EFiled: Sep 30 2013 05:02PM EDT
Filing ID 54305823
Case Number 497,2013

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' OPENING BRIEF

OF COUNSEL:

William Savitt
Kevin S. Schwartz
Ryan A. McLeod (No. 5038)
Anitha Reddy
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000

SEITZ ROSS ARONSTAM & MORITZ LLP
Collins J. Seitz, Jr. (No. 2237)
Garrett B. Moritz (No. 5646)
Anthony A. Rickey (No. 5056)
100 S. West Street, Suite 400
Wilmington, Delaware 19801
(302) 576-1600

Attorneys for Defendants Below/Appellants Robert J. Corti, Robert J. Morgado and Richard Sarnoff

September 30, 2013

RICHARDS, LAYTON & FINGER,
P.A.
Raymond J. DiCamillo (No. 3188)
Scott W. Perkins (No. 5049)
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

OF COUNSEL:

Joel A. Feuer
Michael M. Farhang
GIBSON, DUNN &
CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

Attorneys for Defendants Below/Appellants Vivendi S.A. Philippe G.H. Capron, Jean-Yves Charlier, Frederic R. Crepin, Jean-Francois Dubos, Lucian Grainge, and Regis Turrini

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Edward P. Welch (No. 671)
Edward B. Micheletti (No. 3794)
Sarah Runnells Martin (No. 5230)
Lori W. Will (No. 5402)
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899
(302) 651-3000

Attorneys for Defendant Below/Appellant Activision Blizzard, Inc.

MORRIS, NICHOLS, ARSHT
& TUNNELL LLP
R. Judson Scaggs Jr. (No. 2676)
Angela C. Whitesell (No. 5547)
1201 N. Market Street
P.O. Box 1347
Wilmington, Delaware 19899-1347
(302) 658-9200

OF COUNSEL:

Robert A. Sacks
Diane L. McGimsey
SULLIVAN & CROMWELL
LLP
1888 Century Park East
Suite 2100
Los Angeles, California 90067
(310) 712-6644

Attorneys for Defendants Below/Appellants Brian G. Kelly, Robert A. Kotick, ASAC II LP, and ASAC II LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

RULES AND STATUTES

OTHER AUTHORITIES

NATURE OF PROCEEDINGS

On July 25, 2013, Activision Blizzard, Inc. ("Activision" or the "Company") announced a transaction in which it will repurchase shares of its own stock from Vivendi, S.A. (the "Stock Repurchase"). Because the Stock Repurchase is at a discount, is highly accretive, and will return control of Activision to its public stockholders, the markets immediately endorsed the deal, adding over a billion dollars of value to the Company upon its announcement.

Nearly two months later, just before the deal was set to close, an alleged holder of 0.0001% of Activision's stock sought an emergency temporary restraining order, arguing that because the Stock Repurchase was a "merger, business combination or similar transaction," it was subject to a vote of public unaffiliated stockholders under Activision's charter.

On September 18, 2013, the day before the transaction was to close, the Court of Chancery heard argument on the TRO motion. After argument, the court *sua sponte* converted the TRO motion to a preliminary injunction motion, concluded that the Activision charter was ambiguous, resorted to Delaware's Antitakeover Statute to provide interpretive guidance, and held that Activision's repurchase of its own shares was a "business combination, or similar transaction" subject to a vote of its public stockholders. *See* Order, Exhibit A hereto; Transcript Ruling, Exhibit B hereto ("Tr."). Because the Stock Repurchase may be terminated on October 15, and because Activision cannot hold a stockholder vote before then, the court's preliminary injunction amounts to final relief against the consummation of the Stock Repurchase. This is the appeal from the injunction.

SUMMARY OF ARGUMENT

The Court of Chancery committed reversible error in granting a preliminary injunction barring Activision's repurchase of its own stock from Vivendi, its controlling stockholder, unless the transaction is approved by a majority of Activision's minority stockholders.

I. The Court of Chancery erred by issuing a preliminary injunction *sua sponte*. Plaintiff moved for, and defendants opposed, a temporary restraining order. After giving no notice at all, not even during oral argument, the court converted the TRO application into one for a preliminary injunction and then granted that extraordinary relief. The Court of Chancery's *sua sponte* injunction violates basic notions of fairness, due process, and its own Rule 65(a)(1).

II. The Court of Chancery erred by misapplying the laches doctrine to reward plaintiff's unjustified and prejudicial delay instead of denying equitable relief. Despite knowing all facts pertinent to his claim for two months, plaintiff waited until the eve of closing to seek a TRO against the Stock Repurchase. His gross delay ensured that any relief obtained would be final, as no stockholder vote can be held in accordance with federal law before the Stock Purchase Agreement's termination date. His delay also raises the material risk that Activision's financing for the deal will fall through, which would doom the deal. Plaintiff has no excuse for his delay, instead offering only unsupported speculation that the parties to the Stock Repurchase would be able to renegotiate terms. Instead of denying relief, the court used plaintiff's delay to justify a preliminary injunction.

III. The Court of Chancery erred as a matter of law in applying the preliminary injunction standard to the improperly curtailed record.

1. Likelihood of success on the merits. The court erred as a matter of law in concluding that § 9.1(b) of Activision's charter requires that the Stock Purchase Agreement be subjected to a vote of the Company's minority stockholders. Section 9.1(b) clearly does not require a vote. Courts must read a charter and bylaws together to decide if a disputed provision is ambiguous. Here, § 3.12(a)(iii) of Activision's bylaws requires all transactions between Activision and Vivendi to be approved by the independent directors. And § 8.5 of the charter requires Vivendi to acquire Activision's remaining shares through either a tender offer or short-form merger if its interest in Activision reaches 90%. Read in the context of these provisions, and against the backdrop of Delaware law, the requirement of § 9.1(b) that "any merger, business combination or similar transaction" involving Activision and Vivendi obtain the approval of a majority of Activision's non-Vivendi stockholders, if Vivendi's interest is between 35% and 90%, can be reasonably read only to apply to a controlling stockholder combination (such as a squeeze-out or further combination of the companies' business activities).

Plaintiff's alternative reading is unreasonable. According to plaintiff, Activision's purchase of its own stock back from Vivendi constitutes a "business combination" under § 9.1(b) simply because the purchase is being effected through the acquisition of a holding company containing Activision stock and NOLs (whose presence reduces the effective purchase price to Activision). But plaintiff's reading conflicts with even the broadest commonly accepted meaning of business combination and would arbitrarily require a vote on trivial transactions between the two companies just because the acquisition of a holding company is involved.

