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Case Number 497,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ACTIVISION BLIZZARD, INC., PHILIPPE G.H. CAPRON, JEAN-YVES CHARLIER, ROBERT J. CORTI, FREDERIC R. CREPIN, JEAN-FRANCOIS DUBOS, LUCIAN GRAINGE, BRIAN G. KELLY, ROBERT A. KOTICK, ROBERT J. MORGADO, RICHARD SARNOFF, REGIS TURRINI, VIVENDI, S.A., ASAC II LP AND ASAC II LLC,	)	
Defendants-Below, Appellants,	)	No. 497, 2013
v.	)	CASE BELOW
DOUGLAS M. HAYES,	)	COURT OF CHANCERY OF THE STATE OF DELAWARE
Plaintiff-Below, Appellee.	)	C.A. NO. 8885-VCL

APPELLEE'S ANSWERING BRIEF ON CERTAIN DEFENDANTS' INTERLOCUTORY APPEAL

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NATURE OF PROCEEDINGS

Plaintiff/Appellee Douglas M. Hayes is a stockholder of Defendant Below/Appellant Activision Blizzard, Inc., a Delaware corporation ("Activision" or the "Company"). On September 11, 2013, Plaintiff filed a six count derivative and class action complaint ("Complaint") challenging a July 25, 2013 Stock Purchase Agreement ("Agreement" or "SPA") among Activision, Defendant ASAC II LP, a Cayman Island limited partnership ("ASAC") and Defendant Vivendi, S.A., a large French company which has been Activision's majority stockholder since 2008 ("Vivendi").[1] On September 18, 2013, the Court of Chancery orally ruled ("Ruling") in the exercise of its discretion that a preliminary injunction should be entered against the consummation of the SPA without the minority stockholder vote prescribed by Article IX § 9.1(b) of Activision's Amended and Restated Certificate of Incorporation (the "Certificate"). Based on a tentative interpretation of that Certificate provision, the Vice Chancellor found that Plaintiff had established a reasonable probability that at trial he would succeed in showing that the Agreement fell within § 9.1(b)'s requirement of a minority stockholder vote on "any merger, business combination or similar transaction involving [Activision] . . . and Vivendi or its Controlled Affiliates." The Court

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[1] Sept. 18, 2013 Tr. at 84. References to "Tr. ___" are from the September 18, 2013 Argument on Plaintiff's Motion for a TRO and Rulings of the Court (Ex. B to Defendants' Opening Brief (Trans. ID 54305823) ("DOB")).

also made discretionary determinations that deprivation of the voting right would cause irreparable harm, the balance of harms favored a preliminary injunction, and $150,000 was the appropriate bond. Since Plaintiff had satisfied the more stringent preliminary injunction criteria, he had plainly also met the TRO standard.

Defendants claimed below that if the SPA did not close by September 19, 2013, Vivendi might terminate the SPA or Activision might be unable to obtain financing. Instead, Activision and Vivendi immediately announced that they were still committed to consummating the Agreement. (B33-37; B55). Activision closed a $2.25 billion note financing on September 19, 2013 and, as Defendants admit (DOB 12), the financing for the Agreement remains in place until mid-December, 2013. Indeed, Defendants' brief references the preliminary proxy materials Activision filed for a stockholder vote on the SPA by mid-December. (B47; DOB 12).

Certain Defendants now pursue a scatter-shot interlocutory appeal that challenges virtually everything the Court of Chancery did.[2] This is Plaintiff's answering brief in opposition to their interlocutory appeal.

[2] Defendants Amber Holding Subsidiary Co. ("Amber"), the wholly owned Vivendi subsidiary to be sold to Activision, and Davis Selected Advisers, L.P. ("Davis") and Fidelity Management & Research Co. ("FMR"), Activision stockholders who are investors in ASAC II LP, have not appealed. Vivendi filed a joinder below opposing injunctive relief and is an appellant, but says it is appearing "specially" and may contest personal jurisdiction. Tr. at 67-68; B1-2.

SUMMARY OF ARGUMENT

1. Denied. Defendants failed to raise the use of the preliminary injunction standard either in the Court of Chancery or in their application for and notice of interlocutory appeal. In addition, Defendants had notice of the preliminary injunction as required by Chancery Court Rule 65.

2. Denied. The Court of Chancery's application of the doctrine of laches is not appropriate for, and was not raised on, interlocutory appeal. Additionally, there was no abuse of discretion, no inexcusable delay by Plaintiff and no prejudice to Defendants.

3. Denied. There was no abuse of discretion in (i) granting a preliminary injunction, (ii) balancing the conceded irreparable harm to stockholders against the speculative possible harm from an injunction or (iii) the setting of a $150,000 bond. On appeal, Defendants assert § 9.1(b) of the Certificate is unambiguously limited to "squeeze-outs," a construction they did not assert below. Defendants read into § 9.1(b) limitations not contained in its broad language.

STATEMENT OF FACTS

A. The 2008 Business Combination Among Vivendi, Activision and Management

On December 1, 2007, Activision entered into a Business Combination Agreement ("BCA") with Vivendi and its wholly owned subsidiaries, VGAC LLC ("VGAC") and Vivendi Games, Inc. ("Games"). Pursuant to the BCA, (i) Activision acquired Games in exchange for issuing to VGAC 295.3 million shares of Activision common stock (A215, A228), (ii) Vivendi purchased 62.9 million shares of Activision stock for approximately $1.7 billion (A215, A228-30), (iii) Activision's Certificate and bylaws were amended to include provisions related to Vivendi and minority stockholder protections (A309-43), (iv) Activision conducted a self-tender offer to repurchase up to 146.5 million of its shares (A215, A232-34), (v) Activision, Vivendi, VGAC and Games entered into an Investor Agreement regarding Vivendi's Activision stock (A217, A345) and (vi) Defendants Robert A. Kotick, Activision's President and CEO, and Brian G. Kelly, Activision's Board Co-Chairman, entered into Voting and Lock-Up Agreements and new employment agreements waiving change-in-control benefits. (A216).

