



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SJUNDE AP-FONDEN,)
)
Plaintiff,)
)
v.)
)
ACTIVISION BLIZZARD, INC.,)
ROBERT KOTICK, BRIAN)
KELLY, ROBERT MORGADO,)
ROBERT CORTI, HENDRIK)
HARTONG III, CASEY)
WASSERMAN, PETER NOLAN,)
DAWN OSTROFF, BARRY)
MEYER, REVETA BOWERS,)
KERRY CARR, MICROSOFT)
CORPORATION, and)
ACTIVISION BLIZZARD, INC.,)
as successor to ANCHORAGE)
MERGER SUB INC.)
)
Defendants.)

C.A. No. 2022-1001-KSJM

PUBLIC VERSION

EFILED JUNE 20, 2024

VERIFIED THIRD AMENDED CLASS ACTION COMPLAINT

OF COUNSEL:

PRICKETT, JONES & ELLIOTT, P.A.

KESSLER TOPAZ MELTZER
& CHECK, LLP
Lee D. Rudy
Eric L. Zagar
J. Daniel Albert
Lauren Lummus
280 King of Prussia Road
Radnor, Pennsylvania 19087
(610) 667-7706

Michael Hanrahan (ID No. 941)
Corinne Elise Amato (ID No. 4982)
Kevin H. Davenport (ID No. 5327)
Stacey A. Greenspan (ID No. 7056)
Kirsten M. Valania (ID No. 6951)
Christine N. Chappellear (ID No. 6844)
1310 N. King Street
Wilmington, Delaware 19801
(302) 888-6500
Counsel for Plaintiff

Dated: June 12, 2024

TABLE OF CONTENTS

I.	NATURE OF THE ACTION	3
A.	The Harassment Scandal Results in the Merger Agreement.....	3
B.	Defendants Violated Section 251 of the DGCL.....	6
C.	The Merger Is the Result of Breaches of Fiduciary Duty by Kotick and the Board, Aided and Abetted by Microsoft	8
D.	Defendants Unfairly Extend the Invalid Merger Agreement Beyond the Termination Date	14
E.	Defendants Close the Unfair Merger Without Fixing the Merger’s Statutory Defects or Fairly Compensating Plaintiff and the Class.....	18
F.	Aiding and Abetting and Conspiracy by Microsoft	19
II.	PARTIES	21
III.	FACTUAL BACKGROUND OF THE MERGER.....	35
A.	Kotick Was Implicated In and Aware of the Harassment.....	35
B.	Others Forced or Driven to Leave, But Kotick Stays	39
C.	Kotick’s Pay Cut Agreement, the October 28, 2021 Board Meeting and Long-Range Plan.....	41
D.	The November 16, 2021 <i>Wall Street Journal</i> Article and Activision’s Response	49
E.	Kotick Could and Should Have Been Fired for Cause	57
F.	Microsoft Takes Advantage of the Precarious Position of Kotick and the Board	59
G.	Allen & Co. Was Not Disinterested and Independent	66
H.	Kotick Signals to Microsoft that Activision is for Sale for \$90	70
I.	Kotick Involves More Conflicted Directors.....	74
J.	Kotick Pushes the Board to Hire Conflicted Advisors	75
K.	<i>Morningstar</i> Observes the Board Should but Will Not Push Kotick Out	81

L.	Microsoft Makes a \$90 Offer; Kotick Brushes Off Other Bidders	84
M.	The Board Approves Depressed Forecasts and Accepts Allen & Co.’s Deficient Conflicts Disclosure	92
N.	The Board Approves an Incomplete Draft Merger Agreement; Activision and Microsoft Sign the Merger Agreement.....	103
O.	The Terms of the Merger Protect Kotick and the Director Defendants from the Fallout of the Harassment Scandal.....	112
	1. The Merger Agreement Protected Kotick’s Job and Compensation.....	113
	2. The Merger Agreement Provides Kotick and the Director Defendants with Materially Greater Rights to Indemnification and Advancement.....	116
	3. The Merger Agreement Requires Microsoft to Approve the Settlement of Lawsuits Against Kotick and the Board Arising Out of the Harassment Scandal	136
P.	The Reaction to the Merger’s Announcement and Kotick’s <i>VentureBeat</i> Interview.....	139
Q.	It Is Reasonably Conceivable That Hartong Tipped the Hartong Trust to the Merger Negotiations	143
R.	Defendants Rush the Special Meeting in the Face of Protracted Antitrust Scrutiny They Expected	147
S.	Defendants Absolve Themselves of Wrongdoing and Prepare for the 2022 Annual Meeting.....	151
T.	The Harassment Scandal Abates and New Games are Launched as the Merger Faces More Regulatory Hurdles.....	153
U.	Kotick Vows to do “Everything He Personally Can” to Close Merger While Conceding Activision’s Performance is “Exceptional”	160
V.	Defendants Hold the 2023 Annual Meeting Without Fixing the Merger’s Statutory Defects	162

W.	Activision Releases More Blockbuster New Games and Its Employees Continue Calling for Kotick’s Ouster	163
X.	Defendants Extend the Merger Agreement After Activision Proves Its Problems Were Fixable Without Microsoft	168
1.	Activision Could Have Terminated the Merger Agreement and Collected a \$3 Billion Termination Fee	169
2.	Activision Executes the Letter Agreement Extending the Merger Agreement.....	172
3.	Activision Announces Its Third Consecutive Quarter of Record-Breaking Financial Results.....	177
Y.	Defendants Close the Merger.....	178
IV.	PLAINTIFF’S LITIGATION CHALLENGING THE MERGER AND DEFENDANTS’ COMPLIANCE WITH SECTION 251	180
A.	Plaintiff’s Section 220 Investigation and Section 220 Action	180
B.	Plaintiff’s Prosecution of Its Statutory and Conversion Claims	184
V.	CLASS ACTION ALLEGATIONS.....	190
COUNT I.		193
A.	Violation of Section 251(b)’s Requirement for Board Approval of the Agreement of Merger.....	194
B.	Improper Delegation in Violation of Section 251(b).....	199
C.	Failure to Submit a Complete Agreement of Merger Complying With Section 251(b) for a Stockholder Vote, As Required by Section 251(c)	202
D.	The Section 251 Violations Vitiating Appraisal Rights.....	203
COUNT II		204
A.	Conversion by Merger.....	204
B.	Conversion by the Merger Agreement’s Denial of the Stockholder Rights of Plaintiff and the Class	209
C.	Conversion by Merger Through Filing a False Certificate of Merger in Violation of Section 103 and Section 251(c)(4).....	212

