IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WAYNE COUNTY EMPLOYEES' RETIREMENT SYSTEM, individually, and on behalf of all those similarly situated, Plaintiff, v. ROBERT J. CORTI, RONALD DOORNINK, BARBARA S. ISGUR, ROBERT A. KOTICK, BRIAN G. KELLY, ROBERT J. MORGADO, PETER J. NOLAN, RICHARD SARNOFF, and ACTIVISION, INC. Defendants.	:	C.A. No. 3534-CC

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF ITS INTERIM PETITION FOR ATTORNEYS' FEES AND EXPENSES

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I. PRELIMINARY STATEMENT

Plaintiff, Wayne County Employees' Retirement System, respectfully submits this brief in support of an interim application for an award of attorneys' fees and expenses to compensate Plaintiff's counsel for the successful prosecution of disclosure claims in this action.

Plaintiff filed its Class Action Complaint ("Complaint" or "Compl.," LexisNexis ID No. 18458868) on February 8, 2008, following the December 2, 2007 announcement of an agreement by Activision, Inc. ("Activision" or "Company") to sell voting control of the Company to Vivendi S.A. ("Vivendi") through a series of related transactions (the "Transactions") in which, among other things, Vivendi obtained newly-issued Activision common stock constituting voting control of Activision. The sale to Vivendi required a vote of Activision stockholders to approve an amendment to Activision's Certificate of Incorporation, which, among other things, authorized the issuance of additional stock.

Plaintiff brought disclosure claims relating to the Preliminary Proxy Statement publicly filed with the SEC by Activision on January 31, 2008.[1] Plaintiff obtained expedited proceedings to be heard on a motion for injunctive relief prior to the stockholder vote. Defendants disclosed additional material information directly responsive to Plaintiff's disclosure claims. As discussed herein, the substantial additional disclosures provided the stockholders with newly-disclosed material information,

[1] The Complaint also alleged breaches of fiduciary duty against the directors of Activision, claims challenging the propriety of amendments to Activision's Certificate of Incorporation and claims for aiding and abetting for the breaches against Vivendi and certain of its affiliates, in connection with the sale of voting control of the Company to Vivendi. (Compl. ¶¶99-105; 111-13).

including:

- Activision's internal financial forecasts including those provided to Vivendi;
- The projections derived from Wall Street estimates used by Activision's financial advisor, Allen & Company ("Allen") in its DCF valuation of Activision and Allen's reasoning for using those data points;
- Vivendi Games, Inc.'s ("Games" or "Vivendi Games") management projections and Allen's extrapolations of those projections through fiscal year 2012 that Allen used in its valuation of Games;
- An explanation of Allen's use of General Entertainment Companies in addition to Interactive Entertainment Companies in its comparable companies valuation of Activision;
- A chart setting forth the multiples for the underlying constituent companies used by Allen in its comparable companies valuation of Activision;
- Allen's explanation of its choice of a terminal multiple approach for its Activision DCF valuation and a growth model for Allen's Blizzard DCF valuation;
- The fact Allen was not asked to and did not update its opinion to take into account changes in Activision's performance from December 1, 2007;
- The amount of the fee Allen would receive upon successful completion of the Transactions;

- Expanded information regarding the background of the Transactions, including the existence of a confidentially agreement providing for exclusive negotiations without the authorization of the Board between Vivendi and insider Defendants Robert A. Kotick ("Kotick") and Brian G. Kelly ("Kelly");
- Expanded information about the substance of discussions between Activision and Vivendi, along with Board discussions regarding the Transactions;
- Information regarding the authorization of the Board's Nominating & Corporate Governance Committee (the "Committee")[2] to take certain actions in connection with the Transactions and its duties and responsibilities in that regard;
- Disclosure of insider Defendants Kotick's and Kelly's presence at virtually every meeting of the Committee;
- Additional disclosures regarding the negotiation process and the role, recommendations and views of the Committee (or lack thereof) in that process;
- Additional information regarding negotiations between Allen and Goldman Sachs and the timing and details of the bid/ask history;
- Information regarding the hiring of the law firm Shearman & Stearling,

[2] The members of the Committee were: Defendants Robert Corti, Robert Morgado, and Richard Sarnoff.

LLP to serve as legal counsel for compensation and employment issues, along with the substance of the work performed by Shearman & Stearling;

- Additional information regarding the proposed Activision Amended Certificate of Incorporation provisions;
- Information regarding Activision management's prior review of strategic alternatives; and
- Descriptions of Plaintiff's litigation and Plaintiff's claims, including Plaintiff's disclosure claims.

The charts filed as Exhibits A - C to the Transmittal Affidavit of Meghan A. Adams in Support of Plaintiff's Opening Brief in Support of its Interim Petition for Attorneys' Fees and Expenses[3] provide a detailed chronology of the supplemental and corrective disclosures provided by Defendants, the relationship of those disclosures to Plaintiff's claims, and the location in the revised proxy materials of the supplemental disclosures.

Plaintiff respectfully submits that its counsel is entitled to an interim award of attorneys' fees and expenses for the successful prosecution of the disclosure claims. Plaintiff seeks an award of attorney's fees in the amount of $2,750,000 plus actual out-of-pocket expenses in the amount of $104,746.08. Plaintiff submits that this request is well within the range of fees approved by this Court for substantial non-monetary benefits and is supported by the record which indicates Plaintiff's counsel obtained the supplemental

[3] Cited herein as "Adams Aff. Ex. __".

and corrective disclosure of material information through hard-fought and aggressively defended expedited litigation.

II. STATEMENT OF FACTS RELEVANT TO PLAINTIFF'S INTERIM APPLICATION

A. Plaintiff's Claims Challenging the Sale of Control of Activision to Vivendi, Disclosures to Activision Stockholders and Amendments to the Activision Certificate of Incorporation

On December 2, 2007, Activision announced that its Board had approved the Transactions[4] to sell control of the Company to Vivendi. In exchange for newly-issued shares constituting 52% voting control of Activision, valuing Activision at $27.50 per share, Vivendi (1) merged its wholly-owned subsidiary, Games, with Activision in exchange for new Activision shares ("Merger"), and (2) paid $1.7 billion in cash to the combined company for additional new Activision shares ("Stock Purchase"). The public Activision stockholders retained only a minority share of the combined company and received no control premium or appraisal rights. The only payment available to Activision public stockholders in connection with the sale of control to Vivendi was through a post-sale partial tender offer ("Tender Offer") at $27.50 per share, a discount to market price.

The sale of control also contemplated amendments to Activision's Certificate of Incorporation, including terms that provided substantial post-sale control and protection from liability to Vivendi at the expense of the public Activision stockholders. In

[4] The agreement setting forth the terms of the sale of control, the Business Combination Agreement ("BCA"), was announced on December 2, 2007. The BCA also included various deal protection provisions including, among other things, a no solicitation provision and Vivendi's ability to match a superior proposal. (Compl. ¶¶36-45).

addition, Defendants Kotick and Kelly received new employment contracts and other lucrative bonuses and stock rights in the Transactions.

On January 31, 2008, the Company publicly filed a Preliminary Proxy Statement ("PPS") with the SEC relating to the Transactions.[5] On February 8, 2008, Plaintiff filed its Complaint, which included claims against the Activision directors for failure to discharge their fiduciary duties in the sale of control to Vivendi. Among other things, Plaintiff alleged that the unfair sale of control had been pursued and negotiated by conflicted Activision management, led by Defendants Kotick and Kelly, with little, if any, active involvement of the outside directors or independent advisors. (Compl. ¶¶4, 101). The Complaint articulated claims that the PPS omitted material information and included materially misleading disclosures. (Compl. ¶¶106-110). The Complaint alleged that the then-proposed amendments to Article VIII Section 8.3 and Article IX Section 9.3 of Activision's certificate of incorporation ("Amended Certificate Provisions") were invalid and conflicted with Delaware law. (Compl. ¶103).