The BCA was described to the Activision stockholders in a June 6, 2008 proxy statement (the "2008 Proxy Statement") (A528), which submitted for a stockholder vote certificate and bylaw provisions relating to Vivendi and "minority

stockholder protections" (A536, 546). One provision among these protections was Article IX, Section 9.1(b):

> Unless Vivendi's Voting Interest (i) equals or exceeds 90% or (ii) is less than 35%, with respect to any merger, business combination or similar transaction involving the Corporation or any of its Subsidiaries, on the one hand, and Vivendi or its Controlled Affiliates, on the other hand, in addition to any approval required pursuant to the DGCL and/or the Corporation's by-laws, the approval of such transaction shall require the affirmative vote of a majority in interest of the stockholders of the Corporation, other than Vivendi and its Controlled Affiliates, that are present and entitled to vote at the meeting called for such purpose.

The 2008 Proxy Statement briefly mentioned § 9.1(b), but did not explain its terms nor indicate there were limitations on its scope. (A692, 699).

B. Activision, Vivendi and Management Reconfigure the 2008 Business Combination with the Stock Purchase Agreement

Vivendi currently owns 61% of Activision's stock and designates six of the Company's eleven directors. (A11 ¶2). By June 2012, Vivendi was seeking potential acquirers for its Activision business segment, which is one of Vivendi's six business divisions. (A19 ¶40). Unable to secure a buyer, Vivendi commenced negotiations for a revised business combination with Activision. *Id.*

On July 25, 2013, Activision, Vivendi, and ASAC entered into the Stock Purchase Agreement. The SPA reflects a new $8 billion business combination among Vivendi, Activision, Activision management and management's new investment vehicle, ASAC. It contains, in modified form, essentially the same elements as the 2008 Business Combination. It requires that twelve "restructuring"

actions be taken by various subsidiaries of Vivendi, including the merger of VGAC into another Vivendi subsidiary, which transfers Vivendi's entire 61% interest in Activision, to facilitate the other elements of the SPA (the "Restructuring Transactions"). (A81-82). Amber (in the SPA "New VH") is a party to five of these transactions, which result in Amber receiving 428,676,471 Activision shares from VGAC and holding $676 million of net-operating-loss carry forwards from previous activities, including from Games. (A21 ¶ 46, A88).

Pursuant to § 3.1 of the SPA, Activision will acquire all of Amber's stock for $5.83 billion. (A82). The NOLs in Amber will produce a net after-tax benefit of $200 million for Activision, and Vivendi has given a $200 million indemnity with respect to the NOLs. (A21; *see also* A76-77, A110, A113).

The SPA also includes ASAC purchasing 171,968,042 Activision shares from Vivendi for a total of $2,338,765,371.20, or $13.60 per share (the "Private Sale"). (A82). That price represents a discount of approximately 10% to Activision's trading price on July 25, 2013. (A11 ¶3). ASAC's general partner is defendant ASAC II LLC, a Delaware limited liability company controlled by insider Defendants Kelly and Kotick. (A16 ¶26). Kotick and Kelly are investing only a combined $100 million in the Private Sale and will represent ASAC on the Activision Board. They expect "continued support" from Vivendi. (A21 ¶47).

The SPA also provides for Activision, Vivendi and ASAC to enter into an amended and restated version of the original 2008 Investor Agreement. (A74, A125). The specialized Certificate and bylaw provisions of the BCA will remain in place. As with the 2008 Business Combination, Kotick and Kelly will execute waivers of change-in-control benefits (A74, A123-24) and, along with ASAC, will enter into a Stockholder Agreement with Activision which includes voting and lock-up provisions. (A154, A176-81).

Vivendi will retain approximately 83,000,000 Activision shares. (A21-22 ¶48). After the SPA, ASAC will own approximately 24.9%, Vivendi 12%, Kelly and Kotick 1.1%, FMR 6.8% and Davis 2.7% of Activision's outstanding shares. (A25 ¶60). Thus, ASAC, its participants and Vivendi will hold approximately 47% of Activision's common stock following the SPA.

ARGUMENT

I. THE PRELIMINARY INJUNCTION WAS NOT AN ABUSE OF DISCRETION

A. Questions Presented

Did the Court of Chancery abuse its discretion by determining that (i) Plaintiff had established a reasonable probability of showing at trial, based on the Vice Chancellor's tentative interpretation, that § 9.1(b) of the Certificate requires a minority stockholder vote on the SPA, (ii) the irreparable harm from deprivation of that voting right outweighed the speculative harm that might result from an injunction and (iii) $150,000 was the appropriate bond?

B. Scope of Review

The grant of a preliminary injunction is reviewed for abuse of discretion.[3] The balancing of possible harms is an exercise of judicial discretion.[4] Therefore, the standard of review is abuse of discretion. The amount of an injunction bond is reviewed for abuse of discretion.[5] The Court of Chancery's determination of reasonable probability of success was based on a preliminary construction of the language and purpose of § 9.1(b) with consideration of extrinsic evidence. There

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[3] *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996); *see also Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1218 (Del. 2012) (the grant of injunctive relief is reviewed for abuse of discretion).

[4] *Gimbel v. Signal Cos.*, 316 A.2d 599, 602 (Del. Ch. 1974) (quoting *Aldridge v. Franco Wyoming Oil Co.*, 9 F.R.D. 278, 279 (D. Del. 1949)), *aff'd*, 316 A.2d 619 (Del. 1974).