1.	Merger Agreement Provisions Concerning the Survivor’s Certificate and Certificate of Merger	213
2.	The Requirements of Sections 251(b)(3) and 251(c)(4)	213
3.	The Requirements of Section 103	215
4.	Activision Consummated the Purported Merger by Filing a Merger Certificate That Violated Section 251(c)(4) and Section 103	216
COUNT III		220
A.	Kotick and the Activision Board Were Not Disinterested and Independent When It Approved an Incomplete Version of the Agreement of Merger	221
B.	Kotick and the Board Breached Their Duty of Loyalty and Engaged in a Knowing Violation of Law and Intentional Misconduct by Failing to Approve a Section 251-Compliant Agreement of Merger and Closing an Invalid Merger	225
C.	Kotick and the Board Breached Their Duty of Loyalty Because They Did Not Act Reasonably to Obtain the Best Transaction Reasonably Available	229
D.	Kotick and the Director Defendants Do Not Meet the Entire Fairness Standard	235
1.	The Initiation, Timing, and Purpose of the Merger Were Unfair	235
2.	The Negotiation of the Merger Was Not Fair Dealing	236
3.	The Director Approval Did Not Satisfy Fair Dealing	237
4.	The Stockholder Vote Was Rushed, Coerced, Uninformed and Invalid	239
5.	The Proxy was Materially Misleading and Incomplete	245
a.	Misleading Partial Disclosure Concerning the Merger Negotiations and the Role of the Harassment Scandal	245

b.	Misleading Partial Disclosure of the Terms of the Merger by Failing to Provide the Survivor’s Certificate	251
c.	Misleading Partial Disclosure of the Terms of the Merger by Failing to Completely and Accurately Describe Important Terms and Qualifications of the CDL	252
(i)	The CDL: Introduction.....	252
(ii)	The CDL Shows the Proxy’s Disclosure Regarding the Sexual Harassment Scandal Was Misleading and Incomplete	256
(iii)	The CDL: Failure to Disclose the Section 6.6 Covenants	260
(iv)	The CDL: Failure to Disclose the Section 6.15 [REDACTED]	263
d.	Misleading Partial Disclosure of Allen & Co.’s Conflicts, Engagement and Analysis.....	265
e.	Misleading Partial Disclosure of Kotick’s Employment Agreements with Microsoft	270
6.	The \$95 Merger Price Was Unfair and Activision Was More Valuable as an Independent Company.....	273
COUNT IV		279
A.	The Activision Board Was Not Disinterested and Independent When It Persisted In Pursuit of the Merger.....	279
B.	The Director Defendants’ Decision to Continue the Merger Agreement and Not Fix the Merger’s Statutory Defects Was a Breach of the Duty of Loyalty and Care, Intentional Misconduct and a Knowing Violation of the Law	282
C.	Entry Into the Letter Agreement Was a Breach of the Duty of Loyalty and Duty of Care	284
1.	The Timing and Purpose of the Letter Agreement Was Unfair	284

2.	The Negotiation and Approval of the Letter Agreement Was Not Fair Dealing.....	285
3.	The Letter Agreement Was Unfair	287
COUNT V		289
A.	Microsoft Contributed to and Exploited the Conflicts Kotick and the Director Defendants Faced	289
B.	Microsoft’s Knowing Participation in Kotick and the Board’s Failure to Act Reasonably to Obtain the Best Transaction Reasonably Available.....	291
C.	Microsoft’s Knowing Participation in Kotick and the Board’s Failure to Employ a Fair Process With Fair Dealing	293
D.	Microsoft’s Knowing Participation in the Rushed, Coerced, Uninformed and Invalid Stockholder Vote	293
E.	Microsoft’s Knowing Participation in Kotick and the Director Defendants’ Failure to Secure a Fair Price	296
COUNT VI.....		296
A.	Microsoft Contributed to and Exploited Kotick and the Director Defendants’ Continuing Conflicts	296
B.	Microsoft’s Knowing Participation and Conspiring in Kotick and the Director Defendants’ Refusal to Fix the Merger’s Statutory Defects and Continuation of the Merger Agreement	297
C.	Microsoft’s Knowing Participation in Kotick’s Agreement to the Unfair Letter Agreement	300
COUNT VII		301
A.	The Section 205 Application and July 17, 2023 Minutes	303
B.	Defendants Distribute Deliberately False Information Concerning the 2023 Dividend	308
C.		309
D.		311

COUNT VIII	315
PRAYER FOR RELIEF	318

Plaintiff Sjunde AP-Fonden (“Plaintiff”), individually and on behalf of a class (the “Class”) of former stockholders of Activision Blizzard, Inc. (“Activision” or the “Company”) common stock, excluding Defendants (as defined herein) and their affiliates, brings this Verified Third Amended Complaint (the “TAC”) challenging Activision’s January 18, 2022 Agreement and Plan of Merger (the “Merger Agreement”) with Microsoft Corporation (“Microsoft”). Plaintiff seeks a declaration that Activision and Activision’s directors (the “Board” or “Director Defendants”) violated 8 *Del. C.* § 251 (“Section 251”) because (i) the Activision Board did not properly adopt a Section 251-compliant agreement of merger, (ii) the Board improperly delegated approval of terms of the agreement of merger, (iii) the Board did not properly submit a Section 251-compliant agreement of merger to the Activision stockholders for approval, (iv) Activision failed to provide the Activision stockholders with the entire agreement of merger and (v) Activision filed a false certificate of merger with Delaware’s Secretary of State. These violations rendered (i) the Merger Agreement invalid; (ii) Activision’s October 13, 2023 merger with Microsoft (the “Merger”) invalid and an unlawful conversion of Plaintiff and the Class’s Activision shares; and (iii) the invalid Merger Agreement’s restrictions and prohibitions on fundamental stockholder rights of Plaintiff and the Class for the twenty-one-months that the Merger was pending an unlawful conversion of Plaintiff

and the Class's Activision shares. Plaintiff also seeks a declaration that the Defendants [REDACTED] [REDACTED] in violation of 8 *Del. C.* §§ 170 and 173, Activision's Certificate and Delaware law, [REDACTED]. Plaintiff also claims that the Director Defendants, including Activision's Chief Executive Officer ("CEO") Robert Kotick ("Kotick"), breached their fiduciary duty in connection with Activision's initiation, timing, negotiation, Board approval, stockholder approval and disclosure of the Merger, and in persisting in pursuit of the Merger and the invalid Merger Agreement after the outside termination date in the Merger Agreement of 11:59 p.m. Pacific Time on July 18, 2023 (the "Termination Date") and [REDACTED] [REDACTED] Plaintiff also brings a claim against Microsoft for aiding and abetting breaches of fiduciary duty and civil conspiracy.

