this gets sticky because we haven't dealt with this much, you know, in this Court and under our law in nonsettlement contexts. But in the Philadelphia 2, Philadelphia

Stock Exchange 2, the Ginsburg case, the Court said the people that sell for economic dilution are the people that held on the date that the agreement was signed. And that's theirs. It doesn't pass.

And economic dilution here is really no different than if the Court would find -- if the Court would find there's any individual claim at all -- and I'll get to that -- that could continue, that there was any economic damage on that date, July 25, then Ginsburg says that that doesn't pass. And it's very analogous, actually. Because what the claims are here are not necessarily economic dilution. They're just the mirror image. All that the plaintiffs are saying is instead of being diluted, there was something that happened where -- and this is quite contorted, and this is a problem with their case -- there was something that happened that should have resulted in, if the board did its job, in an enhancement of your value that day. More accretion, more enhancement. So why in principle that's any different than economic dilution is -- is beyond me, Your Honor. So under Ginsburg, this starts with sellers if it's an individual claim. Okay? And with those people who held on July 25. Doesn't go any

further. Supreme Court precedent.

So there are other problems, such as workability. So who would be in the class of the transferees, and who would they be suing? So once again, other than this passing theory where I guess the person who bought, who the board owes no fiduciary duties to, receives a claim through his stock back against people who are no longer directors. When he's a stockholder -- when he is a stockholder, when these people became stockholders, the board has changed. Are there claims against different defendants?

So other than this what I would say rather metaphysical type of passing of the claim which appears to be at odds with Ginsburg, then there's a different set of directors that would have owed those transferees fiduciary duties. Never owed by the earlier board.

So what about interim holders?

THE COURT: Again, that's viewing the directors as owing fiduciary duties not to people qua holders of stock, but people in either their human capacities or their, you know, funds as their personal entities, sort of on up the chain.

I mean, don't we owe fiduciary duties

to people because they're holders of shares? It's the property right that the fiduciary duty attaches to. And that's why historically it was -- that's why we love record ownership; right? Because you're not owning the people indiscriminately up the chain. Now, we give those people, in equity, the right to sue, but we're focused on the shares. We're not focused on the fact that if I look four, five levels of holder status up I might eventually come to, you know, the Morris Nichols retirement fund.

MR. SCAGGS: Right. Right, Your Honor. Well, I do think this is theoretically -- it intertwines a number of things, which presumptively the Supreme Court had thought about in Ginsburg, but one of which is what did that person buy, and were -- and how was their stock valued? Was that claim somehow included? I mean, here there was a lawsuit pending. Did they sell that and get value added for that, and so should they be included, or not? That's very difficult to say, because it does become personal when you've traded your stock for money by selling it to another person.

So we can say it's a property right, I have a property right in my house, but if I sell it

for money, I don't have that right anymore. So once again, I understand Your Honor's theory, and I'm sorry I don't have a better answer, but it appears from Ginsburg that doesn't pass. If it's an economic damage claim, it's on the date it happened, which was July 25, and would end there.

Now, and it would then make, of course -- the other problem here is it would produce these transferees receiving rights, produce an arbitrary result, which is when do we end the class? Are those people who receive the stock? Who's that set of people? Is it at the time of trial? At the time of decision? If they get -- if the set of people has rights --

THE COURT: I think it solves these problems. I don't think it creates these problems. If it doesn't travel with the class, then I have all these intervening definitions to have to worry about. I've got a myriad of intervening sellers and holders. I've got people who -- who, as you say, held on the date. I've got, you know, a period of time in between where there's a lot of trading that takes place. You know, if you look at the shares, then we know how many shares are out there. And the only people that are

excluded in terms of on down the road would be if the entity pumped out more shares. Because then you're actually changing the share base.

Otherwise, what's going to happen at trial, again -- and there's a lot of steps before this, but let's assume that, contrary to your side's views and consistent with Mr. Friedlander's hopes and dreams, that he recovers some amount of money.

What we're going to do is we're going to take that amount of money and we're going to push it out to whoever at that time holds those shares. Akin to what? Akin to like a record date for a dividend distribution. Right? I mean, it's the same sort of concept.

MR. SCAGGS: No -- yeah, that's right, Your Honor. I guess my point is this: Which is, yes, once again, if that theory is followed, those are the persons that currently hold the rights to whatever recovery there would be.

THE COURT: And again, I see that, but I see that as like solving a lot of problems, as opposed to creating them. I mean, the multiple classes -- because this is something that people on the federal securities laws, they wrestle with this

stuff constantly. I mean, they're constantly worrying about the fact that, you know, there's a seller class and a buyer class, and then we briefly had this concept of a holder class, and zero sum is between the classes, so how are we going to figure it out? I feel like we've got a great solution here, in that we look at the shares.