[5] *Guzzetta v. Serv. Corp. of Westover Hills*, 7 A.3d 467, 469 (Del. 2010).

has been no definitive interpretation of, or final judgment concerning, § 9.1(b). Therefore, an abuse of discretion standard applies.[6]

C. The Court of Chancery's Preliminary Reasonable Probability Finding Was Not an Abuse of Discretion

Section 9.1(b) of the Certificate requires stockholder approval by the non-Vivendi holders of "any merger, business combination or similar transaction involving" Activision and Vivendi or its Controlled Affiliates. Based on a context-specific, interlocutory construction of that provision, the Court found a reasonable probability that Plaintiff would prove at trial that elements of the SPA, collectively and individually, fall within § 9.1(b). The Vice Chancellor considered (i) the language and purpose of § 9.1(b), (ii) prior Delaware authority, (iii) the various meanings of "business combination" in accounting, regulatory, statutory and contractual contexts, (iv) the transactions of the SPA, (v) other provisions of Activision's Certificate and bylaws, (vi) the similarities to the 2008 Business Combination Agreement and (vii) the use of similar terms in agreements related to the SPA.[7] The Vice Chancellor's detailed analysis was not an abuse of discretion.[8]

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[6] *Cf. Kaiser*, 681 A.2d at 394, 397-98 (*de novo* review of certificate provision where consideration of extrinsic evidence was not appropriate). Cases reviewing certificate, bylaw and contractual provisions under *de novo* standards involved procedural postures and circumstances where a pure legal question was presented. *See Martin Marietta*, 68 A.3d at 1218 (review of final judgment); *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 926 (Del. 1990) (review of summary judgment); *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010) (review of final judgment).

[7] Tr. at 84-98.

[8] *News Corp. v. Unisuper Ltd.*, No. 635, 2005 (Del. Jan. 27, 2006).

1. The Broad Language and Protective Intent of Section 9.1(b)

The Court of Chancery correctly recognized the broad scope of § 9.1(b):

> So the first key is "merger, business combination or similar transaction." It's not just a merger. It's not just a business combination. It's anything that is a similar transaction to a merger or a business combination.[9]

The plain language of § 9.1(b) extends to transactions that are similar to or resemble business combinations.[10] A second key is that § 9.1(b) is not limited to transactions involving Vivendi or certain types of Vivendi subsidiaries, but applies to all Vivendi's "Controlled Affiliates," including Amber.[11]

The Court of Chancery determined from the language of § 9.1(b) that the provision's intent is to protect Activision's minority stockholders by limiting what the controlling stockholder can do without a vote of the minority.[12] Defendants concede that § 9.1(b) was a protection for Activision's minority stockholders against Vivendi, including its ability unilaterally to effect related-party transactions with Activision. (DOB 5, 7). The Vice Chancellor found that Section 9.1(b) should be interpreted in the context of "the types of business combinations that someone setting up a provision designed to limit the flexibility that a controller has

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[9] Tr. at 85.

[10] *Id.* at 92.

[11] *Id.* at 85-86; *see also* A205-06, Certificate § 10.1 (definitions of Controlled Affiliate and Affiliate incorporating broad definition of Affiliate in SEC Rule 12b-2); 17 C.F.R. § 240.12b-2.

[12] Tr. at 88-89.

would want to contemplate" and should apply to various transactions through which a controlling stockholder could use its authority and influence to transfer value from the controlled corporation.[13]

2. The SPA Is a Business Combination or Similar Transaction

As the Ruling recognized, prior cases considering the elastic term "business combination" have found no single meaning, but many meanings that cover a narrower or broader range of transactions depending on the context.[14] The Court of Chancery made a preliminary finding that, in the specific context of the protective intent and broad language of § 9.1(b), "business combination" includes a large reorganization that, *inter alia*, involves $5.83 billion in cash moving from Activision to its controlling stockholder in exchange for the stock of a Vivendi subsidiary.[15]

Because Activision and Vivendi are parties to the Stock Purchase Agreement, the series of transactions pursuant to that contract are transactions "involving" Activision and Vivendi. The SPA will effect a new business combination that revises and reforms the 2008 Business Combination. The participants in the SPA are essentially the same as in the 2008 Business

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[13] Tr. at 89-90.

[14] Tr. at 86-87, 91 (discussing *Martin Marietta Materials, Inc v. Vulcan Materials Co.*, 56 A.3d 1072, 1106-21 (Del. Ch. 2012), and *In re Home Shopping Network, Inc. S'holders Litig.*, 1993 WL 172371, at *12-15 (Del. Ch. May 19, 1993)).

[15] Tr. at 88-94.

Combination: Activision, Vivendi and Vivendi subsidiaries, and Kelly and Kotick (now with their investment vehicle ASAC). The basic combination of Activision and Games remains in place. Another Vivendi subsidiary (Amber) is being sold to Activision. Through the sale of Amber, Vivendi is transferring to Activision additional assets relating to Games (*i.e.*, NOLs generated by Games), as well as Activision stock. The Company is borrowing $4.5 billion and transferring $5.83 billion in cash to Vivendi in exchange for Amber. The equity interests in the Company are adjusted from 61% Vivendi, 38% public and 1% management to 12% Vivendi, 35% ASAC and its investors, including insiders Kelly and Kotick, and 53% public. Defendants admit that even a 35% block of stock has been found sufficient to give effective control of the corporation.[16]

As the Court of Chancery found, the SPA is structurally similar to the 2008 Business Combination.[17] The 2008 Proxy Statement described the 2008 Business Combination as including the following elements which are also found in the SPA: (i) Activision's acquisition of a Vivendi subsidiary, (ii) sale of Activision stock, (iii) an Investor Agreement with Vivendi, (iv) specialized certificate and bylaw provisions related to Vivendi, (v) agreements with Kelly and Kotick relating to voting, lock-up and waiver of change-in-control benefits and (vi) a large

[16] DOB 21.

