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.	)	

MEMORANDUM OPINION

Date Submitted: July 7, 2009
Date Decided: July 24, 2009

Pamela S. Tikellis, Robert J. Kriner, Jr., A. Zachary Naylor, and Meghan A. Adams, of CHIMICLES & TIKELLIS LLP, Wilmington, Delaware; OF COUNSEL: E. Powell Miller, David H. Fink, Brian E. Etzel, and Darryl G. Bressack, of THE MILLER LAW FIRM, P.C., Rochester, Michigan, Attorneys for Plaintiff.

Edward P. Welch, Edward B. Micheletti, Stephen D. Dargitz, and Rachel J. Barnett, of SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Wilmington, Delaware; OF COUNSEL: Harriet S. Posner, of SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Los Angeles, California, Attorneys for Defendants.

CHANDLER, Chancellor

This is a purported class action brought by a former shareholder of Activision, Inc. ("Activision" or the "Company"), challenging the conduct of the Activision board of directors in negotiating and approving a transaction that resulted in Vivendi S.A. ("Vivendi") obtaining a majority of the voting stock of Activision (the "Combination"). On December 2, 2007, Activision announced that it had entered into an agreement (the "Combination Agreement") pursuant to which Activision would combine its business with that of Vivendi Games, Inc. ("Vivendi Games"), a subsidiary of Vivendi. The Combination Agreement specified the terms of the Combination, which included: (1) the contribution by Vivendi of Vivendi Games in exchange for newly issued shares of Activision; (2) the purchase by Vivendi of additional newly issued Activision shares for $27.50 per share; (3) a post-closing tender offer at $27.50 per share for up to 50% of the remaining Activision shares not owned by Vivendi. After completion of the Combination, Vivendi owned a majority of the voting stock of the combined company, which was renamed Activision Blizzard.

Plaintiff brings several claims arising out of the Combination. Plaintiff alleges that the Activision directors breached their fiduciary duties by failing to disclose allegedly material information to Activision's shareholders in connection with the vote required to approve the Combination. Plaintiff also alleges that two Activision directors, who were also Activision managers, led negotiations with

Vivendi and breached their duty of loyalty by, among other things, favoring their own interests in obtaining employment benefits from the combined company over the interests of Activision's shareholders. Plaintiff alleges that Activision's other directors breached their fiduciary duty of loyalty by allowing those two managers to allegedly control both negotiations with Vivendi and Activision's advisors. In addition, plaintiff asserts a claim, under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,[1] against the Activision directors for their conduct in negotiating and agreeing to a sale of control of Activision. Finally, plaintiff seeks a declaration that two provisions in Activision Blizzard's certificate of incorporation are invalid and unenforceable under Delaware law, and alleges that Activision's directors breached their fiduciary duties by authorizing those provisions.

Defendants have moved for dismissal pursuant to Court of Chancery Rule 12(b)(6). For the reasons set forth below, plaintiff has failed to state a claim upon which relief may be granted. Accordingly, I grant defendants' motion to dismiss.

I. BACKGROUND

A. The Parties

Defendant Activision, a Delaware corporation, was a leading international developer, publisher, and distributor of interactive entertainment software

[1] 506 A.2d 173 (Del. 1986).

products. In other words, Activision made and sold video games, including such well-known titles as *Guitar Hero*, *Call of Duty*, and the *Tony Hawk* series.

According to plaintiff's allegations, Activision was enjoying substantial and increasing success as a stand alone company before the Combination. By the end of 2007, Activision had outperformed the S & P 500, NASDAQ, and the Russell 2000 over the preceding twelve month period. More importantly, the Company had outperformed all but one of its competitors in the twelve months before December 1, 2007. In addition to share performance, Activision had enjoyed a run of record growth and revenues during calendar years 2007-2008. As further explained below, plaintiff alleges that Activision's success continued even after the Combination was announced.

Defendants Robert J. Corti, Ronald Doornink, Barbara S. Isgur, Robert A. Kotick, Brian G. Kelly, Robert J. Morgado, Peter J. Nolan, and Richard Sarnoff (collectively, the "Director Defendants") constituted the board of directors of Activision at the time of the Combination. Kotick served as Chairman of the Activision board of directors and chief executive officer of the Company from February 1991 until the Combination, and now serves as President and chief executive officer of Activision Blizzard. Kelly served as a member of the Activision board of directors from July 1995 until the Combination, and served as the co-chairman of the board from October 1998 until the Combination. Kelly now serves as co-chairman of Activision Blizzard. Kotick and Kelly, combined, owned roughly 7.5% of Activision's stock.

Allen & Company, which was retained by the Activision management, served as the Company's financial advisor throughout the negotiations. Skadden, Arps, Slate, Meagher & Flom LLP, which was also retained by the Activision management, served as legal counsel to the Company and continues to defend the Company in this proceeding.

Prior to the Combination, Vivendi Games was a division of Vivendi, and consisted of four business units: Blizzard, Sierra, Sierra Online, and Vivendi Games Mobile. Of those units, Blizzard accounted for the overwhelming majority of Vivendi Games' value. Blizzard's value, in turn, was derived primarily from a single product, *World of Warcraft*, the enormously popular then-market leader in the massively multiplayer online game segment of the video gaming industry.[2] Despite its success, plaintiff contends that *World of Warcraft* faced significant threats, including subscriber fatigue and the possibility of a disruptive market entrant that could knock *World of Warcraft* from its perch in a segment historically dominated by one product at a time.

[2] According to plaintiff, on October 28, 2008, Activision Blizzard announced that worldwide subscriptions for *World of Warcraft* had surpassed 11 million. For background information on *World of Warcraft*, *see Wayne County Employees' Ret. Sys. v. Corti*, 954 A.2d 319, 321-22 (Del. Ch. 2008) (comparing massively multiplayer role playing games such as *World of Warcraft* to "the world of Mergers and Acquisitions").

B. The Negotiations

By late 2006, Kotick and Kelly, on behalf of the Company, entered exclusive, nonpublic discussions with Vivendi about a possible corporate combination. Before these discussions occurred, Activision had evaluated seventeen potential acquisition targets, of which eight were evaluated as potential entry opportunities into the massively multiplayer online game market. Vivendi Games was among the eight entry opportunities evaluated. Plaintiff contends, however, that none of the alternatives considered by Activision involved a sale of control of the Company, and that Activision had not considered a sale of the Company since around 2003-2004.

At an April 30, 2007 board meeting, Kotick and Kelly informed the Activision board of the already ongoing discussions with Vivendi. The board minutes of this meeting reflect that Allen & Company reviewed the history of the negotiations, including the then-currently proposed transaction terms that Allen & Company had already provided to Vivendi's financial advisor, Goldman Sachs, on April 20, 2007, in response to a proposal Goldman Sachs presented to Allen & Company on April 12, 2007. The Company's definitive proxy indicates that the board decided at the April 30, 2007 meeting to pursue negotiations with Vivendi based on past discussions of earlier contacts by management with other parties regarding potential transactions. Plaintiff alleges, however, that the minutes of the April 30 board meeting do not reflect such a decision.

Allen & Company and Goldman Sachs met several times over the weeks following the April 30 board meeting to discuss a possible transaction. These discussions focused on a transaction consisting of: (1) an acquisition by Activision of Vivendi Games in exchange for shares of Activision common stock; (2) the purchase of additional shares of Activision stock by Vivendi; (3) a post-closing self tender offer conducted by Activision; and (4) the use of the same per-share price for Activision in each step of the transaction. These precepts became known as the "basic principles" upon which further negotiations were based. Plaintiff alleges that Vivendi demanded control of Activision from the start of the negotiations, and assumed that Kotick and Kelly would each have a role in the combined entity.

On May 11, 2007, the board was updated by Kotick and Kelly and the advisors on the discussions with Vivendi, and the board expressed its belief that the involvement of a committee of outside directors in the sale process would be prudent in light of Kotick and Kelly's potential conflicts as members of management. The board authorized the involvement of the Nominating and Corporate Governance Committee (the "NCGC" or the "Committee") in the sale process.[3] According to plaintiff, the NCGC's claimed objective was to ensure that the Activision shareholders received a control premium for their shares if a change of control transaction were to occur.

The NCGC consisted of three outside directors, defendants Corti, Morgado, and Sarnoff, each of whom would serve on the Activision Blizzard board following the Combination. Despite the authority to do so, the NCGC never retained its own legal or financial advisors. Instead, the Committee relied on Allen & Company and Skadden Arps, and reports regarding Kotick and Kelly's negotiations with Vivendi. Plaintiff alleges that the independence and effectiveness of the NCGC were undercut because Kotick and Kelly, along with Activision chief financial officer Thomas Tippl,[4] attended nearly every committee meeting.