The Court of Chancery erroneously concluded otherwise because it (i) failed to read Activision's organic documents as a whole and instead ruled that "business combination" is ambiguous as a matter of law; (ii) failed to request or consider extrinsic evidence in support of defendants' reading and instead considered extrinsic evidence that was irrelevant as a matter of law; and (iii) failed to give effect to the interpretive principle that an ambiguity in a charter provision should be resolved in favor of the default provisions of the DGCL.

2. Balance of the equities. The Court of Chancery further erred by failing to balance the equities. Upon mistakenly concluding that the charter required a vote on the Stock Repurchase, the court dismissed the potential harm to the defendants of an injunction as a necessary consequence of the vote requirement. But a court is required to balance the equities precisely because its merits determination is a preliminary one that could be in error, especially on a bare TRO record. The court thus improperly relieved plaintiff of the burden to show that the balance of the harms weighed in favor of relief. Indeed, the court never considered the impact on Activision and its public stockholders of the risk that the injunction will terminate what all view as a favorable transaction because it cannot now be closed by the October 15 termination date and because of the risk of losing necessary financing.

3. Bond. Even if the preliminary injunction was proper, the court failed to protect defendants and the public stockholders with a proper bond. The nominal bond ordered below is inadequate under Rule 65(c) and binding precedent.

STATEMENT OF FACTS

A. Vivendi buys a controlling block of Activision stock.

Activision, Inc., a Delaware corporation, is a worldwide developer and publisher of video games. In late 2007, Activision entered into a Business Combination Agreement (the "BCA") with Vivendi, a French digital entertainment company with global music, television, movie, and internet businesses. Under the BCA, Vivendi agreed to exchange its Vivendi Games division, valued at $8.1 billion, and $1.7 billion in cash for an approximately 52% stake in Activision. After the closing of that transaction, Activision would be renamed Activision Blizzard, Inc. (Blizzard Entertainment, Inc. was an entertainment software division of Vivendi Games.) The BCA also provided that Activision would promptly launch a tender offer for its own shares that, if fully subscribed, would push Vivendi's stake over 60%. Vivendi's stake is presently 61%.

In negotiating the BCA, Activision's board obtained from Vivendi certain protections for the benefit of Activision's minority stockholders. The protections were implemented through amendments to Activision's charter and bylaws adopted concurrently with the closing of the transaction. In light of Vivendi's acquisition of a majority of Activision's stock, these amendments modified the Company's overall corporate governance structure. The protections took the form of restrictions on Vivendi's ability to exercise control, including its ability unilaterally to effect related-party transactions with Activision.

As amended pursuant to the BCA, the charter and bylaws expressly recognize that Vivendi is the Company's majority stockholder and set forth a detailed scheme regulating Vivendi's relationship with the Company. Section 8.1 of the charter, titled "Relationship with Vivendi," explains that "[b]ecause Vivendi . . . is the majority stockholder . . . and in anticipation that the Corporation and Vivendi may engage in similar activities or lines of business and have an interest in the same areas of corporate opportunities . . . the provisions of this Article VIII are set forth to regulate, define and guide the conduct of certain affairs of the Corporation as they may involve Vivendi." A519. Section 8.2, titled "Business Activities," regulates Vivendi's ability to engage in or acquire competing video or online gaming businesses (A520) and § 8.3, titled "Corporate Opportunities," regulates Vivendi's right to pursue transactions that constitute corporate opportunities for both it and the company (A521). The bylaws provide that three of the board's eleven members must be nominated by an independent committee and qualify as "[i]ndependent" under the NASDAQ rules. A496.

Section 3.12 of the bylaws governs related-party transactions between Vivendi and Activision and subjects specified business decisions to the approval of a majority of these independent directors, as well as a majority of the board, for a period of five years following the closing of the BCA. (Section 3.12 of the bylaws can only be amended with the approval of a majority of the non-Vivendi shares. A518.) Of particular significance to this appeal, Section 3.12(a)(iii) (A502) requires the approval of a majority of independent directors for:

> any transaction or agreement between the Corporation or any of its Subsidiaries, on the one hand, and Vivendi or any of its Controlled Affiliates, on the other hand, including any merger, business combination or similar transaction involving such parties

In addition, if Vivendi's voting interest is between 35% and 90%, § 9.1(b) of the charter (A523) subjects a subset of any such transactions or agreements — transactions involving a further combination of Vivendi and the Company — to the approval of a majority of voting stockholders unaffiliated with Vivendi:

> 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.

And if Vivendi's voting interest equals or exceeds 90%, § 8.5 of the charter (A522) requires that Vivendi acquire the remaining outstanding shares, through either a tender offer or a short-form merger, at essentially the stock's market trading price:

> <u>Purchase of Corporation Stock by Vivendi</u>. In the event that Vivendi's Voting Interest equals or exceeds 90%, then, within sixty (60) days following the date upon which Vivendi's Voting Interest first equals or exceeds 90% (the "*Relevant Date*"), either Vivendi or the Corporation shall commence a tender offer to acquire all shares of Common Stock not owned by Vivendi as of the Relevant Date (the "*Minority Shares*") at a price not less than the volume-weighted average closing price per share

> of Common Stock . . . for the twenty (20) consecutive trading days immediately preceding (but not including) the trading day immediately preceding the Relevant Date (the "*Buyout Price*"). In the alternative, at any time on or before the Relevant Date, Vivendi may, but is not obligated to, cause the Corporation to effect 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.

B. Vivendi agrees to sell its controlling stock position back to Activision.

On July 25, 2013, Activision announced that it had entered into an agreement, negotiated by a special committee of its independent directors, to buy control of itself back from Vivendi. A816. Plaintiff concedes that the special committee members are disinterested and independent. A31 ¶ 77, 78. Under the terms of the Stock Purchase Agreement (or "SPA"), Activision agreed to pay $5.83 billion in cash for approximately 429 million Activision shares, or 38.3% of those outstanding, and for tax attributes in the form of net operating loss carryforwards, or "NOLs." Activision is paying $13.60 per share, a 10% discount to the trading price of its stock before the stock purchase was announced. For tax efficiency, the transaction was structured as the sale of an entity containing the Activision shares and the NOLs. (The entity containing the shares and NOLs was newly formed, had never conducted any historical business, and is contractually prohibited from conducting any business. A88 § 4.8). The SPA also provides that Vivendi will sell an additional 172 million of its Activision shares, or 15.4% of those outstanding, at the same price to ASAC II, LP, an investment vehicle in which

Robert Kotick, Activision's CEO, and Brian Kelly, Activision's co-chairman, as well as four other outside investors, are participating. If the SPA closes, Activision will no longer be a controlled company because the majority, 63.1%, of its outstanding shares will be held by disaggregated public stockholders. ASAC will own 24.9%, and Vivendi will own 12%. Vivendi and ASAC are not affiliated.

