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.	:	Civil Action No. 3534-CC
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.	:	

REPLY BRIEF OF THE DEFENDANTS IN SUPPORT OF THEIR MOTION TO DISMISS

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PRELIMINARY STATEMENT[1]

Many of the issues and arguments raised in Plaintiff's Answering Brief may seem familiar to the Court. That is because Plaintiff already presented many of them in connection with its unsuccessful motion for a preliminary injunction. *See Wayne County Employees' Ret. Sys. v. Corti*, 954 A.2d 319 (Del. Ch. 2008). Nevertheless, based on the same defective legal theories, Plaintiff now pursues money damages against Defendants in connection with an arm's-length, independently negotiated transaction that received overwhelming approval from Activision's stockholders, based on full and fair disclosure. As explained in the Defendants' Opening Brief, and as explained further herein, the Amended Complaint fails to state a claim and should be dismissed.

Plaintiff's central theory of the case is that two of Activision's eight directors were allegedly "interested" and "sold out" Activision's stockholders by selling control of Activision to Vivendi at a low price in order to retain their jobs as executives of the combined company, Activision Blizzard. This is the same theory that Plaintiff raised, and abandoned, at the preliminary injunction phase of the case. The problem for Plaintiff is that its theory is completely unsupported by the allegations in the Amended Complaint, many of which are conclusory, contradict each other, or are otherwise illogical or belied by the procedural record of the case.

For example, the Amended Complaint contains no well-pled facts from which one could conclude that any members of the Activision Board, let alone a majority,

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[1] Except as noted herein, capitalized terms have the same meaning as in the Opening Brief.

had divided loyalties or otherwise breached their duty of loyalty in connection with the Combination. The Amended Complaint alleges almost nothing about the six outside directors, and its allegations against the two co-chairmen of the pre-Combination Activision -- Robert Kotick and Brian Kelly -- also fail to state a claim.

In particular, Plaintiff concedes in the Amended Complaint that Messrs. Kotick and Kelly obtained no unique benefit as a result of the arm's-length Combination, and alleges no conflict of interest that would motivate Kotick and Kelly to jeopardize the value of their substantial holdings of Activision stock to preserve jobs that were never in jeopardy. *See Corti*, 954 A.2d at 324. Indeed, the Amended Complaint alleges that Kotick and Kelly's employment agreements with Activision, which were due to expire, were renegotiated with *directors of Activision*, not Vivendi, and that in fact, Kelly's amended employment agreement provides for a reduced salary. None of this supports a conclusion that Kotick and Kelly breached their fiduciary duties to Activision's stockholders.

The Amended Complaint also fails to state a *Revlon* claim. The Amended Complaint abandons completely any challenge to the modest deal protection features of the Business Combination Agreement, recognizing that they fall well within the range of reasonableness. Plaintiff does not allege that any other bidder emerged in the nearly seven months between the public announcement of the Combination and its consummation. And although the Amended Complaint does allege that the Activision Board and its NCGC held several meetings and engaged professional financial and legal advisors, the Amended Complaint fails to allege facts that would show that any of

Activision's directors had interests that were not aligned with those of Activision's stockholders. Indeed, Activision's stockholders received what the Court determined to be full and fair disclosure and voted overwhelmingly in favor of the Combination. Moreover, as a result of the Combination, Activision's stockholders owned stock in a company that owned World of Warcraft, which even Plaintiff admits has "strong subscription sales" and has "grown steadily since [its] launch." (Am. Compl. ¶¶ 31, 33)

Further, Plaintiff's theory that the outside directors (including members of the NCGC) were insufficiently involved in the sale process is contradicted by numerous allegations in the Amended Complaint, and fails to state a bad faith or other loyalty claim in any event. The Delaware Supreme Court has made clear that a claim that directors have intentionally disregarded their duties is an extraordinary one, requiring proof of extreme facts that are not alleged in the Amended Complaint. *See Lyondell Chem. Co. v. Ryan*, No. 401, 2008, 2009 WL 1024764 (Del. Mar. 25, revised Apr. 16, 2009). Although largely ignored in Plaintiff's brief, *Lyondell* controls the result in the *Revlon* context and requires dismissal of Plaintiff's claims.

Moreover, because Plaintiff fails to allege any particularized facts which, if true, would remove the directors' actions from the protections of Activision's exculpatory charter provision, Plaintiff cannot pursue claims for damages against Activision's directors. Therefore, the Amended Complaint must be dismissed.