On May 16 and 22, 2007, the NCGC met with Allen & Company and Skadden Arps, and reviewed the terms of the proposals exchanged between

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[3] Specifically, the board authorized the NCGC:

> (a) To review, evaluate, respond to and negotiate with respect to the proposed transaction and any other alternative transaction, offer or expression of interest in a possible business combination with Activision, if made; (b) to recommend to the board of directors a course of action, business combination or similar agreement in connection with the proposed transaction and any other proposal . . . ; (c) to hire and retain, at the expense of Activision, such legal counsel as the NCGC deemed necessary and appropriate to advise the committee in furtherance of its responsibilities; and (d) to hire and retain, at Activision's expense, such financial advisors or experts as it deemed appropriate to advise the committee in furtherance of its responsibilities.

[4] Plaintiff alleges that Tippl, who was Activision's CFO, "extracted for himself the role of CFO for the combined entity and was also conflicted." Second Amended Class Action Complaint ("Compl.") ¶ 56.

Goldman Sachs and Allen & Company during early May 2007. These proposals included the concept of a fixed exchange ratio for the transaction, pursuant to which the value of Vivendi Games would be deemed to be a percentage of the value of Activision. Around this time, the NCGC also recommended that Activision and its representatives should continue discussions with Vivendi and explore means of (a) ensuring that shareholders receive a control premium if a change of control were to occur, and (b) protecting existing shareholders in the event that Activision's common stock traded below the per share transaction price after the closing of the proposed transaction.

At the May 22 meeting, Allen & Company presented the NCGC with a proposal that included a "Top-Up" right providing for an additional payment of cash contributed by Vivendi to Activision shareholders if the post-closing market price was below the transaction price. Following the May 16 and 22 meetings, Allen & Company presented an alternative proposal to Goldman Sachs, which valued Vivendi Games at $7.75 billion, provided an Activision share price of $25.50, and included the "Top-Up."

On June 6, 2007, Vivendi rejected the "Top-Up" and made a revised proposal following its "original basic principles" that included a $24.75 per share price with a $2.5 billion post-closing tender offer to be funded with cash from Vivendi and Activision. The June 6 Vivendi proposal included an exchange ratio that fixed the implied value of Vivendi Games to 47.3% of Activision, regardless of the actual relative values of Vivendi Games and Activision.

On June 11, 2007, Vivendi advised Kotick that given the lack of progress and differences between the companies' proposals, Vivendi did not think it made sense to continue discussions. The NCGC was informed of Vivendi's response at a June 15, 2007 meeting, with Kotick and Kelly in attendance. The NCGC then received a presentation from Allen & Company that included a "possible counter-offer for discussion" to present to Vivendi, which was a proposal that valued Activision at $24.75 per share and included a second-step partial tender offer for 42.8% of the non-Vivendi Activision shares.[5] Plaintiff alleges that during the June 15 meeting, "the NCGC apparently relinquished its demands for a control premium and instead instructed management to seek a tender offer for a minimum of 50% of Activision's shares."[6]

Vivendi and Activision management met in France on June 27-28, 2007, during which time Activision management made a proposal that provided for a tender offer for 50% of Activision shares.[7] During the meetings in France, Kotick and Kelly reached an agreement in principle with Vivendi, pricing Activision at

[5] Plaintiff alleges that Allen & Company's presentation to the NCGC omitted references to contacts between Allen & Company and Goldman Sachs on May 23 and May 30, although these contacts were included in materials provided to management.
[6] Compl. ¶ 63.
[7] Plaintiff points out that the tender offer for 50% of Activision shares represents "the bare minimum suggested by the NCGC to present to Vivendi." *Id.* ¶ 64.

$24.75 per share with a fixed exchange ratio for Vivendi Games and Activision, and a post-merger tender offer for 50% of non-Vivendi Activision stock at the same $24.75 per share price.

In the weeks following the meetings in France, Vivendi and Activision management engaged in due diligence and negotiations regarding post-merger governance and management of the combined company. Plaintiff contends that Kotick and Kelly "left the Committee on the sidelines."[8] On September 6, 2007, the Committee met to discuss the terms of the draft documents and heard summaries presented by Skadden Arps of the "open issues" relating to management structure, corporate opportunities, and affiliate transactions, as well as certain issues relating to the terms of the agreement, including the proposed termination fees and required consents. According to the definitive proxy, on September 6, the Committee "recommended that management continue its negotiations regarding the proposed transactions with a view toward obtaining better corporate governance and operational provisions and protections for Activision's existing stockholders," although plaintiff alleges that the minutes of the September 6 meeting include no evidence of any such recommendation.[9] Plaintiff also contends that, despite their conflicts of interest, the NCGC left Kotick and Kelly to negotiate post-sale minority protections and governance. On

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[8] Pl.'s Answering Br. 12.
[9] Compl. ¶ 67.

September 14, 2007, Kotick advised Vivendi that given the number of material open issues remaining it did not make sense to continue discussions regarding a possible transaction at that time. These issues, however, were ultimately resolved without derailing the negotiations.[10]

During September and October of 2007, the Activision board met on at least three separate occasions regarding the discussions with Vivendi. On September 27, 2007, Allen & Company met with the full Activision board to review and update the status of the negotiations with Vivendi. On October 8, 2007, the Activision board met and received a presentation from McKinsey & Co. concerning due diligence performed with respect to Vivendi Games.[11] The definitive proxy indicates that during the September 27 meeting and an October 30 meeting, the Activision board authorized Activision and its representatives to continue negotiations with Vivendi regarding the proposed transactions. Plaintiff alleges, however, that the minutes of these meetings do not include evidence of such authorizations.

As noted above, the transaction terms being discussed included a fixed exchange ratio whereby Vivendi Games was deemed to have an implied value of a

[10] Plaintiff alleges that the open issues that caused Kotick to consider breaking off negotiations were over post-transaction management and governance control, whereas Vivendi's rejection of the NCGC's demand for a control premium did not prompt Kotick and Kelly to break off negotiations. Pl.'s Answering Br. 13.

[11] Plaintiff alleges that it was during this meeting that McKinsey identified the risks faced by *World of Warcraft*, including subscriber fatigue and the possibility of a disruptive market entrant.

fixed percentage of Activision. Thus, the value of Vivendi Games for purposes of the Combination fluctuated along with the value of Activision, regardless of the actual relative values of the two companies. The increasing price of Activision stock during the negotiations led to a renegotiation of the terms of the deal, which resulted in an increase in the price of Activision's shares from $24.75 to $27.50 for purposes of the tender offer and stock purchase by Vivendi. Plaintiff alleges that this increase in the share price was "illusory" because the fixed exchange ratio remained unchanged.[12]

Plaintiff also alleges that Allen & Company "justified" the increase in the implied value of Vivendi Games under the fixed exchange ratio by increasing its valuation of Vivendi Games, as reflected in its November 6, 2007 "Renegotiation Analysis," from a range of $6.9–$8.0 billion to a range of $8.0–$9.5 billion, primarily based on McKinsey's observations with respect to subscriber trends. Plaintiff criticizes Allen & Company's valuation decision because McKinsey's observations were allegedly "non-quantifiable" and subject to a number of upside and downside scenario risks, including the potential threats faced by *World of Warcraft*.

According to the definitive proxy, Allen & Company updated the NCGC on November 7, 2007 regarding the status of negotiations, but no meeting of the

[12] Compl. ¶ 72.

NCGC was held. On November 16, 2007, the NCGC met, with Kotick and Kelly present, received an update from Allen & Company, and according to the definitive proxy, recommended that Activision and its representatives continue discussions with Vivendi. Again, plaintiff alleges that the NCGC meeting minutes include no evidence of any such recommendation.

C. The Activision Board's Approval of the Combination Agreement

The Combination Agreement was finalized on December 1, 2007 and announced publicly on December 2, 2007. The Agreement provided for a stock purchase and tender offer at the per share price of $27.50.[13] On December 1, before approving the Combination, the Activision board met and received a presentation on the analysis underlying Allen & Company's fairness opinion, which is dated December 1, 2007 and has not been updated. Allen & Company used a variety of analyses, including a comparative company analysis, a comparative precedent transaction analysis, and a discounted cash flow analysis, in reaching its opinion that the Combination was fair to Activision and its shareholders from a financial point of view based on the facts known to Allen & Company as of December 1, 2007.

Plaintiff alleges that Allen & Company's fairness opinion was deficient in several respects. On November 26, 2007, Activision management provided

[13] The $27.50 per share price represented an approximate 25% premium over the price at which Activision stock was trading at the time the deal was announced.