Plaintiff continues to actively litigate its claims. On January 14, 2009, Plaintiff filed its Second Amended Class Action Complaint ("Second Amended Complaint," LexisNexis ID No. 23038738). The Second Amended Complaint alleges claims for breaches of fiduciary duty, including the duty of loyalty, against the directors of Activision, and claims for breach of the duty of loyalty and entire fairness against Defendants Kotick and Kelly, in connection with the sale of control of Activision. The Second Amended Complaint alleges that the Amended Certificate Provisions are invalid

[5] The PPS was submitted previously with the March 6, 2008 Transmittal Affidavit of Scott W. Perkins, Esq. as Exhibit A. (LexisNexis ID No. 18887874).

and beyond the scope permissible by Delaware law. In addition, Plaintiff alleges that the June 6, 2008 Definitive Proxy Statement ("Definitive Proxy")[6] failed to disclose material information, including: (1) Games' management projections as of the time of the Transactions; (2) the bases and reasons for the Activision Board's decision on April 29, 2008 to continue its recommendation to Activision stockholders in favor of the Transactions; and (3) the bases of Allen's and management's decision not to seek a revision of the fixed exchange ratio set for the merger in July 2007 and the bases for Allen's increased valuation of Games. Those three remaining disclosure claims are the only ones that did not prompt Defendants to make supplemental or corrective disclosures of material information.[7]

B. Activision's Preliminary Proxy Statement Omitted Material Information, Prompting the Disclosure Claims in Plaintiff's Complaint

Over the course of this litigation, Plaintiff has challenged Defendants' deficient disclosures. As a result, Defendants supplemented and corrected their proxy statements with additional material disclosures. In its Complaint, Plaintiff alleged that the PPS (Defendants' initial disclosure document) omitted material information regarding, among other things, Allen's valuation analyses, the Activision Board's approval and

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[6] The Definitive Proxy was submitted previously with the June 22, 2008 Transmittal Affidavit of Meghan A. Adams in Support of Plaintiff's Motion for Preliminary Injunctive Relief as Exhibit A. (LexisNexis ID No. 20351084).

[7] As of May 5, 2009, Defendants' Motion to Dismiss the Second Amended Complaint is fully briefed. (*See* Defendants' Reply Brief in Support of their Motion to Dismiss, LexisNexis ID No. 25036250). On May 8, 2009, Plaintiff requested oral argument on Defendants' Motion to Dismiss under Court of Chancery Rule 7(b)(4). (LexisNexis ID No. 25085039).

recommendation of the Transactions and the advice provided by the Company's counsel, Skadden Arps, to the directors regarding their duties in a sale of control. (Compl. ¶¶82-98).

1. Plaintiff's Claims of Omissions and Misleading Disclosures Regarding Allen's Valuations

The Complaint alleged that in the PPS, disclosures relating to Allen's work were materially insufficient. (Compl. ¶¶92-98). The unusual structure of the proposed sale of control rendered the disclosures regarding the relative valuations of Activision and Games particularly material to Activision stockholders. Games was a subsidiary of a foreign company with little publicly available financial information. (Compl. ¶¶18-20). In the proposed sale, Activision and Games were combined with Vivendi obtaining ownership of the combined Company. (Compl. ¶1). Thus, in order to make an informed assessment and evaluation of the financial fairness of the exchange and the Transactions, Activision stockholders were entitled to an informed understanding of Allen's valuation analyses of both Activision and Games.

The PPS included a summary of Allen's analyses regarding its valuations of Activision and Games. (PPS at 68-78). The summary lacked material information necessary to understand the analyses and Allen's opinion. (Compl. ¶¶92-98). For example, the PPS did not disclose the relevant multiples for the companies used in Allen's comparable companies analysis to permit the stockholders to evaluate the $27.50 transaction price against the comparables. (Compl. ¶93). The PPS also did not explain why Allen inconsistently used a terminal multiple approach for its discounted cash flow valuation of Activision but used a growth model approach for Games. (Compl. ¶96).

The PPS also did not disclose the projections underlying the discounted cash flow valuation of either Activision or Games. (Compl ¶96).

The PPS included no explanation for Allen's use of "general entertainment" companies in its comparable companies analysis for Activision.[8] (Compl. ¶94). The Complaint further alleged that Allen's opinion and analyses, dated December 1, 2007, were, by the time of the PPS, stale and that Allen's work did not disclose its "fairness" standard. (Compl. ¶¶97-98).

2. Plaintiff's Claims of Omissions and Misleading Disclosures Regarding Engagement Terms of Advisors

The Committee relied on the Company's advisors, Skadden Arps and Allen, both of which had been engaged by Activision management. (Compl. ¶61). The Complaint alleged that the fee structure of the advisors was material information so stockholders could judge whether the advisors' interests diverged from the interests of stockholders. (Compl. ¶¶61, 90). Although the PPS indicated that Allen's compensation included an opinion fee and a contingent component, the PPS did not quantify the components or the total compensation. (PPS at 85). The PPS failed to disclose the terms of the engagements of Allen and Skadden, including any contingencies for payment. (Compl. ¶¶61, 90).

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[8] These included companies such as Lions Gate Entertainment, Dreamworks Animation and Warner Music Group, the businesses of which are not obviously comparable incomparable to Activision. (PPS at 71). Allen also used a category of "interactive entertainment" companies including the seemingly more comparable video games companies: Electronic Arts, THQ, Take Two Interactive and Ubisoft Entertainment. (PPS at 71).

3. Plaintiff's Claims of Omissions and Misleading Disclosures Regarding the Sale Process

The PPS stated that the Activision Board considered "alternatives" and "strategic opportunities." (PPS at 59). The PPS, however, did not disclose any information regarding the particular "alternatives" or "opportunities" considered by the Board or available to the Company. (Compl. ¶¶83, 86).

The PPS also stated that the Activision Board charged the Committee to evaluate proposals and alternatives and "to make recommendations to the Board whether the proposals or alternatives are in the best interests of Activision and its stockholders," and that the Board considered the "recommendations" and "views" of the Committee. (PPS at 59, 64). The PPS omitted information necessary to understand the purpose and role of the Committee. For instance, the PPS did not disclose why the Board gave the Committee this task or what "recommendations" or "views" the Committee provided to the Board. (Compl. ¶82).[9]

[9] The PPS's statements that the Board determined that the sale to Vivendi was in the best interests of the Company and its stockholders and that the Tender Offer provided a "premium" to Activision stockholders were misleading. (Compl. ¶¶63, 88). Although the Board had an obligation to obtain the best value reasonable available for the stockholders, the PPS did not disclose whether the Board determined that the Transactions constituted the best value reasonably available in a sale of control. (Compl. ¶88). Additionally, although the PPS disclosed that Skadden Arps generally advised the Committee regarding fiduciary duties, (PPS at 59), the PPS did not disclose whether Skadden Arps advised the Committee that it had a duty to obtain the best value available in a sale of control or to obtain a control premium. (Compl. ¶87). The PPS likewise did not disclose whether Skadden Arps also advised Kotick and Kelly regarding their new employment terms or the Voting and Lock Up Agreements. (Compl. ¶87).

4. Plaintiff's Claims of Omissions and Misleading Disclosures Regarding Management's Negotiations of Post-Sale Management and Governance

The primary role of Activision management in the negotiations with Vivendi regarding both the transaction terms and the post-transaction management and governance terms presented a conflict with the stockholders' interest in maximizing value and obtaining a premium on a sale of control. (Compl. ¶¶4, 46, 54, 58, 70). The PPS stated that Skadden Arps informed the Committee in September 2007 that there were "material open issues" in the negotiations regarding governance and management. (PPS at 64). The Complaint alleged that the PPS failed to disclose what issues were included in the "material open issues" and how they were resolved. (Compl. ¶89).

The PPS also disclosed that Kotick and Kelly and certain other members of Activision management would receive new employment contracts, stock rights and bonuses if the Transactions were consummated. (PPS at 120). The PPS stated that the Activision Compensation Committee approved the amended employment agreements. (PPS at 120). The PPS failed to disclose how and by whom the new terms were determined. (Compl. ¶91). Given the exclusive role of Activision management in the negotiations with Vivendi, the background and bases for the management employment terms were material to Activision stockholders.[10]

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[10] The PPS also summarized the proposed changes to the Activision Certificate of Incorporation, but omitted a summary of Article 9, which purported to relieve Vivendi affiliates' directors from fiduciary duties and liability. (PPS at 15-16, 66, 85, 131, 137-38). Although the PPS included a full copy of the proposed amended Certificate of Incorporation, a reasonable stockholder cannot be expected to comb through the Certificate to discover these provisions. (Compl. ¶85). Further, the PPS did not disclose the Activision Board's rationale for approving these substantial giveaways to Vivendi.

C. In Response to Plaintiff's Disclosure Claims Defendants Supplemented and Corrected Their Disclosures

From near the beginning of this action, Plaintiff's actions have resulted in beneficial supplemental and corrective disclosures. On February 22, 2008, Plaintiff moved for expedited proceedings to be heard on a motion for preliminary injunctive relief prior to the Activision stockholder vote. ("Initial Motion to Expedite," LexisNexis ID No. 18652325).[11] The Court declined to set a preliminary injunction hearing date, but directed Defendants to proceed with the production of core Company documents.[12] (Adams Aff. Ex. E, Hearing Transcript for Initial Motion to Expedite at 46-48). During the teleconference on Plaintiff's Initial Motion to Expedite, the Activision Defendants stated that the PPS would "be revised in the next couple of weeks" and that Defendants intended to address Plaintiff's disclosure claims. (Adams Aff. Ex. E, Hearing Transcript for Initial Motion to Expedite at 27). The Court directed Plaintiff to review the revised proxy materials and file an amended complaint reacting to Defendants' new disclosures. (Adams Aff. Ex. E, Hearing Transcript for Initial Motion to Expedite at 46-47).

