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IN THE

Supreme Court of the State of Delaware

ACTIVISION BLIZZARD, INC., *et al.*, *Defendants Below, Appellants*, v. DOUGLAS M. HAYES, on behalf of Himself and all Others Similarly Situated and Derivatively on Behalf of Nominal Defendant ACTIVISION BLIZZARD, INC., *Plaintiff Below, Appellee*.	**No. 497, 2013** COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. NO. 8885-VCL

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

This is an appeal from the Court of Chancery's order enjoining a stock buyback the day before it was set to close in an action filed less than a week earlier. The transaction involves no merger and no combination of any businesses. It involves only Activision's purchase of an entity created for the purpose of this transaction that holds Activision stock and some potential tax advantages, conducts no business, and is not taking part in any combination or merger with Activision. The court below nevertheless ruled that this transaction was a "merger, business combination or similar transaction." Plaintiff's brief only reinforces why the Court of Chancery's injunction, which threatens to derail an $8 billion transaction through which Vivendi is disposing of its controlling interest in Activision, which even plaintiff acknowledges is in the interests of Activision's stockholders, was improvidently entered.

The trial court entered the preliminary injunction even though plaintiff never moved for one and without giving notice to defendants, and even though the plaintiff had without excuse waited nearly two months before seeking any kind of relief at all. The court thus failed to respect procedural rules designed to ensure deliberative decision making on an evidentiary record commensurate with the gravity of the relief requested.

This irregular process yielded an improvident ruling and an inequitable result—a wrongful injunction that, if uncorrected, threatens to destroy an $8 billion stock repurchase that the markets have universally applauded for creating over a billion dollars of stockholder value. On the merits, the court below found that §

9.1 of the Activision charter, applicable only to "mergers, business combinations and similar transactions," applies to Activision's proposed repurchase of its own stock. This conclusion was error for multiple reasons:

First, the lower court's interpretation is implausible as a matter of plain language. Section 9.1 applies by its terms to "mergers," "business combinations," and "similar" transactions—that is, by straightforward interpretation of the plain language, transactions that have the effect of putting businesses together. The stock repurchase at issue in this lawsuit does no such thing. Activision is buying its own stock, with the result that Vivendi and Activision will be going their separate ways. It is the opposite of a "combination;" it is a separation.

Second, the lower court's interpretation fails to give effect to the structure and purpose of § 9.1 and Activision's organizational documents read as a whole. As set out in defendants' opening brief, § 9.1 provided a supplemental protection to Activision's public stockholders to ensure that, for so long as Vivendi is a controlling stockholder, any squeeze-out merger or other extraordinary transaction in which Vivendi sought to further combine the business operations of the two companies would be subject to the informed vote of Activision's public stockholders. The concerns animating these provisions are not implicated here.

Third, the lower court's interpretation defies commercial common sense. No one in the market believes that Activision's repurchase of shares, and with it its repurchase of corporate control, from Vivendi amounts to a "combination" of any kind. To the contrary, the transaction has been universally recognized as Vivendi's "separation" from Activision—as a "split" of the two companies. Accordingly, no

one—no market participant, no analyst, not even any Activision stockholder except plaintiff here and his lawyers—believes that a vote of Activision's minority stockholders is in order, under § 9.1 or for any other reason.

The lower court also failed to balance the harms, still less determined that they tilted in favor of an injunction. The court did not take into account the risk of an erroneous ruling—especially important on a nearly non-existent record—including the possibility that one of the parties might terminate the agreement or demand to renegotiate its substantive terms, or that Activision might lose its favorable debt commitment and with it the deal. These considerations were never even weighed in the balance.

In his answering brief, plaintiff does nothing to rehabilitate the erroneous judgment below. Instead, he tries everything in his power to avoid effective appellate review. He tries to hide behind a deferential standard of review when our law is clear that the trial court's legal judgments are reviewed *de novo* here. And he claims that defendants "waived" arguments even though defendants had no opportunity to make them.

As to the merits, plaintiff concedes much. He offers no coherent account of how § 9.1(b) operates together with the rest of Activision's charter and bylaws. He concedes that § 9.1(b) does not unambiguously require a vote by Activision's minority stockholders. What is left of plaintiff's claim boils down to this: the term "business combination" is ambiguous as a matter of law, and § 9.1 therefore requires a minority vote because rules of construction require that all ambiguities be resolved in favor of a minority stockholder vote.