The allegations of the TAC are based on Plaintiff's knowledge as to itself, and on information and belief, including Activision's production of books and records (the "Books and Records") pursuant to Plaintiff's 8 *Del. C.* § 220 ("Section 220") inspection demand (the "220 Demand"), the Defendants' briefs and representations

and documents produced to Plaintiff during this litigation and the investigation of counsel and review of publicly available information as to all other matters.¹

I. NATURE OF THE ACTION

A. The Harassment Scandal Results in the Merger Agreement

1. In 2021, Activision was rocked by public disclosure of a sexual harassment and discrimination scandal (the “Harassment Scandal”). Lawsuits were filed against Activision by the Equal Employment Opportunity Commission (“EEOC”) and the California Department of Fair Employment and Housing (“DFEH”). The SEC launched an investigation into Activision. Several derivative suits and a federal securities action were filed in California and eight actions seeking books and records pursuant to 8 *Del. C.* § 220 were filed in Delaware, all concerning the Harassment Scandal. These lawsuits implicated Activision senior officers and managers for participating in, or failing to act in response to, the misconduct, including Activision’s CEO Kotick. Employees staged a walkout and signed a petition calling for Kotick’s ouster. Investors called on Kotick to resign. Numerous

¹ Numerous allegations herein are based on representations made in Activision’s filings with the Securities and Exchange Commission (the “SEC”), including the March 21, 2022 definitive proxy statement Activision filed in connection with the Merger (the “Proxy”). Plaintiff does not warrant the completeness, accuracy or veracity of the representations made in these SEC filings, many of which, including the Proxy, contain materially misleading and incomplete disclosure.

Activision officers and managers, some of whom Kotick had previously protected, and other employees were fired or forced to resign because of the Harassment Scandal. However, the Board allowed Kotick to remain as CEO. Apparently, the buck stopped with everyone except Kotick and the Board.

2. In response to the continual bad news from July 2021 through November 2021, Activision's stock, which had traded over \$100 per share in February 2021 and closed at \$90.14 the day before the DFEH suit was filed in July 2021, dropped to the low \$60s by the second half of November and stood at \$65.39 on January 14, 2022, the last trading day before the Board purportedly approved the Merger Agreement.

3. The scandal intensified in mid-November 2021, after *The Wall Street Journal* published a scathing article on November 16, 2021, reporting that Kotick knew about and was directly involved in the Harassment Scandal.² Two of Activision's most important business partners and customers, Microsoft and Sony Group Corporation ("Sony"), severely criticized Activision's toxic environment, and Microsoft's then-Corporate Vice President ("VP") of Gaming Phil Spencer

² Kirsten Grind, Ben Fritz and Sarah E. Needleman, *Activision CEO Bobby Kotick Knew For Years About Sexual Misconduct Allegations at Videogame Giant*, WALL ST. J. (Nov. 16, 2021), <https://www.wsj.com/articles/activision-videogames-bobby-kotick-sexual-misconduct-allegations-11637075680> ("*Kotick Knew*").

(“Spencer”³) announced that Microsoft was reconsidering its relationship with Activision. Seeing that Activision and its CEO were weak and wounded, Microsoft—with whom Kotick had developed and maintained a close relationship over the past twenty years, and had the ability and incentive to use Activision’s games to be a leader in the gaming industry—used its commercial leverage to buy Activision at a bargain price. When Kotick, in response to Spencer’s criticism, spoke to Spencer three days after *Kotick Knew* was published, they decided Microsoft should buy Activision. There had been no Board decision to put Activision up for sale, it was not an opportune time to sell Activision because of the Harassment Scandal and the sales process was conducted by Kotick, not by independent directors.

4. Faced with increasing pressure to leave Activision, Kotick hastily negotiated a merger to protect himself, agreeing to sell Activision to Microsoft for \$95 per share (the “Merger”). The Activision Board also faced potential criticism and liability for the Harassment Scandal. However, a majority of the directors have relationships with Kotick that dissuaded them from terminating him. Rather than

³ When it announced the Merger, Microsoft also announced Spencer’s new title as CEO of Microsoft Gaming.

holding Kotick accountable and firing him for cause, the Board approved a draft of the Merger Agreement to protect themselves and Kotick.

B. Defendants Violated Section 251 of the DGCL

5. Defendants violated Section 251 because the Director Defendants did not properly adopt the agreement of merger, as required by Section 251(b). In purportedly approving the Merger Agreement, they failed to review and approve the disclosure schedules, the Company Disclosure Letter (the “CDL”) and the Certificate of the Surviving Corporation (the “Survivor’s Certificate”) that are part of the agreement of merger Section 251 requires. They did not even approve the Execution Version of the Merger Agreement. Instead, they approved a draft merger agreement dated January 17, 2022 (the “Draft Merger Agreement”) that was marked “draft,” identified Activision as “Denali,” included a placeholder date of “January [17],” identified the Merger consideration as “[•],” and omitted the CDL, disclosure schedules and “Exhibit A” (the Survivor’s Certificate). It was evident from the face of the Draft Merger Agreement that it was not complete and did not contain required elements. Section 251(b) requires the Board to approve an entire agreement of merger containing six specified elements, not a partial draft that omitted required elements. It also requires the Board to approve a Section 251-compliant agreement of merger. The Board never approved the agreement of merger Section 251

mandates. The Director Defendants also violated Section 251(b) and 8 *Del. C.* § 141(c) by improperly delegating to an *ad hoc* committee of the Board approval of an important financial term of the agreement of merger—the ability of Activision to pay dividends during the lengthy pendency of the Merger, as Microsoft and Activision sought regulatory approval to close the transaction.