Vivendi with revised internal Activision forecasts which included upward revisions to the management "upside" and "stretch" cases for fiscal year 2008. The "upside" forecast for fiscal year 2008 was revised from $2.124 billion in revenue and earnings per share of $0.68, to $2.3 billion in revenue and earnings per share of $0.85. The "stretch" forecast was revised from revenue of $2.253 billion and earnings per share of $0.83, to revenue of $2.45 billion and earnings per share of $0.95.[14] On November 27, 2007, Activision publicly issued revised guidance to Wall Street that reflected the "upside" case for fiscal year 2008.

Plaintiff laments Allen & Company's decision to use Wall Street estimates through 2010 to perform the discounted cash flow analysis instead of using the Company's revised internal estimates provided to Vivendi.[15] Plaintiff alleges that the Activision board allowed itself to succumb to management pressure to use Wall Street estimates that were allegedly stale and underestimated Activision's expected performance. To support this proposition, plaintiff alleges that on December 19, 2007, Activision again increased its revenue guidance to Wall Street

[14] Plaintiff alleges that the information provided to Vivendi states that "FY08 results tracking well ahead of prior expectations; on pace to deliver previous 'stretch scenario' with additional upside." Compl. ¶ 79.

[15] Building off the Wall Street fiscal year 2008 estimate of $2.33 billion in revenue, Allen & Company used revenue estimates of $2.33 billion for fiscal year 2008, $2.485 billion for fiscal year 2009, and $2.704 billion for fiscal year 2010.

to $2.45 billion for the full year.[16] Thus, plaintiff alleges, Allen & Company and the Activision board should have known that the Company's performance was superior to November Wall Street numbers and should not have used Wall Street numbers in the valuation.[17] On April 29, 2008, despite what plaintiff describes as the "stale and unreliable Allen work"[18] and "the continued divergence of the two companies' performance,"[19] the Activision board determined not to alter its recommendation in favor of the Combination.

Plaintiff alleges that at the same time as the negotiations regarding the Combination were taking place, Kotick and Kelly negotiated with Vivendi "regarding post-merger governance and management."[20] Plaintiff also alleges that on December 1, 2007, before the Activision board meeting approving the Combination, Activision's compensation committee and the NCGC met in a joint session to approve the employment agreement terms for Kotick, Kelly, and Michael Griffith, the president and CEO of Activision Publishing, Inc., a subsidiary of Activision. During this meeting the NCGC did not separately consider or approve any other terms related to the Combination other than

[16] Plaintiff further alleges that on February 8, 2008, Activision announced that it had revised its estimate for full fiscal year revenues to $2.65 billion, and on May 8, 2008, announced that its actual revenues for fiscal year 2008 were $2.9 billion.
[17] In contrast, Allen & Company used Vivendi management projections, rather than Wall Street projections, to value Vivendi Games because, according to Allen & Company, Wall Street did not have access to Vivendi Games' management projections.
[18] Pl.'s Answering Br. 18.
[19] Compl. ¶ 77.
[20] *Id.* ¶¶ 67-68.

agreements related to executive compensation. The new agreements replaced and superseded existing agreements, which were scheduled to expire on March 31, 2008.[21] Also on December 1, 2007, Kotick and Kelly entered into voting and lock-up agreements, pursuant to which Kotick and Kelly agreed to vote all their shares of Activision common stock in favor of the Combination and against any other acquisition proposal.

Plaintiff also alleges that the governance structure of the combined company does not protect minority shareholders and that two provisions of Activision Blizzard's certificate of incorporation ("Activision Blizzard's Certificate") are invalid and unenforceable under Delaware law. Activision Blizzard's board of directors is comprised of eleven members, with a majority designated by Vivendi. All committees of the Activision Blizzard board, other than certain special nominating committees, are required to have at least a majority of Vivendi

[21] Plaintiff alleges that Kotick and Kelly waived some benefits to which they would otherwise have been entitled, and were given new benefits as a result of their new employment agreements. For example, Kelly agreed to a salary reduction of over $400,000. On the closing date of the Combination, Kotick received a grant of 1.25 million performance shares, which will vest in 20% increments on each of the first four anniversaries of the closing, with another 20% vesting on December 31, 2012, the expiration date of Kotick's employment agreement, subject to attainment of certain performance thresholds. Kotick and Kelly also waived certain change of control benefits under their previous agreements, but entered into replacement bonus agreements pursuant to which they each received a grant of 363,637 restricted stock units and two cash bonus payments of $5 million each, one on the date of signing of the replacement bonus agreements and one on the closing date of the Combination. Plaintiff also alleges that the new agreements provide Kotick and Kelly with substantial severance and change of control compensation. *Id.* ¶¶ 92-95.

designees that is proportional to Vivendi's voting interest, as long as Vivendi owns more than 35% and less than 90% of Activision Blizzard stock.

As discussed further below, plaintiff alleges that two provisions of Activision Blizzard's Certificate are invalid under Delaware law, namely, Section 8.3, which purports to renounce certain corporate opportunities in favor of Vivendi, and Section 9.3, which purports to relieve Vivendi and its affiliates, officers, and directors from liability for certain breaches of fiduciary duty, including the duty of loyalty, with respect to agreements and contracts among Activision Blizzard and Vivendi and its affiliates.

D. The Shareholder Vote and the Combination

The Combination could not commence unless it received the approval of Activision's shareholders at the special meeting on July 8, 2008. On February 8, 2008, plaintiff filed its first complaint challenging both the deal and the disclosures pertaining to it. Plaintiff later moved for a preliminary injunction of the shareholder vote based on alleged disclosure violations. On July 1, 2008, the Court denied plaintiff's motion in a written opinion, holding that plaintiff had failed to demonstrate a reasonable likelihood of success on the merits of its disclosure claims because plaintiff "failed in every respect to establish the materiality of the alleged omissions."[22]

[22] *Corti*, 954 A.2d at 331.

The Court's denial of plaintiff's motion cleared the way for the Activision shareholder vote, which occurred on July 8, 2008 and resulted in the approvals necessary for the transaction to proceed.[23] On July 10, 2008, after completion of the merger and stock purchase provided for in the Combination Agreement, Vivendi became the majority shareholder of Activision Blizzard, with 52% ownership on a fully diluted basis. On July 16, 2008, with its stock trading around $36 per share, Activision Blizzard began the tender offer to purchase up to 146,500,000 shares of its outstanding common stock at $27.50 per share. On August 19, 2008, Activision Blizzard announced that it had purchased 85,916 shares of its common stock pursuant to the tender offer.

On December 23, 2008, plaintiff moved to amend its complaint, and filed the now-operative Second Amended Class Action Complaint (the "Complaint"). Before the Court is defendants' motion to dismiss the Complaint pursuant to Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief may be granted. This Opinion constitutes the Court's ruling on defendants' motion.

[23] Defendants assert that, other than a proposal relating to possible adjournment (which received more than 91% of the votes cast), each of the shareholder proposals relating to the transactions at issue in this litigation received at least 96% of the votes cast. Defendants acknowledge, however, that the shareholder vote does not "ratify" the actions of Activision's directors. *See Gantler v. Stephens*, 965 A.2d 695, 712-13 (Del. 2009).

II. ANALYSIS

A. The Legal Standard

This Court may grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) if the Court can determine with reasonable certainty that the plaintiff would not be entitled to relief under any set of facts that could be reasonably inferred from the well-pleaded allegations in the complaint.[24] In considering a motion to dismiss, the court must accept the well-pleaded allegations of fact in the complaint as true and draw all reasonable inferences that logically flow from those allegations in the plaintiff's favor.[25] Of course, the court is not required to accept mere conclusory allegations as true or make inferences that are not supported by well-pleaded factual allegations.[26] Moreover, the court "is not required to accept every strained interpretation of the allegations proposed by the plaintiff."[27]

B. The Disclosure Claims

In Count V of the Complaint plaintiff alleges that the Director Defendants breached their fiduciary duties by failing to provide full and fair disclosure to shareholders in connection with the shareholder vote required for the Combination to proceed. When a board of directors seeks shareholder action, the fiduciary duty of disclosure, which is a specific application of the duties of care and loyalty,

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[24] *Malpiede v. Townson*, 780 A.2d 1075, 1082-83 (Del. 2001).
[25] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).
[26] *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999).
[27] *Gen. Motors*, 897 A.2d at 168 (quoting *Malpiede*, 780 A.2d at 1083).

requires that the board "disclose fully and fairly all material information within the board's control."[28] As this Court explained in the July 1, 2008 Opinion, however, a plaintiff bringing disclosure claims must identify the facts that are allegedly missing from the proxy statement and "state why they meet the materiality standard and how the omission caused injury."[29] To establish the materiality of omitted facts under Delaware law, a plaintiff "must show a substantial likelihood that the omitted facts would have assumed actual significance in the deliberations of a reasonable stockholder because, if disclosed, those facts would have 'significantly altered the total mix of information' available to the stockholders."[30]