No part of this argument is correct. The term "business combination" is not ambiguous as a matter of law. Plaintiff's lead authority on this point—the *Martin Marietta* case—says no such thing. And the phrase "business combination" cannot plausibly be interpreted to apply to a business *separation*. Plaintiff says that the Stock Repurchase is "structurally similar to" the 2008 merger that created the Company, even though they are opposites. He implausibly invokes case law showing holding stock is a lawful business to argue that Activision's purchase of the shares of a non-operating entity is a "business combination" under its charter and bylaws. He asks the Court to interpret the phrase "similar transaction" to encompass nearly any transaction, ignoring the terms "merger" and "business combination" that precede it and cabin its scope under the well-settled principle of *ejusdem generis*.

Nor does any rule of construction require that ambiguities in charters be construed "in favor of the minority franchise right." This Court held to the exact contrary in *Centaur Partners*: special voting rights in derogation of simple majority rule as provided under the DGCL should be narrowly construed and found only when expressed in "clear and unambiguous" language. Plaintiff has produced no authority in support of his position. That is because there is none.

In defending the improvident injunction, plaintiff is left to invite this Court to join the Court of Chancery in substituting speculation for judicial balancing of the competing equities and guesswork in place of evidence in setting the bond.

The injunction ordered below is supported by neither the words of the charter nor its structure, nor common sense, nor the equities. It should be vacated.

ARGUMENT

I. PLAINTIFF IS TRYING TO EVADE APPELLATE REVIEW.

Plaintiff tries to evade review of the injunction by arguing that every aspect of the appeal was waived or is subject to only abuse-of-discretion review. AB 8, 27, 31.

Defendants waived nothing. "[W]aiver occurs where a party intentionally relinquishes an available contention or objection." *Brown* v. *United Water Del., Inc*., 3 A.3d 272, 276 (Del. 2010). Defendants had no opportunity to contest the lack of notice, because the Court of Chancery gave no hint before ruling that it was even considering granting a preliminary injunction. Defendants cannot waive an objection they had no chance to make. Equally baseless is plaintiff's assertion that defendants "did not seek Rule 42 certification of [the laches] issue," AB 31, which is thoroughly addressed in defendants' application. *See* Trans. ID 54257541.

On the merits, plaintiff says this Court must defer to the Court of Chancery's discretion in awarding injunctive relief without any evidentiary record. But the case plaintiff cites—*Kaiser Aluminum Corp*. v. *Matheson*, 681 A.2d 392 (Del. 1996)—held the reverse. *Kaiser* refused to give "deference to the embedded legal conclusions of the trial court" and exercised "*de novo* review of legal issues" because the lower court interpreted a certificate without a record. *Id*. at 394 & n.4. The same is true for laches. *E.g.*, *Reid* v. *Spazio*, 970 A.2d 176, 182 (Del. 2009). And while this Court has refused interlocutory laches review, it has not done so in a situation like this, where the lower court's failure to apply the doctrine resulted in effectively permanent relief. There is no obstacle to review here.

II. THE COURT OF CHANCERY ERRED BY GRANTING A PRELIMINARY INJUNCTION WITHOUT NOTICE.

In their opening brief, defendants argued that the Court of Chancery's *sua sponte* issuance of a preliminary injunction in response to plaintiff's TRO application was unprecedented in Delaware law and a clear violation of the notice requirement of Court of Chancery Rule 65(a). In his answering brief, plaintiff cites no authority to the contrary. Plaintiff asserts that the court's issuance of a preliminary injunction was "an approach expressly endorsed by leading Chancery practitioners." AB 27. But the one treatise plaintiff cites notes merely that the court may in its discretion apply the preliminary injunction standard to a TRO application; it nowhere says the court has the power to *issue* a preliminary injunction without notice in response to a TRO application. *See* Donald J. Wolfe, Jr. & Michael A. Pittinger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 10.03[a], at 10-60 (2013). Nor do the two cases plaintiff cites supply any authority for what the Court of Chancery here did. In *Insituform Technologies, Inc.* v. *Insitu, Inc.*, 1999 WL 240347, at *7, *16 (Del. Ch. Apr. 19, 1999), the court applied the preliminary injunction standard to a tardy TRO and granted the noticed TRO. And in *Newman* v. *Warren*, 684 A.2d 1239, 1247 (Del. Ch. 1996), the Court of Chancery *denied* the TRO application. Neither case stands for the unprecedented proposition that the Court of Chancery has the authority to issue a preliminary injunction without notice in response to a TRO application.