6. The Defendants also violated Section 251(c) by purporting to submit a Section 251-compliant agreement of merger to the Activision stockholders for their approval while providing the Merger Agreement which omitted required elements, such as the CDL, disclosure schedules and Survivor’s Certificate. In a further violation of the DGCL, Activision filed a false certificate of merger, which attached a survivor’s certificate that was not the same survivor’s certificate that was purportedly part of the Merger Agreement (though the Board and stockholders never saw it). The multiple failures to comply with Section 251 also vitiated appraisal rights under 8 *Del. C.* § 262, which requires an agreement of merger and a merger “pursuant to Section 251.” Consequently, Plaintiff and the Class are entitled to a quasi-appraisal of the fair value of their shares on the date of the Merger.

7. Because the contents, adoption and approval of the Merger Agreement did not comply with Section 251, the Merger Agreement and the Merger were invalid. Consummation of the Merger constituted the unlawful conversion of the

Activision stockholders' shares. In addition, the Merger Agreement's stringent restrictions and prohibitions on fundamental stockholder rights—including the right to vote, to amend the bylaws, to have shares purchased by Activision and to receive dividends—also constituted the unlawful conversion of stockholders' shares because the Merger Agreement was invalid, though it was pending for twenty-one months.

C. The Merger Is the Result of Breaches of Fiduciary Duty by Kotick and the Board, Aided and Abetted by Microsoft

8. Kotick and Microsoft initiated and timed the Merger discussions largely as a result of the Harassment Scandal. Kotick was not an independent and disinterested negotiator. He was at risk of being forced out of Activision in disgrace. A termination for "Cause" under Kotick's employment agreement (the "Employment Agreement") would cause him a huge loss of financial benefits, including the forfeiture of millions of stock options. In contrast, the Merger Agreement avoided his termination, prevented further damage to his reputation and legacy, and secured for Kotick continuing employment and an over \$400 million pay-out when the Merger closed. The parties amended the Merger Agreement to push back the Termination Date, which kept Kotick employed even longer. Kotick even stayed on and continued to get paid after the Merger closed. The Merger Agreement also provided Kotick with materially greater indemnification,

advancement and exculpation protection, including from Microsoft, and insulates him from claims arising out of the Harassment Scandal and this Action. The Merger also extinguished derivative claims against Kotick and other Activision directors arising out of the Harassment Scandal.⁴

9. The Board allowed the conflicted CEO to negotiate the Merger to protect himself. It placed loyalty to Kotick above loyalty to Activision and the Activision stockholders. The Board also did not object to Kotick's chosen financial advisor, Allen & Company ("Allen & Co."), turning their heads to the myriad of conflicts that Allen & Co. faced. The Board approved the Merger Agreement to protect Kotick and themselves from the consequences of the Harassment Scandal that occurred on their watch. Like Kotick, the other directors were the beneficiaries of materially greater liability protections, elimination of derivative claims against them and reduction of further reputational damage in connection with the Harassment Scandal.⁵

10. The Merger Agreement was ill-timed and a poor deal for the Activision stockholders. The Merger Agreement was hastily negotiated after Activision's stock

⁴ Shortly after the closing of the Merger, pending derivative suits were dismissed because the stockholders had lost standing.

⁵ Incredibly, Kotick and the Board have claimed the Harassment Scandal had no role in bringing about the Merger.

price had dropped by over 30% in the previous few months based on disclosures concerning the Harassment Scandal, related investigations and suits by regulators, federal securities and derivative actions by stockholders, and employee departures and protests. Without Board authorization, Kotick negotiated with Microsoft for two weeks before a Board meeting was held. The Board did not establish a sale process but just let Kotick negotiate with Microsoft and quickly deflect the few other potential bidders who contacted Activision or Kotick superficially contacted. Two weeks after the Board first learned of Microsoft's interest, it authorized exclusivity for Microsoft at the \$95 price it had already negotiated with Kotick.

11. Though the parties knew, and the termination provisions in the Merger Agreement confirmed, that regulatory approval of the Merger was far from certain and likely to take a year or more, the \$95 Merger consideration would remain the same without adjustment. The Merger Agreement contained no provision to true-up the Merger price based on any increase in Activision's value during the lengthy pendency of the Merger. As Activision recovered from the effects of the Harassment Scandal and its performance improved, the benefit went to Microsoft, not the Activision stockholders.

12. Plaintiff pleaded in its initial complaint (the “Complaint”) and amended complaint (the “Amended Complaint” or “AC”),⁶ that the Merger Agreement left stockholders with dividends suspended after the 2022 annual dividend.

13. The defective and incomplete Merger Agreement was signed by Kotick on January 18, 2022 and voted on by shareholders in a hurried, coercive and uninformed vote on April 28, 2022. Microsoft and Activision structured the Merger Agreement to require a hasty, premature stockholder vote. It required a preliminary proxy statement to be filed within twenty business days of the execution of the Merger Agreement. Activision filed its preliminary proxy statement on February 18, 2022. Activision issued the Proxy on March 21, 2022 for a stockholders’ meeting to vote on the Merger on April 28, 2022 (the “Special Meeting”). Defendants rushed Activision stockholders to approve the Merger, despite knowing the Merger would be subject to protracted review by antitrust regulators, given the challenging antitrust environment and the size and nature of the Merger. Defendants did not provide the stockholders with a Section 251-compliant agreement or merger or even the complete Merger Agreement. The Proxy and notice of meeting did not include or describe the contents of the CDL and the Survivor’s Certificate.

⁶ See Trans. IDs 68309108, 68884046.

14. The Proxy was materially misleading and incomplete in numerous respects. The Proxy provided misleading partial disclosure concerning (i) the role of the Harassment Scandal in bringing about the Merger, (ii) the terms of the Merger Agreement, (iii) Allen & Co.'s conflicts, engagement and analysis and (iv) Microsoft's arrangements with Kotick regarding employment and compensation. Because the Proxy failed to provide or describe the contents of the Company Disclosure Letter and disclosure schedules, the stockholders were deprived of material information necessary for them to cast an informed vote, including that (i) the Merger required antitrust approval from sixteen countries, the identities of those sixteen countries, (ii) the indemnification agreements Activision has which Microsoft will assume, (iii) that Microsoft had the right to veto the settlement of pending and potential future litigation against Kotick and the Director Defendants arising out of the Harassment Scandal and (iv) additional terms in the CDL evidencing that the Merger arose out of the Harassment Scandal, such as references to Activision's sexual harassment settlements, pending claims, employee protests and workplace issues. The Proxy and Merger Agreement did not disclose additional covenants found in the CDL concerning [REDACTED]

[REDACTED]
[REDACTED] The rushed vote forced

stockholders to decide whether to seek appraisal long before the Merger would close, essentially denying them meaningful appraisal rights. Moreover, because there was no agreement of merger and merger pursuant to Section 251, there were no valid appraisal rights or legitimate appraisal process.