[17] Tr. at 93.

repurchase of shares by Activision.[18] Thus, a reasonable stockholder would believe that a transaction with the elements contained in the SPA was a business combination or similar transaction. The SPA does not undo the 2008 Business Combination, but creates a new business combination that contains essentially the same elements as the 2008 Business Combination but in different measures.

Focusing on the sale of Amber's stock to Activision, the Vice Chancellor observed that *Martin Marietta* recognized that a business combination occurs "when a holding company sells a wholly-owned subsidiary to another business in a pure stock sale."[19] Indeed, *Martin Marietta* reiterated that point:

> As mentioned, one common form of business combination would be a sale of a wholly-owned subsidiary by way of a stock sale, another would be an asset sale.[20]

The Court below recognized that the sale of a wholly owned subsidiary "is precisely what's happening" under Section 3.1 of the SPA:

> Vivendi is selling Amber, a wholly owned subsidiary. Activision is acquiring it. This falls from the plain language of Section 9.1(b); in other words, a transaction involving the corporation, Activision, on the one hand, and a controlled affiliate of Vivendi, on the other hand.[21]

Activision's acquisition of Amber through a stock purchase could have instead been accomplished by merger, like Activision's 2008 acquisition of Games

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[18] A536, 546, 548-550, 555-560, 575, 640-645, 663-666, 693-701.

[19] *Martin Marietta*, 56 A.3d at 1108; *see* Tr. 87-88.

[20] *Martin Marietta*, 56 A.3d at 1111.

[21] Tr. at 88.

under the BCA. Therefore, under § 9.1(b), it is a "similar transaction" to a merger involving Activision and a Controlled Affiliate of Vivendi. As Defendants admit, the form of the transaction does not change the need for § 9.1(b)'s protection against Vivendi abusing control. (DOB 24).

D. Defendants' Mischaracterization of the SPA as a Repurchase of Activision Stock

Defendants' repeated mischaracterization of the SPA as only involving Activision's repurchase of its own shares[22] is disproven by the terms of the SPA. The SPA provides for Activision's purchase of the stock of a Vivendi subsidiary, not a repurchase of Activision stock. That subsidiary owns $676 million of NOLs, not just Activision stock. Significantly, the 2008 BCA was a business combination though it included a tender offer by Activision to repurchase up to 146.5 million shares, which represented approximately 50% of Activision's outstanding shares before shares were issued to Vivendi pursuant to the BCA. Therefore, stockholders would not expect to be denied a vote on the SPA simply because it includes a repurchase of Activision stock among numerous elements that are similar to the BCA. Defendants' far-fetched hypothetical that § 9.1(b) would apply to "trivial transactions" (DOB 3-4), is based on the faulty premise that Activision and Vivendi would engage in meaningless actions such as an acquisition of "a single share of Activision stock." (DOB 24).

[22] DOB 1, 2, 3, 8, 10, 21, 23, 24, 28, 29.

E. Defendants' Newly Created Construction of § 9.1(b)

Defendants argued below, based on dictionary definitions and non-Delaware cases, that the term business combination in § 9.1(b) could only mean "two businesses come together (*i.e.*, combine) to form a single new operation." (A454, A466). For numerous reasons, the Court of Chancery rejected Defendants' extremely light authority and their overly simplistic sound-bite argument that the SPA was a divorce, not a combination. (Tr. 92-93). On appeal, Defendants offer a wholly new interpretation that § 9.1(b) is unambiguously limited "to squeeze-out transactions or other transactions combining the companies' business activities."[23] Ignoring Delaware precedent that has held that the term "business combination" is ambiguous, Defendants contend that the term is somehow unambiguous in § 9.1(b) and "can be reasonably read only to apply to a controlling stockholder combination (such as a squeeze-out or further combination of the company's business activities)." (DOB 3, 25).

Defendants recognize they cannot support so restricted an interpretation based on the plain language of § 9.1(b), which contains no limitation to squeeze-outs or further combinations of business activities. Instead, they claim § 8.5 of the Certificate and § 3.12 of the bylaws impose such limitations on § 9.1(b). That

[23] DOB 22; *see also* DOB 23 ("unwanted squeeze-out type transactions").

theory does not work as a matter of fact, a matter of construction or as a matter of law.

First, Defendants never contended below that § 9.1(b) is directed to squeeze-out transactions. They never even used the words "squeeze out" or any variation thereof in their letter memoranda, brief or argument. Limiting § 9.1(b) to squeeze-out transactions can hardly be the only reasonable reading of the section when Defendants failed to fairly raise that strained construction below because they only made it up on appeal.

Second, the plain language of § 9.1(b) simply does not contain the limitations Defendants belatedly seek, five years later, to write into the provision. Section 9.1(b) applies to any merger, business combination or similar transaction involving Activision and Vivendi "or its Controlled Affiliates," not just to squeeze-outs, "a controlling stockholder combination," or "further combination of the companies' business activities."[24] The Defendants could have narrowly defined "business combination" in § 10.1 of the Certificate, which defines 15 terms used in

[24] "Any" is broad language, means "every and all" and suggests the absence of limits. *Siegman v. Columbia Pictures Entm't, Inc.*, 576 A.2d 625, 632 (Del. Ch. 1989); *Russo v. Ziegler*, 67 A.3d 536, 541-42 & n.32 (Del. Super. 2013). "Similar" means "resembling in many respects," "somewhat like" and "having a general likeness." *Handloff v. Ocean-Bay Mart, Inc.*, 1975 WL 21614, at *1 (Del. Ch. June 16, 1975) and *Gaston v. Schramm*, 1986 WL 7613, at *3 (Del. Ch. July 8, 1986), both quoting *Black's Law Dictionary*, 1968 and 1981 editions.

the Certificate, or in § 9.1(b) itself.[25] The Certificate could have clearly stated the result for which Defendants now contend but it did not.[26]

Third, § 8.5 of the Certificate shows that § 9.1(b) is not limited to squeeze-outs.[27] Section 8.5 is entitled "Purchase of Corporation Stock by Vivendi" and is in Article VIII, which primarily relates to corporate opportunities, not Article IX which governs "Affiliate Transactions." (A519-524, A691-692, A698-699). Section 8.5 refers to "a merger or other business combination pursuant to which the holders of the Minority Shares receive an amount equal to the Buyout Price in exchange for each of their Minority Shares." (A522) (emphasis added). Thus, when the Certificate refers to squeeze-out transactions, it does so specifically. In contrast, § 9.1(b) contains no restriction on the types of mergers or business combinations it includes, but applies to "any merger, business combination or similar transaction involving" Activision and Vivendi or its Controlled Affiliates.