The SPA provides for a termination date of October 15, 2013, after which time any party may terminate the agreement without penalty. A109. When it announced the Stock Purchase, Activision stated that the transaction was expected to close by the end of September 2013. A51.

After Activision announced the SPA, Joystiq.com, a video game industry trade magazine, ran the headline, "Activision buys itself back from Vivendi for $8 billion." Alexander Sliwinski, July 26, 2013, http://aol.it/13JJqqK. News reports recognized that the deal marked Activision's "split[]" and "separati[on]" from Vivendi. *See, e.g.*, Keith Stuart, *Activision Blizzard Splits from Vivendi in $8bn Buyout*, GUARDIAN, 2013 WLNR 18401903 (July 26, 2013); William Alden, *Activision Reaches Pact to Separate from Vivendi*, INT'L HERALD TRIBUNE, 2013 WLNR 18433343 (July 27, 2013).

On news of the transaction, Activision stock jumped 15%, instantly creating approximately $1 billion of value for the Company's minority stockholders. *See* A825; Paul Ausick, *Activision Blizzard Nears All-Time High on Independence from Vivendi*, 24/7 WALL ST., 2013 WLNR 18418447 (July 26, 2013); *Activision Spikes After Buying Most of Vivendi Majority Stake*, PROACTIVE INVESTORS, 2013 WLNR 18434259 (July 26, 2013). Analysts declared the transaction "the best possible outcome for ATVI shareholders," BMO CAPITAL MARKETS REPORT, July 26, 2013, and "applaud[ed] management for its ability to structure such a shareholder friendly deal," JEFFERIES COMPANY NOTE, July 29, 2013.

C. Plaintiff moves for a TRO, claiming that Activision's purchase of its own stock from Vivendi is a "business combination."

On September 11, 2013, seven weeks after Activision announced the SPA and one week before the planned closing, plaintiff filed this action and a motion for an order temporarily restraining the completion of the SPA. Plaintiff based his TRO application on the theory that Activision's acquisition from Vivendi of Activision's own stock and NOLs via a shell entity required for IRS purposes was a "merger, business combination or similar transaction" involving Activision and Vivendi or their affiliates, and that it was therefore subject to a vote of Activision's minority stockholders under § 9.1(b) of the charter. Most of plaintiff's 33-page complaint, however, did not object to the transaction at all, but instead claimed that the price Activision was paying for its stock was so favorable that Activision should be purchasing the entirety of Vivendi's stake, not just part of it. A10-42.

On Friday, September 13, defendants sent letters to the court opposing plaintiff's request to schedule a TRO hearing. A388-400. At a telephonic conference that began at 2 p.m., the court directed defendants to file a single brief in opposition to the TRO by 9:30 a.m. the following Monday, September 16, and set a TRO hearing for two days later, Wednesday, September 18. A33-39. The court did not ask for evidentiary submissions and gave no hint that it might enter a preliminary injunction rather than a TRO.

On Monday, September 16, the court sent the parties a letter stating that "[r]esearch has identified two accounting standards that may provide guidance on the meaning of the term 'business combination'" and directed defendants to explain by the next day how the parties to the SPA intended to account for the transaction. A868. Defendants submitted a letter stating that no party intended to account for the transaction as a "business combination." A870. Defendants explained that Activision planned to account for the transaction as a share buyback and that it could not treat the transaction as a business combination under the relevant standards. *Id.* Plaintiff made no response. On the issue of balancing the harms, defendants also submitted a preliminary affidavit from Kevin F. Dages, an expert on valuation and damages issues, who opined that the Stock Repurchase was highly beneficial to Activision's stockholders and that scuttling the Stock Repurchase could cause a $2.5 billion drop in the Company's market capitalization. A840. This affidavit went unrebutted by plaintiff.

D. The Court of Chancery grants a preliminary injunction *sua sponte.*

At the hearing on Wednesday, September 18, the court heard oral argument for two hours. Plaintiff did not contest that it was impossible to hold a stockholder vote on the SPA before the October 15 termination date. The court nevertheless rejected defendants' laches argument, and instead purported to "take into account plaintiff's delay" by testing the application against the "more searching" preliminary injunction standard. Tr. 84. The court ruled that plaintiff had met the less-plaintiff-friendly standard and then *sua sponte* issued a preliminary injunction barring the closing of the SPA without the approval of Activision's minority stockholders. Tr. 75-76. Notwithstanding the October 15 termination date and the impossibility of meeting that date if a stockholder vote is required, the court nowhere acknowledged the risk that the injunction might kill the transaction or the consequences to the Company and its public stockholders if that happens.

In the wake of the preliminary injunction, Activision, Vivendi, and ASAC are scrambling to save the deal. But neither Vivendi nor ASAC, which includes four investors unaffiliated with Activision, has agreed to extend the termination date or to stand by the SPA's other terms if the termination date is extended. There is thus substantial risk that the deal will fall apart, or get materially worse for Activision's minority stockholders, if other parties seek to renegotiate its terms in light of the market reaction (for example the even more substantial discount at which Vivendi is agreeing to sell given today's stock price) or changes in financing conditions. Nevertheless, Activision is trying to prepare a preliminary proxy statement to be filed with the SEC for a hypothetical stockholder vote. The Company is doing so because there will be no chance of obtaining SEC approval for a proxy statement before debt commitments expire in mid-December if the Company waits until after an amended SPA is negotiated to begin the proxy review process. Unless an amended SPA is negotiated or this Court vacates the injunction, the deal will die on October 15.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN GRANTING A PRELIMINARY INJUNCTION *SUA SPONTE* WITHOUT NOTICE.

A. Question Presented

Did the court below err in *sua sponte* converting a TRO application into a preliminary injunction motion without notice? This issue was raised *sua sponte* by the Court of Chancery (Tr. 75, 84).

B. Scope of Review

This Court will apply *de novo* review to the Court of Chancery's legal conclusions in converting the TRO application into a preliminary injunction motion. *See Kaiser Aluminum Corp.* v. *Matheson*, 681 A.2d 392, 394 (Del. 1996).