MR. SCAGGS: Yeah. And it's administratively convenient. I don't think it's consistent with Ginsburg. And I also say, well, what does that do for an interim holder? Was he damaged along the way?

THE COURT: He sold long. He bought it knowing that the claim was out there.

MR. SCAGGS: Right.

THE COURT: He briefly held the right to a share that included the right to a recovery, should there ever be one, and then he sold it. Let's assume you bought your house; right? You bought your house and, you know, God forbid you were sitting over, you know, a nuclear dump or, you know, the Amityville Horror cemetery, or something like that; right? While you owned that house, you bought it, you acquired the potential claim to sue, to increase the value of

property. And when you sold it, you sold that bundle of property rights that went with the house. And unless you carved it out -- I mean, you could carve it out, I guess, but if you don't do something otherwise, it passes.

And the new guy who holds the house said, you know what? I bought this now. I paid Scaggs -- and your house is probably worth millions -- I paid Scaggs $5 million for this house, and it turns out it's over a dump. Like, you know, I ought to get to sue the people who -- you know, I've got this thing. It's not worth $5 million any more.

MR. SCAGGS: I think I work on the wrong side of the V to have that size house, Your Honor, but, yeah. Of course the problems run in again as to what I knew and if I knew about that dump. And if I did, whether that value --

THE COURT: Sure. That's why he in his personal capacity might have a fraud claim back against you. And that's the difference -- conceptually, I think a fraud claim is different than a breach of fiduciary duty claim. Because the fraud claim, that buyer -- like let's say, you know -- and you obviously would never do this, Mr. Scaggs, not

only because you're a good guy, but you're also a Delaware lawyer -- but you would never know about the dump and then make some misleading disclosure about that. But if you do, if you did, right, I mean they might have a personal fraud claim back against you. But that would be different from the property right that's attached to the property and scoots along with it.

MR. SCAGGS: Got it, Your Honor. And I think that --

THE COURT: I mean, you believe that's contrary to Ginsburg. So I -- listen -- as I understand it --

MR. SCAGGS: That's right. And the reason I think Your Honor put the finger on it was, and why -- and we'll go on that assumption that we should talk about, because Your Honor's -- his mind is made up and --

THE COURT: Well, I don't know if my mind's made up, but --

MR. SCAGGS: -- and it's not with me. But --

THE COURT: Again, and I understand if Ginsburg forecloses it, I may have this theory that

makes a lot of sense in my strange and skewed view of the world, but I may not be able to adopt that. You know, it's -- there's things that I just can't do because either there's a statute or there's a Supreme Court decision or -- you know, but what I want to know is -- I get the Ginsburg problem.

MR. SCAGGS: Okay.

THE COURT: What I want to know is besides Ginsburg, help me -- if I'm going to completely destroy the fabric of class certification law, I want to know.

MR. SCAGGS: No. And I think, Your Honor, if it's one or the other, does it make a huge difference to us? No. It may make a difference, and we'll get back to you on Fidelity and other affiliates, but if that number says the same, so -- the point I would make, then, to talk about this case and not about the -- because I think either one of those is justifiable and rational.

THE COURT: You're -- at least as I understand it -- again, tell me if I'm missing things -- I mean, there's a certain number of shares out there, right, and let's say it's 1,000, just to make the numbers easy. If that 1,000 shares were

damaged -- and again, if Mr. Friedlander's hopes and dreams come true, you want to pay whatever the damages is once. You don't want to pay it to the 1,000 guys who owned it on the date of the transaction, the 1,000 guys who bought them later, or whoever it was, the 1,000 guys who then bought them after that, the 1,000 guys who owned them at the time of trial. I mean, you want only to have to -- as you should -- pay one recovery, should that happen. You know, and I get that, and I think that's very important. And we want that type of certainty so that people don't have, you know, exponential exposure just because stock trades.

And I guess it sounds to me like perhaps the two ways to do that, one would be to freeze it on the date of approval, as I guess you may prefer. And I don't want to put words in your mouth if you don't prefer that. The other way to do it, or another way to do it, would be my concept of passing with the shares, because then we're just focusing on the shares in whoever's hands they might be. But am I getting that right, that what you-all want to avoid is the potential damages multiplier of multiple --

MR. SCAGGS: Exactly, Your Honor. And the way we interpreted that definition and what could

have happened, particularly with the reference to allocation, was this huge class that includes interim transferees, perhaps -- who knows -- and then later we hear something about some economic theory that, well, they lost this much because during their ownership -- it would be very federal-securities like. And we think it's not here, it's not in these claims, so that's what we were worried about. But if we've got -- you know, on the date of or -- essentially a record date for a class at some time --

THE COURT: Yeah. I mean, it's interesting. I have to think about the two, because the other has -- I mean, the way I've been thinking about it has the property rights-ish aspects to it that equate to our traditional (b)(1) certification of these things as based on a coherent group of holders defined by their property rights.