(Compl. ¶85). The Board's rationale was material because the Activision stockholders would be in a minority position following the sale of control to Vivendi. (Compl. ¶85).

[11] No stockholder meeting date had yet been set at the time of the Initial Motion to Expedite. Plaintiff, however, believed the setting of a meeting date was imminent and believed it was in the best interests of the Class and judicial economy to begin the discovery process to avoid or ease the time pressure on the parties of preparing and presenting a motion for injunctive relief in a compressed time period. Indeed, in opposing Plaintiff's motion and discovery, Defendants advised the Court that they expected a meeting date within the first part of 2008. (Adams Aff. Ex. E, March 12, 2008 Hearing Transcript for Plaintiff's Initial Motion to Expedite at 30).

[12] The Activision Defendants began production of core documents, including minutes of Board and Committee meetings and Allen's presentations, on March 21, 2008.

1. Defendants Make Material Supplemental and Corrective Disclosures in the April 30, 2008 Revised Preliminary Proxy

On April 30, 2008, Activision filed its Revised Preliminary Proxy Statement with the SEC ("April 30 RPPS")[13] which added material disclosures directly responsive to Plaintiff's claims.

a. Disclosures Regarding Allen's Work

In response to Plaintiff's claims that disclosures concerning Allen's valuation analyses were materially deficient, the April 30 RPPS included substantial additional disclosures. (Adams Aff. Ex. A, Chart of Defendants' Supplemental and Corrective Disclosures Made in the April 30 RPPS ("April 30 RPPS Chart") at 24-31). The additional disclosures provided material information regarding Allen's methodologies, including charts of comparable companies' multiples, explanations of Allen's weighted average cost of capital calculation and terminal multiple calculation for Activision, and an explanation for Allen's use of a perpetual growth model for Games' DCF. (April 30 RPPS Chart at 28-31). Most significantly, the supplemental disclosures provided the projections underlying Allen's DCF analyses of Activision and Blizzard and informed stockholders that in performing its stand-alone DCF valuation of Activision, Allen relied on projections derived from Wall Street estimates, rather than actual, contemporaneous Activision management projections. (April 30 RPPS Chart at 28, 29, 31). The additional disclosures also included a more detailed explanation and chart describing Allen's DCF

[13] The April 30 RPPS was previously filed with the May 14, 2008 Transmittal Affidavit of Scott W. Perkins as Exhibit A. (LexisNexis ID No. 19839842).

valuation of Blizzard.[14] (April 30 RPPS Chart at 29-31). The disclosure stated that Allen had not updated or revised its work and opinion in view of events that had occurred since the December 1, 2007 date of the opinion. (April 30 RPPS Chart at 24).

b. Disclosures Regarding Allen's Engagement Terms

The April 30 RPPS also directly responded to Plaintiff's claim that the PPS failed to disclose Allen's compensation terms. (April 30 RPPS Chart at 1, 32). The additional disclosures informed the stockholders that Allen was paid a $1 million opinion fee and would be entitled to a $27.5 million transaction fee if the Transactions were consummated. (April 30 RPPS Chart at 32). The additional disclosures informed the stockholders that for more than five years prior to the Transactions, Allen had advised the Company regarding a number of transactions and had not been compensated for its services. (April 30 RPPS Chart at 32). The April 30 RPPS revealed Allen was engaged in March of 2007, prior to management's informing the outside directors, to act as the Company's financial advisor with respect to, among other things, evaluation of the Company's historic and projected results and a possible transaction. (April 30 RPPS Chart at 3).[15]

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[14] Blizzard was the division of Games that accounted for virtually all of Games' value. (Compl. ¶79).

[15] Skadden Arps separately advised Plaintiff's counsel that Skadden Arps' engagement was based on hourly billing and included no success-based contingency. Based on that representation, Plaintiff determined no material deficiency existed in the proxy materials regarding Skadden's compensation.

c. Disclosures Regarding the Events of the Sale Process and the Purpose and Role of the Committee

The April 30 RPPS provided additional material disclosures regarding the purpose and role of the Committee. (April 30 RPPS Chart at 6, 7). The additional disclosures showed that Activision management along with Allen and Skadden Arps began exclusive negotiations with Vivendi contemplating a sale of control months before management informed the outside directors that any discussions were underway. (April 30 RPPS Chart at 1-5). The April 30 RPPS disclosed that proposals and counterproposals, all of which contemplated a sale of control, had already been exchanged between Vivendi and Activision management by the time the outside directors were first informed that discussions were underway. (April 30 RPPS Chart at 1-5). The April 30 RPPS provided supplemental material information regarding the "alternatives" and "opportunities" considered by the Board. (April 30 RPPS Chart at 1, 2). The additional disclosures stated that in June-September 2006, Activision identified potential strategic opportunities, including potential business combinations with public and private companies in the interactive entertainment industry, strategic partnerships and other alliances or investments. (April 30 RPPS Chart at 1). The supplemental disclosures also provided material additional information concerning the genesis of the exclusive discussions between Vivendi and Activision management beginning in late 2006. (April 30 RPPS Chart at 2).[16]

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[16] The April 30 RPPS also included additional material disclosures regarding Skadden Arps' advice to the Board. (April 30 RPPS Chart at 5, 20). The additional disclosures indicated that Skadden Arps advised the Board at the April 30, 2007 meeting, at which the Board resolved to pursue the transaction with Vivendi, that the Board "was

The April 30 RPPS also added specifics regarding the bid/ask history between Allen and Goldman Sachs, Vivendi's financial advisor. (April 30 RPPS Chart at 3-5, 7-9, 12, 15, 16). The April 30 RPPS disclosed that the fixed exchange ratio[17] had been contemplated since the beginning of negotiations. (April 30 RPPS Chart at 8).

Further, the April 30 RPPS disclosed the full charge of the Committee, including that it was empowered to retain advisors, to negotiate and to provide recommendations to the Board in light of Activision management's possible conflict in any transaction. (April 30 RPPS Chart at 6). The April 30 RPPS stated for the first time that the Committee's aim from the outset was to ensure that Activision stockholders received a control premium if a change of control were to occur (April 30 RPPS Chart at 7). The additional disclosures also described negotiations in which the Committee had at most a passive role in the negotiations, receiving updates from management and the advisors at a few meetings during the months of negotiations and yielding to Vivendi's rejection of a "Top Up" option, while management directly negotiated the transaction terms with Vivendi and directed the advisers. (April 30 RPPS Chart at 7-19).

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advised with respect to its fiduciary duties under Delaware law." (April 30 RPPS Chart at 5). The April 30 RPPS also disclosed that, at the December 1, 2007 Board meeting, at which the Transactions were approved after nearly a year of exclusive discussions, Skadden advised that the Board's duties included the duty "to act in a manner reasonably designed to obtain the best price for the stockholders," and that the Board "considered that the transaction was best value available for the stockholders on a sale of control of Activision." (April 30 RPPS Chart at 19, 20, 22).

[17] The fixed ratio pegged the value of Games to 43.7% of Activision, regardless of the actual relative value of Games to Activision. (Compl. ¶¶32, 59).

d. Disclosures Regarding New Employment Contracts and Post-Sale Governance

The April 30 RPPS added material disclosures directly responsive to Plaintiff's claims regarding Activision management's amended employment agreements and bonuses and the post-closing management structure of the Company. (April 30 RPPS Chart at 4, 10, 12-20, 23). The supplemental and corrective disclosures informed the stockholders that Activision's Compensation Committee had retained separate legal counsel, Shearman & Sterling, LLP ("Shearman"), to serve as its counsel to negotiate Kotick's and Kelly's employment terms and bonuses. (April 30 RPPS Chart at 10). The additional disclosures also stated that the Committee and the Compensation Committee negotiated employment terms with Kotick and Kelly, but that management handled all negotiations with Vivendi, even with respect to Kotick's and Kelly's employment terms. (April 30 RPPS Chart at 4, 13, 14). The additional disclosures also informed the stockholders that Shearman retained outside consultants to evaluate the structure and valuation of the proposed executive compensation packages. (April 30 RPPS Chart at 15, 17, 19). The employment negotiations proceeded simultaneously with the negotiations with Vivendi regarding the transaction terms, all of which were conducted by Activision management. (April 30 RPPS Chart at 13, 14, 16, 18-20). The disclosures also clarified that Kotick and Kelly were being represented by Wachtell, Lipton, Rosen & Katz, and not Skadden Arps, for their amended employment agreement. (April 30 RPPS Chart at 13).[18]

[18] The April 30 RPPS also added a summary of the then-proposed amendment to Article 9 of Activision's Certificate of Incorporation in response to Plaintiff's claim that

2. Despite its Improved Disclosures, the April 30 RPPS Still Omitted Material Information and Contained Material Misstatements

The April 30 RPPS addressed some, but not all of Plaintiff's disclosure claims. The April 30 RPPS' supplemental and corrective disclosures were material, but still left gaps in the total mix of information necessary for an informed stockholder vote. On May 8, 2008, Plaintiff filed its Amended Class Action Complaint ("AC") as directed by the Court. (Adams Aff. Ex. E, Hearing Transcript from Plaintiff's Initial Motion to Expedite at 46-47). The AC alleged that the April 30 RPPS continued to omit material information and that some of the new disclosures in the April 30 RPPS and documents produced to Plaintiff in discovery raised new issues of material omission.[19]

The AC alleged that the April 30 RPPS omitted, among other things: (1) that Kotick and Kelly were present at almost every meeting of the Committee (AC ¶118); (2) the actual Activision management projections provided by Activision management to Vivendi in late November 2007 and early April 2008 (AC ¶111); (3) Allen's rationale for its use of Wall Street estimates instead of the actual Activision management projections

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the PPS excluded this material information. (April 30 RPPS Chart at 32-33). A summary of Plaintiff's allegations from the Complaint, including a description of Plaintiff's disclosure claims, was also added. (April 30 RPPS Chart at 35).