C. Merits of Argument

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek* v. *Armstrong*, 520 U.S. 968, 972 (1997); *see also SI Mgmt. L.P.* v. *Wininger*, 707 A.2d 37, 40 (Del. 1998). The Court of Chancery granted this extraordinary relief at a hearing—on plaintiff's TRO application—one week after plaintiff filed his complaint. Plaintiff had not moved for a preliminary injunction and the court had not given notice that it was considering such relief.

The Court of Chancery's entry of a preliminary injunction, *sua sponte* and without notice, is unauthorized by Delaware law. Defendants have identified just one case in which the Court of Chancery, taking account of the movant's delay, applied the preliminary injunction standard on a TRO application and nevertheless granted relief. *See Insituform Techs., Inc.* v. *Insitu, Inc.*, 1999 WL 240347, at *7, 16 (Del. Ch. Apr. 19, 1999). But in that case, the court still granted only the relief sought by plaintiffs and noticed to defendants: a TRO, *not* a preliminary injunction. *Id.*; *see also Weitzman* v. *Stein*, 897 F.2d 653, 657 (2d Cir. 1990) (vacating a *sua sponte* preliminary injunction and questioning whether a trial court "even has the power to enter an injunction of this type on its own motion").

Even assuming that the court had the power to enter such relief *sua sponte*, it had no power to do so without giving the notice required by Court of Chancery Rule 65(a)(1). *See* Ct. Ch. R. 65(a)(1) ("Notice.—No preliminary injunction shall be issued without notice to the adverse party . . . ."). Although defendants know of no Delaware case interpreting that rule, federal courts have repeatedly vacated preliminary injunctions issued without proper notice under the corresponding federal rule. *See, e.g., All Care Nursing Serv., Inc.* v. *Bethesda Mem'l Hosp, Inc.*, 887 F.2d 1535, 1538 (11th Cir. 1989).

Indeed, the U.S. Supreme Court has ruled that "[t]he 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." *Granny Goose Foods, Inc.* v. *Bhd. of Teamsters*, 415 U.S. 423, 433 n.7 (1974). The Court specifically held that "[t]he same-day notice provided in this case before the temporary restraining order was issued does not suffice."

Here, defendants did not get even same-day notice. Not only did the court issue the injunction without any warning, it also premised the injunction on legal arguments to which defendants had no meaningful opportunity to respond. In ruling that the charter required a stockholder vote on the SPA, the court relied on arguments that plaintiff made only in its reply brief, and others that plaintiff did not make at all. *E.g.*, Tr. 91, 97-98 (basing ruling on independent conclusion that the SPA qualified as a "business combination" under § 203(c)(3)(v) and under § 3.3 of the investor rights agreement entered into in connection with the SPA).

The Court of Chancery further erred by resolving factual disputes in the plaintiff's favor without giving defendants an opportunity to gather and present evidence. As Chancellor Allen explained, there is special risk of judicial error in a TRO application when "the parties have [not yet] had an opportunity to take discovery and develop a record." *Cottle* v. *Carr*, 1988 WL 10415, at *2 (Del. Ch. Feb. 9, 1988) (a TRO "is not a preliminary injunction masquerading under another name" because it "involves . . . a materially different emphasis").

Here, for example, in balancing the equities, the court accepted plaintiff's counsel's unsupported assertion that "Vivendi can't walk away" from the SPA because there are no other potential buyers for its Activision stake. *See* Tr. 23, 102. But Vivendi's options and likely course of action are factual questions, not legal ones, and the court could not properly resolve them on the say-so of plaintiff's counsel. The court also assumed, without basis, that the parties could complete the transaction before Activision's debt commitments expire in December or that "[m]aybe that financing can be put off as well." Tr. 102-03. This conjecture is not a substitute for a properly supported factual finding.

II. THE COURT OF CHANCERY ERRED IN FAILING TO DENY ANY EQUITABLE RELIEF BASED ON LACHES.

A. Question Presented

Did the court below err in failing to bar equitable relief on the ground of laches? This issue was raised below (A388-92, A395-98, A464) and considered by the Court of Chancery (Tr. 80-84).

B. Scope of Review

This Court reviews the interpretation and application of legal precepts such as the doctrine of laches *de novo*. *Levey* v. *Brownstone Asset Mgmt., LP*, __ A.3d __, 2013 WL 4525770, at *3 (Del. Aug. 27, 2013).

C. Merits of Argument

Seven weeks after the stock buyback was announced, and just one week before it was scheduled to close, plaintiff filed this action and a motion for a TRO. The motion was based entirely on a one-paragraph provision of Activision's charter, adopted and filed publicly in 2008. Under Delaware law, laches bars equitable relief when (1) the plaintiff knew or should have known of the invasion of his rights; (2) the plaintiff unreasonably delayed bringing suit to vindicate those rights; and (3) the delay prejudiced the defendant or third parties. *Whittington* v. *Dragon Grp., L.L.C.*, 991 A.2d 1, 8 (Del. 2009). All three elements are met here.

First, plaintiff knew or should have known all the facts relevant to his claim on July 25, 2013. The Company issued a press release that day stating that the transaction was expected to close in September and filed documents detailing the transaction and its October 15 termination date. A816-21. That information, along with Activision's 13-page charter, provided plaintiff everything he needed to know to bring his TRO motion. *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 11.06[b][1] (2013) ("[I]t is sufficient that the plaintiff could have informed himself of the relevant facts through the exercise of reasonable diligence").

Second, plaintiff delayed bringing suit for nearly 50 days, allowing the vast majority of the time available for litigation to expire. Plaintiff's only excuse for this delay was that it is "difficult to pull things together." Tr. 70. The Court of Chancery nevertheless excused the delay, blaming Activision for not referring to the charter provision (which Activision had determined was inapplicable) in the Form 8-K announcing the transaction and surmising that it may take time "for a diligent stockholder to focus on the charter and realize that the charter vote was potentially applicable." *Id.* at 81-82. The court did not explain how or why it is reasonable for one stockholder to take weeks to decide whether to jeopardize the economic interests of every other stockholder by interposing a voting-rights claim based on a straightforward provision in a concise certificate of incorporation.