MR. SCAGGS: That's right.

THE COURT: Now, your record date issue idea as of the date of the harm -- I mean, that's got pros and cons, too. It is similar to a record date. It also, though, strikes me as more (b)(3)-ish, in that it's a holders as of that time, and then the shares go on down the road.

MR. SCAGGS: Yeah. Unless Your Honor determined that the impact on all those were, you know, essentially the same. But that may require ignoring, say, what price they sold at and under what conditions. So --

THE COURT: Yeah.

MR. SCAGGS: -- so could that produce more (b)(3) issues, I think is what Your Honor is saying. And I agree. And we're fine either way, as long as it's not both, or some mixture of all those interim holders.

THE COURT: And I will tell you that I resist, because we've always handled these as (b)(1) claims with the (b)(2) possibility when people are seeking injunctive relief or declaratory things or other things that are similar in effect to (b)(1)-ish type issues. I balk a little bit at something that makes it more (b)(3)-ish. I really do. So that's part of why, at least on first blush, I'm having trouble with the fixing it in the people who happened to be around as of the time of the board decision. But I hear where you're coming from.

MR. SCAGGS: And I agree, there's more complications, and I also would agree that the

rationale, to the extent it's there, as stated in Ginsburg, doesn't help us a lot here on this idea --

THE COURT: Yeah.

MR. SCAGGS: -- that that's a quote, unquote, "personal" claim. That's exactly the word used, which we would also interpret as individuals.

So there's one other aspect of this, Your Honor, about the claims that I need to speak to. And it's exactly about this direct versus derivative aspect which they talk about in Ginsburg, which is there are no -- and so there can't be a class certified, is the argument. There are no individual claims other than the injunctive claims for relief concerning the shareholder agreement and the desire to reformulate that.

So the -- if you look at page -- I don't have the page -- oh. At the opening brief. Confronted with these problems before -- with their class definition, the plaintiffs gave an explanation. Before they had to spin and it try to amend it, they said why these class -- what claims were individual or direct. And I quote -- and it's actually the complaint at 45. I don't have the reply brief cite -- but "The basis for classifying the claims as direct is

that ASAC's purchase from Vivendi of the post-Restructuring 24.7% block coupled with shares owned by ASAC investors, effected a transfer of control to ASAC's investors, despite the availability of alternatives that would have allowed for control to rest in the public stockholders, thereby depriving public stockholders of the economic value and voting power associated with the realistic ability to participate in a proxy contest and accept a takeover premium. Such harms are individual in nature. To rectify this individual harm, plaintiffs seek to reform the stockholders agreement so as to deprive Kotick and Kelly of their control over the company through ASAC." That's it. There's no other explanation in there. There's no other attempt to argue there's any other individual claims that could form a class.

Now, since then, and seeing the problems with the class, they've said, oh, well, we filed an expert report and he has somehow transformed what are derivative claims concerning what could have been done with this, quote, unquote, "opportunity" into individual claims that we can now use to certify a class.

You know, I would respectfully submit a couple of things: One is no expert in the world, expert report in the world, should be allowed to transform the nature of claims stated in a fifth amended complaint from derivative to individual because some expert can -- and I can assure you, Your Honor, that these numbers in that expert report are made up of whole cloth. They're just a bunch of alternative transactions that somebody dreamed up that weren't feasible, were never negotiated. But you'll see that. Sorry.

THE COURT: No. That's what we'll have a trial about. I get it. But again, assume -- let's go back to the pre-revelation description of the claims.

MR. SCAGGS: Uh-huh.

THE COURT: Things like ability to participate in a proxy contest, ability to receive controlled premium, that type of thing. Why isn't that the type of thing that ought to pass with the shares? Again, if the idea is to participate in the proxy contest and voting is the quintessential property right of a share, and it's held by the -- whoever currently happens to own the share because

it's an aspect of the shares. Again, unless you do some funky contract thing which would give you a contract claim separate and apart from the share, you don't leave it with the seller. I mean, it moves.

So, again, I hear that, I hear you read that, and I think, all right. Well, maybe I'm not too crazy about this passing with the shares thing, because that's the quintessential type of right that passes with them.

MR. SCAGGS: That's right, Your Honor. That -- but that, of course, is purely injunctive relief. And that can only benefit those people who are shareholders and who acquired that right on July 25 and still hold.

THE COURT: Why can't it benefit -- again, why hasn't it passed with the shares so that if, you know, if I buy now, part of what I'm buying -- you know, and again, I get that there's been this historic distinction in Delaware law between the right to be -- to sue in the capacity of named plaintiff and the right to benefit from the claim. You know, we draw that distinction between standing to sue and the right to benefit from the claim.