Fourth, Defendants' reliance on a portion of an expired bylaw, § 3.12(a)(iii) (A502), misses the target by a mile. As the Court of Chancery recognized, this bylaw was both broader than § 9.1(b) in that it is not limited to a merger, business combination or similar transaction, but is also narrower in that it is limited to a

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[25] Certificate §§ 8.2(b) (defining "Qualifying Entity" and "Option Notice"), 8.3(b) (defining "Mutual Corporate Opportunity"), 8.5 (Defining "Relevant Date," "Minority Shares" and "Buyout Price"), 10.1 (Definitions). A520-522, A524-525.

[26] *Kaiser*, 681 A.2d at 396.

[27] *Cf.* DOB 3, 23.

"transaction or agreement" that is "between" Activision or its subsidiaries and Vivendi or its Controlled Affiliates. Section 9.1(b) applies to any merger, business combination or similar transaction "involving" Activision and Vivendi, or its Controlled Affiliates even if Activision Board approval of an agreement is not required or the transaction is not directly between them.[28] Bylaw 3.12(a)(iii) does not restrict the scope of § 9.1(b), and if it did purport to limit that Certificate provision, it would have been invalid.[29] Most importantly, the plain language of § 9.1(b) provides that the mandatory minority stockholder vote is "in addition to any approval required pursuant to ... the Corporation's bylaws." (A523). The 2008 Proxy Statement reinforced that the vote required under § 9.1(b) is "in addition to any approval required pursuant to ... the post-closing bylaws." (A692). Bylaw 3.12(a)(iii) and § 9.1(b) of the Certificate are easily harmonized. Bylaw 3.12(a)(iii) required disinterested board approval of transactions or agreements between Activision and Vivendi even if those transactions and agreements did not relate to a merger, business combination or similar transaction involving Activision and Vivendi. Section 9.1(b)'s minority vote applies to any merger, business combination or similar transaction involving Activision and Vivendi, even if there is no transaction or agreement directly between them. Both the independent

[28] *Cf. Martin Marietta*, 56 A.3d at 1113-21 (finding that phrase "business combination transaction between" two corporations required a transactional agreement approved by the corporate boards and therefore did not apply to a unilateral exchange offer) (emphasis added).

[29] *Centaur Partners*, 582 A.2d at 929.

director approval of bylaw 3.12(a)(iii) (had it not expired before July 25, 2013) and the minority stockholder approval under § 9.1(b) would apply to the SPA, a transaction or agreement between Activision and Vivendi for a merger, business combination or similar transaction involving Activision and Vivendi.

F. Amber Is a Business

The Court below also found Amber was a "business" with over $5 billion in assets, and that Activision and Vivendi assets would be combined under the SPA because Activision would acquire the NOLs held by Amber.[30] NOLs totaling $676 million that are worth at least $200 million and backed by a $200 million indemnification from Vivendi are "no mere bagatelle."[31]

Defendants are forced to concede that § 9.1(b)'s vote requirement could be triggered by Activision acquiring a Vivendi subsidiary. (DOB 25 n.2). Yet they claim that § 9.1(b) does not apply to Activision's acquisition of Amber because it is "a newly formed Vivendi subsidiary containing only Activision shares and NOLs, which has never conducted any business or operation and never can." *Id.* However § 9.1(b) applies to <u>any</u> merger, business combination or similar transaction involving a Controlled Affiliate of Vivendi, whether that affiliate is newly formed or not, and regardless of what assets it holds or business or

[30] Tr. at 98 (citing *In re Seneca Inv. LLC*, 970 A.2d 259, 265 (Del. Ch. 2008) (holding company is a business)); Tr. at 87-88. *See also Giancarlo v. OG Corp.*, 1989 WL 72022, at *4 (Del. Ch. June 23, 1989) (DGCL permits a corporation to function as a passive holding company).

[31] *See Sanders v. Wang*, 1999 WL 1044880, at *7 (Del. Ch. Nov. 8, 1999).

operations it conducts. Once again, Defendants try to read limits into § 9.1(b) that are simply not found in the section's plain language. Furthermore, Amber was "newly formed" so that VGAC, which is not newly formed but was the Vivendi subsidiary that was a party to the 2008 Business Combination, could transfer most of Vivendi's Activision business segment to Amber. At the time Amber is sold to Activision it will have conducted substantial business pursuant to a contract with Activision, including (i) issuing stock to Vivendi in exchange for the stock of VHI, another Vivendi subsidiary, (ii) redeeming shares of its stock from Vivendi in exchange for issuing Vivendi a note, (iii) assuming indebtedness of VHI to Vivendi in exchange for the stock of UMG, another Vivendi subsidiary, and 428,676,471 Activision shares, (iv) contributing the equity interest of VHI to UMG and (v) transferring all the stock of UMG to Vivendi in repayment of its note and indebtedness to Vivendi. In short, Amber will have conducted billions of dollars of "business." Furthermore, pursuant to Section 7.7 of the SPA, Amber must continue as a going entity for at least two years to meet the "continuity of business enterprise" test under Internal Revenue Code Section 382 or the NOLs will be reduced to zero. 26 U.S.C.A. § 382. A106.