Plaintiff also argues that defendants received notice in compliance with Rule 65(a) because plaintiff's complaint contains a prayer for preliminary injunctive

relief. But Rule 65(a) does not provide that a prayer for such relief is an adequate substitute for notice. Rule 65(a)(1) says the opposite: "No preliminary injunction shall be issued without notice to the adverse party, *and* without a prayer therefor appearing in a verified complaint." (emphasis added). Unsurprisingly, plaintiff cites no authority contradicting the plain words of the rule.

Plaintiff further argues that notice of his TRO application constituted sufficient notice of the preliminary injunction. For this proposition, plaintiff inexplicably cites *Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters*, 415 U.S. 423 (1974). In that case, the U.S. Supreme Court addressed the notice requirement of Federal Rule of Civil Procedure 65(a), on which the Chancery rule is based, and expressly held that "informal, same-day notice, desirable though it may be before a restraining order is issued, is *no* substitute for the more thorough notice requirements which must be satisfied to obtain a preliminary injunction of potentially unlimited duration." *Id.* at 432 n.7.

The U.S. Supreme Court's admonition reflects what the Court of Chancery has itself repeatedly recognized: temporary restraining orders and preliminary injunctions are different types of relief awarded under different legal standards for different purposes. Thus, notice of a TRO cannot fairly be substituted for notice of a preliminary injunction. A temporary restraining order is "a very special remedy of short duration" that is issued before the parties "have had an opportunity to take discovery and develop a record," and is "designed primarily to prevent imminent irreparable injury" until a preliminary injunction hearing. *Cottle* v. *Carr*, 1988 WL 10415, at *2 (Del. Ch. Feb. 9, 1988). The court's focus in deciding a TRO

application is thus on the balance of the equities, not on the merits. *See id.* As Chancellor Allen explained, when a TRO application is made on short notice, "a court can be expected . . . to pass over the merits with a light touch, asking only whether the claims urged are colorable." *Id*. at *3. In contrast, a plaintiff seeking a preliminary injunction carries the burden of showing not merely that his claims are colorable, but that they have a reasonable likelihood of success given the evidentiary record—a record compiled after defendants have had an opportunity to introduce evidence in their favor. *See SI Mgmt. L.P.* v. *Wininger*, 707 A.2d 37, 40 (Del. 1998).

The "materially different emphasis" in the TRO inquiry also undermines plaintiff's argument that defendants were afforded a sufficient opportunity to introduce evidence in their favor. *Cottle*, 1988 WL 10415, at *2. Defendants attached a single exhibit to their TRO opposition brief—a preliminary expert affidavit opining that the balance of the equities weighed against a TRO. Defendants did not introduce any evidence going to the merits of plaintiff's claim—a decision reflecting the fact that a court deciding a TRO application generally "pass[es] over the merits with a light touch." *Id.* at *3. That decision cannot be reasonably interpreted as a waiver of defendants' right to rely on evidence to contest the merits of plaintiff's claim at either a preliminary injunction hearing or trial. Rather, that decision reflected only the reality that defendants had a single weekend to prepare their opposition and that, on the merits inquiry at the TRO stage, plaintiff needed to show only a "colorable" claim.

III. THE TRIAL COURT SHOULD HAVE BARRED EQUITABLE RELIEF ON ACCOUNT OF LACHES.

Completely and remarkably absent from plaintiff's answering brief is any explanation, still less any legally cognizable excuse, for why he waited seven weeks—to the very eve of closing—to bring his motion for TRO. Plaintiff's delay in bringing his motion is thus conceded and undefended.