But if I go out -- I'm obviously not

going to do this, for a ton of reasons -- but if I go out today and buy Activision Blizzard stock, why have I not now gained the right to benefit, should Mr. Friedlander be successful, from the enhanced voting power that I will have if he is somehow able to fix this thing? I mean, the dude who sold it to me doesn't care about that anymore. He's gone. And the people who happened to own back on the date the transaction was approved -- I mean, if they've sold, they don't care either. The only people who are going to care and be affected by this benefit that, if Mr. Friedlander's dreams come to pass, he might achieve, are folks like me who actually hold the shares.

MR. SCAGGS: Well, that's right, Your Honor. And to the extent that this idea of -- you know, the flip side of Ginsburg, the opposite, that these pass through and then would entitle you to injunctive relief just because you own it, not because you held it at the time of the wrong, which would -- you know, doesn't have to do with the class, it has to do with the class representative, that's exactly right. That would be the type of claim one could get injunctive relief for --

THE COURT: Or declaratory --

MR. SCAGGS: -- if it is indeed individual. Our only point here was, based on the Ginsburg side of things, is if that's the case, then if you have an injunctive relief claim at the end, it would have to be only those persons who continually held.

THE COURT: See, and that's -- it seems to me strange, then. Because then you're going to have like two groups of people? There's going to be some -- I mean, how would I craft an injunction, right? How would I craft an injunction that would only benefit those people who happen to still hold?

MR. SCAGGS: I don't -- I don't know that you could, Your Honor.

THE COURT: I don't either. It's --

MR. SCAGGS: And I don't know that this couldn't be brought by one shareholder.

THE COURT: I'm sorry?

MR. SCAGGS: I don't know that that couldn't be brought by one shareholder. The point is --

THE COURT: You mean on a nonclass basis?

MR. SCAGGS: Yeah. And the point is -- and it's not directly related here, particularly on this -- the idea that these property rights passed, which is something Your Honor already ruled on but we would point out, which is that the claims here would be, the monetary claims, would be derivative. Because what the plaintiffs have focused on is the alleged loss of an opportunity by -- by the company concerning the ASAC shares.

THE COURT: See, there again, that's another one of these be careful what you wish for issues. Because when I'm dealing with -- again, and who knows whether we get there, but if one deals with damages, right -- I mean, this is the Southern Peru problem. You can craft a remedy at the derivative level that has to deal with 100 percent of the harm. Or you can craft a derivative remedy at the stockholder level that remedies it as to that portion of the shares not held by the defendant. By definition, because the stockholder-level remedy is fractional, it generates a smaller number than the derivative-level remedy.

So, you know, there may be some near-term procedural advantage in hooking yourself to

the derivative characterization. But if and -- you know, if by some unforeseeable eventuality it actually gets to the point where one has to do a damages calculation, the class remedy is actually better for the defendants. Because you're dealing with a fraction of the number that otherwise would have to be granted to fix the problem at the corporate level.

MR. SCAGGS: Well, yeah. It would be presumptively a smaller number if you --

THE COURT: Yeah.

MR. SCAGGS: -- computed those damages per shareholder.

THE COURT: Exactly.

MR. SCAGGS: Per shareholder.

THE COURT: So all I'm saying is, you know, you've sort of got to think a couple moves ahead. And if you guys are really -- I mean, I don't know. I mean, Mr. Friedlander might like the bigger number. Bigger number means -- again, if he prevails -- it would be more fees, it would be -- you know, that was part of the defendants in Southern Peru when they went up on appeal. They were like, oh, my God. This is horrible. This fee number is calculated based on the remedy to the corporation, but we know

that, you know, a majority of the shares were held by the controller. Dial that thing back. Dial it back just based on the amount that went to the minority.

I mean here, if we proceed on a class basis, it seems to me that there are equities in the sense of fairness to both sides, because I don't want to put you-all in the position -- again, this eventuality may never happen, but smart people have to think about not only what happens today, but also what happens in the future. That's why you invest for your retirement, I assume.

It actually might work out more fairly in the sense of equitably to both sides -- doesn't confer a windfall on those guys, doesn't confer a penalty on you-all -- to do this at the class level rather than the grossed-up number for the derivative action.

MR. SCAGGS: Or that -- or fairness could dictate that the derivative remedy just be to those people, if it actually is a derivative claim.

THE COURT: But then it's not a derivative remedy. Then it's --

MR. SCAGGS: Right, right. Then it's essentially a class remedy.

THE COURT: Yeah.

MR. SCAGGS: But I think the problem here --

THE COURT: I -- go ahead.

MR. SCAGGS: I'm sorry, Your Honor.

THE COURT: No, no. I shouldn't interrupt you.

MR. SCAGGS: Anyway, and the reason why this is somewhat perplexing is that -- and not to get into an expert report which Your Honor's had no reason to study, but --

THE COURT: I skimmed it. I didn't --

MR. SCAGGS: Yes. But the numbers --

THE COURT: Part of what I was worrying about is I didn't have yours, frankly. I'm sure yours is very different.