This Court has held that "unreasonable delay" can be "as little as one month," *Whittington*, 991 A.2d at 7-8, and "where many persons will be affected by an act that involves a change of capital structure and a material alteration of rights attached to stock ownership, the stockholder, having knowledge of the contemplated action, owes a duty both to 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). Accordingly our courts have not hesitated to find laches where a claimant's tardiness in pressing claims far more arcane than plaintiff's here has consumed much of the time available to resolve a demand for extraordinary equitable relief. *See, e.g., CNL-AB LLC* v. *E. Prop. Fund I SPE (MS Ref) LLC*, 2011 WL 353529, at *6-7 (Del. Ch. Jan. 28, 2011) (laches barred relief in a "highly complicated" case with "somewhat unusual claims" because plaintiff "unreasonably sat on its hands for two weeks" when only three weeks were available to litigate).

The delay here was extreme: knowing in July that the Company was planning to close the transaction in September without a stockholder vote, knowing that millions of shares of stock were trading on the expectation that no vote was required, and knowing that the transaction had an October 15 termination date, plaintiff raised a claim at the last minute based on a publicly available charter provision he could and should have read two months earlier. This delay is not reasonable and is not excused. *See In re Blockbuster Entm't Corp. S'holders' Litig.*, 1994 WL 89011, at *1 (Del. Ch. Mar. 1, 1994).

Third, plaintiff's delay prejudiced defendants and Activision's stockholders. The delay consumed seven-eighths of the time available to prepare the case, which —even when a plaintiff wastes only *half* the time available for a defense—"is unquestionably prejudicial to the defendants' ability to present their defense" and can "prejudice the court's ability to adjudicate the matter fairly." *Oliver Press Partners, LLC* v. *Decker*, 2005 WL 3441364, at *1 (Del. Ch. Dec. 6, 2005).

Most importantly, plaintiff's delay risks potentially devastating injury to Activision and its stockholders. The SPA has a termination date of October 15. A109 § 9.1. Under the terms of the court's order, the SPA cannot be consummated before its expiration date. Even if the deal can be recut and extended, there is no assurance a vote can be had in time to save Activision's debt commitments. As the expert affidavit defendants submitted below showed, nullifying the SPA poses billions of dollars of risk to Activision's stockholders. A840.[1] But the timing of plaintiff's application means that the court's order necessarily does just that.

Plaintiff thus waited so long to bring his application that no preliminary equitable relief can be (or could have been) ordered that would not operate as a permanent injunction against this transaction. Such relief is impermissible as a matter of law. *See Stahl* v. *Apple Bancorp, Inc.*, 579 A.2d 1115, 1120 (Del. Ch. 1990). The court below recognized that plaintiff should not be rewarded for his tardiness and purported to "account [for] the plaintiff's delay" by converting, without notice, plaintiff's application for a TRO into one for the even more severe remedy of an injunction. Tr. 84. But the court then *ordered* the injunction, notwithstanding the lack of evidence and notice. This result turns the laches doctrine on its head. The proper remedy for laches is refusal to grant the requested equitable relief—not an irremediable order of even *more* extraordinary relief.

---

[1] Without taking any evidence and without analysis, the Court of Chancery *sua sponte* decided that a stockholder vote could not have been had before October 15 even if plaintiff had not slept on his rights. Tr. 83 (describing a theoretical timeline based on how long it "probably" would have taken a more diligent plaintiff to file suit). In fact, had plaintiff acted diligently, the matter likely could have been resolved with enough time to schedule a vote if the Court determined one were required (and if Vivendi agreed), within the time prescribed by the SPA.

III. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW IN GRANTING THE *SUA SPONTE* PRELIMINARY INJUNCTION.

A. Question Presented

Did plaintiff's application for a TRO satisfy the standards for a preliminary injunction? The question whether plaintiff's motion satisfied the TRO standard was raised below (A463-85) and the Court of Chancery considered whether the application satisfied the preliminary injunction standard (Tr. 84-104).

B. Scope of Review

The Court of Chancery based its preliminary injunction solely on the court's interpretation of the Activision charter. In these circumstances, this Court gives "[no] deference to the embedded legal conclusions of the trial court," and will apply *de novo* review. *Kaiser Aluminum Corp*. v. *Matheson*, 681 A.2d 392, 394 (Del. 1996) (*de novo* review of preliminary injunction order where court below interpreted certificate with no factual record).

C. Merits of Argument

1. Plaintiff showed no likelihood of success in demonstrating that Activision's purchase of its own stock from Vivendi is subject to a minority stockholder vote.

a. No vote is required under the plain meaning of Activision's charter.

Under Delaware law, "[c]orporate charters and bylaws are contracts among a corporation's shareholders; therefore, our rules of contract interpretation apply." *Airgas, Inc.* v. *Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010). In determining whether a disputed contract term is ambiguous, the court "must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument." *Alta Berkeley VI C.V.* v. *Omneon, Inc.*, 41 A.3d 381, 386 (Del. 2012). A term is not ambiguous just because the parties dispute its meaning; rather, to be ambiguous, it "must be fairly or reasonably susceptible to more than one meaning." *Id.* at 385.

Under these interpretive principles, Activision's repurchase of its own stock from Vivendi is not a transaction subject to the minority-stockholder vote requirement contained in § 9.1(b) of its charter. Because Activision's charter and bylaws "were adopted in tandem and intended to be complementary," they should be read together in interpreting the disputed charter provision. *Centaur Partners, IV* v. *Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990). Here, § 9.1(b) was just one provision of several adopted in connection with the BCA and designed to regulate the relationship between Vivendi, as the majority stockholder, and Activision, as the controlled company. Considered as a whole, these provisions create a coherent scheme of regulation that does not require the minority vote plaintiff urges.

Section 3.12(a)(iii) of the bylaws mandates arm's length bargaining for even ordinary transactions between Activision and Vivendi by broadly requiring independent director approval for "*any transaction or agreement* between the Corporation or any of its Subsidiaries, on the one hand, and Vivendi or any of its Controlled Affiliates, on the other hand, including any merger, business combination or similar transaction involving such parties" (emphasis added).

Section § 9.1(b) of the charter, the provision at issue here, provides that "any merger, business combination, or similar transaction"—a subset of the transactions and agreements subject to independent director approval—is also subject to a vote by non-Vivendi stockholders:

> 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.