G. The Analogy to 8 *Del. C.* § 203(c)(3)

Defendants' assertions that Plaintiff did not reference 8 *Del. C.* § 203 below and that the Court invoked § 203 on its own initiative are simply untrue.[32]

The Court of Chancery did not misinterpret § 203(c)(3) – Defendants' § 203 argument misinterprets the Court's Ruling. The Ruling only referenced § 203(c)(3) as illustrative of the type of transactions that would probably be business combinations under a protective provision such as § 9.1(b).[33]

H. *Contra Proferentem* and the Rule Favoring the Franchise Require Affirmance

Defendants cannot appeal application of *contra proferentem* and the rule in favor of the stockholder franchise because the Court below refrained from applying those rules of construction.[34] Nevertheless, this Court may affirm on the basis of a different rationale than that which was articulated by the trial court.[35] Because Activision and Vivendi drafted § 9.1(b) and deliberately chose to use the ambiguous term "business combination" without defining it in the Certificate or

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[32] DOB at 27. *See* A61, A64, A399, A421, A434-435, A473-477, A888-890; Tr. at 20-21, 44-47, 87, 89-90.

[33] Tr. at 89-91.

[34] Tr. at 8-11, 84-98.

[35] *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

explaining its meaning in the 2008 Proxy Statement, the ambiguity should be resolved against the Defendants based on *contra proferentem*.[36]

Section 9.1(b) creates a voting right for the minority stockholders of Activision to protect them from significant transactions involving Vivendi. (A399). The stockholders were not involved in drafting the provision, and neither the Certificate nor the 2008 Proxy Statement contains any definition or explanation indicating that the stockholders intended § 9.1(b) to have a narrow meaning. To the contrary, the 2008 Proxy Statement confirms that § 9.1(b) was intended to protect minority stockholders and that a transaction with elements similar to the SPA (*i.e.*, the 2008 Business Combination) would be considered a business combination or similar transaction requiring a favorable minority stockholder vote. (A536, A546). Under these circumstances, any ambiguity in § 9.1(b) must be resolved against the Defendants and in favor of the reasonable expectations of the stockholders.[37]

Neither *Airgas*[38] nor *Centaur Partners*[39] requires a different result. *Airgas* did not overturn the rule in favor of the stockholder franchise, nor did it eliminate

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[36] *Kaiser*, 681 A.2d at 388-99; *Shiftan v. Morgan Joseph Holdings, Inc.*, 57 A.3d 928, 935-36 (Del. Ch. 2012).

[37] *Kaiser*, 681 A.2d at 399.

[38] *Airgas*, 8 A.3d at 1182.

[39] *Centaur Partners*, 582 A.2d at 923.

the long standing doctrine of *contra proferentem*. Indeed, *Airgas* reaffirmed the rule in favor of the stockholder franchise.[40]

Centaur Partners held that the clear language of the proxy materials indicated an intent that an 80% vote was required to amend an anti-takeover provision for a super-majority vote that had the effect of potentially thwarting the will of the majority of the stockholders in a corporation that had no controlling stockholder.[41] In contrast, § 9.1(b) was intended to limit the power of a controlling stockholder to impose transactions upon a public minority by giving the minority a voting right. The protective purpose of the voting right requires that it should be construed against the controlling stockholder and in favor of the minority franchise right, not *vice versa*.

I. The Court of Chancery's Balancing of the Equities in Favor of a Preliminary Injunction Was Not an Abuse of Discretion

The Court of Chancery followed settled Delaware law in holding that Activision's minority stockholders would suffer irreparable harm if the Court permitted the SPA to close without the stockholder vote required by § 9.1(b).[42] Because Defendants have not challenged that finding on appeal, irreparable harm to the minority stockholders is conceded.

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[40] 8 A.3d at 1188 ("If charter or bylaw provisions are unclear, we resolve any doubt in favor of the stockholders' electoral rights.").

[41] 582 A.2d at 928.

[42] Tr. at 98-99.

Defendants' "harm" is mere speculation, not evidence: Activision's stock price might fall, Activision might not be able to obtain financing for the SPA, Vivendi might walk away from the SPA or the parties to the SPA might not agree to extend the closing beyond October 15, 2013. The Court of Chancery did not abuse its discretion, but correctly determined that the certain irreparable harm to the stockholders outweighed the low risk of non-completion from a short delay to allow a stockholder vote.[43] The Court of Chancery's discretionary balancing has been vindicated. Activision's stock price has not decreased, Vivendi has not walked away, Activision's financing is in place, and Activision has filed proxy materials to hold a stockholders vote. (B44-260).

J. The $150,000 Bond Was Not an Abuse of Discretion

The Vice Chancellor's rejection of Defendants' request for a $1 billion bond was a proper exercise of discretion.[44] Defendants did not establish a record providing a credible estimate of the damages the parties enjoined might suffer if wrongfully enjoined, but submitted a speculative opinion that Activision's stockholders – not the parties enjoined – might lose equity appreciation resulting from announcement of the transaction.[45] Defendants must support their injunction

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[43] Tr. at 102-103. *Cf. In re Atheros Commc'ns, Inc. S'holder Litig.*, 2011 WL 864928, at *13 (Del. Ch. Mar. 4, 2011).

[44] *See Guzzetta*, 7 A.3d at 469.