15. Even after Plaintiff filed its Complaint pointing out the statutory defects in the Merger Agreement and Merger, Defendants refused to cure those deficiencies. For nearly a year before the Merger closed, Plaintiff pointed out in its Complaint, Amended Complaint and other papers that (i) the Merger Agreement did not contain elements required by Section 251, (ii) the Board's approval of the incomplete Draft Merger Agreement did not satisfy Section 251 and (iii) the execution and submission to stockholders of the non-Board approved incomplete Merger Agreement was not in compliance with the statute. Defendants were served with the complaints, which quoted the plain statutory language. The Activision directors can read plain English. Plaintiff also pointed out that the Merger's lengthy pendency allowed the Defendants the opportunity to cure the defects before the Merger closed. The Activision Board could approve a Section 251-compliant agreement of merger and submit the executed version to Activision's stockholders at the 2023 annual meeting. It is reasonably conceivable that Defendants intentionally and deliberately refused to cure the statutory defects and closed the Merger in knowing violation of the law.

D. Defendants Unfairly Extend the Invalid Merger Agreement Beyond the Termination Date

16. Kotick told employees on September 1 and November 8, 2022 that the Merger would not close until June 2023. His prediction proved optimistic. On December 8, 2022, the United States Federal Trade Commission (the “FTC”) initiated an antitrust proceeding against the Merger (the “FTC Suit”), with trial starting on August 2, 2023.⁷ On April 26, 2023, the United Kingdom’s Competition and Markets Authority (“CMA”) issued a decision prohibiting the Merger,⁸ which Microsoft promptly appealed (the “CMA Appeal”) to the United Kingdom’s Competition Appeals Tribunal (the “CAT”) for an October 23, 2023 evidentiary hearing.⁹

17. The FTC Suit and CMA Appeal meant that the conditions to closing the Merger under Sections 7.1(b) and (d) of the Merger Agreement would not be

⁷ See Complaint, *In the Matter of Microsoft Corp.*, No. 9412 (F.T.C. Dec. 8, 2022), (the “FTC Complaint”) Notice. Pleadings and filings in the FTC Suit are available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/2210077-microsoftactivision-blizzard-matter>.

⁸ The CMA’s findings, reports, orders, statements and press releases about the Merger, and related third-party submissions and communications, are available at the CMA’s Merger-dedicated webpage at: <https://www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-merger-inquiry#full-publication-update-history>.

⁹ The CAT’s findings, orders, statements, papers, transcripts and schedules in the CMA Appeal are available at: <https://www.catribunal.org.uk/cases/159041223-microsoft-corporation>.

met, and the Merger therefore could not close, before the July 18, 2023 Termination Date. After that date, Activision could walk away from the Merger and collect a \$3 billion termination fee from Microsoft, which amounted to approximately \$3.80 per share for the Class.

18. As of the July 18, 2023 Termination Date, Activision had rebounded from the multiple effects of the Harassment Scandal, as evidenced by (i) three consecutive quarters of record-breaking financial results, (ii) the timely release of blockbuster new games and (iii) significantly improved employee retention and satisfaction. Kotick admitted that Activision's performance was exceptional, the Company had proved to be among the strongest in its industry and did not need Microsoft. Activision's employees, however, attributed the Company's success to employee-led efforts, not Kotick. Employees were still openly calling for Kotick's resignation. Kotick's job was still at risk. In addition, many lawsuits filed against Kotick and the Director Defendants arising out of the Harassment Scandal were still pending in trial and appellate courts.

19. Kotick had publicly proclaimed in the months leading up to the Termination Date that he would personally do everything he could to advocate for the Merger, and said that he was only focused on closing the Merger. Instead of walking away from the Merger and having the Company collect a \$3 billion

termination fee, Kotick decided to extend the Termination Date until October 18, 2023. Kotick, on behalf of Activision, executed the July 18, 2023 Merger Letter Agreement (the “Letter Agreement”) with Microsoft memorializing the extension.

[REDACTED]

20. The Letter Agreement (i) stripped Activision of its right to collect a \$3 billion termination fee after the July 18, 2023 Termination Date, (ii) narrowed Activision’s rights to terminate the Merger Agreement until the new termination date of 11:59 p.m. Pacific Time on October 18, 2023 (the “Amended Termination Date”), (iii) eliminated conditions to closing—including the absence of the FTC Suit—making it easier for the Defendants to close the Merger and (iv) kept in place the forbearance covenants of the Merger Agreement, extending the restrictions and prohibitions on fundamental stockholder rights.

21. The Letter Agreement benefitted Kotick and the Director Defendants. It extended the provisions in the Merger Agreement that protected them and Kotick’s employment and preserved Kotick’s prospects for a large change-in-control payout. It did not, however, benefit the public stockholders. The Letter Agreement did not

¹⁰ Following announcement of the Letter Agreement, Defendants refused to provide information on the Activision Board’s approval of the Letter Agreement. [REDACTED]

[REDACTED] to their May 2, 2024 Application under 8 *Del. C.* § 205.

provide for increased Merger consideration to adequately compensate the stockholders for the increased value of their Activision shares, their delayed receipt of the Merger consideration and the extension of the forbearance covenants in the Merger Agreement. The Letter Agreement did allow the Board to issue a 2023 annual dividend of \$0.99 per share. The dividend mitigated Plaintiff's claims that (i) the invalid Merger Agreement improperly suspended the issuance of the 2023 annual dividend, (ii) the Board's delegation of the dividend term to the *ad hoc* committee violated Section 141(c), breached the Board's fiduciary duty and caused damages to the stockholders and (iii) Kotick breached his fiduciary duty by negotiating the dividend issue and agreeing to the suspension of the 2023 annual dividend when he was not even on the *ad hoc* committee. The \$0.99 dividend did not, however, adequately compensate stockholders for the increased value of their Activision stock, the further delay in receipt of the Merger consideration or the conversion of their shares resulting from further extension of the invalid Merger Agreement. In addition, Activision [REDACTED]

[REDACTED] This violated the DGCL, certificate and Delaware law and was a breach of the duty of loyalty and knowing violation of law by the Activision Board, who approved, declared and had Activision [REDACTED]

[REDACTED]

E. Defendants Close the Unfair Merger Without Fixing the Merger's Statutory Defects or Fairly Compensating Plaintiff and the Class

22. After executing the Letter Agreement, Microsoft and Activision negotiated a resolution of the CMA Appeal. On October 13, 2023, they purported to close the Merger and seized the Class's shares without fixing the Merger's statutory defects.