Although plaintiff's disclosure claims were "to put it mildly, a moving target," by the time of the preliminary injunction hearing they had been "whittled down to three."[31] Plaintiff now brings a claim for breach of fiduciary duty against the Director Defendants based on the same three alleged omissions that plaintiff argued supported its motion for a preliminary injunction, namely, the failure to disclose: (1) Vivendi Games' management projections as of the time of the Combination; (2) the bases and reasons for the Board's decision on April 29, 2008 to continue its recommendation to the Activision shareholders in favor of the Combination; and (3) the bases of Allen & Company's and management's decision

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[28] *Corti*, 954 A.2d at 330 (quoting *Stroud v. Grace,* 606 A.2d 75, 84 (Del. 1992)).
[29] *Id.* (quoting *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1173 (Del. 2000)).
[30] *Id.* (quoting *McMillan v. Intercargo Corp.*, 1999 WL 288128, at *5 (Del. Ch. May 3, 1999)).
[31] *Id.* at 330-31.

not to seek a revision of the fixed exchange ratio set for the Combination in July 2007, and the bases for Allen & Company's increased valuation of Vivendi Games.[32]

When evaluating these disclosure claims in the context of plaintiff's motion for a preliminary injunction, the Court focused on the requirement that a moving party must demonstrate, among other things, a likelihood of success on the merits of the underlying claim. As I explained:

> Materiality is the essence of a successful disclosure claim, and plaintiff has failed to demonstrate how any of the alleged omissions would significantly alter the total mix of information that is already available in the nearly 300-page definitive proxy released by the Company. As a result, plaintiff has failed to demonstrate a reasonable likelihood of success on the merits and has, therefore, failed to earn the preliminary injunction it seeks.[33]

The Court then explained in detail how plaintiff failed to establish a probability of success on the merits for each of the three alleged omissions. Although plaintiff is correct that in the July 1, 2008 Opinion the Court was applying the preliminary injunction standard, and is now applying the Rule 12(b)(6) standard, I am nevertheless convinced that the reasons given by the Court with respect to the materiality of the alleged omissions also warrant granting defendants' motion to dismiss for failure to state a claim. Plaintiff has failed to put forth any convincing argument addressing the Court's reasons for holding that

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[32] Compl. ¶ 131; *Corti*, 954 A.2d at 331.
[33] *Corti*, 954 A.2d at 323 (footnote omitted).

plaintiff "failed in every respect to establish the materiality of the alleged omissions."[34] Thus, for substantially the same reasons set forth in this Court's July 1, 2008 Opinion in this case, I conclude that plaintiff's disclosure claims should be dismissed. Given that plaintiff has offered no convincing argument addressing the Court's analysis of the materiality of the alleged omissions, I need not repeat those reasons here, and instead incorporate the reasons given in the Court's July 1, 2008 Opinion. To the extent necessary, I hereby clarify that the factual allegations in the Complaint fail to support any reasonable inference that the alleged omissions are material under Delaware law, and that it is therefore reasonably certain that plaintiff would not be able to prevail on its disclosure claims based on any set of facts that could be proved in support of the disclosure claims.

I also note this Court's instruction in *In re Transkaryotic Therapies, Inc.*[35] that, given the problems associated with an after-the-fact damages award for disclosure violations, the appropriate course is for the Court to address disclosure claims before the shareholder vote, rather than after the vote and the challenged transaction have occurred and "the metaphorical merger eggs have been scrambled."[36] This preference is consistent with this Court's explicit holding that a breach of the duty of disclosure leads to irreparable harm, or harm that cannot be

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[34] *Id.* at 331.
[35] 954 A.2d 346 (Del. Ch. 2008).
[36] *Id.* at 356-63 (quoting *McMillan v. Intercargo Corp.,* 768 A.2d 492, 500 (Del. Ch. 2000)).

remedied after the fact.[37] Indeed, plaintiff took the position in this case that the very disclosure violations alleged in the Complaint threatened plaintiff with irreparable harm.[38]

Moreover, although plaintiff addresses the issue by concluding that the alleged breaches of fiduciary duty based on inadequate disclosure constituted a breach of the duty of loyalty, the Complaint fails to adequately plead facts that state a claim for damages that is not barred by the provision in Activision's certificate that, pursuant to 8 *Del. C.* § 102(b)(7), eliminates the personal liability of Activision's directors for monetary liability for breaches of the duty of care. A mere conclusory allegation that the alleged disclosure violations also constitute a violation of the duty of loyalty is not sufficient to survive a motion to dismiss, particularly in light of the holding that the Complaint fails to otherwise state a non-exculpated claim against the Director Defendants for breach of fiduciary duty.

Accordingly, and for all the reasons stated above, Count V of the Complaint is dismissed for failure to state a claim upon which relief may be granted.

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[37] *Transkaryotic*, 954 A.2d at 361 ("[O]nce . . . irreparable harm has occurred—*i.e.*, when shareholders *have* voted without complete and accurate information—it is, by definition, too late to remedy the harm. If the Court could redress such an informational injury after the fact, then the harm, by definition, would not be irreparable, and injunctive relief would not be available in the first place.") (footnotes omitted); *Corti*, 954 A.2d at 329 ("The right at issue in this case and in all disclosure cases is 'the right to receive fair disclosure of the material facts necessary to cast a fully informed vote,' and that right, if infringed, can only be truly remedied by a specific, injunctive order mandating the appropriate disclosure before the shareholders are required to vote. By their very nature, then, plaintiff's disclosure claims, if meritorious, involve irreparable harm.") (footnotes omitted).

[38] Pl.'s Corrected Opening Br. in Supp. of its Mot. for Prelim. Injunctive Relief 45-46.

C. The Fiduciary Duty Claims

The directors of Delaware corporations are bound by the traditional fiduciary duties of care and loyalty. The appropriate starting place in evaluating plaintiff's fiduciary duty claims, however, is with the well-established presumption of the business judgment rule, which reflects and promotes the role of the board of directors, and not the Court, as the appropriate body to manage the business and affairs of the corporation.[39] The business judgment rule, of course, "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[40] "Absent an abuse of discretion, that judgment will be respected by the courts."[41] As the party challenging the directors' decisions, the burden is on plaintiff to establish facts that rebut the presumption of the rule.[42]

As the Delaware Supreme Court has recently reiterated, when a board of directors decides to sell control of the corporation, "the 'board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of

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[39] 8 *Del. C.* § 141(a); *In re CompuCom Sys., Inc. Stockholders Litig.*, 2005 WL 2481325, at *5 (Del. Ch. Sept. 29, 2005).
[40] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).
[41] *Id.*
[42] *Id.*

the enterprise.'"[43] Thus, a sale of control of the corporation does not implicate additional fiduciary duties, but instead requires the directors to exercise their fiduciary duties in the context of the particular decision being made.[44] As always, the Court must take into account the circumstances surrounding the decision when determining whether the directors made a well-informed business decision that they reasonably believed was in the best interests of the corporation, or whether the plaintiff has successfully rebutted the presumption of the business judgment rule.[45] It follows from the contextual nature of directors' fiduciary duties that, even in a sale of control, "there is no single blueprint that a board must follow to fulfill its duties."[46] Further, as noted above, Activision's certificate contained a provision that bars claims for money damages against Activision's directors based on breaches of the duty of care. Thus, in order to survive dismissal, plaintiff must allege facts sufficient to state a claim that is not exculpated by Activision's certificate, such as a claim that the Director Defendants violated the duty of loyalty by, for example, acting in their own self-interest at the expense of the Company or otherwise failing to act in good faith.

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[43] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 239 (Del. 2009) (quoting *Malpiede*, 780 A.2d at 1083).

[44] *McMillan*, 768 A.2d at 502.

[45] *Id.* ("[T]he board's actions must be evaluated in light of the relevant circumstances to determine if they were undertaken with due diligence and good faith. If no breach of duty is found, the board's actions are entitled to the protections of the business judgment rule.") (quoting *Goodwin v. Live Entm't, Inc.*, 1999 WL 64265, at *21 (Del. Ch. Jan. 25, 1999)).

[46] *Lyondell*, 970 A.2d at 242-43 (quoting *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989)).

The allegations in the Complaint challenge the conduct of the Director Defendants in negotiating and approving the Combination. Plaintiff's theory of this alleged breach of fiduciary duty is that Kotick and Kelly, who plaintiff alleges controlled the sale process and Activision's advisors, had their own self-dealing interests in the Combination and favored their personal interests ahead of the interests of Activision shareholders. Moreover, according to plaintiff, the remaining Director Defendants breached their fiduciary duties by allowing Kotick and Kelly "to control the negotiations and advisors"[47] and by otherwise failing to satisfy their fiduciary obligations.