As for Plaintiff's three disclosure claims, they have already been rejected by the Court in a published opinion. Specifically, the Court held that: (i) certain projections of Vivendi Games were not material in light of comprehensive disclosures

contained in the Definitive Proxy; (ii) the Activision Board's reasons for recommending the Combination were adequately disclosed; and (iii) the Definitive Proxy disclosed the rationale for accepting a fixed ratio. *Corti*, 954 A.2d at 333-34. No additional discovery (beyond what occurred before the preliminary injunction hearing) will change either the disclosures that have already been made or the allegations that have been made about them. Further, Plaintiff's attempt to seek money damages for these disclosure claims is untimely, *see In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 355-56 (Del. Ch. 2008), and also barred by the Company's exculpatory charter provision. Accordingly, the Amended Complaint fails to state a disclosure claim.

Finally, Plaintiff's challenges to certain provisions in the Activision Blizzard Charter fail to demonstrate that the provisions are facially invalid. Moreover, because Plaintiff's challenges to the validity of the provisions depend on how they are applied and the Amended Complaint does not allege that anyone has applied, is applying, or will soon apply the provisions, Plaintiff's challenges are not ripe.

For these reasons, and as explained further below, the Court should dismiss the Amended Complaint in its entirety.

ARGUMENT

Plaintiff's Answering Brief and the Amended Complaint contain numerous arguments and allegations that are inconsistent with the evidentiary record that was developed in connection with Plaintiff's unsuccessful application for a preliminary injunction. Solely for purposes of this motion, however, Defendants accept as true all well-pled allegations in the Amended Complaint. *See, e.g., In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006); *In re CompuCom Sys., Inc. S'holders Litig.*, C.A. No. 499-N, 2005 WL 2481325 (Del. Ch. Sept. 29, 2005). Even accepting those allegations as true, the Amended Complaint fails to state a claim.

I. PLAINTIFF FAILS TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST ACTIVISION'S DIRECTORS.

A. Plaintiff Has Not Adequately Alleged That A Majority Of Activision's Board Was Interested Or Lacked Independence.

As we explained in our Opening Brief, the Amended Complaint fails to state a claim for the breach of the duty of loyalty because it does not allege facts from which one could conclude that a majority of Activision's directors was interested in the Combination with Vivendi or lacked independence.[2] (Op. Br. at 21-26) The Amended Complaint fails to allege that any director, let alone a majority of directors, was controlled or dominated by Vivendi. Nor does the Amended Complaint allege that the

[2] As explained below, claims for the breach of the duty of care are effectively barred by Activision's certificate of incorporation.

Board gave Vivendi an improper negotiating advantage *vis-a-vis* other potential bidders.[3] Instead, Plaintiff's Answering Brief relies on arguments that are internally inconsistent, contradicted by the allegations of the Amended Complaint, and legally insufficient to state a claim.

The Amended Complaint virtually ignores all but two of Activision's eight directors, making no particularized allegations from which one could infer that any of them suffered from a conflict of interest or divided loyalty.[4] Instead, the Amended Complaint focuses its attention on only two of the directors, Messrs. Kotick and Kelly. Without allegations that a majority of directors is interested or lacks independence, Plaintiff fails to state a claim, even if it succeeds in challenging the disinterestedness of a minority of directors (and Plaintiff has failed even at that lesser task). *See, e.g.*, *Blackmore Partners, L.P. v. Link Energy LLC*, C.A. No. 454-N, 2005 WL 2709639, at *7 (Del. Ch. Oct. 14, 2005) (holding that "[t]he protections of the business judgment rule . . . insulate a board decision from challenge so long as a majority of the directors approving the transaction remain disinterested"); *In re Frederick's of Hollywood, Inc. S'holders Litig.*, C.A. No. 15944, 2000 WL 130630, at *7 (Del. Ch. Jan. 31, 2000) (dismissing duty

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[3] This distinguishes this case from such cases relied upon by Plaintiff as *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1285 (Del. 1989).

[4] Curiously, Plaintiff's Answering Brief cites the *Unocal* standard as the one that should apply to Defendants' motion to dismiss. (*See* Ans. Br. at 23 n.19 (citing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del. 1995)) The Amended Complaint does not allege, however, that the Board agreed to the Combination as a way of responding to a perceived threat. Therefore, the *Unocal* standard (and the omnipresent specter of a board acting in its own self interest) does not apply. *See Gantler v. Stephens*, 965 A.2d 695, 705 (Del. 2009).

of loyalty claim because plaintiff alleged that only one of four directors was interested and because the challenged merger was approved by a majority of disinterested directors); *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 728 (Del. Ch. 1999), *aff'd mem. sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000).