23. The Merger was not fair to Plaintiff or the Class. The \$95 Merger price only approximated Activision's trading price before the scandal disclosures. [REDACTED]

[REDACTED]

[REDACTED]

Moreover, the Merger consideration was never worth \$95 per share to the stockholders because the Defendants knew the Merger consideration would not be received for at least twelve to eighteen months after the signing of the Merger Agreement. Further, after executing the Merger Agreement, Activision released highly anticipated and successful games, which contributed to three consecutive quarters of record-breaking earnings. However, the Company's improved performance was not reflected in the Merger price. The Merger put Activision and its stockholders in limbo for twenty-one-months. Stockholders only received \$95 per share for their Activision stock in late 2023 after being stuck with Kotick as CEO for nearly two more years. By then, the Harassment Scandal had abated, blockbuster

new games had generated record revenues and Activision's financial performance approached record levels.

24. After the Merger closed, the Defendants settled litigation implicating Kotick and the Director Defendants. The plaintiffs in derivative lawsuits dismissed their suits because the Merger extinguished their standing. On December 29, 2023, Kotick finally left Activision, more than two years after *Kotick Knew's* publication.

F. Aiding and Abetting and Conspiracy by Microsoft

25. Microsoft and its Delaware merger subsidiary Anchorage Merger Sub Inc. ("Anchorage" or "Merger Sub") knowingly participated and conspired in the breaches of fiduciary duty by Kotick and the other Director Defendants.

26. Microsoft knowingly exploited the Harassment Scandal and its commercial leverage over Activision precisely to offer Kotick a way to save his own skin in return for Kotick's support of the Merger at the expense of the Activision stockholders. The CDL it negotiated included disclosures, terms and covenants referencing, and reflected multiple due diligence calls concerning, the Harassment Scandal. Microsoft had full knowledge of the scandal the Merger would help cover up and the facts and CDL provisions that were not disclosed to the Activision stockholders. It conspired with Kotick and the Board to help them evade the personal and professional consequences of that scandal by breaching their fiduciary

duties through their negotiation and approval of an ill-timed, unfair and highly risky Merger.

27. To induce Kotick to support the Merger, Microsoft agreed to keep him on as CEO of Activision during the lengthy period the Merger would be pending as the parties sought regulatory approval, and as an initial officer of Activision after the Merger closed. Kotick continued as CEO for the twenty-one months the Merger was pending, plus an additional two months after the Merger closed. Microsoft and the Board also agreed to improved compensation for Kotick in violation of his agreement to reduce his compensation. They also agreed to provide materially greater rights to indemnification, advancement and insurance for him and the rest of the Board.

28. Microsoft and Kotick orchestrated a hasty sale that effectively precluded alternative bids. They negotiated in secret and pressured the Activision Board into quickly authorizing exclusivity. Microsoft insisted on the rushed vote and reviewed and approved the deliberately misleading disclosures in the Proxy.

29. Microsoft also insisted on having a veto right over the settlement of litigation against and implicating Kotick and the Director Defendants arising out of the Harassment Scandal. Microsoft anticipated lengthy antitrust review of the

Merger. Microsoft knew the veto-right would give it leverage over Kotick and the Director Defendants, if and when needed, during the Merger’s lengthy pendency.

30. Microsoft also conspired with Kotick and the Board to close the Merger without fixing the statutory defects under Section 251. Plaintiff served Microsoft with its Complaint, Amended Complaint and other filings pointing out the Merger’s statutory defects and Defendants’ ability to cure those defects before the Merger closed. Microsoft, however, conspired with Activision and the Director Defendants in refusing to fix the Merger’s statutory defects, and in delaying disposition of Plaintiff’s statutory claims, until after the Merger closed.

II. PARTIES

31. Plaintiff was a beneficial owner of Activision common stock and held such stock at all material times alleged in this TAC.

32. Activision is a leading global developer, publisher and distributor of interactive entertainment content and services on video game consoles, personal computers (“PCs”), and mobile devices. Activision’s games include high-quality games commonly referred to in the industry as “AAA” games.¹¹ Activision conducts

¹¹ See FTC Complaint ¶¶ 3, 46; Answer and Defenses of Respondent Activision Blizzard, Inc., *In the Matter of Microsoft Corp.*, No. 9412 (F.T.C. Jan. 4, 2023) (the “Activision Answer”) ¶ 3; Amended Answer and Defenses of Respondent Microsoft Corp., *In the Matter of Microsoft Corp.*, No. 9412 (F.T.C. Jan. 4, 2023) (the “Microsoft Answer”) ¶ 3.

its business through three subsidiaries, each of which develops and publishes AAA games: (i) Activision Publishing, Inc. (“Activision Publishing”), which houses the AAA marquee franchise *Call of Duty* (“COD”), (ii) Blizzard Entertainment, Inc. (“Blizzard”), which houses Activision’s popular *Diablo* and *Overwatch* franchises and (iii) King Digital Entertainment (“King”), which houses AAA *Candy Crush*.¹² Activision is known as one of the “Big 4” of the industry’s limited top tier of independent AAA publishers.¹³ Activision is incorporated in Delaware and headquartered in Santa Monica, California. Before the Merger closed, Activision’s common stock was listed on the NASDAQ Global Select Market (“NASDAQ”) under the ticker symbol “ATVI.”

33. Defendant Kotick was a Company director from February 1991 until the Merger closed, including Chairman of the Board from 1991 to 2008. Kotick was also Activision’s CEO from February 1991 until December 29, 2023. Kotick invested in Activision in 1990, acquiring a 25% stake in the Company with his co-defendant Brian Kelly (“Kelly”). Beginning in July 2021, Kotick became the focus

Each of Activision and Microsoft’s Initial Answer and Answer contains the same Introduction, General Responses and Specific Responses.