Plaintiff would nevertheless avoid application of laches because, he says, defendants were not prejudiced by his unexcused delay. This argument is wrong as a matter of law. Because of plaintiff's delay, defendants were forced to prepare their brief in opposition to a TRO in 48 hours over a holiday weekend. That is prejudice under our law. *See CNL-AB* v. *E. Prop. Fund I SPE*, 2011 WL 353529, at *7 (Del. Ch. Jan. 28, 2011). The delay consumed most of the time available to defendants to respond to the motion for extraordinary relief. That is prejudice under our law. *Oliver Press, LLC* v. *Decker*, 2005 WL 3441364, at *1 (Del. Ch. Dec. 6, 2005). Plaintiff waited so long that no relief could have been ordered by the court below that would not have operated as a permanent injunction against this transaction. That is also prejudice as a matter of law. *See Stahl* v. *Apple Bancorp, Inc.*, 579 A.2d 1115, 1120 (Del. Ch. 1990). Plaintiff failed to act with dispatch even though he sought to raise claims that will affect all his fellow stockholders and "involve a change in [Activision's] capital structure." He thus violated his "duty [to] both the corporation and to the stockholders to act with the promptness demanded by the particular circumstances." *Fed. United Corp.* v. *Havender*, 11 A.2d 331, 343 (Del. 1940). Plaintiff makes no attempt to answer this authority.

Plaintiff instead tells the Court that even if he had acted promptly as required by law, nothing would be different, because Activision still would not have been in a position to hold a stockholder vote before the drop-dead date of the stock repurchase agreement. AB 32-33. We cannot know whether this is so because the trial court erroneously declined to consider evidence on the point. *See Fed. United*, 11 A.2d at 343 ("[w]hat constitutes unreasonable delay is a question of fact"). But it is certain that plaintiff's delay destroyed any chance of complying with the court's ruling within the time provided by the SPA. And it is certain that plaintiff's delay has created a material risk that—even if a stockholder vote is found to be required and the parties agree to seek one—the SEC cannot approve proxy materials in time to allow a vote before Activision's debt commitments expire in mid-December. These prejudices are unrebutted and all suffice, as a matter of law, to apply laches in this case.

Plaintiff exerts much energy trying to demonstrate that defendants failed to change their position even after the adverse ruling below, as though that confirms that his delay worked no prejudice. This is a non sequitur. Had plaintiff moved quickly as he should have, defendants would not have found themselves subject to an adverse judicial ruling the day before the planned closing that jeopardizes a transaction that no other Activision stockholder has sought to block. The defendants would have had time to reorder their affairs, if necessary, in light of the definitive ruling of this Court as to their rights. But plaintiff's unexplained delay deprived defendants of that time. The essence of laches is that he should not be rewarded for his delay.

IV. PLAINTIFF DID NOT EARN A PRELIMINARY INJUNCTION.

A. The Stock Repurchase is not a merger or business combination or anything similar.

As defendants explained in their opening brief, the SPA is not a "merger, business combination or similar transaction" as a matter of plain English, because the transaction is the opposite of a "combination"—it is a separation. OB 23-24. Moreover, only this interpretation creates a reasonable relationship between § 9.1(b) of the charter and the rest of the charter and bylaws, considered (as they must be) as a whole: Bylaw § 3.12(a)(iii) subjects *all* transactions or agreements between Activision and its subsidiaries and Vivendi or its controlled affiliates to independent director approval, while § 9.1(b) requires the additional approval of the minority stockholders for a subset of those transactions that further combine Vivendi and Activision, and thus increase Vivendi's control. OB 22-23.

Plaintiff disputes this reading, but his objections do not take account of all of the language of § 9.1(b), fail to read that section in the context of the entire charter and bylaws, and lead to absurd results. Plaintiff contends that § 9.1(b) must be read expansively because it "contains no restriction on the types of mergers or business combinations it includes," AB 17. But § 9.1(b) does contain a restriction—it applies to "any merger, business combination or similar transaction" involving Activision and its affiliates on one hand, and Vivendi or its affiliates on the other hand, *only if Vivendi's ownership interest is at least 35% and less than 90%*. Plaintiff offers no explanation for this restriction. Plaintiff thus runs afoul of one of the basic principles of contract jurisprudence: readings that render portions

of the text superfluous are disfavored. *See NAMA Holdings, LLC* v. *World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007). Defendants' reading, in contrast, not only ascribes meaning to the restriction but connects § 9.1(b) and § 8.5 as complementary provisions. When Vivendi's interest equals or exceeds 35% but falls short of 90%, Activision's minority stockholders can protect themselves against an unfairly priced combination proposal by voting it down. And when Vivendi's interest equals or exceeds 90%, Activision's minority stockholders are guaranteed the market price for their stock in a mandated buyout.