MR. SCAGGS: The numbers -- I'm sorry, Your Honor. And if I could step back a second, Your Honor. What this case has consisted of so far is Mr. Friedlander telling the Court repeatedly how much money my clients could make. They're at risk in the market. And we hear that every time. It's not a claim. The stuff he told Your Honor today is just wrong. And I need to say that on the record, about --

for instance, the -- the internal terms not being negotiated, and -- and that whole set of stuff he started with, Your Honor, is just more of, Your Honor, these guys are going to make too much money. There must be something wrong. That's not a claim. Heaven forbid if it becomes a claim under Delaware law.

So what you heard this morning from Mr. Friedlander was more of the same. And you don't hear more about his claim because that's it. Because what happens -- and if you look at the expert report, it's just, well, there were all these other -- and we would say purely hypothetical, in the purest sense -- speculative ways that something else could have been done differently to produce a bigger amount of money going into ASAC. That's -- that's the deal.

And so they also go on to say, well, and you should have dividended that out as a secondary offering or some other way maybe got that to the shareholders and, therefore, it's an individual claim, we're fine. But the point is, it's the same -- and it appears to have to do with this claim which is derivative, this corporate opportunity claim. And if it's that and not some other claim, then we should call it that, because that corporate opportunity claim

is dead on arrival because, we will show Your Honor, there was no opportunity here. The Court -- you know, these independent directors, and especially -- looked, and there was no other way. There was no other money to borrow.

THE COURT: Yeah.

MR. SCAGGS: And that's going to be -- so anyway that's the step back, Your Honor.

THE COURT: Those issues -- again, I think those issues are going to be in play regardless. Aren't they?

MR. SCAGGS: Yup. Yup. Your Honor, and so --

THE COURT: So part of the way I am approaching this class certification issue is as much from practicality as from doctrine. I mean, again, I'm trying to not to create problems for myself down the road, because what I think, if we ever get there, what we're all going to want is -- and what you said at the outset you want, which makes total sense to me -- is you want a nice definition so you know what you're dealing with. Right?

MR. SCAGGS: That's it, Your Honor. That's it.

THE COURT: And you don't want something that is going to be transitory over time. And I also don't think you want something that has the potential to flip in at some point to a grossed-up derivative level claim, as opposed to the smaller-level class claim. So, I mean, I'm coming at this as much from practicality as anything else, because I think that's part of what, Rule 23, I am supposed to do.

And I hear you. I mean, part of what I have to wrestle with is what Ginsburg allows me to do.

MR. SCAGGS: And I'll move to the second part about this representative, Your Honor.

THE COURT: Yes. Mr. Pacchia.

MR. SACKS: Yes. But either way, if we don't double pay -- there should be a class. We don't dispute that. So that's -- after all this, Your Honor -- and it's been very helpful to us to hear your thoughts on it.

THE COURT: I agree you should not double pay. You shouldn't triple pay, and you shouldn't infinitely pay.

MR. SCAGGS: Thank you, Your Honor.

THE COURT: Because really, if we adopt the sort of churning view, I mean, again, like it has -- although it may end up, because if it goes negative, right -- part of what I was wondering is if it really goes negative, they might have to pay you. The class would get so infinitesimally small it would come out big on the other side and they would owe you money.

Anyway, but --

MR. SCAGGS: I'm all for that, Your Honor. But -- so that's where we're at.

THE COURT: Right.

MR. SCAGGS: We want a definition and, again, we understand it's not going to be funky and that would be wonderful.

So on the class representative -- and I'll be quick here -- I think the question is, has our test for class representative effectively become, one, someone shows up with a brokerage statement saying that, hey, I'm a beneficial owner of stock and, two, the burden shifts to defendants to prove some compelling reason why that person cannot fill the spot of a representative plaintiff, such as they sold their stock or they've got some blatant irreconcilable

conflict with the rest of the class. I don't think that's the test. And I think this Court should resist making that the de facto test.

Then to jump to the points here, the Court, of course, exercises its sound discretion to decide whether Mr. Pacchia is an adequate plaintiff. And the point we wanted to put before Your Honor is, Your Honor, we ask you to exercise your discretion concerning all the problems together that he has. Of course, he sold 3,000 of his 7,472 shares when the deal was announced, the transaction he called "nice." A week later, after the price rose some more, he sold 2,000 more of his shares. We say that's probably not consistent with someone that had a view of this transaction as an egregious breach of duty.

He became interested in challenging the transaction after he sold 73 percent of his shares and he learned about the lawsuit. That's when he decided to keep, in our view, keep some shares and go play the corporate litigation game. He makes arbitrary decisions, number two. He testified that he sold his Activision shares because he was "pissed off." He even confirmed -- because I think the questioner was so surprised that he said that, you

know, there's a follow-up question. It was "No other reason?"