1. Kotick and Kelly

Count II of the Complaint asserts a claim against Kotick and Kelly for breach of the duty of loyalty. Plaintiff contends that Kotick and Kelly "obtained material special financial and employment benefits from Vivendi as a result of the sale of control while the stockholders received no premium or payment of any kind to compensate for the sale of control."[48] Plaintiff also asserts that Kotick and Kelly "promoted their own interests in creating and leading a combined Activision/Games empire over the interests of the stockholders in obtaining maximum value and compensation for the sale of control."[49]

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[47] Pl.'s Answering Br. 31.
[48] *Id.* at 26.
[49] *Id.* at 25.

Again, there is no "blueprint" that directors must follow to satisfy their fiduciary obligations in a change of control transaction. Rather, what a director must do to discharge her fiduciary obligations depends on the circumstances in which the director is acting. Here, the Complaint fails to state a claim that Kotick and Kelly were interested in the transaction or otherwise violated their fiduciary duty of loyalty. There are several aspects of plaintiff's allegations that lead to this conclusion.

According to the Complaint, Activision had contemplated several acquisition targets before the discussions with Vivendi. At least part of Activision's motivation in considering these transactions was a desire to enter the massively multiplayer online games market, and Vivendi Games owned *World of Warcraft*, the then-leader in that market. The negotiations with Vivendi began in late 2006, and culminated in an agreement in December 2007, with the close of the transaction occurring in July 2008.

Significantly, the factual allegations in the Complaint do not suggest that Kotick and Kelly's jobs were ever in danger.[50] There is no allegation that there was a bidder threatening to take over Activision and replace management. There is no allegation that Kotick and Kelly would be removed as managers if Activision did not pursue a transaction with Vivendi. Moreover, plaintiff alleges that from the

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[50] Indeed, plaintiff even alleges that Activision was performing well as a stand alone company. Compl. ¶ 24.

start of negotiations Vivendi assumed Kotick and Kelly's roles in the combined company.[51] That Kotick and Kelly did not have to pursue the transaction with Vivendi in order to retain their positions as managers significantly alleviates the concern that Kotick and Kelly were acting out of an impermissible "entrenchment" motive. When Vivendi's assumption regarding Kotick and Kelly's roles is added to the analysis, plaintiff's "entrenchment" theory fails completely.[52]

Moreover, before approving the Combination, Activision's compensation committee and the NCGC met in a joint session to approve employment agreements for Kotick and Kelly, that replaced agreements scheduled to expire on March 31, 2008.[53] During this meeting, the NCGC did not separately consider or approve any other terms related to the Combination other than agreements related

[51] *Id.* ¶ 46 ("[F]rom the start of negotiations, Kotick and Kelly's roles in the merged Company was assumed by Vivendi.")

[52] Plaintiff states that directors "may not utilize corporate machinery for the purpose of perpetuating themselves in office." *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 185 (Del. Ch. 2005). Although management "entrenchment" can be a concern when a company is faced with an offer to purchase the company that would likely result in management being replaced, or when a management sponsored offer for the company is being considered alongside a competing, less management-friendly bid, such circumstances are not present in this case. Indeed, plaintiff has put forth no factual allegations that reasonably suggest that Kotick and Kelly's actions were motivated by "entrenchment," given that (1) there is no allegation in the Complaint that there was a competing bidder that would be hostile to existing management; (2) there is no allegation in the Complaint that Kotick and Kelly's jobs with Activision were in danger; and (3) the Complaint alleges that from the start of negotiations Vivendi assumed Kotick and Kelly's continuing roles in the combined entity. Any "entrenchment" concerns are further belied by plaintiff's allegation that Activision was enjoying "record results" and had recently "enjoyed a run of record growth and revenues." Compl. ¶ 24.

[53] Compl. ¶¶ 91-92.

to executive compensation.[54] Although plaintiff alleges that Kotick and Kelly negotiated with Vivendi regarding post-merger governance and management issues, the Complaint does not allege that Kotick and Kelly negotiated the terms of their employment agreements with Vivendi.[55] In fact, Kotick and Kelly's employment agreements were approved by *Activision* directors.[56] This approval dispels any notion that the new agreements were kept secret from the board or that Kotick and Kelly surreptitiously obtained employment benefits without Activision's knowledge. As noted above, it was contemplated from the outset that Kotick and Kelly would continue as mangers of the combined entity.[57]

Although plaintiff alleges that Kotick and Kelly received substantial benefits under the new employment agreements, plaintiff has not alleged facts that rebut the presumption that the members of Activision's compensation committee and the NCGC exercised their independent and disinterested business judgment in approving the employment agreements. Plaintiff has not alleged facts supporting

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[54] *Id.* ¶ 91.

[55] In its answering brief plaintiff asserts that a conflict of interest remained despite the NCGC's approval of the employment agreements because "Kotick and Kelly, not the Committee, negotiated the terms of their continued employment *with Vivendi* and they did so while negotiating the sale of control terms for the Company and stockholders." Pl.'s Answering Br. 29. The Complaint alleges that "Vivendi and Activision management engaged in due diligence and negotiations regarding post-merger governance and management" and that "[o]n September 6, 2007, the NCGC . . . heard summaries presented by Skadden Arps of the 'open issues' relating to management structure, corporate opportunities and affiliate transactions . . . ." Compl. ¶ 67. The Complaint does not, however, allege that Kotick and Kelly negotiated the terms of their new employment agreements with Vivendi.

[56] Compl. ¶¶ 91-92.

[57] *Id.* ¶ 46.

the conclusion that Kotick and Kelly dominated and controlled the Activision board when it approved the employment agreements. Moreover, even according to the allegations in the Complaint, by entering into the new employment agreements Kotick and Kelly waived some benefits to which they would otherwise be entitled, and Kelly agreed to a salary reduction of over $400,000.[58] Moreover, Kotick and Kelly, combined, owned approximately 7.5% of Activision's stock, which gave Kotick and Kelly an incentive to obtain a higher price for Activision shares.

Finally, plaintiff has not alleged facts sufficient to support the conclusory allegation that Kotick and Kelly favored their own "interests in creating and reigning over [a] combined empire."[59] A mere allegation that a manager pursued a corporate combination out of a desire for a larger "empire" is not sufficient to rebut the presumption of the business judgment rule. Indeed, to support such a claim a plaintiff would ultimately have to show that the manager's primary purpose for pursuing the transaction was a desire to increase the size of the company for the manager's benefit.[60] This would be a difficult showing to make, and there are not sufficient facts alleged in the Complaint to support it here.

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[58] *Id.* ¶¶ 93, 95.
[59] Pl.'s Answering Br. 27-28.
[60] *Cf. Benihana*, 891 A.2d at 186 ("A plaintiff charging a primary purpose of entrenchment bears a heavy burden of proof at trial.").

The circumstances here differ in important ways from those in *Mills Acquisition Co. v. Macmillan, Inc.*,[61] a case cited repeatedly by plaintiff. In *Mills*, the conflicted managers were bidders in an auction by which control of the company would be sold. The company at issue in *Mills*, Macmillan, Inc., faced competing bids from multiple potential acquirers, including a management sponsored buyout of the company by Kohlberg Kravis Roberts & Co. ("KKR") in which Macmillan senior management would receive a significant ownership interest in the newly formed company.[62] The conflicted managers in *Mills* were thus bidders in an auction in which the sale of control would occur, and sought to transfer the company to themselves at the expense of the shareholders of the company.[63] As a result, the "auction was clandestinely and impermissibly skewed in favor of KKR."[64] For example, one of the conflicted insiders improperly "tipped" KKR as to the amount of the all cash bid of one of the competing bidders.[65] The Supreme Court concluded that the insiders' concealment of this tip at a critical board meeting, "utterly destroys their credibility."[66] Among other things, this "illicit manipulation of a board's deliberative processes by self-

[61] 559 A.2d 1261 (Del. 1989).
[62] *Id.* at 1272-73.
[63] *Id.* at 1279-81 (noting that the company's chief executive officer's and chief operating officer's "conduct throughout was resolutely intended to deliver the company to themselves in *Macmillan I,* and to their favored bidder, KKR, and thus themselves, in *Macmillan II*.").
[64] *Id.* at 1281.
[65] *Id.* at 1275.
[66] *Id.* at 1282.

interested corporate fiduciaries" led the Supreme Court to abandon the "judicial reluctance to assess the merits of a business decision."[67]

There are important differences between the two cases that warrant viewing the fiduciary duty claims here differently than those in *Mills*. Significantly, unlike in *Mills*, there was no management sponsored buyout offer that triggered the need for an increased role of the independent directors. Rather, Activision and Vivendi agreed to combine Activision's business with that of Vivendi Games. There is much less cause for concern where managers will continue their employment with the combined post-transaction entity, than when the conflicted managers are bidders in an auction for control of the company, and are thereby seeking to transfer control of the company to themselves personally.