[19] Also on May 8, 2008, Plaintiff filed its Renewed Motion for Expedited Proceedings to enable Plaintiff to be heard on a motion for preliminary injunctive relief prior to the special meeting of Activision stockholders in connection with the Transactions. (LexisNexis Transaction ID No. 19680894). On May 28, 2008, the Court set a hearing on Plaintiff's Motion for Preliminary Injunction for June 30, 2008 and also ordered expedited discovery on Plaintiff's process and disclosure claims. (LexisNexis ID No. 19995890). During the period of expedited discovery, Plaintiff deposed Defendants Kotick and Morgado, an Allen representative and a Vivendi executive. Plaintiff also received and reviewed tens of thousands of pages of document discovery.

to value Activision (AC ¶111); (4) the "recommendations" or "views" of the Committee regarding the final transaction terms (given that the Committee's charge by the Board specifically required this) (AC ¶112); (5) the identity of specific "alternatives" and "opportunities" considered by the Board and Activision management (AC ¶¶113-114); and (6) that Allen had increased its valuation of Games by over $1 billion coincident with the increase in the per share price of Activision to $27.50 in order to maintain the fixed exchange ratio demanded by Vivendi. (AC¶117).

3. Defendants Make Material Supplemental and Corrective Disclosures in the June 3, 2008 RPPS and June 6, 2008 Definitive Proxy Statement

On June 3, 2008, Activision filed a further revised preliminary proxy statement with the SEC ("June 3 RPPS," Adams Aff. Ex. G), and, on June 6, filed the Definitive Proxy. The June 3 RPPS added further material disclosures in response to Plaintiff's disclosure claims.[20] (*See* Adams Aff. Ex. B, Chart of Defendants' Supplemental and Corrective Disclosures Made in June 3 RPPS and Definitive Proxy ("June 3 RPPS Chart")).

a. Disclosure of Activision Management Projections

Plaintiff claimed that the April 30 RPPS failed to disclose Activision's actual management projections (which Plaintiff learned during discovery not only existed but had been provided to Vivendi). (AC ¶111). The June 3 RPPS disclosed that Activision provided management projections for its 2008, 2009 and 2010 fiscal years to Vivendi,

[20] The Definitive Proxy was substantially the same as the June 3 RPPS, and included all of the supplemental and corrective disclosures made by Defendants in response to the Complaint and the AC. The June 3 RPPS was not previously part of the record and is thus submitted as Adams Aff. Ex. G.

Activision's Board, the Committee and Allen in August and November 2007. (June 3 RPPS Chart at 6-13). The August management projections consisted of "base case," "upside case" and "stretch case" scenarios. (June 3 RPPS Chart at 6-13). The August management projections were disclosed and the circumstances of their creation was described. (June 3 RPPS Chart at 9-11). The November 2007 Activision management projections provided to Vivendi were also disclosed. (June 3 RPPS Chart at 11-12). The November projections reflected expectations of substantially better performance than did Wall Street projection on which Allen relied. (June 3 RPPS Chart at 11). The disclosure clarified that Allen continued to use Wall Street estimates for its valuation of Activision, despite the availability of more favorable management projections. (June 3 RPPS Chart at 7).

The June 3 RPPS also disclosed that Activision provided Vivendi revised guidance for fiscal year 2008 in April 2008. (June 3 RPPS Chart at 12). These newly disclosed Activision management projections showed that the previous projections were now outdated because they projected substantially better performance than the November 2007 management projections and the Wall Street projections relied upon by Allen. (June 3 RPPS Chart at 12-13). Additionally, the June 3 RPPS disclosed that Activision's May 8, 2008 results for fiscal year 2008 were in line with management's "stretch" case for fiscal year 2010 provided to Vivendi in November 2007. (June 3 RPPS Chart at 12).

b. Disclosure of Allen's Justification for Using Wall Street Analyst Projections to Value Activision

Plaintiff claimed that the April 30 RPPS failed to disclose why Allen relied on projections for Activision derived from Wall Street estimates rather than management

projections, and current projections by Games' management. (AC ¶111). The June 3 RPPS disclosed that Allen relied on Wall Street estimates because Activision management "believed [it was] appropriate." (June 3 RPPS Chart at 5). The disclosure of Allen's rationale indicated that it was conflicted Activision management that chose the crucial input for Allen's DCF valuation rather than the Committee or an independent advisor. (June 3 RPPS Chart at 5).[21]

c. Disclosure of Material Information Regarding the Sales Process

In response to Plaintiff's claim that the April 30 RPPS omitted to disclose information regarding specific "alternatives" and "opportunities" purportedly considered, the June 3 RPPS added material disclosures on the subject. (June 3 RPPS Chart at 2). The June 3 RPPS added that "During the 2006 strategic planning process, Activision specifically evaluated 17 potential acquisition targets, of which 8 (including Vivendi Games) were evaluated as potential entry opportunities into the MMOG market." (June 3 RPPS Chart at 2). No sale of Activision was considered or pursued at that time. In addition, the June 3 RPPS disclosed that Kotick signed a confidentiality agreement with Vivendi on March 13, 2007, without informing the outside directors. (June 3 RPPS Chart

[21] The April 30 RPPS disclosed that Activision engaged due diligence advisors, McKinsey & Company ("McKinsey") to perform a due diligence review of Blizzard. (April 30 RPPS Chart at 12). Also, in response to Plaintiff's claim that the April 30 RPPS did not disclose the basis for Allen's increase in its valuation of Games, the June 3 RPPS disclosed that McKinsey presented both upside and downside scenarios to the Board regarding Blizzard's future growth. (June 3 RPPS Chart at 4).

at 2).[22] The June 3 RPPS also disclosed Kotick and Kelly's presence at nearly every Committee meeting. (June 3 RPPS Chart at 2-4).

4. The Definitive Proxy Still Contained Material Omissions Prompting Plaintiff to Seek and Obtain More Supplemental and Corrective Disclosures

On June 24, 2008, Activision filed a Supplemental Proxy Statement with the SEC (the "June 24 Supplement") in response to Plaintiff's Proposed Second Amended Complaint ("2AC")[23] and Plaintiff's Opening Brief in Support of its Motion for Preliminary Injunctive Relief.[24] The June 24 Supplement described the claims in Plaintiff's 2AC and brief, including Plaintiff's disclosure claims. In discovery, Plaintiff ascertained that the Activision Board had met on April 29, 2008 and had been presented further financial information regarding Activision and Games. The June 24 Supplement disclosed the occurrence of April 29, 2008 Activision Board meeting as follows:

> On April 29, 2008, the Activision board of directors held a special meeting at which the status of the proposed transaction and each of Vivendi Games' and Activision's recent financial performance were discussed.

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[22] The June 3 RPPS also disclosed that the Committee never made a "formal" recommendation to the full Board regarding the Committee's "recommendation" or view regarding the final Transaction terms despite its having been empowered to do so, but "instead participated in the full board's deliberations." (June 3 RPPS Chart at 5). The June 3 RPPS further included a summary of Plaintiff's allegations from the AC, including descriptions of Plaintiff's disclosure claims. (June 3 RPPS Chart at 14).

[23] Plaintiff filed its Opening Brief in Support of its Motion for Preliminary Injunctive Relief, on June 22, 2008, which included additional information Plaintiff had learned in discovery. (LexisNexis ID No. 20284425).

[24] The June 24 Supplemental Proxy was previously submitted with the February 13, 2009 Transmittal Affidavit of Stephen D. Dargitz in Support of the Opening Brief of the Defendants in Support of their Motion to Dismiss as Exhibit B. (LexisNexis ID No. 23780934).