In light of the background Delaware law against which it was drafted, § 9.1(b) is reasonably read as applying only to squeeze-out transactions or other transactions combining the companies' business activities, that increase Vivendi's control position. That reading is confirmed by the provision's introductory clause, which limits its applicability to instances in which Vivendi controls at least 35% but less than 90% of Activision's stock. Under the case law, 35% is at the low range of minority shareholdings that have been found to exercise effective control over a corporation and thus acquire fiduciary status as a controlling stockholder. *See In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531 (Del. Ch. 2003) (finding a 35% stockholder to be a controller in the context of a merger transaction); *see also In re Morton's Rest. Grp., Inc. S'holders Liitg.*, __ A.3d __, 2013 WL 4106655, at *5 (Del. Ch. July 23, 2013) (noting that 35% stock ownership is the "most aggressive" level at which control has been found). And the 90% cut-off is significant for two reasons. It is the threshold at which Vivendi acquires the statutory right to compel a short-form merger pursuant to 8 *Del. C.* § 253; and it is also the threshold at which Vivendi is obligated by § 8.5 of the charter to acquire all remaining Activision shares at a specified "Buyout Price," essentially the most recent trading price of Activision stock. Delaware law has long recognized both the danger of unfair squeeze-outs and the shield that majority-of-the-minority voting requirements can provide. *See, e.g.*, *Kahn* v. *Tremont Corp.*, 694 A.2d 422, 429 (Del. 1997). Reflecting this well-developed line of case law, §§ 8.5 and 9.1(b) together protect Activision's minority stockholders from unwanted squeeze-out type transactions by giving them a veto over such transactions when Vivendi's interest is less than 90% and guaranteeing them the market price for their shares when Vivendi's interest reaches 90%.

But this Court need not determine the precise scope of transactions to which § 9.1(b) applies, because the provision is not under any circumstances applicable to the Stock Repurchase, and certainly not "fairly or reasonably susceptible" to the reading plaintiff successfully sponsored below. According to plaintiff, the SPA is subject to a minority stockholder vote because Activision's purchase of its own stock back from Vivendi—in a transaction that would transform Vivendi from a majority to 12% stockholder—is a "merger, business combination or similar transaction." But no reasonable stockholder or businessperson would describe Vivendi's sale of a controlling interest in Activision back to Activision as anything like a “merger” or “business combination.” Rather, as the press did, a reasonable stockholder or businessperson would describe the transaction as the opposite—as a business separation.

Nor does the presence of the NOLs in the transaction change the analysis. The NOLs serve to reduce the effective price being paid by Activision in a transaction in which Vivendi is decreasing its ownership interest. But no businesses of Vivendi and Activision are being combined and Vivendi’s interest in Activision is being reduced, not increased.

Plaintiff insisted, and the court below agreed (Tr. 88, 92), that Activision’s buyback of its own stock is nevertheless at least “similar” to a merger or business combination because Activision is not acquiring shares directly, but rather a corporate entity that contains nothing but Activision’s own stock and NOLs. Leave to the side that a stock buyback splitting up Activision and Vivendi is not “similar,” as a matter of plain English or common sense, to a business combination, but is instead its very opposite. Even on its own terms, plaintiff’s argument proves too much. Under plaintiff’s reading, *any* acquisition by Activision of a Vivendi subsidiary, even one that held only a single share of Activision stock, would trigger a minority stockholder vote. At the same time, plaintiff’s reading would permit Activision to pay billions of dollars to Vivendi to acquire shares directly without triggering a minority stockholder vote. This makes no sense. The potential for Vivendi, as Activision’s majority stockholder, to exercise control over a stock buyback is just as great whether the transaction is conducted as a stock sale or as the sale of stock held in a subsidiary. Either way, the transaction is one in which Vivendi is disposing of its interest in Activision. Plaintiff's misreading of § 9.1(b) thus needlessly interprets § 9.1(b) to operate arbitrarily, subjecting insignificant transactions to costly and time-consuming votes merely because a corporate form is involved while taking no account of the 35% and 90% thresholds that signal the purpose of the certificate provision.[2]

Because only defendants' interpretation of § 9.1(b) gives effect to the charter and bylaws taken as a whole, the provision is unambiguous. Accordingly, the Court of Chancery erred as a matter of law in finding ambiguity in the provision that could reasonably make it apply to the SPA. The court's error stemmed from its misreading of *Martin Marietta Materials, Inc.* v. *Vulcan Materials Co.*, 56 A.3d 1072 (Del. Ch. 2012), *aff'd*, 45 A.3d 148 (Del. 2012), to stand for the proposition that the phrase "business combination" is "fundamentally ambiguous." Tr. 86. *Martin Marietta* said no such thing. The Court of Chancery there held only that the meaning of "business combination" was unclear in the context of the contract in dispute in that case, and, more specifically, was ambiguous when applied to the question whether "business combination" could comprise a hostile merger as well as a negotiated merger. Nothing in *Martin Marietta* remotely suggested that the term "business combination" can be stretched to apply to a company's purchase of its own stock. *See Morgan Stanley Grp., Inc.* v. *New England Ins. Co.*, 225 F.3d

[2] Defendants do not contend that § 9.1(b)'s vote requirement could not possibly be triggered by any acquisition of a Vivendi subsidiary by Activision, or that a company holding shares can never be viewed as being in the "business" of holding stock. Rather, defendants contend that Activision's acquisition of a newly formed Vivendi subsidiary containing only Activision shares and NOLs, which never has conducted any business or operations and never can, does not qualify as a "merger, business combination or similar transaction" for the purpose of § 9.1(b).

270, 278 (2d Cir. 2000) ("[A] contract may be ambiguous when applied to one set of facts but not another. Therefore, ambiguity is detected claim by claim."); *Cont'l Cas. Co.* v. *Rapid-Am. Corp.*, 609 N.E.2d 506, 512 (N.Y. 1993) ("Clauses can, of course, be ambiguous in one context and not another."). Delaware courts will not look to create ambiguity when the natural reading of contractual terms points clearly towards an ordinary and common sense interpretation. *See Rhone-Poulenc Basic Chems. Co*. v. *Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

b. Even if the language of § 9.1(b) were ambiguous, the court erred in resolving its meaning without consideration of extrinsic evidence.

Even if § 9.1(b) were ambiguous, the Court of Chancery erred as a matter of law by resolving the ambiguity in plaintiff's favor, and ordering effectively final relief barring the SPA, without giving defendants notice and an opportunity to present extrinsic evidence in support of their reading. "If there is more than one reasonable interpretation of a disputed contract term, consideration of extrinsic evidence is required to determine the meanings the parties intended." *Airgas*, 8 A.3d at 1190. Plaintiff sought no discovery, adduced no record, and presented no evidence concerning the meaning of § 9.1(b) of the Activision charter. He could not possibly have met his burden of proving a likelihood of success on the merits of construing an ambiguous contract under Delaware law.