Accordingly, the allegations in the Complaint are not sufficient to support a claim that Kotick and Kelly were interested in the transaction or otherwise violated their fiduciary duty of loyalty, particularly given that their employment agreements were approved by Activision directors. Given all of the above, I am able to conclude with reasonable certainty that plaintiff would not be able to prevail on its duty of loyalty claim against Kotick and Kelly based on any set of facts that could be reasonably inferred from the allegations in the Complaint.

[67] *Id.* at 1279.

2. <u>The Remaining Director Defendants</u>

Count I of the Complaint asserts a claim against the Director Defendants for breach of the duty of loyalty in connection with the sale of control to Vivendi.[68] The Complaint does not allege facts that support a reasonable conclusion that the six outside directors were interested or lacked independence with respect to the Combination.[69] Plaintiff nevertheless asserts three theories of a breach of the duty of loyalty by the outside directors, namely that: (1) the outside directors allowed Kotick and Kelly to control the negotiations and advisors in the face of their conflict of interest; (2) the outside directors conducted no independent market check or canvass while Kotick and Kelly negotiated with Vivendi; and (3) the outside directors obtained no control premium or other protective devices of substantial value for Activision's shareholders in the sale of control. For the reasons explained below, and in light of the reasons given above for concluding that the Complaint does not state a claim against Kotick and Kelly for breach of the

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[68] Count I is asserted against all the Director Defendants. Plaintiff, however, focuses this section of its brief on the six "outside directors." I will also focus on the outside directors, but should note, in an abundance of caution, that Count I fails to state a claim against any of the Director Defendants.

[69] Plaintiff suggests in paragraph 114 of the Complaint that defendants Corti, Morgado, and Sarnoff, the members of the NCGC, were not independent and disinterested because they retained their board seats in the combined company, and that Doornink was not independent and disinterested because he was a paid company consultant. Compl. ¶ 114. These allegations are insufficient. As this Court has stated, "the fact that several directors would retain board membership in the merged entity does not, standing alone, create a conflict of interest." *Krim v. ProNet, Inc.*, 744 A.2d 523, 528 n.16 (Del. Ch. 1999). The Complaint also fails to allege facts from which the Court could reasonably conclude that any consulting fees were material to Doornink. *See, e.g.*, *Highland Legacy Ltd. v. Singer*, 2006 WL 741939, at *5 (Del. Ch. Mar. 17, 2006).

duty of loyalty, I conclude that the Complaint also fails to state a claim against the outside directors for their conduct in the sale of control to Vivendi.

Plaintiff first argues that the outside directors breached their duty of loyalty by failing to retain independent advisors and by allowing Kotick and Kelly to control the negotiations and advisors and to attend NCGC meetings. Plaintiff contends that the NCGC never negotiated with Vivendi, and that Kotick and Kelly "sidelined" the NCGC in response to the NCGC's demand for a control premium for the Activision shareholders and proposed the "Top-Up."

While a board cannot completely abdicate its role in a change of control transaction, Delaware law is clear that in certain circumstances it is appropriate for a board to enlist the efforts of management in negotiating a sale of control.[70] Here, the allegations in the Complaint do not state a claim that the outside directors breached their duty of loyalty by allowing Kotick and Kelly to play a significant role in negotiating with Vivendi. I reach this conclusion in large part as a result of the reasons given above for concluding that plaintiff has not stated a claim that Kotick and Kelly had a debilitating conflict of interest in the transaction. That

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[70] *See In re MONY Group Inc. S'holder Litig.*, 852 A.2d 9, 20 (Del. Ch. 2004) ("The plaintiffs first argue that because the Board relied upon [its CEO] to determine and explore alternatives it breached its fiduciary duties. Specifically, the plaintiffs allege that '[t]he Board's exclusive reliance on [the CEO] was particularly inappropriate in view of the fact that [the CEO] and other members of MONY's senior management stood to gain excessive payments under the CIC Agreements if MONY was sold.' . . . This 'lone wolf' theory, as described at oral argument, cannot stand up against the record, and fails as a matter of law. A board appropriately can rely on its CEO to conduct negotiations, and the involvement of an investment banker is not required.") (footnote omitted).

conclusion undermines a key premise of plaintiff's argument that the outside directors left the negotiations in the hands of conflicted managers. It also alleviates concerns over the failure of the NCGC to retain separate advisors, and the presence of Kotick and Kelly at NCGC meetings.[71]

The allegations in the Complaint also establish that the NCGC and the board did not completely abandon their roles in the sale of control. The Complaint contains no convincing allegation that Kotick and Kelly controlled or dominated Activision's outside directors. The NCGC's approval of Kotick and Kelly's employment agreements demonstrates that the NCGC was aware not only that Kotick and Kelly would continue as managers of Activision Blizzard, but also of the specific terms of their new employment agreements. Moreover, the NCGC met regularly throughout the negotiations and received updates on the status of the negotiations from Kotick and Kelly and from professional financial and legal advisors.[72] Indeed, after Vivendi rejected the proposed "Top-Up" and threatened to walk away from the negotiations in June 2007, Allen & Company presented to the NCGC a possible counter-offer that valued Activision at $24.75 per share and

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[71] While it is possible that the board and the NCGC could arguably have better navigated the sale process, Delaware law does not require perfection. Moreover, Activision's certificate eliminates the personal liability of Activision's directors for monetary damages for breaches of the duty of care. Even assuming, arguendo, that Kotick and Kelly's presence at NCGC and board meetings was not optimal, plaintiff has still failed to state a non-exculpated claim against the Director Defendants.

[72] For example, the Activision board met in 2007 on May 11, September 27, October 8, October 30, and December 1, and in 2008 on April 29. Compl. ¶¶ 25, 52, 69, 70-71, 77. The NCGC met in 2007 on May 16, May 22, June 15, September 6, and November 16. *Id.* ¶¶ 58-59, 62, 67, 75.

included a tender offer for 42.8% of non-Vivendi Activision shares.[73] In response to this proposal, the NCGC instructed Kotick and Kelly to seek a tender offer for a minimum of 50% of Activision shares.[74] These facts, which are alleged in the Complaint, belie an inference that the outside directors completely abdicated their role in negotiating and approving the Combination.

Plaintiff also brings specific challenges to the conduct of the Director Defendants in negotiating and approving the Combination, all of which fail to state a non-exculpated claim against the Director Defendants. Plaintiff concedes that "no formal auction process is required" but contends that "the directors must at least have probed for alternatives to demonstrate that they posses a reasonable basis to conclude that their choice is the best reasonable alternative."[75] Plaintiff also asserts various challenges to the conduct of the board and the valuations conducted by Allen & Company and considered by the board. For example, plaintiff criticizes the adherence to the fixed exchange ratio in the face of Activision's increasing success, and Allen & Company's decision to use Wall Street estimates, rather than Activision management projections, in its discounted cash flow valuation of Activision.[76]

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[73] *Id.* ¶ 62.
[74] *Id.* ¶ 63.
[75] Pl.'s Answering Br. 37. Plaintiff does not assert claims challenging the deal protection devices in the Combination Agreement, which was announced publicly on December 2, 2007, over seven months before the transaction closed. Compl. ¶¶ 76-78.
[76] Compl. ¶¶ 72-73, 80-86.

Delaware law does not hold directors liable for failing to carry out a perfect process in a sale of control.[77] Moreover, a provision in Activision's certificate exculpates the Director Defendants from personal liability for monetary damages for breaches of the duty of care. Although plaintiff frames its attacks on the process employed by the Director Defendants as breaches of the duty of loyalty, the factual allegations in the Complaint do not support such a claim. As noted above, plaintiff has failed to establish that Kotick and Kelly suffered from a conflict of interest that precluded them from participating in the negotiations with Vivendi without breaching their duty of loyalty. Plaintiff has also failed to raise any credible challenge to the independence or disinterestedness of the Director Defendants. Thus, to survive dismissal, the Complaint must plead facts that support a claim that the Director Defendants failed to act in good faith. "[B]ad faith will be found if a 'fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.'"[78] Bad faith cannot be shown by merely showing that the directors failed to do all they should have done under the circumstances.[79] Rather, "[o]nly if they knowingly and completely failed to undertake their responsibilities would they breach their duty of

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[77] *Lyondell*, 970 A.2d at 243 ("Directors' decisions must be reasonable, not perfect.").
[78] *Id.* (quoting *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006).
[79] *Id.*

loyalty."[80] As the Delaware Supreme Court has recently proclaimed, the relevant question is whether the Director Defendants "*utterly failed to attempt* to obtain the best sale price."[81]

Rather than suggesting that the Director Defendants "*knowingly and completely* failed to undertake their responsibilities,"[82] the allegations in the Complaint demonstrate that the board and the NCGC, along with its financial advisor, Allen & Company, met several times in the months leading up to the transaction, regularly evaluated financial reports and analyses, and considered several facts and analyses in reaching a decision to approve the Combination. The Complaint even alleges that the NCGC instructed Kotick and Kelly to obtain a tender offer for at least 50% of non-Vivendi Activision shares. Moreover, plaintiff is no longer pursuing challenges to the deal protection devices in the Combination Agreement, and there is no allegation than any alternative bidder emerged in the roughly seven month period between the signing and the closing of the Combination.