> Mr. Tippl provided the board with an overview of Activision's financial results for the fiscal year ended March 31, 2008, including updates to the guidance provided by management in November 2007. Mr. Tippl also reviewed with the board a presentation prepared by Allen & Company, which summarized the financial results for Vivendi Games and Blizzard Entertainment for the fiscal year ended December 31, 2007, as well as the current 2008 and 2009 estimated financial results of Vivendi Games and Blizzard Entertainment as compared against those estimates reviewed with the board in December 2007. Additionally, representatives from Skadden Arps advised the board with respect to its fiduciary duties in connection with its recommendation of the proposed transaction to Activision's stockholders. The board reviewed its reasons for undertaking the proposed transaction and determined there was no need to change its December 1, 2007 recommendation to Activision's stockholders.

(*See* Adams Aff. Ex. C, Chart of Defendants' Supplemental and Corrective Disclosures Made in the June 24, 2008 Supplemental Proxy Statement).

III. ARGUMENT

A. An Interim Award of Attorneys' Fees and Expenses Is Appropriate to Compensate Plaintiff's Counsel for the Successful Prosecution Of Disclosure Claims

An application for fees and expenses for Plaintiff's counsel relating to the mooting of some but not all of the claims is appropriate. "[I]nterim fee awards may be appropriate where the plaintiff has achieved the benefit sought by the claim that has been mooted or settled and that benefit is not subject to reversal or alteration as the remaining portion of the litigation proceeds." *Louisiana State Employees' Ret. Sys. v. Citrix*, 2001 Del. Ch. LEXIS 115, at *12 (Sept. 17, 2001). Defendants provided additional information to the Activision stockholders in response to Plaintiff's disclosure claims prior to the stockholder vote.[25]

The supplemental and corrective material information disclosed in response to Plaintiff's claims and mooted many of the disclosure claims. *See Wayne County Employees' Ret. Sys. v. Corti*, 954 A.2d 314, 335 (Del. Ch. 2008) (acknowledging Plaintiff's efforts in obtaining material disclosures for Activision stockholders). Because Plaintiff's disclosure claims were mooted by publication of additional information to stockholders, the claims are not subject to reversal or alteration as Plaintiff's remaining claims move forward. *See Citrix*, 2001 Del. Ch. LEXIS 115, at *12.

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[25] This Court has stated that it is preferable to bring disclosure claims prior to the stockholder vote. *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 Del. Ch. LEXIS 169, at *37-*38 (Nov. 30, 2007) (*citing In re Netsmart Technologies, Inc. Shareholder Litigation*, 924 A.2d 171, 208 n.115 (Del. Ch. 2007)). Indeed, the Court has urged stockholder plaintiffs to bring forth their claims on proxy materials in preliminary form. *In re HCA Inc. Shareholders Litigation*, 2006 Del. Ch. LEXIS 197, at *5 (Nov. 20, 2006).

B. Plaintiff is Entitled to an Award of Attorneys' Fees And Expenses For the Successful Prosecution of the Disclosure Claims

The "common corporate benefit" doctrine provides a basis for awarding attorneys' fees and expenses. *In re Plains Resources Inc. Shareholders Litigation.*, 2005 Del. Ch. LEXIS 12, at *8 (Feb. 4, 2005). Where, as here, a corporate defendant takes action to moot plaintiff's claims, plaintiff is entitled to attorneys' fees if: (1) the claims were meritorious when filed; (2) the resolution of the litigation, by settlement or defendants' curative acts, benefits the corporation or class; and (3) the litigation was causally related to the benefits. *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 878-80 (Del. 1980). It is well-settled in Delaware that curative disclosures confer compensable benefits to stockholders. *See In re FLS Holdings, Inc. Shareholders Litigation,* 1993 Del. Ch. LEXIS 57, at *16 (Apr. 2, 1993) (improved disclosures proved beneficial to stockholders); *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164-1165 (Del. 1989) (corrective disclosures conferred benefit to all stockholders).

1. Defendants' Additional Disclosures Mooted Meritorious Disclosure Claims to the Benefit of Activision Stockholders

A "claim" is meritorious "if it can withstand a motion to dismiss on the pleadings, [and] if, at the same time, the plaintiff possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success." *Allied Artists*, 413 A.2d at 879 (*citing Chrysler Corp. v. Dann*, 223 A.2d 384, 387 (Del. 1966)). The Court does not require that ultimate success is certain; all that is required is that a reasonable hope of success exists. *Allied Artists*, 413 A.2d at 879.

Plaintiff's disclosure claims were meritorious when filed and the additional

responsive disclosures constituted material information. Under Delaware law, omitted information is material if it "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available," and that there is a "substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder." *In re Tele-Communications, Inc. Shareholders Litigation*, 2005 Del. Ch. LEXIS 206, at *13 (Dec. 21, 2005), *quoting TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

The many additional disclosures, obtained as a direct result of this litigation revealed, flaws in the Board's sale process, failures in the independence of process and problems with Allen's valuation approach. Disclosures such as those obtained here are particularly valuable to a class of stockholders asked to sell control. *See, e.g.*, *Gantler v. Stephens,* 965 A.2d 695, 711-712 (Del. 2009) (misleading disclosure about "careful deliberations" in the sales process was material and valuable to a stockholder considering the merits of a transaction).

a. Disclosures Regarding Allen's Work and Reliance on Wall Street Estimates to Value Activision

The unusual structure of the sale of control, and absence of appraisal rights, made it particularly important that the stockholders have a fully informed understanding of Allen's valuations of both Activision and Games, particularly based on projected performance. An understanding of Allen's assumptions and analyses was even more important given the continued skyrocketing improvement of Activision's actual and projected performance up to and through the time of Allen's opinion and the stockholder vote.

The additional disclosures made in response to Plaintiff's claims concerning disclosure of Allen's work provided material information to the stockholders. Further, the supplemental disclosures showed that Activision management directed Allen to rely on Wall Street estimates. In response to Plaintiff's claims, Defendants divulged the Wall Street projections Allen used and the expectations Allen drew from those Wall Street projections. The supplemental disclosures included the reason Allen used general entertainment companies as comparable companies to Activision, the range of trading multiples for the comparable companies used by Allen, a materially more detailed explanation regarding the DCF analyses for Activision and Blizzard, and information revealing that Allen was not asked to update its opinion after December 1, 2007.

The disclosure of information regarding the underlying work that Allen performed, including its valuations, its key assumptions, its use of Wall Street projections to value Activision and the range of values was material to Activision's stockholders. *See In re Pure Resources, Inc. Shareholders Litigation*, 808 A.2d 421, 449-50 (Del. Ch. 2002); *Netsmart,* 924 A.2d at 203 (a proxy statement should "give the stockholders the best estimate of the company's future cash flows as of the time the board approved the Merger."). In addition, because Games' projections were not easily accessible to Activision stockholders and because Activision stockholders were asked to take a minority stake in a new company consisting of Games and Activision, the Blizzard projections Allen used and the extrapolations drawn from those projections were material. *See In re Golden State Bancorp Inc. Shareholders Litigation*, 2000 Del. Ch.

LEXIS 8, at *8 (Jan 7, 2000) (the financials of the privately-held bidder were material and "of some interest" to Golden State stockholders in deciding how to vote).

b. Disclosures Regarding Activision Management Projections

In response to Plaintiff's claims that Defendants failed to disclose Activision management projections provided to Vivendi in August 2008, November 2007 and April 2008, the Company disclosed those projections in the June 3 RPPS. Plaintiff submits that the disclosure showed that Allen's reliance on Wall Street estimates did not reflect the significantly better performance projected by management at the time of the Allen opinion or the actual and projected performance at the time of the stockholder vote. The management projections were material to Activision stockholders because the revised projections exceeded the Wall Street analyst projections Allen relied upon in valuing Activision. *Netsmart,* 924 A.2d at 203 (the company's stockholders "would obviously find it important to know what management and the company's financial advisor's best estimate of those future cash flows would be").

c. Disclosures Regarding Allen's Engagement and Compensation

In response to Plaintiff's allegation that the proxy statements failed to disclose the terms and conditions of Allen's engagement, the Company disclosed the underlying terms, including the $27.5 million contingent fee. Activision also disclosed that Allen had previously worked as a financial advisor to Activision for over four years and without compensation prior to evaluating the Transactions. The disclosure of Allen's contingent compensation and the fact that it had worked for management without

compensation over the preceding five plus years was important for stockholders to understand in assessing Allen's work, which was directed by management.