The court nevertheless entered an injunction. Relying on older trial court authority, and ignoring this Court's most recent teaching, plaintiff argued (and the court below apparently accepted) that even if § 9.1(b) were ambiguous, consideration of extrinsic evidence is foreclosed as a matter of law by "the rule of construction in favor of stockholder franchise rights." A59-60. But the very case plaintiff cites for that proposition explains that this rule of interpretation applies "[w]hen a corporate charter is alleged to contain a restriction on the fundamental electoral rights of stockholders under default provisions of law — such as the right of a majority of the shares to elect new directors or enact a charter amendment." *Harrah's Entm't, Inc.* v. *JCC Holding Co.*, 802 A.2d 294, 310 (Del. Ch. 2002); *see also Jana Master Fund, Ltd.* v. *CNET Networks, Inc.*, 954 A.2d 335 (Del. Ch. 2008). Here, of course, § 9.1(b) *expands* minority stockholders' voting rights beyond those required by Delaware law. The proper interpretive rule—the one that harmonizes the case law and gives effect to the principle that courts should seek to give effect to statutory purpose—is that ambiguous charter provisions should be interpreted in favor of the default rule supplied by the DGCL. *Cf. Centaur*, 582 A.2d at 928 (charter provisions in derogation of the statutory default of majority control will be enforced only if clear and unambiguous). Applied to this case, that interpretive rule precludes the result below, because the DGCL requires no stockholder vote on the SPA.

The Court of Chancery further erred by invoking, on its own initiative, 8 *Del. C.* § 203 as "the strongest analogy" for interpreting the term "business combination" in the Activision charter. Tr. 89. (Plaintiff did not even mention § 203 in his moving papers.) The General Assembly took care in defining "business combination" in § 203 to provide that the definition is for "use[] in this section only." 8 *Del. C.* § 203(c). There is thus no warrant to apply this definition elsewhere, as the case law makes clear. *See Martin Marietta*, 56 A.3d at 1109 (refusing to import Section 203's definition of "business combination" into confidentiality agreements); *Grand Metro. Pub. Ltd. Co.* v. *Pillsbury Co.*, 558 A.2d 1049, 1051, 1054 n.7 (Del. Ch. 1988) (declining to construe § 203 in interpreting charter voting provision based on the phrase "business combination"). And in misreading *Martin Marietta*, the court lost sight of what the transaction involves and what it accomplishes—a separation (not a combination) resulting in the reduction of Vivendi's stake in Activision from controlling to 12%.

Moreover, if the drafters of the organic documents wished to import § 203's definition of "business combination," they would have done so explicitly—the same drafters explicitly invoked § 203 in Bylaw § 3.12(a)(iv). A503. Because the drafters of the charter and bylaws made specific reference to § 203, courts should assume "that all omissions [of that same provision] were intended." *Brown* v. *State*, 36 A.3d 321, 325 (Del. 2012).

The court's reliance on a 2013 investor agreement between Activision, Vivendi, and ASAC, Tr. 97, was equally improper. That contract was drafted in connection with Vivendi's effort to sell its shares back to Activision—five years after the charter at issue in this lawsuit. The court below introduced the 2013 documents into the case as relevant extrinsic evidence on its own initiative and seemed to think that the 2013 agreement involved the "[s]ame set of transaction documents, same lawyers involved." Tr. 43. The court was mistaken. The 2013 documents were written five years later, by different lawyers and different parties in the context of a different transaction—a business separation, not a business combination. The court had zero basis to find that agreement relevant to the meaning of terms negotiated long ago as part of the BCA, when Vivendi was seeking to acquire a majority interest in Activision. Courts should look for extrinsic evidence "which reveals the parties' intent at the time they entered into the contract," because later-gathered evidence is "not usually helpful." *Eagle Indus., Inc.* v. *DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 n.11 (Del. 1997).

And the court below selectively ignored extrinsic evidence that confirmed defendants' interpretation. At the court's direction, defendants submitted a letter explaining that they are not accounting for the Stock Purchase as a "business combination" but, unsurprisingly, as a stock purchase. A870. The trial court rejected this evidence without explanation, Tr. 86-87, but there is no contrary evidence in the record and it must be credited on appeal. *Watson* v. *Wal-Mart Assocs.*, 30 A.3d 775, 779 (Del. 2011) (fact-finder "is not free to ignore this evidence if it is undisputed").

At bottom, the ruling below appears to reflect the trial court's intuition that § 9.1(b) should apply whenever "[v]alue is moving." Tr. at 96; *id.* at 90-91, 96-98. We say "intuition" because the court gave no reasoned explanation of that interpretation. The charter and the bylaws do not provide that an unaffiliated vote must be had whenever "value is moving." There is no basis in these documents, or in any evidence before the Court of Chancery, to conclude that a transaction in which Activision is buying its own shares, separating from Vivendi, and returning control to its public stockholders, is a "merger" with Vivendi, or a "business combination" with Vivendi, or anything "similar."

The trial court's interpretation cannot bear its own weight. Substantial "value" can move in any kind of related party transaction, but § 3.12(a)(iii) makes clear that only the approval of the independent directors—obtained here through a robust special committee process—is usually required for such transaction (subject, of course to enforceable fiduciary duties). And even tiny transactions—the purchase of a single share of stock for example, if transferred via a holding company—would require a separate majority of the minority vote under the interpretation adopted by the trial court. This is not a reasonable reading of Activision's corporate contracts. The decision below should accordingly be reversed.

2. The Court of Chancery did not balance the equities before issuing the injunction.

A preliminary injunction may not issue unless the movant carries its burden to show that the failure to grant an injunction will cause greater harm than its issuance. *Fletcher Int'l, Ltd.* v. *ION Geophysical Corp.*, 2010 WL 1223782, at *4-5 (Del. Ch. Mar. 24, 2010). This fact-intensive inquiry requires the court to consider which side bears the greater risk in the event the court reaches an erroneous preliminary view of the merits on a necessarily incomplete record. *Koehler* v. *NetSpend Holdings Inc.*, 2013 WL 2181518, at *21-23 (Del. Ch. May 21, 2013) (denying injunction despite finding likelihood of success on the merits and risk of irreparable harm). The failure of a moving party to demonstrate that the balance of equities tips in its favor is generally fatal to the application. *Id.*; Donald J. Wolfe, Jr. & Michael A. Pittenger, CORPORATE AND COMMERCIAL

PRACTICE IN THE DELAWARE COURT OF CHANCERY § 10.02[b][5] (2013) (citing cases).