[45] *See* Defendants' Joint Brief, A483-84; Dages Aff. A838-40. Ct. Ch. R. 65(c); *Guzzetta*, 7 A.3d at 470-71; *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 844 (Del. Ch. 2011)

bond application with facts, not speculative theories of possible damages or the costs of a preliminary proxy statement which was not raised below.[46] *Guzzetta* did not mandate an evidentiary hearing to determine potential damages from an injunction, but said the trial court could, "if necessary," conduct an evidentiary hearing "to satisfy itself that there is some credible basis for the estimated damages."[47]

Even if Defendants had provided a credible estimate of potential damages, a bond below that level would not constitute an abuse of discretion because the trial court explained its rationale by giving reasons for the $150,000 bond.[48] First, a $1 billion bond would effectively render the Ruling a nullity. Second, the Defendants agreed in the SPA that no bond would be required if an injunction was entered. Third, a $150,000 bond was adequate to offset costs and at the very high end of past precedent for bonds in stockholder cases.[49] Given the limited duration of the injunction (*i.e.*, until a stockholder vote is held), the low probability of harm and

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("...damages to the stockholder class if the deal were lost ... is a different question than the harm an improvidently granted injunction could inflict on the defendants").

[46] *Guzzetta*, 7 A.3d at 470 (citing *Petty v. Penntech Papers, Inc.*, 1975 WL 7481, at *1 (Del. Ch. Sept. 24, 1975)). *Compare* DOB 34, *with* Defendants' Joint Brief below (A483-85) and Dages Aff. ¶¶ 19-23. (A838-40).

[47] *Guzzetta,* 7 A.3d at 471.

[48] *Id.*

[49] Tr. at 103-04.

the risk of chilling the assertion of stockholder rights, the bond was an appropriate exercise of discretion.[50]

[50] *Atheros*, 2011 WL 864928, at *14; *Del Monte*, 25 A.3d at 844.

II. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION BY APPLYING THE PRELIMINARY INJUNCTION STANDARD

A. Question Presented

Did the Court of Chancery abuse its discretion by applying the more stringent preliminary injunction standard?

B. Scope of Review

The grant of a preliminary injunction is reviewed for abuse of discretion.[51]

C. Requiring Plaintiff to Meet a Higher Standard for Interim Injunctive Relief

Defendants' lead appeal argument is that it was legal error for the Court of Chancery to require Plaintiff to satisfy the more difficult preliminary injunction standard in order to earn interim injunctive relief.[52] The Vice Chancellor applied the "more searching" preliminary injunction standard to protect defendants and address their arguments about the timing of the TRO application (Tr. at 84), an approach expressly endorsed by leading Chancery practitioners.[53] Because the Court below found the standards for a preliminary injunction were met, the tests

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[51] *Kaiser*, 681 A.2d at 394.

[52] DOB 13-15.

[53] *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* §10.03[a], at 10-60 (2013) (in addressing a claim of laches in presenting a TRO application, "the Court might opt to treat the [TRO] application as one for a preliminary injunction, applying the more rigorous requirement of a showing by the applicant of a probability of ultimate success"); *see also Newman v. Warren*, 684 A.2d 1239, 1244-45 (Del. Ch. 1996) (noting that circumstances sometimes permit the court, in the exercise of its discretion on a TRO motion, to apply a test "akin to the traditional preliminary injunction formulation").

for a temporary restraining order were also met. There was no prejudice to Defendants because they would have been enjoined either way.[54]

D. The Issue Was Not Fairly Raised

Defendants' challenge to the Court of Chancery's use of the preliminary injunction standard was not fairly presented below and is not properly raised on appeal.[55] Defendants had ample opportunity to raise this issue with the trial court, at the September 18 hearing (Tr. at 104-106, 108, 110), when they agreed to the form of Preliminary Injunction (B3-5), in their application to certify an interlocutory appeal (B6-13) and in their Notice of Appeal. (B14-17). Because Defendants raised the issue for the first time in their opening appeal brief, it is not properly before this Court. Moreover, the Court of Chancery's use of the preliminary injunction standard did not determine a substantial issue, establish a legal right or meet the interlocutory appeal criteria of Supreme Court Rule 42. Finally, Defendants' Application for Certification of Interlocutory Appeal did not raise the Court's application of the preliminary injunction standard as an appeal point. (B6-13).

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[54] *See Insituform Techs., Inc. v. Insitu, Inc.*, 1999 WL 240347, at *16 (Del. Ch. Apr. 19, 1999) (applying preliminary injunction standard but entering a TRO).

[55] Supr. Ct. R. 8.

E. Appellants Had Notice under Court of Chancery Rule 65

Court of Chancery Rule 65(a) only provides that no preliminary injunction is to be "issued" without "notice" to the adverse party and "without a prayer therefor appearing in a verified complaint." The first prayer in Plaintiff's Verified Complaint was for a preliminary injunction. (A41). Rule 65 only requires notice of the injunctive hearing to enable the adverse party to appear and oppose injunctive relief.[56] Defendants had far more than that: September 11: received Plaintiff's Complaint and TRO papers; September 13: filed 13 pages of letter memoranda (A388-400) and appeared at the telephonic hearing; September 16: filed a 35-page opposition brief, 20-page expert affidavit, and 325 pages of exhibits; September 18: appeared at the hearing and were present when the Court of Chancery indicated that it intended to enter a preliminary injunction and did not object; September 19: negotiated and stipulated to the terms of the Preliminary Injunction.[57]

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[56] *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 433 n.7 (1974) ("The notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition."); *see also Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir. 1965) ("where the opposing party has notice of the application for a temporary restraining order, ... such order does not differ functionally from a preliminary injunction"); *Genworth Fin. Wealth Mgmt., Inc. v. McMullan*, 721 F. Supp. 2d 122, 125 (D. Conn. 2010) (because the adverse party "received adequate notice and participated in an adversarial hearing on the application for a temporary restraining order," the court treated the application as one for a preliminary injunction).

[57] A387-867; Tr. 104-110; B3-5.

Defendants presented a factual record, including documents, affidavits and other materials outside the Complaint. Any other evidence supporting Defendants' construction of § 9.1(b) was entirely within Defendants' control. Defendants have failed to identify any evidence on the meaning of § 9.1(b) that they were unable to present on September 18.