Plaintiff's assertion that the Director Defendants failed to "probe[] for alternatives"[83] does not state a claim for a breach of the duty of loyalty. *Revlon* does not proscribe any specific steps that must be taken by a board before selling

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[80] *Id.* at 243-44.
[81] *Id.* at 244 (emphasis added).
[82] *Id.* at 243-44 (emphasis added).
[83] Pl.'s Answering Br. 37.

control of the corporation.[84] "Thus, the directors' failure to take any specific steps during the sale process could not have demonstrated a conscious disregard of their duties."[85]

Finally, plaintiff's argument that the Director Defendants did not obtain a "control premium" or other protective devices for Activision shareholders does not support a claim for breach of the duty of loyalty. Admittedly, it is not clear to the Court whether plaintiff is merely asserting that the consideration received by Activision in exchange for the sale of control was too low, or whether plaintiff contends that the board had a responsibility to obtain and identify some separate consideration that would satisfy the requirement that the shareholders receive a "control premium."[86] In either case, plaintiff's argument fails.

As part of the Combination, Vivendi contributed Vivendi Games to the combined company, and as a result, the Activision shareholders now hold shares in a company that owns, among other things, the enormously popular *World of Warcraft.* Although plaintiff may disagree about whether the consideration

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[84] *Lyondell*, 970 A.2d at 243.

[85] *Id.* at 243-44 ("We assume, as we must on summary judgment, that the Lyondell directors . . . did not even consider conducting a market check before agreeing to the merger. Even so, this record clearly establishes that the Lyondell directors did not breach their duty of loyalty by failing to act in good faith.").

[86] Pl.'s Answering Br. 36 ("Defendants make no attempt to identify a control premium.").

provided by Vivendi was sufficient, it is difficult to fathom how plaintiff could believe that "Defendants acquired nothing for the Activision stockholders."[87]

Again, the duty of the directors in a sale of control is to exercise their fiduciary duties in furtherance of the objective of obtaining the best price reasonably available for the shareholders. Any "control premium" received by the selling company would be included in the consideration received by the shareholders in exchange for what is given to the acquirer, including voting control. There is certainly no requirement that the board obtain some separate consideration that could be separately identified as a "control premium." Thus, plaintiff's allegation that the board failed to obtain a "control premium" for Activision shareholders is, at most, a thinly veiled attack on the adequacy of the price the board obtained in the sale of control. If the directors fulfilled their fiduciary duties in the sale of control, however, the Court will not second guess the business decision of the board.[88] This process-based approach to evaluating director action in a sale of control is consistent with the business judgment rule and the foundational principle of Delaware corporate law that the directors, and not the court, properly manage the corporation.

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[87] Pl.'s Answering Br. 36.

[88] *See CompuCom*, 2005 WL 2481325, at *10 ("[T]he plaintiff is merely expressing its disagreement with the business judgment of the members of the CompuCom board regarding the merits of the Merger Agreement. This does not provide a basis for liability.").

Plaintiff is correct that a sale of control has significant consequences for the shareholders, and that the Supreme Court in *Paramount Communications, Inc. v. QVC Network Inc.*,[89] stated that shareholders "are entitled to receive, and should receive, a control premium and/or protective devices of significant value."[90] Even the *QVC* Court, however, did not interpret this statement to mean that the Court should independently scrutinize the adequacy of the consideration obtained for the shareholders. Rather, the reviewing court properly focuses on the board's decision making process rather than making an independent business judgment of whether the consideration obtained for the shareholders was adequate.[91] Plaintiff has reversed the order of the Court's inquiry to the extent that it suggests that the Court should evaluate whether the consideration received by the shareholders included a "control premium," and then use the result of that inquiry to determine whether the Director Defendants breached their fiduciary duties. Plaintiff's repeated assertions that the Director Defendants failed to obtain a "control premium" do not support a claim against the Director Defendants for breach of the duty of loyalty.

Accordingly, and for all the reasons set forth above, Counts I and II of the Complaint are dismissed for failure to state a claim upon which relief may be granted.

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[89] 637 A.2d 34 (Del. 1994).
[90] *Id.* at 43.
[91] *Id*. at 43-45; *see Lyondell*, 970 A.2d at 242-44.

D. The Challenges to Activision Blizzard's Certificate

Defendants move for dismissal of Count III, which seeks a declaration that Sections 8.3 and 9.3 of Activision Blizzard's Certificate are invalid and unenforceable under Delaware law, and Count IV, which asserts a claim for breach of fiduciary duty against the Director Defendants for authorizing those sections. As previously stated, the amendments were adopted in connection with the Combination. Defendants argue that plaintiff's challenges to Sections 8.3 and 9.3 are not ripe for adjudication, and that, in any event, those sections are not facially invalid under Delaware law.

Defendants contend that plaintiff's challenges to the provisions in Activision Blizzard's Certificate are not ripe for adjudication because plaintiff is not challenging the use of, or any action taken under, these provisions, but instead relies on arguments that are "hypothetical, speculative and based upon no concrete situation giving rise to a justifiable attack upon the provision."[92] Generally speaking, an action is not ripe for adjudication when it is "contingent," meaning "the action requires the occurrence of some future event before the action's factual predicate is complete."[93] As the Delaware Supreme Court has noted, "courts will

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[92] *Ackerman v. Stemerman*, 201 A.2d 173, 176 (Del. 1964) ("Courts have always refused to make a speculative inquiry upon a hypothetical basis which may never come to pass as to the validity of statutes the effect of which in actual circumstances may not be clearly perceived or thought of.").

[93] *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *7 (Del. Ch. Oct. 11, 2006) ("The Delaware Supreme Court has emphasized that the declaratory judgment statute must

not entertain suits seeking an advisory opinion or an adjudication of hypothetical questions."[94] In determining whether a given claim is ripe for judicial determination:

> [A] practical evaluation of the legitimate interest of the plaintiff in a prompt resolution of the question presented and the hardship that further delay may threaten is a major concern. Other necessary considerations include the prospect of future factual development that might affect the determination to be made; the need to conserve scarce resources; and a due respect for identifiable policies of the law touching upon the subject matter of the dispute.[95]

Applying those standards, and weighing the reasons for not rendering a hypothetical opinion against the benefits to be derived from a declaratory judgment,[96] I conclude that plaintiff's challenges to Activision Blizzard's Certificate are not ripe for judicial determination.

The first challenged provision, Section 8.3, purports to allow Vivendi's directors and officers to pursue corporate opportunities for Vivendi except when

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not be used as a means to elicit advisory opinions from the courts. Even when . . . the case involves the duties of a fiduciary, a court cannot issue an 'adjudication of hypothetical questions.'") (footnotes omitted).

[94] *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662 (Del. 1973).

[95] *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 (Del. Ch. 1987) (footnote omitted).

[96] *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 480 (Del. 1989) ("Courts decline to render hypothetical opinions, that is, dependent on supposition, for two basic reasons. 'First, judicial resources are limited and must not be squandered on disagreements that have no significant current impact and may never ripen into legal action [appropriate for judicial resolution]. Second, to the extent that the judicial branch contributes to law creation in our legal system, it legitimately does so interstitially and because it is required to do so by reason of specific facts that necessitate a judicial judgment.' Whenever a court examines a matter where facts are not fully developed, it runs the risk not only of granting an incorrect judgment, but also of taking an inappropriate or premature step in the development of the law.") (citation omitted) (quoting *Schick*, 533 A.2d at 1239).

they are expressly offered the opportunity in their capacity as a director or officer of Activision Blizzard. Section 8.3 states, in relevant part:

> (b) In the event that a director or officer of the Corporation who is also a director, officer or employee of Vivendi acquires knowledge of a potential transaction or matter which may be a corporate opportunity for both the Corporation and Vivendi (a "*Mutual Corporate Opportunity*"), such director or officer shall to the fullest extent permitted by law have fully satisfied and fulfilled his fiduciary duty with respect to such Mutual Corporate Opportunity, and the Corporation to the fullest extent permitted by law waives and renunciates any claim that such Mutual Corporate Opportunity constituted a corporate opportunity that should have been presented to the Corporation, if such director or officer acts in a manner consistent with the following policy: a Mutual Corporate Opportunity offered to any person who is an officer or director of the Corporation, and who is also an officer, director or employee of Vivendi, shall belong to Vivendi, unless such Mutual Corporate Opportunity was expressly offered to such person in his or her capacity as a director or officer of the Corporation (an "*Activision Opportunity*"), in which case such Activision Opportunity shall not be pursued by Vivendi. In the event Vivendi decides to pursue any Mutual Corporate Opportunity (other than an Activision Opportunity), then, subject to any contractual restrictions on Vivendi with respect to confidentiality, Vivendi shall provide prompt written notice to the Corporation of such decision.