Information regarding Allen's engagement was material to Activision stockholders. *See, e.g., In re Lear Corp. Shareholder Litigation*, 926 A.2d 94, 114 (Del. Ch. 2007) (a "reasonable stockholder would want to know an important economic motivation of the negotiator singularly employed by a board to obtain the best price for the stockholders, when that motivation could rationally lead that negotiator to favor a deal at a less than optimal price, because the procession of a deal was more important to him, given his overall economic interest, than only doing a deal at the right price").[26]

d. Disclosures Regarding Events of the Sale Process and the Purpose and Role of Committee

Defendants made material supplemental and corrective disclosures in response to Plaintiff's claims relating to the sales process and the purpose and role of the Committee.

i. Disclosures Regarding the Genesis of the Sales Process and "Alternatives" and "Opportunities" Considered by the Board

The supplemental disclosures, among other things, showed that Activision management began the negotiations with Vivendi for a sale of control months before the

[26] Similarly, Allen's contingent fee basis and its prior relationship with the Company speaks to Allen's independence, or lack thereof, and their ability to provide independent advice to the Special Committee was material. *La. Mun. Police Employees' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1191 (Del. Ch. 2007) (citation omitted) ("the contingent nature of an investment banker's fee can be material and have actual significance to a shareholder relying on the banker's stated opinion"); *Tele-Communications*, 2005 Del. Ch. LEXIS 206, at *41 (the contingent nature of the financial advisor was material to whether the advisor could provide independent advice, and the special committee's use of the financial advisor of the company "raises questions regarding the quality and independence of the counsel and advice received").

outside directors were informed. In response to Plaintiff's claim that Defendants omitted to disclose material information regarding the purported "alternatives" and "opportunities" considered by the Board, Defendants disclosed additional information, including the fact that that Activision management had previously evaluated at least 17 potential acquisition *targets*, of which 8 (including Games) were evaluated as a potential entry into the Massively Multiplayer Online Games ("MMOG") market. The April 30 RPPS disclosed that Activision management engaged in exclusive, non-public, negotiations with Vivendi without the Board's knowledge or consent during late 2006 and early 2007. Additionally, the filing disclosed that Kotick and Kelly entered into a confidentiality agreement with Vivendi on March 13, 2007, prior to informing the outside directors that discussions regarding a sale of control were underway.

The disclosure of Activision's strategic opportunities, initial discussions with Vivendi and existence of the confidentiality agreement with Vivendi were material. *See Gantler*, 965 A.2d at 710-711 ("Although boards are 'not required to disclose all available information[,]. . .once they travel down the road of partial disclosure of. . .[prior bids] us[ing]. . .vague. . .language, they ha[ve] an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events.'") *citing Arnold v. Society for Savings Bancorp*, 650 A.2d 1270, 1280 (Del. 1994); *In re Grace Energy Corp. Shareholders Litigation*, 1992 Del. Ch. LEXIS 134, at *15 (June 26, 1992) ("Plaintiffs are correct that the disclosure of third party inquiries and informal offers. . .would have 'significantly altered the 'total mix' of information made available.'") *quoting TSC Indus., Inc. v. Northway*, 426 U.S. 438, 449 (1976). The original disclosure

implied that the Activision Board had significant deliberations regarding unspecified "alternatives" and "opportunities." In fact, as the further disclosures showed, the "alternatives" and "opportunities" did not involve a sale of control and were matters that were considered by management, not the Board, in management's strategic planning process in mid-2006 and before.[27]

ii. Disclosures Regarding the Committee and Background of Sale Process

The disclosures revealed that the Committee was formed in light of the conflict of management and was authorized by the Board to retain advisors, negotiate and provide recommendations to the Board. The disclosures also showed that, despite their known conflicts, Kotick and Kelly attended nearly every Committee meeting.

The disclosures revealed that the Committee retreated from its initial determination to ensure a control premium for the stockholders and was relegated to at most a passive role in the process, with management conducting the negotiations with Vivendi and directing the advisors. The disclosures demonstrated that the Committee,

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[27] In response to Plaintiff's allegation that the proxy statements failed to articulate Skadden's advice to the Board and whether the Board considered the combination with Vivendi the best value reasonably available to Activision stockholders, Defendants disclosed that Skadden advised the Board and the Committee with respect to their fiduciary duties under Delaware law and of their duty to obtain the best price for the stockholders. Also, the April 30 RPPS disclosed that the Board considered the Merger to be the best value reasonably available in a sale of control. The Board members' understanding of their duties in a sale of control from the outset and their ultimate belief that the transaction was the best value reasonably available for the stockholders in a change of control was material. *See*, *e.g.*, *Paramount Communications, Inc. v. QVC, Inc.*, 637 A.2d 34, 43 (Del. 1994) (directors "have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders" in a change of control).

despite its charge by the Board, never made a formal recommendation to the Board regarding the Transactions. The disclosures also materially supplemented the description of the bid/ask history of the sale process described previously.

The purpose, charge and function of the Committee of outside directors in connection with a potential sale of control proposed by management was fundamentally material to the public stockholders. *See QVC*, 637 A.2d at 44 (the role of outside directors is particularly important given that management may not be acting in the best interests of the stockholders); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 709 n.7 (Del. 1983) (result might have been completely different if company had appointed an independent negotiating committee of its outside directors to deal with aquiror at arm's length)*; Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1281-84 (Del. 1989) (where outside directors surrender the sale of control to conflicted insiders, they have created an atmosphere that permits the interests of stockholders to be compromised, in breach of their duty of loyalty).

An understanding of the role of the Committee of outside directors was material to the stockholders in a sale of control negotiated by management. *See QVC*, 637 A.2d at 44. Activision stockholders were "entitled to a balanced and truthful recitation of events, not a sanitized version that is materially misleading." *Pure Resources*, 808 A.2d at 451 (*citing Clements v. Rogers*, 790 A.2d 1222, 1242-43 (Del. Ch. 2001)); *Krasner v. Moffett*, 826 A.2d 277, 285-86 (Del. Ch. 2003) (discussing the importance of disclosing the details of the special committee process). "[O]nce defendants [have] traveled down the road of partial disclosure of the history leading up to the Merger and used the vague

language described, they had an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events." *Arnold*, 650 A.2d at 1280 (citation omitted). The supplemental and corrective disclosures indicated that the Committee did not follow its charge, negotiate the transaction terms with Vivendi, or meet its goal of ensuring a control premium for the stockholders.

The disclosure of Kotick and Kelly's presence at nearly every Committee was material. *See In re Freeport McMoRan Sulphur Shareholders Litigation*, 2005 Del. Ch. LEXIS 96, at *49-*52 (June 30, 2005) (questioning whether the special committee evaluating a potential merger could act independently of the other directors, especially given the fact that the company's interested President and CEO participated in nearly every meeting); *In re Siliconix Inc., Shareholders Litigation*, 2001 Del. Ch. LEXIS 83, at *54 (June 19, 2001) ("Where there are material conflicts, disclosure of information sufficient to allow the shareholders to assess and understand those conflicts is necessary.").

e. Disclosures Regarding the Post-Closing Management Structure and Management's New Employment Agreements

Plaintiff alleged that the PPS failed to disclose how, and by whom, the new terms of management's amended employment agreements and the post-closing management structure of the company were negotiated and determined. In response, Defendants disclosed that Shearman served as counsel for the Compensation Committee to negotiate Kotick and Kelly's employment and bonus agreements and described the role of the Compensation Committee in establishing these continued employment agreements.

Importantly, the supplemental disclosures indicated only management, Kotick and Kelly, ever negotiated directly with Vivendi regarding their continued employment in the combined company.

Information about the Compensation Committee's retention of Shearman to negotiate the employment contracts with Kotick and Kelly along with the Compensation Committee's role in the negotiations was material to Activision stockholders. *See Gantler* 965 A.2d at 710-11 (boards have "an obligation to provide the stockholders with an accurate, full, and fair characterization of [] historic events.") (quotation omitted); *Siliconix*, 2001 Del. Ch. LEXIS 83, at *54 ("Where there are material conflicts, disclosure of information sufficient to allow the shareholders to assess and understand those conflicts is necessary.").[28]

2. Defendants' Disclosure of Material Supplemental and Corrective Information Was Caused By Plaintiff's Lawsuit

Once the Court determines a meritorious suit has been filed and that a benefit to the class or corporation followed, the burden shifts to defendants to demonstrate that the lawsuit in no way contributed to the creation of that benefit. *Tandycrafts*, 562 A.2d at 1165. The Court typically presumes the existence of a causal connection between a plaintiff's efforts and the defendant's unilateral actions mooting the claim. Donald J.

[28] Defendants included a summary of the amendment to Article 9 in the April 30 RPPS in response to Plaintiff's demand. The disclosure of the summary of the proposed amendment disclosure was material. *See Sonet v. Plum Creek Timber Co., LP*, 1999 Del. Ch. LEXIS 49, at *28 (Mar. 18, 1999) ("It is the case that if material information facts are buried in a lengthy disclosure document so that the true import of that information is lost, such 'buried fact' disclosure may be deemed misleading.") (citation omitted); *ODS Techs., L.P. v. Marshall*, 832 A.2d 1254, 1261 (Del. Ch. 2003) ("Delaware law requires a full and fair explanation of the rationale for a proposal that directors are recommending stockholders to approve.").