His answer: "No other reason." He even confirmed that he does things "... out of emotion." He could not explain why he did not sell all his shares. "I don't know, honestly." He either kept some shares just so he could act as a plaintiff, which means he lied under oath, saying that he did not know why, or he really makes -- he really doesn't have an idea and he makes financial decisions purely on emotion. I would say either answer should be fatal to his role as a plaintiff.

Why would this matter? Well, what happens if he's pissed off one day and turns down a great settlement offer? That hurts our clients and hurts the class. He wants to be a fiduciary like Delaware --

THE COURT: I can tell you what the answer is on that. The answer is that Mr. Friedlander has a duty as a class representative to potentially present a fair settlement to the Court, notwithstanding the views of the class representatives. I mean, that's -- I forget then-Vice Chancellor, our Chief Justice's, decision on that.

Remember, he had the decision. I think it was actually Ms. Zeldin's firm brought in a settlement over the strident objections of the named class representatives. And they were like, Oh, this is horrible, this is injustice, we're the clients, et cetera, et cetera. And you know, then-Vice Chancellor Strine said, No, that's exactly what you've got to do when you're a class representative.

So I can reassure you, Mr. Scaggs, that that's actually not a problem. So what else do you got?

MR. SCAGGS: Okay. I would sort of say I guess we're going to do -- you know, we might as well have private Attorneys General, because these -- what difference do they make, these representative plaintiffs.

Okay. So how much does he care about the lawsuit. He's suing to change the voting power in connection with the corporation and to remove two directors. And he sought, through his lawyers and expedited scheduling -- imposing really serious burdens on the defendants -- to get this done before the next annual meeting. So what did he do at the 2014 annual meeting? Doesn't know. In fact, I guess,

since we know nothing, it's as likely as not that he voted for the two directors he now wants to remove as a plaintiff. Okay. Well, I guess if Mr. Friedlander, you know, is the answer, then I guess we're fine. It's not -- it's not a fiduciary type of conduct.

He knew he should not be trading in Vivendi stock while he served as a plaintiff. In connection with his contested motion to be appointed lead plaintiff, he offered to sell his Vivendi stock. Did he? No. Not right away. He sold 3500 shares between December 19 and February 18. And the response here is, Well, you can't prove he traded on nonpublic information. We would respectfully suggest that shouldn't be the question. How do we know what he trades on? We do know -- because I looked it up -- that there was, of course, the 220 request documents. And there was another 6,000 pages from defendants produced prior to his last trade. If Mr. Friedlander is going to say, Well, we didn't talk to him about anything that was nonpublic, so he couldn't have, I think that's a waiver and we get to find out. But if not, then I think the presumption should be you don't trade.

Oh, and by the way, on the corporate

insiders trading, of course, that's specifically allowed. And they file Form 4's. Mr. Pacchia doesn't file a Form 4.

THE COURT: Specifically allowed what? They have plans or something?

MR. SCAGGS: No, no. I mean under the law. They don't do anything illegal by trading or anything, and consistent with their duties, as long as they follow the federal law under that, which is file the form 4, et cetera. So that's not relevant to what should be done here by a fiduciary.

So that's our view on that. And whether Your Honor, you know, deems them adequate, we thought you should know what you're dealing with here. So the question is, to us, do we now have under our law the question of whether -- well, if the director said, Well, gee whiz, I voted for a merger because I was pissed off -- and that was his unequivocal testimony. He was asked several times and he said, No, no. I -- I don't honestly -- well, later, Mr. Pacchia said, I don't remember why I traded at any time.

Well, imagine that testimony from a Delaware director, a fiduciary. What would happen to

him? But are we just going to wave our hand and say we don't need fiduciaries in that role, we need placeholders? I think that's the question for the Court, Your Honor. And unless you have questions, I'm done.

THE COURT: I don't. I appreciate it. Thank you, Mr. Scaggs.

MR. FRIEDLANDER: Well, Your Honor, let's start with the last point. Do plaintiffs just need to show up with a brokerage statement? Maybe. It's a hypothetical question. That's not our case. Mr. Pacchia showed up with a brokerage statement. He showed up at the leadership hearing. He showed up in Newport Beach, California, for a full-day mediation. He showed up here today. He showed up at a meeting with our expert. That's pretty good.

He came up with the idea of a rights offering. It's right in his testimony. Why was he pissed off? "Why didn't I get that deal." What did defendants have to do? Prove he's lying. Why don't you try that? When he says he's pissed off, sold shares, initiated a 220, sued, showed up to the mediation, showed up with the expert, advanced the theory consistent with his actions throughout.

And we have to prove claims against defendants. That's the way it works when you're a plaintiff. If you want to say someone's lying, prove it. The idea you can't sell shares based on emotion -- let's return the Nobel prize to Mr. Kahneman, let's return the Nobel prize to Mr. Shiller, because that's just deemed to be like morally reprehensible or something.