It is conceded that 8 *Del. C.* § 122(17) permits a corporation to renounce in its certificate of incorporation any interest or expectancy in a corporate opportunity.[97] Plaintiff contends, however, that Section 8.3 fails to comply with

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[97] Specifically, § 122(17) provides that:

> Every corporation created under this chapter shall have power to: . . . (17) Renounce, in its certificate of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories

§ 122(17) by not specifying the renounced corporate opportunities as required in the statute.

The second challenged provision, Section 9.3, purports to limit the liability of officers and directors of Vivendi and its affiliates for certain breaches of fiduciary duty, where the officer or director in good faith takes action under agreements or contracts between Vivendi and Activision Blizzard. Section 9.3 states, in relevant part:

> *No Liability For Good Faith Actions*. To the fullest extent permitted by law, neither Vivendi, its Controlled Affiliates, nor any of their respective officers or directors thereof shall be liable to the Corporation or its stockholders for breach of any fiduciary duty or duty of loyalty or failure to act in (or not opposed to) the best interests of the Corporation or the derivation of any improper personal benefit by reason of the fact that Vivendi, its Controlled Affiliates or an officer of director thereof in good faith takes any action or exercises any rights or gives or withholds any consent in connection with any agreement or contract between Vivendi and its Controlled Affiliates, on the one hand, and the Corporation, on the other hand. No vote cast or other action taken by any person who is an officer, director or other representative of Vivendi, which vote is cast or action is taken by such person in his capacity as a director of this Corporation, shall constitute an action of or the exercise of a right by or a consent of Vivendi for the purpose of any such agreement or contract.

This exemption from fiduciary liability, plaintiff contends, exceeds the authority permitted under 8 *Del. C.* § 102(b)(7) because it eliminates liability for any breach of fiduciary duty, including the duty of loyalty. Plaintiff further asserts that a

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of business opportunities that are presented to the corporation or 1 or more of its officers, directors or stockholders.

declaratory judgment could prevent harm before it actually occurs. Specifically, plaintiff argues that judicial determination of the validity of the provisions is necessary so that corporate fiduciaries are given clear notice of the scope of their duties. Such clarity, plaintiff contends, could reduce the risk of harm to the corporation, particularly given Vivendi's status as a controlling shareholder with designees constituting the majority of the Activision Blizzard board.

I agree with defendants, however, that the mere existence of the provisions does not threaten harm sufficient to warrant a declaratory judgment on their facial validity. Plaintiff cites *Siegman v. Tri-Star Pictures, Inc.*[98] and *Moran v. Household International, Inc.*[99] in support of its argument that the claims are ripe, but those cases are distinguishable from the present case. *Siegman* involved a challenge to the validity of a certificate amendment that purported to limit the liability of the company's directors for breach of fiduciary duty in certain circumstances involving the taking of corporate opportunities belonging to the company.[100] The *Siegman* Court, in making the practical determination to issue a declaratory judgment, noted the "fundamental policies" implicated by the

[98] 1989 WL 48746 (Del. Ch. May 5, 1989).
[99] 490 A.2d 1059 (Del. Ch. 1985).
[100] *Siegman*, 1989 WL 48746, at *4-5.

provisions at issue, and the potential harm that could be caused by continued uncertainty regarding those issues.[101]

The circumstances here warrant a different outcome. *Siegman* predated the enactment of § 122(17), which eliminated the uncertainty regarding the power of a corporation to renounce in advance any interest or expectancy in corporate opportunities. Here, plaintiff's challenge is that Section 8.3 does not "specify" the renounced opportunities, and thus does not comport with § 122(17). The mere existence of Section 8.3, however, does not threaten plaintiff with harm that justifies expending judicial resources to render a declaratory judgment on the issue of whether the corporate opportunities allegedly renounced by Section 8.3 are sufficiently "specified."

Similarly, plaintiff is not threatened with harm as a result of the mere existence of Section 9.3, which importantly is qualified by the phrase, "[t]o the fullest extent permitted by law." This clause reduces the probability of harm to plaintiff from the mere existence of the provision by arguably precluding an interpretation of the provision that would run afoul of Delaware law. To the extent Section 9.3 could possibly be construed as endorsing conduct that would be prohibited by Delaware law, the provision's own language bars such an

[101] *Id.*

interpretation.[102] Accordingly, I am not convinced that the harm threatened by the mere existence of the provision warrants the risks attendant to rendering a declaratory judgment based on plaintiff's hypothetical argument that the provision could, in some theoretical circumstance, be applied in contravention of Delaware law.

The circumstances here also differ from those in *Moran*, which involved the present detrimental effect of a "rights plan" on shareholders' interests, "regardless of whether the rights are in fact ever triggered."[103] The interest of a court in postponing review until a concrete, factual question arises can be outweighed when the plaintiff seeks relief from a challenged provision's current adverse impact.[104] In *Moran*, the Court acknowledged such a current adverse impact because the rights plan had a present detrimental effect on shareholders' entitlement to receive and consider takeover proposals and engage in a proxy fight.[105] Here, plaintiff

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[102] Defendants maintain that Section 9.3, by its terms, does not purport to limit the liability of Activision Blizzard directors in their capacity as Activision Blizzard directors. Defs.' Reply Br. 23. *See La. Mun. Police Employees' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1180 n.8 (Del. Ch. 2007). At this juncture, however, the court need not decide the issue because there is no present effort to enforce the provision in a manner to preclude or waive liability for any Activision Blizzard directors. The plausible reading of Section 9.3 as not applying to Activision Blizzard directors in their capacity as Activision Blizzard directors further convinces me, however, that the mere existence of Section 9.3 does not threaten plaintiff with harm that warrants declaratory relief.

[103] *Moran*, 490 A.2d at 1072.

[104] *Stroud*, 552 A.2d at 480.

[105] *Moran*, 490 A.2d at 1072 ("Although plaintiffs' claims plainly are predicated on the triggering of the rights and the dilution associated with the flip-over provision, the plaintiffs have not initiated this action to prevent harm that may accrue to a potential acquiror as a result of the possible dilution of its capital. Rather, plaintiffs are contesting the Plan's present effect on their

does not allege any present negative or detrimental effect on shareholders that warrants granting declaratory relief. Rather, plaintiff relies on the possibility that some future action may be taken under Sections 8.3 and 9.3 that will harm plaintiff and be contrary to Delaware law. Such a possibility, however, is too remote and speculative to justify rendering a declaratory judgment, and plaintiff is not entitled to a declaratory judgment merely because it is able to conjure up hypothetical situations in which the challenged provisions *may* be applied contrary to Delaware law. Here, in light of the nature of the challenges to the two provisions, I am not convinced that the potential benefit of a declaratory judgment outweighs the valid concerns associated with rendering a hypothetical opinion. Accordingly, I am convinced that plaintiff's challenges to Sections 8.3 and 9.3 of Activision Blizzard's Certificate are not ripe for adjudication. Counts III and IV of the Complaint are therefore dismissed.

III. CONCLUSION

Delaware law does not impose monetary liability on directors for failing to conduct a perfect sale process. Indeed, the exculpatory provision in Activision's certificate even eliminates the personal liability of the Director Defendants for monetary damages for breaches of the duty of care, including actions that constitute *gross negligence*. Accordingly, plaintiff was left to show that the

entitlement to receive and consider takeover proposals and to engage in a proxy fight for control of Household.").

Director Defendants breached their fiduciary duty of loyalty. As explained above, however, the involvement of Kotick and Kelly in negotiations with Vivendi did not result in a breach of the duty of loyalty. This result, along with the exculpatory provision in Activision's certificate, was fatal to plaintiff's remaining fiduciary duty claims. Finally, plaintiff's challenges to Activision Blizzard's Certificate are not ripe for review.

For the reasons set forth above, the Complaint fails to state a claim upon which relief may be granted. Accordingly, defendants' motion to dismiss pursuant to Rule 12(b)(6) is granted.

IT IS SO ORDERED.