¹² Activision Answer ¶ 4; Microsoft Answer ¶ 4.

¹³ FTC Complaint ¶ 46; Microsoft Answer ¶ 46.

of employee protests, Department of Justice (“DOJ”) and SEC investigations, shareholder opposition and lawsuits arising out of the Harassment Scandal that put his job, lucrative compensation, reputation and legacy at risk. In connection with the Merger, Kotick received an over \$400 million payout for his Company stock and options and remained CEO while the Merger was pending, which prevented him from being terminated for Cause and forfeiting 2,201,878 unvested options, Performance Stock Units (“PSUs”) and other financial gains because of his role in the Harassment Scandal. Since 1993, Kotick earned over \$749 million in Company compensation, including base salary, equity awards and options, as one of the highest-paid CEOs nationwide. In 2020 alone, before the Harassment Scandal broke, Kotick made over \$154.5 million in total compensation, earning him the title as the second-highest paid CEO in the gaming industry, earning approximately \$77,306 an hour.¹⁴ Despite Kotick’s October 28, 2021 pledge to only receive \$62,500 annually because of the Harassment Scandal, he still received \$826,549 in compensation during 2021 (after receiving \$154,613,318 of compensation in 2020), and an over \$400 million payout in the Merger. Given Kotick’s conflicting interests, Kotick was not disinterested and independent when he pressed for and approved the

¹⁴ *Game CEO Pay in 2020*, GAMES ONE, <https://gamesone.co/ceo-pay/>.

Merger Agreement, executed the Letter Agreement and persisted in closing the Merger without fixing its statutory defects.

34. Defendant Reveta Bowers (“Bowers”) was a Company director from January 2018 through the Merger. Until the Merger closed, Bowers had served on the Compensation Committee since January 2018 and the Workplace Responsibility Committee (“WRC”) since its formation on November 22, 2021. Bowers’ relationship with Kotick goes back to 2000, when Kotick’s children started attending West Hollywood’s Center for Early Education (“CFEE”), an independent primary school where Bowers has worked for many years. Kotick’s children attended CFEE from 2000 to 2014, Kotick was a member of the school’s board of trustees (the “CFEE Board”) from 2008 until at least December 1, 2021, and Kotick donated \$100,000 to CFEE’s Annual Fund in 2021. The CFEE Board on which Kotick served manages finances and hires the Head of School. Bowers was a teacher and administrator at CFEE from 1972 to 2016 when Kotick’s children attended, and CFEE’s Interim Head of School from July 1, 2020 until June 30, 2022, when Kotick made a significant donation and served on the CFEE Board that hired and oversaw Bowers in that position.

35. Defendant Kerry Carr (“Carr”) was a Company director and member of the Audit committee from June 2022 until the Merger closed. Carr is Senior Vice President at Bacardi Ltd. (“Bacardi”), where she has worked since 2014.

36. Defendant Robert Corti (“Corti”), age 74, was a Company director and Chair of the Audit Committee from December 2003 until the Merger. Corti also served as a member of the Board’s Nominating and Corporate Governance Committee in 2021. Corti has been a professional director since retiring in 2006, including at Bacardi during that time. Because of his nearly twenty-year relationship with Kotick and Activision, Corti was not independent. He was part of the Gang of Four directors described below and a member of the *ad hoc* committee that improperly approved the dividend term.

37. Defendant Hendrik Hartong III (“Hartong”) was a Company director and member of the Audit Committee from July 2015 until Activision’s annual meeting on June 28, 2022. Before that, Hartong worked as Activision Publishing’s Vice President of Marketing from 1996 to 1998. As discussed below, it is a fair inference and reasonably conceivable that Hartong tipped his spouse and/or the investment manager of his spouse’s trust concerning inside information on Activision and the Merger negotiations. Therefore, he was not independent or disinterested when he approved the Merger Agreement.

38. Defendant Kelly has been business partners and co-investors with Kotick for decades. Kelly ran the Company with Kotick starting when they co-invested in Activision together in 1990. Over the years, Kelly held numerous positions at the Company, including as Chief Financial Officer (“CFO”) from 1991 until 1997, Chief Operating Officer (“COO”) from 1995 to 1998, President from 1997 to 1998, Co-Chairman of the Board from 1998 until 2012 (with Kotick as Chair from 1998 until 2008), and Chairman from 2012 until the Merger. Thus, Kelly ran the Company alongside Kotick from 1991 until the Merger as CFO, COO, co-Chairman and Chairman. In 2007, Kotick and Kelly were the chief negotiators of Activision’s merger with Vivendi Games Inc. (“Vivendi”) (the “Vivendi Merger”) in a transaction resulting in Vivendi becoming Activision’s largest stockholder. In 2009, Kelly and Kotick co-founded the “Call of Duty Endowment,” a 501(c)(3) non-profit that Kotick touts in his internet biographies. Kelly’s additional co-investments with Kotick over the years include ASAC II LP (“ASAC”), an entity Kelly and Kotick formed in 2012 to hold 172,968,042 Activision shares purchased from Vivendi, then Activision’s largest shareholder, when it liquidated most of its position in Activision in a recapitalization (the “ASAC Transaction”).¹⁵ Prior to that

¹⁵ *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1035 (Del. Ch. 2015).

recapitalization, Kotick and Kelly’s beneficial ownership of Activision had dwindled down to about 1%. Kotick and Kelly personally committed \$100 million to ASAC and the co-investors they solicited provided over \$1.62 billion.¹⁶ In 2016 and 2017, ASAC distributed its Activision shares to limited partners and members. Kotick and Kelly co-managed, including as of the Merger’s close, ASAC’s general partner ASAC II, LLC (“ASAC GP”). Because of his long-term relationship with Kotick and Activision, Kelly was not independent. He was part of the Gang of Four and helped Kotick orchestrate the Merger. He was a member of the *ad hoc* committee that improperly approved the dividend term of the Merger Agreement.