Plaintiff's refusal to acknowledge the Vivendi stock ownership restriction on the applicability of § 9.1(b) leads him to argue that § 3.12(iii) is "both broader . . . but . . . also narrower" than § 9.1(b) in the scope of transactions it covers. AB 17. The unreasonableness of this position is demonstrated by noting its absurd result: under plaintiff's reading, the contract necessarily contemplates transactions between Activision and Vivendi that are subject to a minority stockholder vote, but not subject to independent director approval, because § 3.12(iii) is "narrower" than § 9.1(b). It is not reasonable to read these provisions, which were negotiated by sophisticated parties with the assistance of specialized corporate lawyers, as operating together to deem a transaction significant enough to be subject to the protection of a minority stockholder vote, but at the same not significant enough to benefit from the approval (and negotiating power) of the independent directors.

In response to defendants' coherent reading of § 9.1(b) in the context of the entire charter and bylaws, plaintiff offers the following argument: The phrase "business combination" is ambiguous as a matter of Delaware law. Because the

phrase is ambiguous, the phrase can be stretched to encompass Activision's purchase of its own stock from its controlling stockholder. And the *contra proferentem* rule requires that the ambiguous phrase must be stretched to cover Activision's buyback of its own stock. No part of plaintiff's argument is correct.

To begin with, the phrase "business combination" is *not* ambiguous as a matter of law. The only "precedent" plaintiff identifies for this proposition is *Martin Marietta Materials, Inc.* v. *Vulcan Materials Co.*, 56 A.3d 1072 (Del. Ch. 2012). But all the court held there was that "business combination" was ambiguous in the disputed contract because the plaintiff's reading (that the term included hostile business combinations) and the defendant's reading (that the term included only friendly business combinations) were both reasonable. *Id.* at 1110-11. It did not hold that "business combination" was ambiguous in every context as a matter of law, or that it is so amorphous as to encompass, as plaintiff argues, both a company's sale of control of itself *and* the company's repurchase of that control by buying back its own stock. As plaintiff does not dispute, a provision is ambiguous only when both parties offer a reasonable reading. *See Alta Berkeley VI C.V.* v. *Omneon, Inc.*, 41 A.3d 381, 391 (Del. 2012).

But plaintiff does not offer a reasonable reading. He argues that the Stock Repurchase is "structurally similar" to a business combination because, as it did in the 2008 BCA, Activision is buying a Vivendi subsidiary. But in 2008, Vivendi contributed its Vivendi Games subsidiary to Activision in exchange for a controlling interest in Activision. In that deal, Activision and Vivendi's games subsidiary (called "Blizzard") were merged to form Activision Blizzard. In the

Stock Repurchase, Vivendi is contributing a nonoperating entity that contains only Activision stock and NOLs. The Stock Repurchase is not "similar" to the 2008 BCA—it is unwinding and reversing the 2008 BCA, and in the process returning control to the public stockholders. Nothing is being combined. Plaintiff's argument reduces to the claim that Activision's sale of its stock to Vivendi is just like a purchase of its stock from Vivendi because the counterparties are the same.[1]

Plaintiff also argues that the Stock Repurchase and the 2008 BCA are alike because in both transactions Activision is buying Activision stock. This supposed similarity is equally nonsensical. Under the 2008 BCA, Activision launched a self-tender offer for shares held by public stockholders with the purpose of increasing Vivendi's majority ownership stake. In the Stock Repurchase, Activision is buying its stock from Vivendi with the purpose of reducing Vivendi from a majority stockholder to only a 12% holder.[2] That is why no one but plaintiff—no analyst, no reporter, no defendant, no other stockholder—viewed it as anything but a corporate separation. Plaintiff nevertheless claims that "a reasonable stockholder

[1] Without support, plaintiff argues that this transaction, like the 2008 BCA, is also creating a controlling stockholder block. AB 12. This claim is false. After the transaction, Vivendi will own 12% of Activision; ASAC will own 24.9% of Activision; and 63% of the Company will be in unaffiliated public hands. Plaintiff has not even alleged a basis to lump any of the public stockholders together with ASAC and Vivendi, or Vivendi together with ASAC, as part of a controlling group.