Moreover, while the Answering Brief asserts that Kotick and Kelly "dominated and controlled" *negotiations with Vivendi* (Ans. Br. at 25-26), the Answering Brief studiously avoids any argument that a majority of *Activision's director*s was controlled and dominated. Even more importantly, none of the factual allegations in the Amended Complaint supports an inference of a controlled and dominated board. *See In re CompuCom Sys., Inc. S'holders Litig.*, C.A. No. 499-N, 2005 WL 2481325 (Del. Ch. Sept. 29, 2005) (dismissing claims based on similar conclusory allegations). Indeed, factual allegations made in the Amended Complaint, and repeated in the Answering Brief, chronicle the actions of an active board that held several meetings and retained professional advisors. The Amended Complaint alleges several facts that are inconsistent with a controlled and dominated board, such as:

- holding numerous meetings over a period of several months relating to the Combination (Am. Compl. ¶¶ 49, 52, 57-59, 62, 67, 69-71, 73-75, 81);
- seeking the advice of professional financial and legal advisors concerning the Combination (Am. Compl. ¶¶ 51, 57-60, 62, 67, 69-70, 73-74, 81); and
- negotiating the salaries of the two directors who supposedly dominated them, and even *reducing Kelly's salary* (Am. Compl. ¶ 95).

Plaintiff's attacks on Kotick and Kelly also fail completely in their own right. Plaintiff's argument rests entirely on the misguided idea that these two officer-directors somehow sought to enrich themselves personally by agreeing to a Combination

with Vivendi, but none of the facts alleged in the Amended Complaint warrants such an inference. For example, the Amended Complaint concedes that new employment agreements for these two individuals were negotiated with Activision, not Vivendi,[5] *see Corti*, 954 A.2d at 324, and replaced agreements that were set to expire on March 31, 2008. (Am. Compl. ¶ 92) The Amended Complaint also concedes that in the new agreements, Kotick and Kelly waived benefits to which they would otherwise have been entitled. (Am. Compl. ¶ 93) The Amended Complaint further concedes that Kelly's salary was substantially reduced under his new employment agreement. (Am. Compl. ¶ 95)

Moreover, between the two of them, Kotick and Kelly "own[ed] roughly 7.5% of Activision's stock, thereby aligning their economic interests with those of the shareholders." *Corti*, 954 A.2d at 324. The Answering Brief asserts that Kotick and Kelly wanted to destroy the value of their substantial holdings of Activision stock in order to "creat[e] and reign[] over [a] combined empire" (Ans. Br. at 27-28), but the Amended Complaint alleges nothing in support of this illogical theory, which fails to state a claim in any event. The Answering Brief also asserts that the Amended Complaint "alleges that Kotick and Kelly obtained substantial new benefits and retained their positions at the helm of the combined Company as a result of negotiations with Vivendi"

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[5] The Answering Brief contradicts these allegations by asserting for the first time that Kotick and Kelly negotiated new employment agreements with Vivendi. (Ans. Br. at 29) Of course, for purposes of this motion, Plaintiff is bound by the allegations it made in its complaint and cannot rely on "facts" not alleged therein. Because Plaintiff learned through discovery that, in fact, Vivendi did not even want to be involved in the negotiation of these employment agreements, we assume that this argument was simply a result of inadequate editing of the Answering Brief.

(Ans. Br. at 26), but the cited paragraphs of the Amended Complaint contain no such allegations. (Am. Compl. ¶¶ 55, 67) The Amended Complaint fails to allege that, as a result of the Combination, Kotick and Kelly received any benefits not shared on a pro rata basis with the other stockholder of Activision. This case is, therefore, nothing like the management buyout at issue in *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1281 (Del. 1989). (*Cf.* Ans. Br. at 32) Finally, the Amended Complaint's boilerplate, conclusory allegations that Kotick and Kelly acted to "entrench" themselves make no sense in light of the Amended Complaint's allegations that Activision was enjoying "record results." (Am. Compl. ¶ 34) Because the Amended Complaint fails to allege any material conflict of interest on the part of Kotick and Kelly, allegations that these two individuals "dominated" the sale process would fail to state a claim even if the allegations in the Amended Complaint were not wholly conclusory – and they are.[6]

In short, the Answering Brief does not adequately address several shortcomings of the Amended Complaint that require its dismissal. The Amended Complaint contains no particularized allegations that suggest that the Combination was anything but an arm's-length transaction, independently negotiated between Activision

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[6] The Answering Brief asserts that Kotick and Kelly "sidelined the [NCGC] when Vivendi threatened to end negotiations" (Ans. Br. at 28), but the Amended Complaint itself alleges that the NCGC continued to meet and receive reports after it was supposedly "sidelined." (*See, e.g.*, Am. Compl. ¶¶ 74-75) Moreover, because there was no conflict of interest requiring the use of a special committee, whether or not the NCGC continued to meet separately from the Activision Board is irrelevant to whether the members of the NCGC and the Activision Board fulfilled their fiduciary duties. *See Shingala v. Becor W. Inc.*, C.A. Nos. 8858, 8859, 1988 WL 7390, at *5 (Del. Ch. Feb. 3, 1988) (attaching no significance to committee's failure to hold separate meetings, where majority of full board was independent).