As discussed above, the consideration of 8 *Del. C.* § 203 was no surprise, and merely illustrative. The Amended Investor Agreement is an exhibit to the SPA, was in the record, (A125) and was cited only as a secondary indication of the meaning of the term "business combination." (A125; Tr. 89, 91, 97). The Court's assessment of the risk Vivendi would walk away was based on consideration of Vivendi's restructuring and cash needs, Vivendi's unsuccessful efforts to sell its Activision business segment, the limits of a possible dividend and other facts that were not disputed and have been confirmed in Activision's Preliminary Proxy Statement. (Tr. 102; A19; B79-81). Defendants have not presented an affidavit from Vivendi saying it will walk away, but an expert affidavit speculating without any first-hand knowledge that Vivendi "might" walk away. Similarly, given the nearly 90 day period between the Court's Ruling and the expiration of Activision's debt commitments, the Court's finding that there is time for Defendants to obtain a stockholder vote under § 9.1(b) is amply supported, as the filing of the Preliminary Proxy Statement confirms. (DOB 12; B44-260).

III. THE COURT OF CHANCERY'S FINDING THAT THERE WAS NO LACHES WAS NOT CLEARLY ERRONEOUS

A. Question Presented

Should this Court review the Court of Chancery's interlocutory laches determination and, if so, did the Court of Chancery abuse its discretion by concluding that there was no inexcusable delay in the timing of Plaintiff's application for injunctive relief and that Defendants suffered no prejudice?

B. Scope of Review

An interlocutory rejection of a laches defense is not a proper subject for interlocutory appeal.[58] Defendants did not seek Rule 42 certification of the trial court's laches ruling. Therefore, this Court should not review this issue on an interlocutory basis. If this Court reviews the Court of Chancery's interlocutory laches ruling, the Vice Chancellor's findings as to lack of unreasonable delay and prejudice are entitled to deferential review under a clearly erroneous standard.[59]

C. The Court's Findings Are Not Clearly Erroneous

The burden is on Defendants to establish all elements of the affirmative defense of laches, including unreasonable delay by Plaintiff and material prejudice

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[58] *O'Brien v. IAC/Interactive Corp.*, 2009 WL 2998531, at *2 (Del. Ch. Sept. 14, 2009), *appeal refused*, 979 A.2d 1110 (Del. 2009) (refusing interlocutory appeal after Court of Chancery denied certification on the grounds that a laches defense was improperly rejected); *see also Levinson v. Conlon*, 385 A.2d 717, 720 (Del. 1978).

[59] *Poliak v. Keyser*, 65 A.3d 617, 2013 WL 1897638, at *2 (Del. May 6, 2013) (TABLE).

to the Defendants.[60] The Vice Chancellor found no unreasonable delay, after considering the length of the alleged delay, the faster filing of another suit that did not assert the § 9.1(b) claim, Defendants' limited disclosures of the SPA, which did not refer to any stockholder vote or Activision's Certificate and the SPA term that said no vote was required. (Tr. 80-84). The Court concluded that, to offset any alleged delay by Plaintiff and alleged prejudiced to Defendants, Plaintiff would have to meet the more searching preliminary injunction standard to earn an interim injunction. (Tr. 84).

The Vice Chancellor carefully considered and rejected Defendants' claim of prejudice. (Tr. 82-84). Defendants' claim of prejudice is not that Plaintiff's supposed delay caused an adverse change in their position.[61] Their position before and after they announced the SPA, and before and after Plaintiff filed suit, was, and remains today, that no stockholder vote is required under § 9.1(b). Defendants are claiming prejudice for not changing their position, based on the counterfactual notion that had Plaintiff filed earlier, Defendants might have reversed themselves and decided to hold a vote. However, even a Preliminary Injunction has not changed their position that a vote is not necessary. The filing of Plaintiff's

[60] *Austin v. Judy*, 65 A.2d 616, 2013 WL 1944102, at *2 (Del. May 9, 2013) (TABLE).

[61] *See, e.g.*, *Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009).

Complaint did not change their view, so the filing of that Complaint a few weeks earlier would not have caused Defendants to schedule a vote.

Defendants' speculation that if an injunction had been entered earlier, they might have held a stockholder vote fails for the same reason. (*See* Tr. at 83-84) (questioning whether an earlier filing of the Complaint would have allowed a stockholder vote by October 15, 2013). Moreover, the Court of Chancery correctly recognized that the consent of all three parties to the SPA, including Vivendi, to hold a stockholder vote would have been necessary to amend the SPA to provide for a vote, even if an injunction had been entered sooner. (Tr. 102). Defendants cannot establish prejudice by asserting they could have changed their position when the record shows they would not have changed and, in fact, did not change, their position.

Nor can Defendants show prejudice through their threat that one of them might choose to terminate the SPA because they choose not to amend § 9.1(b) of the SPA to push their right to terminate back past October 15, 2013. Their choices are their choices, not prejudice. Defendants attempt to coerce the Court by threatening that:

> Unless an amended SPA is negotiated or this Court vacates the injunction, the deal will die on October 15.

DOB 12. *See also* DOB 32 (referring to "the October 15 drop-dead date"). Section 9.1 of the SPA only provides that a party may terminate the Agreement if

it does not close by October 15. Both Activision and Vivendi have publicly announced their continued commitment to complete the SPA, (B33-37, B55) the financing remains in place until mid-December and Activision's filing of a preliminary proxy for a December meeting concedes they can hold a stockholder vote. Defendants cannot establish prejudice by threatening self-inflicted harm.

CONCLUSION

The Ruling and Preliminary Injunction should be affirmed, and the case remanded to the Court of Chancery.

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Dated: October 7, 2013

CERTIFICATE OF SERVICE

I, Michael Hanrahan, do hereby certify that on this 7th day of October 2013, I caused a copy of the foregoing **Appellee's Answering Brief on Certain Defendants' Interlocutory** Appeal to be filed and served via LexisNexis File & Serve upon the following counsel of record:

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