The record shows that the court below did not even attempt to weigh the equities, still less conclude on the basis of a proper evidentiary record that the balance tilted toward an injunction. The court recognized that the "balancing of the harms depends primarily on the defendants' point, which resonates with me, that this is likely a good transaction for Activision" and that there is "downside risk" that could be "sizable." Tr. 100, 102. But the court declined to weigh this "downside risk" in any balance, holding instead that the potential loss of a voting right outweighs any harm of an injunction as a matter of law. Tr. 101-02. In essence, having found plaintiff's likely success on the merits of the charter-based voting claim, the court dispensed with any analysis of the relative equities.

This was legal error. Putting aside the court's incorrect assessment of success on the merits, before granting injunctive relief, the court must engage in a "fact-specific inquiry" "to assess competing equitable factors". *In re Trust for Gore*, 2010 WL 5561813, at *1 n.5 (Del. Ch. Dec. 23, 2010); *see also eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 392-93 (2006) ("[T]his Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a [right] has been infringed."). This principle applies with full force to claims related to stockholder voting rights. *See, e.g., Kansas RSA 15 Ltd. P'ship* v. *SBMS RSA, Inc.*, 1995 WL 214363, at *1 (Del. Ch. Mar. 31, 1995) ("I concluded that the risks and costs of enjoining [the] asset swap outweighed the risk to defendants of perhaps failing to protect the voting rights" of a limited partner); *Braunschweiger* v. *Am. Home Shield Corp.*, 1989 WL 128571, at *6-7 (Del. Ch. Oct. 26, 1989) (declining injunctive relief based on risk of withdrawal or modification of existing merger proposal, finding relief "would appear . . . at least as likely to injure the economic interests of the Company's shareholders as to protect or enhance those interests").

Had the court below held plaintiff to his burden to show that the balance of equities favor an injunction, the record would have established that the risk of a wrongful injunction far outweighs the risk of a wrongful failure to enjoin. The injunction subjects Activision's public minority stockholders to the risk of permanent loss of a value-creating, accretive transaction, including billions of dollars in increased share value and the opportunity for the public to recapture control of Activision (and with it the opportunity for a future control premium). *See In re Delphi Fin. Grp. S'holder Litig.*, 2012 WL 729232, at *11-12 (Del. Ch. Mar. 6, 2012) (denying injunction "predicated on a coercive vote on the Charter Amendment" because "the value of injunctive relief to the stockholder class seem[ed] likely to be overwhelmed by the concomitant loss"). Although the court below recognized that "this is probably a good deal for Activision," Tr. 94, it failed to weigh that consideration. The court seemed to assume that the parties would extend the expiration date of the SPA, with no change in terms, but there was no evidence before the court to support such an assumption and there is now no agreement to extend the SPA with the October 15 drop-dead date just days away.

In addition to the substantial risk that the entire $8 billion transaction will be irretrievably lost, the injunction carries other important costs and risks, including:

the cost of holding an improvidently ordered stockholder vote; the risk that the transaction may not close before Activision's debt commitments expire in December; the concomitant risk that equivalent financing will not be available in uncertain debt markets, which could render completion of the deal impossible; and the costs and management distraction of an unnecessary proxy filing. Right now, stockholders who disapprove of the deal may vote with their feet and sell their shares at a premium; if the deal dies because of the injunction, both the approving and disapproving stockholders will suffer, because the ability to sell at a premium and the benefits of the stock repurchase will be lost. The court below took no account of these risks and costs. And, having decided that the charter established a voting right on no record at all, the court took no account of the fact that—as is the case on all equitable decisions made on a preliminary record (let alone on an effectively non-existent TRO record)—its preliminary view of § 9.1(b) may ultimately prove to be in error. The court instead assumed the correctness of its preliminary merits finding and determined that the potential deprivation of a highly contestable non-statutory voting right trumped all potential equities on the other side of the balance. Accordingly, plaintiff did not satisfy a necessary element of injunctive relief, and for this reason too the judgment below should be reversed. *Abrons* v. *Marée*, 911 A.2d 805, 810 (Del. Ch. 2006) ("The party seeking a preliminary injunction must demonstrate all three elements to prevail.").

3. The nominal bond ordered by the court below is insufficient.

Court of Chancery Rule 65(c) provides that a party seeking an injunction must give security "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined." In *Guzzetta* v. *Service Corp. of Westover Hills*, 7 A.3d 467 (Del. 2010), this Court held that the appropriate size of a bond is a fact question requiring an evidentiary hearing if there is dispute about potential damages. The court did not take or evaluate any evidence in deciding the amount of the bond. This was error.

The $150,000 bond the court ordered is insufficient, as defendants would have demonstrated had they been given the chance. The costs of the contingent preliminary proxy statement filing alone dwarf this amount, and if the deal itself is scuttled those costs will climb dramatically. Worse, the bond provides no possible relief for Activision's stockholders, who stand to lose an aggregate $1 billion in share value if the SPA is lost due to an improvident injunction. The bond is inadequate in light of those potential losses.

CONCLUSION

For the foregoing reasons, the preliminary injunction should be vacated.

SEITZ ROSS ARONSTAM
& MORITZ LLP

/s/ Collins J. Seitz, Jr.
Collins J. Seitz, Jr. (No. 2237)
100 S. West Street, Suite 400
Wilmington, Delaware 19801
(302) 576-1600

Attorneys for Defendants Below/ Appellants Robert J. Corti, Robert J. Morgado, and Richard Sarnoff

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP

/s/ Edward P. Welch
Edward P. Welch (No. 671)
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000

Attorneys for Defendant Below/Appellant Activision Blizzard, Inc.

MORRIS, NICHOLS, ARSHT
& TUNNELL LLP

/s/ R. Judson Scaggs Jr.
R. Judson Scaggs Jr. (No. 2676)
1201 N. Market Street
P.O. Box 1347
Wilmington, Delaware 19899-1347
(302) 658-9200

Attorneys for Defendants Below/ Appellants Brian Kelly, Robert Kotick, ASAC II LP, and ASAC II LLC

RICHARDS, LAYTON & FINGER,
P.A.

/s/ Raymond J. DiCamillo
Raymond J. DiCamillo (No. 3188)
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Attorneys for Defendants Below/Appellants Vivendi S.A. Defendants Below/Appellants Vivendi S.A., Philippe G.H. Capron, Jean-Yves Charlier, Frederic R. Crepin, Jean-Francois Dubos, Lucian Grainge, and Regis Turrini

September 30, 2013