and Vivendi. The Amended Complaint fails to allege any material conflict of interest, and in fact, *all* directors' interests were aligned with stockholders. The Amended Complaint says virtually nothing about the outside directors, and also ignores that Kotick and Kelly had a powerful incentive, because of their stock ownership, to strike the best possible deal. *Corti*, 964 A.2d at 324. The Amended Complaint also ignores that the jobs of Kotick and Kelly were not in jeopardy, while at the same time acknowledging that the factors that supposedly tainted Kotick's and Kelly's judgment – the terms of their employment agreements – were negotiated with other directors of Activision, not Vivendi, and that Kelly took a reduction in salary. Plaintiff's attempt to allege a duty of loyalty claim fails, and the Amended Complaint should be dismissed.

B. The Amended Complaint Fails To State A Claim Based On The Duty Of Good Faith.

In *Lyondell*, the Delaware Supreme Court made clear that "[an] extreme set of facts [is] required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties." *Lyondell*, 2009 WL 1024764, at *7 (citing *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 654 (Del. Ch. 2008)). Plaintiff's attack on the Activision Board is that the six outside directors supposedly were insufficiently involved with the sale process. These allegations, however, fall well short of stating a claim for the breach of the duty of loyalty. In order to plead a duty of loyalty claim based on a bad faith, intentional dereliction of duty, which appears to be the argument implicitly made by Plaintiff's Answering Brief, the Amended Complaint would have to allege facts demonstrating that Activision's directors "knowingly and completely failed to undertake their responsibilities." *See Lyondell*,

2009 WL 1024764, at *7. *See also id.* (duty of loyalty claim in *Revlon* context would require facts showing that directors "*utterly failed to attempt* to obtain the best sale price") (emphasis added).

Far from alleging that Activision's directors "utterly" failed to attempt to perform their duties, the Amended Complaint does the exact opposite, cataloguing several meetings held by the Board and the NCGC, as well as the retention of professional financial and legal advisors. Although Plaintiff suggests (erroneously) that, in its view, Activision's directors did some things incorrectly, or should have done more, the Complaint fails to allege that the directors "knowingly and completely failed to undertake their responsibilities." At the absolute *most*, assuming that all well-pled allegations are true and drawing every inference in favor of Plaintiff, the Amended Complaint alleges only that the Activision directors "failed to do all that they should have under the circumstances," a classic duty of care claim, damages for which are barred by Activision's exculpatory provision.[7] *See Lyondell*, 2009 WL 1024764, at *7.

In support of its argument, Plaintiff cites the case of *McMullin v. Beran*, 765 A.2d 910, 918 (Del. 2000), in which a controlling stockholder negotiated the sale of control to a third party and then presented the transaction to the board as a *fait accompli*. (Ans. Br. at 29) As Plaintiff's own Amended Complaint makes clear, this case is nothing like *McMullin*, both because the board in that case allegedly met only once to consider

[7] As for the allegation that Activision's directors breached their duty of loyalty by "agreeing to invalid governance provisions that undermined the rights of stockholders" (Ans. Br. at 29), the provisions in question are expressly authorized by Delaware law and cannot form the basis for a breach of fiduciary duty claim. The validity of these provisions is discussed at greater length below.

the proposed transaction after it had been negotiated and because six of the twelve directors were employees of the controlling stockholder that negotiated the transaction. *McMullin*, 765 A.2d at 921-23. Here, unlike the *McMullin* case, the Activision Board met repeatedly and was advised by professional advisors. Also, *none* of the Activision Board members (including Kotick and Kelly) were employees of Vivendi at the time the Combination was negotiated. Moreover, even in *McMullin*, the Supreme Court acknowledged that "the . . . Board could properly rely on the majority shareholder to conduct preliminary negotiations." *Id.* at 924; *see In re MONY Group Inc. S'holder Litig.*, 852 A.2d 9 (Del. Ch. 2004). Although Plaintiff asserts that the Activision Board behaved more like the board in *McMullin* and less like the board in *MONY* (Ans. Br. at 33), the allegations in the Amended Complaint fail to support that argument.

For these reasons, Plaintiff has failed to state a claim based on the duty of good faith.