THE COURT: If we're going to give shout-outs to Mr. Kahneman, "Thinking Fast and Slow" is one of his most brilliant books of all time.

MR. FRIEDLANDER: Excuse me? Yeah.

THE COURT: Kahneman wrote his most recent book "Thinking Fast and Slow," I'll recommend it to anyone. It's fantastic. I'm sure Mr. Shiller's books are good, too. I've read Mr. Kahneman's books more recently, and he definitely deserves a shout-out.

MR. FRIEDLANDER: But if we go back to the first part of the argument, I agree with Mr. Scaggs, I agree with Your Honor, there's an issue, the logic of shares transferring. I would suggest this, Your Honor: For today let's follow Phil Ex 1 and put Phil Ex 2 to the side. Phil Ex 2 says who gets the money. Phil Ex 1 says who has a sufficient

interest in the class that they should be a part of the class. And let's avoid the risk of excluding people from classes who may have protected interests who could litigate them.

I was -- you know, I was a little surprised when Phil Ex 1 came out. I was a little surprised when Phil Ex 2 came out. But they say what they say. It's a legal issue that if the Court doesn't have to deal with here, I'm sure we'll have to deal with in a multitude of other cases. But I think for present purposes on class certification, there's a strong logic to Phil Ex 1, before the Court had actually even formulated the ruling in Phil Ex 2, to say, well, they have a sufficient interest to be in the class, the sellers do.

The idea that we transformed derivative claims into direct claims, no. We do have derivative claims on other theories. For instance, what's called the over-the-wall transaction, which is -- well, instead of Mr. Kotick and Mr. Kelly bringing people over the wall and saying, Hey, let me tell you about this deal I am cooking up. Would you like to invest in something called ASAC? It's, Well, how about Mr. Kotick and Mr. Kelly, as CEO and

chairman of the company, cochairman, coming to people and saying, Hey, let me tell you something we're cooking up with Vivendi. Wouldn't you like to buy shares of Activision? Then they can use all their negotiating prowess to get a better price from these outside investors. Oh, yeah, the stock is trading at 15 but look at this accretion, look at the benefits of Vivendi going away. Mr. Kotick says he predicted the stock price would go up to 17.65. Mr. Nolan from Leonard Green, he pegged it right on the money, 17.46. And so why don't you buy it, you know, 17, 16.50. Negotiate. And then the company captures the difference between 13.60 and whatever that number is. That's a derivative claim. So we have derivative claims, we have direct claims, based on alternative scenarios.

In terms of whether these terms were negotiated, Mr. Scaggs protests, but I was eagerly waiting for him to say who negotiated them. Are we going to say it was Leonard Green, the people who told in advance? The people who wrote internally in the December 12 presentation, "Goal is for management to receive 1 plus billion dollars of value on exit"? Are they the ones who negotiated these terms? They came

up with the idea of preferred, common 1, common 2, common 3, common 4, or A, B, C, D. That was their idea, but then Mr. Kotick and Mr. Kelly did the numbers and made it so it would come out exactly the same with the economics based on what they had been thinking of. Is it all purely hypothetical? Speculative? We'll have a trial about that.

THE COURT: I was going to say, I can't get into any of that today. I don't know, I'm sure your friends have dramatically different views as to what went down.

MR. FRIEDLANDER: But I think that's -- I think those are my points on class certification, Your Honor. Thank you.

THE COURT: All right. So here's what I'd like to do: I'm going to give you an answer today on the adequacy of Mr. Pacchia. I think he is adequate. I do think that the standard for adequacy, absent conflict, is low. Whether it's as low as Mr. Scaggs posits, I don't think so. I think that it is something where this Court does have discretion.

I do think that it's helpful to have these issues raised -- sunlight is always valuable -- but I'm actually guided the most by Chancellor

Chandler's opinion in Fuqua. That was derivative, but it's still a representative plaintiff scenario. He talks about the United States Supreme Court's decision involving the perhaps inaptly named Mr. Brilliant. It is a low standard. And when I take everything into account, I think Mr. Pacchia more than surpasses it, and I don't read too much into his statements about selling in terms of emotion or being irritated, or things like that.

So as to that, to the extent the opposition to class certification is based on Mr. Pacchia's inadequacy, the opposition is rejected and that aspect of the motion for class certification is granted. I do think he is an adequate representative.

I'm going to wait on these other issues until I hear from Mr. Scaggs and his friends on the Fidelity points. I don't think it makes sense for me to weigh in on the class definition only then to have to weigh in again once I find out whether there's a Fidelity problem.