Wolfe and Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 9.05[d][2] at 9-206 (2008). For a plaintiff to establish the requisite causal connection the benefit "need not be directly and entirely attributable to the underlying litigation." *In re Dunkin' Donuts Shareholders Litigation*, 1990 Del. Ch. LEXIS 197, at *17 (Nov. 27, 1990).

Defendants' supplemental and corrective disclosures were directly and exclusively caused by the filing and prosecution of the claims in expedited proceedings. In fact as Defendants represented to the Court in the March 12, 2008 hearing on Plaintiff's Initial Motion to Expedite,

> "we do note that there is another preliminary proxy statement that the company is preparing to file within the next couple of weeks that we believe will moot or otherwise eliminate all of Plaintiff's disclosure claims, because we're going to refine our disclosure, we're going to add additional disclosure, or we're going to add disclosure about what Plaintiff's are claiming was omitted from the preliminary proxy statement or should be disclosed . . ."

(Adams Aff. Ex. E, March 12, 2008 Hearing Transcript for Plaintiff's Initial Motion to Expedite at 18:15-24). Defendants also argued during the Teleconference on Plaintiff's Renewed Motion for Expedited Proceedings that their April 30 RPPS mooted some of Plaintiff's disclosure claims. (Adams Aff. Ex. F, May 20, 2008 Hearing Transcript for Plaintiff's Renewed Motion to Expedite at 18, 24, 27) (Defendants' counsel, for example, argued, albeit incorrectly, that they had intended to moot "out all plaintiff's disclosure claims in the original complaint"). Defendants conceded this causal relationship between Plaintiff's claims and the supplemental disclosures in their Corrected Answering Brief in Opposition to Plaintiff's Motion for a Preliminary Injunction filed June 26, 2008.

("Corrected Answering Brief" LexisNexis ID No. 20421631 at 27) (arguing, again not correctly, that the intention of the disclosures in the April 30 RPPS and June 3 RPPS was to "moot any and all of Plaintiff's disclosure claims.").

In the Court's May 28, 2008 letter granting Plaintiff's Motion to Expedite (LexisNexis ID No. 19995890), the Court noted that "defendants propose to issue additional disclosures '[and] intend[ed] to moot Plaintiff's disclosure claims.'" Defendants, in their Corrected Answering Brief, argued, albeit incorrectly, that they mooted Plaintiff's disclosure claims with supplemental disclosure. (*See* LexisNexis ID No. 20421631 at 3, 7, 25-28). Additionally, in the July 1, 2008 Memorandum Opinion on Plaintiff's Motion for Preliminary Injunction, the Court recognized that "Plaintiff has vigorously battled for additional information about the proposed transaction, and, indeed, additional information [was] released by the Company during the pendency of this litigation." 954 A.2d at 335. "Likewise, defendants have responsively and effectively addressed the many variations of claims that plaintiff has proffered." *Id.*

C. The Amount of the Award Sought is Fair and Reasonable

Plaintiff seeks an award of attorneys' fees in the amount of $2,750,000 and expenses in the amount of $104,746.08 to compensate Plaintiff's counsel for the successful prosecution of the disclosure claims in the expedited proceedings which preceded the stockholders vote. Plaintiff's counsel has collectively devoted 3,625 hours

in the prosecution of this litigation through June 30, 2008, the date of the preliminary injunction hearing.[29]

Under Delaware law, an award of attorneys' fees and expenses is warranted where counsel's "efforts result in…the conferring of a corporate benefit." *Tandycrafts*, 562 A.2d at 1164 (corrective disclosures conferred benefit to all stockholders that warranted attorneys' fees); *In re FLS Holdings Inc. Shareholder Litigation*, 1993 Del. Ch. LEXIS 57, at *16 (Apr. 2, 1993) ("[i]mproved disclosures may certainly prove beneficial to class members and may constitute consideration of a type which will support settlement of claims"). As this Court stated in *United Vanguard*:

> Delaware courts have long recognized the "common corporate benefit" doctrine as a basis for the reimbursement of attorneys' fees and expenses in corporate litigation. Under this doctrine, a litigant who confers a common monetary benefit upon an ascertainable stockholder class is entitled to an award of counsel fees and expenses for its efforts in creating the benefit. This doctrine is premised on the theory that "all of the stockholders … benefited from plaintiffs' action and should have to share in the costs of achieving that benefit."

United Vanguard Fund v. Takecare Inc., 693 A.2d 1076, 1079 (Del. 1997) (citations omitted).

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[29] Chimicles & Tikellis, LLP reports that it has expended 2,567 hours of professional time through June 30, 2008. The Miller Law Firm, P.C. reports that it has expended 1,058 hours through June 30, 2008. Plaintiff's counsel collectively expended $104,746.08 in out-of-pocket expenses through June 30, 2008. (Adams Aff. Ex. D, Out-of-Pocket Litigation Expenses Relating to Litigation Efforts and Including June 30, 2008 as Contemporaneously Recorded by Plaintiff's Counsel, Chimicles & Tikellis LLP and The Miller Law Firm P.C.). Plaintiff's request for attorney's fees in the amount of $2,750,000 equates to an implied hourly rate for the time of Plaintiffs' counsel in the amount of $758.62 per hour – an hourly rate consistent or below those rates implied in this Court's fee awards for lesser disclosure benefits.

The award of attorneys' fees and expenses and the determination of the amount of an award are within the province of the Court. Whether a case has been settled or mooted, there is no single standard method with which to compute the proper amount of attorneys' fees. *PaineWebber R&D Partners II, L.P. v. Centocor, Inc.*, 2000 Del. Ch. LEXIS 12, at *9 (Jan. 31, 2000). The Court typically considers the following factors: (1) the benefits achieved by the litigation; (2) the amount and value of attorney time for that purpose; (3) the standing and experience of plaintiff's counsel; (4) the contingent nature of the case; and (5) public policy considerations. *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142, 159 (Del. 1980); *In re First Interstate Bancorp Consolidated Shareholder Litigation*, 756 A.2d 353, 363 (Del. Ch. 1999).

1. The Benefits Achieved

The benefits achieved by the litigation should be accorded the greatest weight in determining the fee to be awarded. *Dow Jones & Co. v. Shields*, 1992 Del. Ch. LEXIS 24, at *3 (Jan. 10, 1992) (result achieved "given the most weight" by court); *PaineWebber*, 2000 Del. Ch. LEXIS 12, at *11 (size of the benefit conferred is accorded the greatest weight in the fee calculation); *In Re Maxxam Group, Inc. Stockholders Litig.*, 1987 Del. Ch. LEXIS 423, at *34 (Apr. 16, 1987) (the "benefits achieved by the litigation constitute the factor generally accorded the greatest weight" in determining the fee award).

The benefit required to sustain an award of attorneys' fees need not be "pecuniary." *Allied Artists*, 413 A.2d at 878. *See also Tandycrafts*, 562 A.2d at 1165 ("benefit need not be measurable in economic terms"). Non-monetary benefits such as a

"heightened level of corporate disclosure" are a sufficient basis for a fee award. *Tandycrafts*, 562 A.2d at 1165; *Eisenberg v. Chicago Milwaukee Corp.*, 1988 Del. Ch. LEXIS 141, at *8 (Oct. 25, 1988) (success in correcting invalid disclosures in connection with a corporate transaction constitutes a benefit to stockholders meriting an award of attorneys' fees).

The benefit achieved by the successful prosecution of the disclosure claims in this case was in the form of additional material disclosures prior to the July 8, 2008 stockholder vote. The volume and importance of the additional information disclosed was particularly high. The vast majority of the supplemental disclosures tended to cast question on whether the $27.50 price for Activision and Allen's valuation of Games appropriately reflected the true value of Activision and prospects of the respective companies, and whether the process employed by Activision's Board satisfied the fiduciary duties of the Activision directors in a sale of control. The additional disclosures were obtained through aggressive litigation of expedited proceedings prior to the vote and were thus part of the total mix of information available to stockholders at the time of the vote. Because of the extraordinary quality and quantity of the material disclosures obtained by this litigation, the contentious litigation efforts required to achieve these benefits, and the complexity of the Transactions, Plaintiff's counsel merits a fee award at or above the top end of the range of fee awards in similar actions.