C. Plaintiff Fails To State A Claim Under *Revlon*.

As we explained in our Opening Brief, the Activision Board met its obligation to seek the alternative offering the best value reasonably available to stockholders, and the Amended Complaint fails to allege any facts demonstrating otherwise. (Op. Br. at 26-29) *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986). Instead, the Answering Brief misstates the applicable legal standard, and suggests that if the Activision Board did not take steps taken by other boards in other situations or obtained a transaction meeting certain metrics, Activision's directors must have failed to satisfy *Revlon*. (Ans. Br. at 34-38) That is the same

argument that failed to persuade the Delaware Supreme Court in *Lyondell*, 2009 WL 1024764, at *6 (describing as "erroneous" the "conclusion that directors must follow one of several courses of action to satisfy their *Revlon* duties"). "[T]he directors' failure to take any specific steps during the sale process could not have demonstrated a conscious disregard of their duties." *Id.* at *7.

Under *Revlon* and its progeny, a board of directors need only "act[] reasonably to seek the transaction offering the best value reasonably available to the stockholders." *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 43 (Del. 1994). The duties of the directors do not change, and directors must continue to "'act in accordance with their fundamental duties of care and loyalty.'" *Id.* (citing *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989)). In the context of a sale of control, those duties obligate the directors to try to strike the best deal that is reasonably available under the circumstances. *Id.* at 44. Thus, "[t]here is only one *Revlon* duty-to '[get] the best price for the stockholders at a sale of the company.'" *Lyondell*, 2009 WL 1024764, at *6 (citing *Revlon*, 506 A.2d at 182). And, while Plaintiff downplays this limitation, there is "'no single blueprint'" by which directors must act, and "[n]o court can tell directors exactly how to accomplish that goal, because they will be facing a unique combination of circumstances, many of which will be outside their control." *Id.* at *6 (citation omitted). *Revlon* does *not* "creat[e] a set of requirements that must be satisfied during the sale process."[8] *Id.* at *4.

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[8] While Plaintiff is wrong as a matter of law in arguing that every sale of control must involve a control premium, we also note that the Amended Complaint fails to allege *(cont'd)*

At *most*, the Amended Complaint alleges that the Activision Board did an inadequate job of obtaining the best value reasonably available, but not that Activision's directors failed even to try. *See Lyondell*, 2009 WL 1024764, at *7 (conscious disregard in *Revlon* context requires that directors "*utterly failed to attempt* to obtain the best sale price") (emphasis added). Even if the Court were to conclude that fact questions remain as to whether the Activision Board satisfied its duty of care under *Revlon*, there can be no question that the Amended Complaint fails to state a good faith or other duty of loyalty claim arising under *Revlon*, for the reasons previously discussed. As explained below, Activision's charter requires dismissal of all damages claims based on a breach of the duty of care.

Moreover, the Amended Complaint fails even to state an (exculpated) duty of care claim against the members of the Activision Board. If the Combination had been substantively a bad deal for Activision's stockholders, they would not have voted to approve it in overwhelming numbers, after being informed in excruciating detail of each of Plaintiff's objections -- but they did. (*See* June 30, 2008 Transcript at 83 (conceding that "stockholders have a veto")) If the Combination had not been the best deal available, and the Activision Board left value on the table, one would have expected an alternative

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facts that would show that Activision's stockholders did *not* receive a control premium. As a result of the Combination, Activision's stockholders owned stock in a company that owned World of Warcraft, which even Plaintiff admits has "strong subscription sales" and has "grown steadily since [its] launch." (Am. Compl. ¶¶ 31, 33) Based on what the Court determined to be full and fair disclosure, the stockholders voted overwhelmingly in favor of the Combination, and only one of Activision's stockholders, Plaintiff, has complained about it. *See also Corti*, 954 A.2d at 328 ("[S]everal leading investment advisory sources have recently recommended that shareholders vote in favor of this transaction.").

bidder to emerge in the nearly seven months between the time the Combination was publicly announced and its consummation, given the mild deal protection terms that are no longer even challenged by the Amended Complaint -- and no one did. Plaintiff also fails adequately to allege that the Activision Board lacked adequate information about the Company's value before entering into the Combination. Instead, the Amended Complaint makes clear that the full Board and the NCGC, acting with a financial advisor, met frequently over a period of several months, considered financial reports and analyses, and were well-informed about the values of Activision and Vivendi Games. (Am. Compl. ¶¶ 25, 52, 58-59, 62, 67, 69-71, 88-89) In light of these indisputable facts, the Amended Complaint fails to state a *Revlon* claim based on either the duty of loyalty or the duty of care.

In short, the Amended Complaint fails to state a duty of loyalty claim against any of the directors, whether that claim is based on the sale process, obligations under *Revlon*, the disclosures made by directors, or any other events.