So I will look forward to hearing from you-all on that. Hopefully it's something that we can hash out in writing. You know, if we do have to get

back together, we certainly can get back together. I always worry about the number of trips Mr. Sacks is taking to the East Coast. I'm sure he travels a lot, but if we can avoid having to drag him back here again, that would be great. Not that I don't like to see him, but I do think it's a long flight, having done it myself. Anyway, I will wait to hear from you-all on that and then we'll decide how to proceed.

Mr. Scaggs, you look like you have something on your mind.

MR. SCAGGS: Just real quick, Your Honor, because we're talking about it and we called chambers, so I didn't want it to surprise you later, since it's on the table today, is trial was scheduled, back at the time we put the entire case schedule in place, for five days. Having looked at the vast number of witnesses -- and we can educate you more on that, Your Honor -- as you can imagine, six Vivendi directors, three special committee, and all the advisors. Our view is that we're going to need more trial time. We've talked to plaintiffs. Actually, I called them the same day they heard from Fidelity, on Wednesday, to raise that.

THE COURT: Very good.

MR. SCAGGS: And we have called the Court and got from your chambers the other days available in December. I assume we'll be talking some more about that. And I don't know their position yet, but I didn't want that to surprise you sometime later this week.

THE COURT: No. And I appreciate you raising it, Mr. Scaggs. I'm easily surprised, so it's good to proceed with caution. Avoids me being startled. I don't know, it's not inconceivable to me that you-all could need more than five days. I do want to have some explanation, to the extent you-all can't agree, of how we're going to use the trial time productively. You know, I have been reading what you-all are giving me. I will read what you-all give me in advance of trial. I don't think we necessarily need a lot of potentially redundant witnesses. I don't know how many of them will be redundant, but obviously if there are key people that need to testify, then they need to testify.

So if, indeed, it comes down to something -- and particularly if you're asking for -- five days is a long time. You guys are efficient. You can do a lot in five days. We're not moving

juries in and out. So if you do need more time, it would be helpful for me to understand the why and the wherefore. And I'm not saying I won't give you more time. I just want to understand how we're going to use it. Fair?

MR. SCAGGS: Absolutely.

THE COURT: Great.

MR. SCAGGS: We'll let you know, Your Honor.

MR. FRIEDLANDER: If I could just speak to that for a few seconds. We're not unalterably opposed to there being additional time. I mean, a request was made for 12 days, which I think is extraordinarily long and unnecessary. I have no doubt that people can use up whatever time the Court allots, having been through the Disney trial. But I think as the trial gets longer, there will be more redundant and unnecessary testimony. So if there's a couple more days, we can understand that. We were glad to find out that the Court's schedule permits that, because we certainly don't want to delay, you know, to find out we have to go into some other week or month to get something done. So I think we should try to talk over the next few days.

THE COURT: Yeah.

Oh. Mr. Sacks.

MR. SACKS: Your Honor, we will speak to the plaintiffs, but just so Your Honor understands why we asked for 12 days, we expect there are going to be 25 or so witnesses in this case. There are five experts who have been designated in this case. Vivendi witnesses are going to testify, some of them through translators, which is going to be a cumbersome and slow process. The issues in the case have reasonably been expanded by virtue of plaintiff challenging an election of directors, and so we're not just focused on the transaction. We're focused on other issues. There are going to be individuals who are going to -- they're individually named -- who are going to want to defend themselves. Plaintiff has offered speculation about raising more money, which is causing us to have to bring in more people to talk about raising money, which we never understood to be an issue in this case.

So, you know, 12 days, you're talking two witnesses a day, with people who are going to be translated witnesses. I understand we're going to be efficient here, I understand we have long trial days,

we don't have juries, we have minimal breaks, we're on regular schedules. All of us are going to be efficient, because you'll skewer us if we're not.

THE COURT: I'll encourage you to be efficient.

MR. SACKS: You will encourage us. In an appropriate way you will, but --

THE COURT: Yes. I will give you positive reinforcement for being efficient.

MR. SACKS: None of us wants to spend more time in December here with Your Honor than is necessary, but this is a --

THE COURT: There's a nice ring to the 12 days of Christmas, though.

MR. SACKS: But we will talk with plaintiffs, and hopefully we'll be able to offer Your Honor, you know, an agreed-upon proposal. And if not, since I am on the East Coast regularly, I am happy to come back to talk to you about it.

THE COURT: All right. Well, look, as I say, I don't want you to hear me that I'm ruling it out, and I am certainly amenable to it. I just want to know the why and the wherefore and to have an intelligent explanation of how we need the additional

time and how we're going to use it. So I look forward to getting that. Thank you all for your time today, and I will await the further submission from Mr. Scaggs and his friends and guidance on how you want to proceed as to the Fidelity matters.

Thank you, everyone, for coming in.

(Court adjourned at 10:58 a.m.)

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CERTIFICATE

I, JULIANNE LaBADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 3 through 77, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing 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 this 14th day of October, 2014.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public