[2] In arguing that the Stock Repurchase is similar to a business combination, plaintiff also relies on *Martin Marietta* for the proposition that "a business combination occurs 'when a holding company sells a wholly-owned subsidiary to another business in a pure stock sale.'" AB 13 (quoting 56 A.3d at 1108). But in the Stock Repurchase, Vivendi is selling a subsidiary to Activision *for cash*. Unlike the hypothetical discussed in *Martin Marietta*, the sale here is not a "pure stock sale." And that is precisely why it is not anything like a business combination, because it is reducing, rather than increasing, Vivendi's ownership interest in Activision.

would believe" that the Stock Repurchase is similar to the 2008 BCA. AB 13. Apparently, plaintiff believes that he is Activision's only reasonable stockholder.

Plaintiff also claims that Activision's acquisition of New VH, a Vivendi subsidiary, is a "business combination" because New VH is a "business." More specifically, plaintiff says that New VH is a "business" because holding stock is a lawful business purpose for a corporation under Delaware law and because the subsidiary must qualify as a "business" under the federal tax code for Activision to use the NOLs. But the fact that the subsidiary Activision is buying was created for a lawful business purpose or qualifies as a business under the tax code is irrelevant to the question presented here—whether the purchase of that subsidiary is "a merger, business combination or similar transaction" involving Activision, on the one hand, and Vivendi, on the other, within the meaning of Activision's charter. That phrase cannot reasonably be read to include a corporation's acquisition of its stock back from its controlling stockholder. Nor does the fact that the stock purchase is being achieved via a nonoperating entity change the analysis. The entity is not being combined in any way with Activision, and indeed is contractually barred from ever conducting any business at all. A106.

Equally unavailing is plaintiff's invocation of the *contra proferentem* principle, which rests on a misunderstanding of the rule's rationale and proper application. According to plaintiff, "any ambiguity in § 9.1(b) must be resolved against the Defendants," as drafters of that provision, "and in favor of the reasonable expectations of the stockholders." AB 22. But as this Court has made clear, *contra proferentum* may be used to resolve ambiguity only if the disputed

provision is not part of "a bilateral negotiated agreement." *SI Mgmt.*, 707 A.2d at 43. That limitation reflects the policy decision that it is fair to construe ambiguity against a party when it was "in control of the process of articulating the terms." *Id.* at 42. The principle is not applicable here because § 9.1(b) is part of "a bilateral negotiated agreement"—the 2008 BCA. The 2008 BCA was negotiated between Activision, then an independent company, and Vivendi, the prospective purchaser of a majority stake in Activision. As plaintiff concedes, the amendments to Activision's charter and bylaws specified by the BCA were negotiated by Activision's board for the protection of Activision's future minority stockholders. This case is thus nothing like *Kaiser*, 681 A.2d 392, the case plaintiff cites. There, this Court applied the principle as a "last resort" after it found it questionable that either of the potential drafters—the issuer and the underwriter—had negotiated the disputed indenture provision on behalf of the plaintiff preferred stockholders. *Id.* at 399.

Moreover, even if *contra proferentum* applied, it would require adoption of defendants' reading of § 9.1(b). As plaintiff concedes, it requires the resolution of ambiguity "in favor of the reasonable expectations of the stockholders." AB 22. Except for plaintiff, no other Activision stockholder has expressed the view that a vote on the Stock Repurchase is required. And no one among the many analysts, investors, and commentators that have discussed the transaction have described it as anything but a separation—the *opposite* of a "business combination." Plaintiff has not produced an iota of support for the claim that Activision stockholders "reasonably expected" a vote on the business separation transaction; there is none.

In fact, the rule of construction directly applicable here requires resolving any ambiguity in favor of defendants' reading. As this Court made clear in *Centaur Partners, IV* v. *National Intergroup, Inc.*, 582 A.2d 923, 926-27 (Del. 1990), supermajority voting provisions—such as the minority stockholder vote provided by § 9.1(b)—that are not provided for in the DGCL—will be enforced only if they are "clear and unambiguous." The other authority on which plaintiff relies likewise holds that ambiguous charter provisions should be interpreted in accord with default provisions of law. *See, e.g., Harrah's Entm't, Inc.* v. *JCC Holding Co.*, 802 A.2d 294, 312 (Del. Ch. 2002). According to plaintiff, "business combination" is ambiguous. Under the DCGL, no vote at all is required for the transaction here, let alone a minority vote. Thus, even under plaintiff's reading, this Court should not enforce the voting right plaintiff alone is seeking.[3]