II. ACTIVISION'S CHARTER BARS PLAINTIFF'S DAMAGES CLAIM.

As explained above and in our Opening Brief, the Amended Complaint must be dismissed because Activision's certificate of incorporation bars damages claims against its directors for breach of the duty of care. (Op. Br. at 29-30) Plaintiff's claims all seek money damages, because the equitable relief of a preliminary injunction blocking the stockholders' meeting or ordering corrective disclosure is no longer possible, and the Combination has been consummated. (Op. Br. at 30 n.25) As a result, all of Plaintiff's

claims, which, at best, are claims of a breach of the duty of care, must be dismissed pursuant to Activision's exculpatory charter provision. (Op. Br. at 29)

Plaintiff does not dispute that the exculpatory provision exists, or that it requires the dismissal of claims based on the duty of care. *See Orman v. Cullman*, 794 A.2d 5, 40 (Del. Ch. 2002). Instead, Plaintiff attempts to recast its care claims as loyalty claims (Ans. Br. at 24-40), but Plaintiff fails in this effort. *See Lyondell*, 2009 WL 1024764, at *7 ("[T]here is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties."); *Lukens*, 757 A.2d at 733. Plaintiff attempts to "distinguish" *Lukens* by pointing out that "[t]he *Lukens* claims solely implicated the duty of care" (Ans. Br. at 41), but that is no distinction at all. Here, as in *Lukens*, the Amended Complaint pleads, at most, duty of care claims. As explained above and in Defendants' Opening Brief, the Amended Complaint fails to state a claim for the breach of the duty of loyalty.[9]

Plaintiff also attempts to resurrect the old argument that an exculpatory charter provision may not be raised on a motion to dismiss (Ans. Br. at 41 n.34), but that is simply wrong. *See, e.g., McPadden v. Sidhu*, 964 A.2d 1262 (Del. Ch. 2008) (dismissing claims because of exculpatory charter provision); *Orman*, 794 A.2d at 40 (same). *See also In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del.

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[9] The Answering Brief cites opinions in which plaintiffs brought post-closing due care claims against directors, based on transactions that occurred before the enactment of 8 *Del. C.* § 102(b)(7). *See, e.g., Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53 (Del. 1989); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134 (Del. Ch.), *aff'd*, 663 A.2d 1156 (Del. 1995). Because there was no director exculpation in those cases, the analysis of the duty of good faith and the duty of care was not as refined as in later opinions, such as *Lyondell*.

2006) ("The trial court may also take judicial notice of matters that are not subject to reasonable dispute."). Because the Amended Complaint fails to state litigable duty of loyalty claims, and the only relief that can be awarded is money damages, Activision's certificate of incorporation requires dismissal of all claims.

III. THE ACTIVISION SHAREHOLDERS WERE FULLY INFORMED WHEN THEY VOTED TO APPROVE THE COMBINATION AND RELATED TRANSACTIONS.

In pressing its motion for a preliminary injunction, Plaintiff itself acknowledged at a scheduling conference that money damages are not an appropriate remedy for inadequate disclosure and that disclosure claims should be pursued before a transaction is consummated. (Op. Br. at 20 (citing May 12, 2008 Trans. at 34-35, D.I. 137)) The Court appeared to agree with Plaintiff that disclosure claims should be addressed at the earliest opportunity because the Court would be unable to fashion meaningful relief after the stockholders' vote. (*See* March 12, 2008 Transcript at 27, 40, 46-49) Plaintiff also stated in its opening brief in support of its Motion For Preliminary Injunction that "[n]o remedy besides injunctive relief would be effective to redress [Plaintiff's disclosure claims]" (*See* Motion for Preliminary Injunction Opening Brief at 46-47, D.I. 114) Having lost in its bid for a preliminary injunction based on disclosure, Plaintiff now seeks a second bite at the apple, but the Amended Complaint has no new "teeth."

Defendants explained in their Opening Brief that prior to the preliminary injunction hearing, Plaintiff abandoned all but three of its disclosure claims, and the Court concluded those three claims were not material. (Op. Br. at 18) Specifically, the

Court held that certain projections of Vivendi Games were not material in light of disclosures contained in the Definitive Proxy. *Corti*, 954 A.2d at 333 ("[T]he plaintiff has failed to demonstrate the materiality of the requested Vivendi Games projections. . . . The estimates upon which Allen & Company relied are already disclosed in the definitive proxy. . . .[P]laintiff itself admits that the current projections are 'generally' the same as those already disclosed."). The Court also held that the Activision Board's reasons for recommending the Combination were adequately disclosed. *Id.* ("First, the June 24, 2008 supplement to the definitive proxy already discloses the board's reasons for continuing the recommendation: the same reasons it recommended the transaction in the first place. . . .Second, *plaintiff has not alleged* that the board had some alternative reason or basis for its continued recommendation.") (emphasis added). Finally, the Court held that the Definitive Proxy disclosed the rationale for accepting a fixed ratio. *Id.* at 334 (finding that Definitive Proxy already disclosed fixed ratio and reasons for using it).