Substantial fee awards for supplemental disclosures have been awarded by this Court when counsel obtained the disclosures through significant time spent in expedited proceedings. In *Virgin Islands Government Employees' Retirement System v. Alvarez*,

following discovery, including four depositions, the parties settled the case for the provision of supplemental disclosures, including: 1) greater information about the history of the transaction; 2) the establishment of the special committee; 3) supplemental projections for the company; 4) the justification for the selection of the comparable companies; and 5) how the bankers performed their DCF analysis. C.A. No. 3976-VCS (Strine, V.C.) (Dec. 2, 2008) (Tr. at 8-10; 13); C.A. No. 3976-VCS (Strine, V.C.) (Dec. 15, 2008) (Order at 1-2). Plaintiff's counsel requested $1.25 million in fees and expenses, and the Court awarded the requested amount based on the expedited nature of the case and the material substantial disclosures obtained. C.A. No. 3976-VCS (Dec. 2, 2008) (Tr. at 48).

In *SafeNet*, plaintiffs brought "*Revlon*" and disclosure claims challenging a tender offer. *Globis Capital Partners, LP v. SafeNet, Inc.*, No. 2772-VCS (Strine, V.C.) (Dec. 20, 2007), (Slip op. and hearing transcript at 6, 10). After expedited discovery and a hearing on plaintiff's motion for a preliminary injunction, the parties negotiated a settlement.[30] *Id.* at 10. The defendants argued plaintiffs were entitled to $108,000 because the only benefit to the class was therapeutic disclosures and because over 90% of the stockholders voted in favor of the transaction. *Id.* at 18, 20, 21-24. The Court, in awarding plaintiff's counsel $1.2 million, noted the fact that the litigation had created a substantial benefit to the class. *Id.* at 44 (amounting to about $1,500 an hour).

[30] In the settlement, plaintiffs dropped their *Revlon* claims and defendants provided greater disclosure of the investment banker's analysis, including the comparable companies analysis and the multiples used by the bankers. *SafeNet,* No. 2772-VCS (Slip op. and hearing transcript at 11,18).

The Court will, on occasion, consider the hourly rate implied by the fee request. *See, e.g., Globis Partners LP v. Safenet, Inc.*, C.A. No. 2772-VCS (Strine, V.C.) (Dec. 20, 2007) (slip op. and hearing transcript at 44) (considering hourly rate in the award of attorneys' fees). The hourly rate implied by Plaintiff's Fee Petition amounts to an hourly rate of $758.62. The Court has awarded a higher hourly rate under analogous circumstances. *See, e.g., Globis Partners LP v. Safenet, Inc.*, C.A. No. 2772-VCS (Strine, V.C.) (Dec. 20, 2007) (slip op. and hearing transcript at 44) (awarding an implied hourly rate of $1,500 for supplemental disclosures); *See also Gilmartin v. Adobe Resources Corp.*, C.A. No. 12467 (Jacobs, V.C.) (June 29, 1992) (Order at 2, 3 n.2) (awarding a fee implying hourly rate of $839.87 for a single disclosure).

In re Wm. Wrigley Jr. Co. Shareholders Litigation, 2009 Del. Ch. LEXIS 12, at *23 (Jan. 22, 2009) (awarding an implied hourly rate of $841.47 per hour for supplemental disclosures and certain modifications to the merger agreement); *In re James River Group, Inc. S'holders Litig.*, 2008 Del. Ch. LEXIS 4, at *5-*6 (Jan, 8, 2008) (awarding an implied hourly rate of $756 per hour to plaintiff's counsel who devoted, at most, 528 hours to litigation that settled for supplemental disclosures); *Berger v. Pubco Corp.*, 2008 Del. Ch. LEXIS 129, at *7 (Sept. 8, 2008) (awarding an implied hourly rate of $953 per hour for supplemental disclosures and quasi-appraisal); *In re Jacuzzi Brands, Inc. Shareholder Litigation*, C.A. No. 2477-CC (June 26, 2007) (Order) (awarding an

implied hourly rate of more than $800 per hour for a benefit consisting primarily of supplemental disclosures).[31]

2. The Amount and Value of Plaintiff's Counsel's Work and the Difficulty of Litigation

The efforts undertaken by Plaintiff's counsel and the high quality of the work produced cannot be challenged. The additional disclosures resulted solely from Plaintiff's zealous expedited litigation of claims which Defendants vigorously opposed at every juncture. This action involves complex Transactions with difficult factual issues and contested, difficult and expedited proceedings and negotiations. Through June 30, 2008, the date of the Preliminary Injunction hearing, Plaintiff's counsel spent 3,625 hours of professional time and $104,746.08 in out-of-pocket expenses over the course of 4 months including extensive discovery in the form of three depositions and significant document production from Activision, Vivendi and Allen. *See SafeNet*, C.A. 2772-VCS (Slip op. and hearing transcript at 18, 19) (plaintiff spent almost 800 hours and $60,000 in expenses pursuing its preliminary injunction and obtained extensive discovery over the

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[31] Because the benefit achieved by supplemental disclosures is often unquantifiable, the Court will sometimes use the *quantum meruit* approach to compensate counsel for the successful prosecution of disclosure claims prior to a vote. *In re Golden State Bancorp, Inc. Shareholders Litigation*, 2000 Del. Ch. LEXIS 8, at *12-*15 (Jan. 7, 2000) (using the *quantum meruit* approach to award attorneys' fees and expenses for material supplemental disclosures). Under the *quantum meruit* approach, the Court will consider the work performed to achieve the benefit, the amount and value of attorney time required for that purpose, the experience of counsel and the contingent nature of the case. *First Interstate*, 756 A.2d at 363 (Del. Ch. 1999) (*quoting In re Diamond Shamrock Corp.*, 1988 Del. Ch. LEXIS 123 (Sept. 14, 1988)). In some cases, the Court applies a "risk premium" above the normal hourly rates that "accounts for the contingent nature of the case and the intense effort required over a short time period by skilled lawyers, even though that effort produced a modest benefit." *Golden State*, 2000 Del. Ch. LEXIS 8, at *15.

course of three and a half weeks, including four depositions and significant document production).

The resulting additional disclosures here were achieved through vigorously defended litigation which included substantial expedited discovery that revealed much of the important information ultimately disclosed and which would otherwise have been concealed from stockholders.

3. The Standing and Experience of Plaintiff's Counsel

The Court will also consider the standing and ability of counsel. *Sugarland*, 420 A.2d at 152. This Court is very familiar with Chimicles & Tikellis, LLP Plaintiff's counsel, who are highly experienced lawyers in the field of stockholder class action litigation. Plaintiff also has been represented by the Miller Law Firm, P.C., which specializes in complex business lawsuits and securities and consumer class action litigation. The Miller Law Firm is well-respected in the field and has recently been appointed co-lead counsel in the AIG securities fraud action pending in the Southern District of New York.

The Court may also consider the standing of opposing counsel when evaluating a fee application. *See, e.g., In re Warner Communications Securities Litigation*, 618 F.Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986). Defendants are represented by Skadden Arps, which spared no effort or expense in the defense of their

clients.[32] The abilities of opposing counsel enhance the significance of the result that counsel has been able to achieve for Activision stockholders.

4. The Contingent Nature of Counsel's Engagement

Courts in Delaware and elsewhere recognize that the contingent nature of counsel's fee must be considered in awarding attorneys' fees. *Chrysler*, 223 A.2d at 389; *PaineWebber R & D Partners II, L.P.*, 2000 Del. Ch. LEXIS 12 at *10. Counsel is entitled to a significantly larger fee when the compensation is contingent. *Chrysler*, 233 A.2d at 389.

The contingent nature of the fee and the risks of litigation in this action should be given substantial weight by the Court in evaluating the fee application. Plaintiff's counsel undertook this litigation on a fully contingent basis, and continues to litigate this action on a fully contingent basis, with the expectation since realized, that they might expend hundreds of hours working to achieve maximum value for the stockholders of Activision, without any assurance of payment for their efforts.

5. Public Policy Considerations

Public policy considerations underlie awards of attorneys' fees in class actions. Fee awards should encourage lawyers to undertake representation of persons whose damages are too small to justify an individual lawsuit or who simply do not have the resources to retain a lawyer on an hourly-fee basis. *See Seinfeld v. Coker*, 847 A.2d 330, 333 (Del. Ch. 2000). The costs and fees involved in such litigation often substantially

[32] In addition, Vivendi, VGAC LLC and Vivendi Games were represented by Richards Layton & Finger and Gibson Dunn & Crutcher, LLC prior to their dismissal on June 30, 2008.

outweigh the economic interest the individual stockholder. The complexity and societal importance of shareholder litigation requires the involvement of the most able counsel available. To encourage first-rate attorneys to represent plaintiffs on a contingent basis in this type of socially important litigation, the attorneys' fees awarded, with the reimbursement of out-of-pocket expenses, should reflect this goal. *See generally Allied Artists*, 413 A.2d at 878.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully submits that its request for an award of attorneys' fees in the amount of $2,750,000 and $104,746.08 in out-of-pocket expenses is fair and reasonable. Accordingly, Plaintiff respectfully requests that the Court award interim attorneys' fees and expenses in the amount sought.

Dated: May 18, 2009

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