B. The Court of Chancery failed to balance the equities.

Plaintiff describes what happened below as a "discretionary balancing" of harms, AB 24, but what actually happened is that the trial court concluded that the potential loss of a non-statutory voting right outweighs any harm from the loss or

[3] Even if this Court decides that § 9.1(b) is ambiguous and that the ambiguity should not be resolved by rules of construction, the preliminary injunction must still be lifted. When "there is more than one reasonable interpretation of a disputed contract term," our law requires that "consideration of extrinsic evidence is required to determine the meanings the parties intended." *Airgas, Inc.* v. *Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1190 (Del. 2010). Defendants here were given no opportunity to present extrinsic evidence in support of their reading of the contract at an adversarial hearing. Basic principles of due process, as embodied in Court of Chancery Rule 65(a), require an evidentiary hearing when material factual issues are in dispute. At any rate, plaintiff bears the burden of proving a likelihood of success on the merits of a contract claim like this, *e.g.*, *Nutzz.com* v. *Vertrue Inc.*, 2005 WL 1653974, at *9 (Del. Ch. July 6, 2005), and he cannot have met that burden if evidence were required and he put forward none, *see In re Black Stallion Tax Ditch*, 1986 WL 6594, at *4 (Del. Super. Ct. Apr. 10,1986).

delay of the Stock Repurchase as a matter of law and so it declined to undertake a balance. That was legal error. *See, e.g.*, *Kansas RSA 15 Ltd. P'ship* v. *SBMS RSA, Inc.*, 1995 WL 214363, at *1 (Del. Ch. Mar. 31, 1995). Without a factually supported finding that the risk of harms favors an injunction, a preliminary injunction may not issue. *Koehler* v. *NetSpend Holdings Inc.*, 2013 WL 2181518, at *21-23 (Del. Ch. May 21, 2013). Here, plaintiff supplied no evidence on the point; defendants were given no notice on the point; and the only evidence submitted—defendants' expert affidavit—tilted the balance against relief. Indeed, the trial court itself recognized the "sizeable risk" of an injunction, Tr. 102, but declined to weigh that risk in the required balancing.

To try to excuse the legal error as harmless, plaintiff goes outside the record and observes that Activision's stock price has been stable and the parties have filed a preliminary proxy statement. But plaintiff cannot tell the Court that there is any assurance that this deal will proceed. No party has agreed to extend the SPA beyond the termination date. No party has agreed not to seek to renegotiate the terms of the SPA. There is no assurance that the proxy will clear the SEC in time to save the debt commitments. And as the expert affidavit (and common sense) makes clear, if the deal dies because of the trial court's order, the likely result is a billion dollar loss of stockholder value. Contrary to plaintiff's assertion, defendants are not trying to scare the Court. The blunt fact is that the injunction below has put Activision and its public stockholders at the mercy of its negotiating counterparties, who by next week will have every right to walk away from or force the substantive renegotiation of a deal that the market has endorsed as highly

favorable to Activision. Against that risk, plaintiff offers nothing but his unenforceable and inadequately bonded say-so that all will be well.

C. The nominal $150,000 bond is insufficient.

The Court of Chancery did not take any evidence with respect to the proper bond for its preliminary injunction, and thus ignored *Guzzetta* v. *Serv. Corp. of Westover Hills*, 7 A.3d 467, 469 (Del. 2010). Plaintiff did not even offer any evidence on the point below, and now he adopts the Court of Chancery's reasoning that no bond was necessary because the SPA provides for no bonds in the event of intraparty litigation. AB 25. This contract provision is irrelevant to the proper bond of a third-party who seeks to terminate the entire transaction. *See* A118. *Guzzetta* is an important source of protection against improvident injunctions, which the Court of Chancery has routinely ignored. *See, e.g.*, *In re Art Tech. Grp., Inc. S'holders Litig.*, C.A. No. 5955, at 104 (Del. Ch. Dec. 20, 2010) (no bond); *In re Complete Genomics, Inc. S'holder Litig.*, C.A. No. 7888, at 21 (Del. Ch. Nov. 9, 2012) (nominal bond of $5000). The risk to defendants and Activision stockholders here—of unrecoverable loss resulting from an improvident injunction—demonstrates why *Guzzetta* must be respected and a bond commensurate with the likely loss ordered.

CONCLUSION

For all the foregoing reasons, and the reasons set forth in defendants' opening brief, the injunction should be vacated.

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