Despite its tactical decision to present its disclosure claims to the Court in the context of a motion for a preliminary injunction, Plaintiff now asserts that it is not bound by the Court's legal rulings. (Ans. Br. at 40 n.33) Plaintiff's argument is apparently that, because it is generally easier for a plaintiff to meet the pleading standard for a motion to dismiss than to establish a reasonable probability of success on the merits, the Court's decision denying a preliminary injunction is not preclusive as to the issue of whether or not Plaintiff has stated a claim. With respect to Plaintiff's disclosure-based claims, however, the Court was able to determine that those claims lacked materiality on the basis of an evidentiary record. *Corti*, 954 A.2d at 323 (holding that "plaintiff has

failed in every respect to establish the materiality of the alleged omissions"). In other words, even after having given Plaintiff the benefit of expedited discovery to develop its disclosure-based claims, Plaintiff was still unable to convince the Court that the alleged omissions were material. The disclosures made in the Definitive Proxy have not changed since the preliminary injunction hearing. Nor, for that matter, have Plaintiff's disclosure-based claims.[10] In order to prevail against a motion to dismiss, Plaintiff must identify some disclosure deficiency not previously addressed by the Court, or at the very least, a new argument. *See In re KDI Corp. S'holders Litig.*, C.A. No. 10278, 1990 WL 201385, at *5 (Del. Ch. Dec. 13, 1990) ("These disclosure claims, set forth in one paragraph of the Complaint, were considered and rejected in connection with plaintiffs' motion for a preliminary injunction. . . .Little more needs to be added in the context of this motion to dismiss."). Plaintiff has failed to do that, and the three disclosure claims should be dismissed.[11]

Plaintiff also argues that "Defendants repeatedly were forced to supplement their proxy materials when confronted by Plaintiff's meritorious disclosure claims." (Ans. Br. at 3 n.4) Of course, none of Plaintiff's pleadings ever stated

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[10] Although it is true that the preliminary injunction standard is different than the standard for summary judgment (*see* Ans. Br. at 40 n.33), the Amended Complaint makes no allegation that Plaintiff's disclosure claims were not already addressed thoroughly by the Court at the preliminary injunction hearing. Thus, the "law of the case" decisions cited in Activision's Opening Brief apply here. (*See* Op. Br. at 18-19)

[11] The disclosure claims should also be dismissed on the basis of Activision's exculpatory charter provision. (Op. Br. at 20 n.14) *See Lyondell*, 2009 WL 1024764, at *3 ("[Because of the corporation's exculpatory charter provision,] this case turns on whether any arguable shortcomings on the part of the . . . directors also implicate their duty of loyalty, a breach of which is not exculpated.").

"meritorious disclosure claims," but in any event, Plaintiff cannot defeat a motion to dismiss by relying on stale pleadings that were based on Activision's preliminary proxy statement. (*See, e.g.*, Compl. ¶ 45; Ans. Br. at 31 n.23) In order to state a valid disclosure claim, Plaintiff would have to allege that the Definitive Proxy that actually went to stockholders contained materially false or misleading statements. The Amended Complaint does not do that, and Plaintiff fails to state a disclosure-based claim.

Finally, Plaintiff is unsuccessful in distinguishing *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 355-56 (Del. Ch. 2008). (Ans. Br. at 40 n.32) While it is true that Plaintiff in this case did not wait two years after the consummation of the Combination before filing disclosure claims, Plaintiff did abandon all but three of its disclosure claims at the preliminary injunction hearing and in the Amended Complaint, and the three disclosure claims that remain in the Amended Complaint have already been found not to be material as a matter of law. *Corti*, 954 A.2d at 330-31. Thus, the facts in this case are in some ways even more egregious than in *Transkaryotic*. Moreover, the "limited exception to *Loudon*" cited by Plaintiff (Ans. Br. at 40) has nothing to do with the timing of a disclosure claim. *See Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135 (Del. 1997). In *Loudon*, the Delaware Supreme Court limited dicta in its *Tri-Star* opinion that had suggested a rule of "per se damages" to be awarded on any successful disclosure claim, regardless of actual damages. *Loudon*, 700 A.2d at 42. *Loudon* limits nominal damages to those cases in which an injury to voting or economic rights is shown. *Loudon* does not allow a litigant to sandbag defendants and delay pressing damages claims until after a transaction has been consummated.

IV. PLAINTIFF'S CHALLENGE TO THE ACTIVISION BLIZZARD CHARTER PROVISIONS IS NOT RIPE AND OTHERWISE LACKS MERIT.

One of the conditions of the Combination was that the certificate of incorporation and bylaws of Activision Blizzard would contain provisions which, among other things, (i) would prevent Vivendi, its Controlled Affiliates, and their respective officers and directors from being held liable to Activision Blizzard for a breach of fiduciary duty based on a good faith action in connection with any contract between Vivendi and its Controlled Affiliates, on the one hand, and Activision Blizzard, on the other, and (ii) would renounce corporate opportunities. The Amended Complaint alleges that these provisions are contrary to the DGCL.

As an initial matter, Plaintiff's claims are not ripe, because the provisions are not facially invalid. (*See* March 12, 2008 Transcript at 43-44 (suggesting that challenge to provision could "wait until it becomes a reality, until it's actually adopted, it's in effect and someone tries to use it")) First, Section 9.3 of the Activision Blizzard Charter does not expressly apply to directors of Activision Blizzard, and refers only to Vivendi and its Controlled Affiliates, and their respective directors and officers. Second, Section 9.3 is expressly qualified by the phrase, "[t]o the fullest extent permitted by law." Thus, to the extent that Section 9.3 might be read as authorizing conduct that would be prohibited by Delaware statutory law, this limiting language prevents such a reading. This is consistent with Delaware law, which favors interpreting a certificate of incorporation in a way that will prevent any conflict with the DGCL. *See Jones Apparel Group, Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 845-46 (Del. Ch. 2004). Third, Section

8.3 is expressly authorized by Section 122(17) of the DGCL, and specifies the types of claims as to which Activision Blizzard renounces any claim of corporate opportunity; *i.e.*, opportunities offered to officers, directors, or employees of Vivendi that are not expressly offered to such persons as a director or officer of Activision Blizzard.

Plaintiff cites three opinions in support of its argument that its challenges to the provisions are ripe, but all of them are distinguishable. (Ans. Br. at 46-47 & n.39) First, the *Siegman* case included a challenge to the validity of an amendment that purported to renounce corporate opportunity doctrine *before the enactment of Section 122(17) of the DGCL*, and without any savings clause limiting the application of the provision, such as Section 9.3's phrase, [t]o the fullest extent permitted by law." *See Siegman v. Tri-Star Pictures, Inc.*, C.A. No. 9477, 1989 WL 48746, at *5 (Del. Ch. May 5, revised May 30, 1989). Second, the Court in *Leonard Loventhal* was apparently eager to lock defendants into representations made by their counsel at the hearing concerning the effect of a right plan's limitation on liability of directors. *See Leonard Loventhal Account v. Hilton Hotels Corp.*, C.A. No. 17803, 2000 WL 1528909, at *11 (Del. Ch. Oct. 10, 2000), *aff'd*, 780 A.2d 245 (Del. 2001). Third, the *landmark* Moran case involved a challenge to a rights plan based on the alleged current "depressing effect" of the rights plan, which resulted precisely *because* the rights plan would never be triggered. *See Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1072 (Del. Ch.), *aff'd*, 500 A.2d 1346 (Del. 1985), *overruled in part on other grounds*, *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1037 (Del. 2004). Here, there is no imminent danger that the

provisions will be applied in a manner violating the law, or that any such act will occur without notice to stockholders.

Plaintiff asserts that Section 9.3 is illegal because, according to Plaintiff, it provides that persons serving on the Activision Blizzard Board at the request of Vivendi "cannot be held liable for any breach of fiduciary duty, including the duty of loyalty," and "[s]uch a limitation on liability is barred by 8 *Del. C.* § 102(b)(7)." By its terms, Section 9.3 does not purport to limit the liability of Activision Blizzard's directors in their capacity as Activision Blizzard's directors. As Defendants explained their Opening Brief, a corporation may provide indemnity to the directors and officers of *another corporation* (Op. Br. at 34 n.28), and Plaintiff does not dispute this proposition. The Court need not decide, however, whether the limitation on liability in Section 9.3 applies to directors of Activision Blizzard acting in that capacity, or whether such a limitation on liability would be barred by 8 *Del. C.* § 102(b)(7), because no one is currently trying to enforce Section 9.3 in such a way as to preclude liability for Activision Blizzard's directors. If and when such a controversy arises, it will be ripe for adjudication.

As for the merits of Plaintiff's challenge to Section 8.3 of the Activision Blizzard Charter, Plaintiff concedes that Section 122(17) of the DGCL authorizes the renunciation of corporate opportunities, and even concedes that Section 8.3 specifies a class of renounced corporate opportunities. (Ans. Br. at 44-45) Plaintiff criticizes Section 8.3 for what is *not* specified about the corporate opportunities it renounces, but fails to cite any authority stating that a charter provision adopted pursuant to Section

122(17) must provide the information identified by Plaintiff. Section 8.3 is facially valid, and Plaintiff fails to allege otherwise.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court grant Defendants' motion to dismiss, and dismiss Plaintiff's Second Amended Complaint.

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