39. Defendant Barry Meyer (“Meyer”) was a Company director and member of the Board’s Nominating and Corporate Governance Committee from January 2014 until the Merger. Meyer joined the Board upon retiring from Warner Brothers in 2013. Meyer is a longtime Hollywood insider who, as *Bloomberg* noted, has “undoubtedly brushed shoulders with Kotick during his many years in Los Angeles,”¹⁷ where Kotick lives. Meyer’s daughter Elizabeth Brink (“Brink”) is a senior executive at San Francisco-based architecture and design firm Gensler, which

¹⁶ *Id.*

¹⁷ Jason Schreier, *Activision’s Board is Full of CEO’s Old Friends*, BLOOMBERG (Nov. 19, 2021), <https://www.bloomberg.com/news/newsletters/2021-11-19/activision-blizzard-s-atvi-board-is-full-of-ceo-bobby-kotick-s-friends>.

the Books and Records indicate Activision has engaged. Brink is Co-Regional Managing Principal of Gensler's Southwest Region, where Kotick lives and Activision is based. This indicates that Brink has been directly involved in Gensler's work with Activision while Kotick ran the Company. Meyer was not an independent director.

40. Defendant Robert Morgado ("Morgado"), age 81, was a Company director from February 1997, and Lead Independent Director from 2018, until the Merger. Morgado also served on the Compensation Committee from June 1998, including as Chairman from 2002, until the Merger. Morgado's Compensation Committee consistently granted Kotick substantial compensation, making Kotick by 2013 among the highest paid CEOs in the gaming industry.¹⁸ By 2020, Morgado's Compensation Committee made Kotick the second-highest paid CEO in the gaming industry.¹⁹ Morgado was also Chair of the Nominating and Corporate Governance Committee from 2006 until the Merger. Morgado survived numerous Board shake-ups over the years. Of Activision's eight-member Board before the Vivendi Merger, Morgado was among four directors, including Kotick and Kelly, that continued as

¹⁸ Rob Golum, *Activision's Kotick Gets 8-Fold Raise to Reach Top U.S. Pay Tier*, BLOOMBERG (Apr. 27, 2013), <https://www.bloomberg.com/news/articles/2013-04-26/activision-ceo-s-64-9-million-puts-him-in-top-ranks-of-pay-1-#xj4y7vzkg>.

¹⁹ *Game CEO Pay in 2020*, GAMES ONE, <https://gamesone.co/ceo-pay/>.

directors after the Vivendi Merger. In addition, in 2013, in connection with the ASAC Transaction, Morgado served on a special committee of Activision directors (the “ASAC Special Committee”) that negotiated opposite Kotick and Kelly and rubber-stamped the deal that Kotick and Kelly wanted. In a May 27, 2022 letter to Activision shareholders, an activist investor, after noting that “Activision’s Board is comprised of an unusually high number of extremely long-tenured executives,” wrote:

The structure of Activision’s Board concentrates authority in a highly unusual way: in addition to serving as Lead Independent Director, Mr. Morgado also serves as Chairman of the Compensation Committee and of the Nominating and Corporate Governance Committee. In other words, a single extremely long-tenured director occupies the Board’s primary independent leadership position, oversees executive pay, and heads the committee responsible for determining if the Board requires refreshment and identifying suitable director candidates.

Morgado was a member of the Gang of Four that helped Kotick orchestrate the Merger. He served on the *ad hoc* committee that improperly approved the dividend term. He was not an independent director.

41. Defendant Peter Nolan (“Nolan”) was an Activision director from 2003 to 2008 and from October 2013 until the Merger. Nolan served on the Audit Committee from 2019 until the Merger. Nolan is a Senior Advisor at Leonard Green

& Partners, L.P. (“LGP”), which he joined in 1997. In 2012, when Nolan was LGP’s Managing Director, Kotick and Kelly approached him with a pitch for LGP to invest in ASAC as a limited partner and LGP did.²⁰ Kotick and Kelly subsequently asked Nolan to re-join the Board. Nolan’s LGP colleagues had concerns about Nolan joining the Board because it would limit LGP’s ability to trade and hedge in Activision stock. Nolan ultimately joined the Board, however, because LGP recognized that it “value[s] its relationship with Kotick and Kelly.”²¹ As one of Nolan’s partners observed, the “[m]ain reason to even consider [joining] is if Bobby/Brian really want it.”²² Because of the long relationship of Nolan and LGP with Activision, Kotick and Kelly, Nolan was not an independent director.

42. Defendant Dawn Ostroff (“Ostroff”) was a Company director from June 2020 until the Merger. She served on the Compensation Committee from 2021, and the WRC upon its November 22, 2021 formation, until the Merger. Ostroff has known Kotick for years.²³ Because of her long relationship with Kotick, Ostroff was not an independent director.

²⁰ See *Activision*, 124 A.3d at 1036.

²¹ *Id.*

²² *Id.*

²³ Cynthia Littleton, *Bobby Kotick Breaks His Silence: Embattled Activision CEO Addresses Toxic Workforce Claims as Microsoft Deal Hangs in Balance*, VARIETY (May

43. Defendant Casey Wasserman (“Wasserman”) was a Company director and member of the Nominating and Corporate Governance Committee from July 2015 until June 21, 2022. Wasserman lives in Hollywood, California—like Kotick—and has teamed up with Kotick over the years. In 2004, Kotick and Wasserman co-chaired the Tony Hawk Foundation’s Stand Up for Skateparks charity event in Studio City. Kotick and Wasserman have been co-Trustees of the Los Angeles County Museum of Art (“LACMA”) since 2007. Wasserman has served as a LACMA Trustee since 2004 and Kotick, who is Vice Chair, since 2007. Wasserman and Kotick are also both listed in Jeffrey Epstein’s “Little Black Book.” Wasserman is also connected to Microsoft. Wasserman is the founder and CEO of “Wasserman” (f/k/a/ Wasserman Media Group), a Los Angeles-headquartered talent agency. Microsoft is one of Wasserman’s most important clients and largest sources of revenue. For years, Wasserman has partnered with Microsoft to provide technology to the NFL. Wasserman calls the partnership “Surface on the Sidelines,” and has described it as follows:

In partnership with Microsoft, Wasserman developed custom hardware and software systems to revolutionize professional football game play and drive digital transformation across the NFL . . . Once the product and

31, 2023), <https://variety.com/2023/digital/news/activision-blizzard-ceo-addresses-toxic-workforce-claims-microsoft-deal-1235628361/>.

technology passed all the necessary tests, we worked with Microsoft and the NFL to distribute the tablets to teams across the country.²⁴

In a 2017 interview with the *Financial Times*, Wasserman explained that clients like Microsoft bring in a bigger proportion of the agency's annual revenue than individual clients, and the agency can more quickly grow and profit from such a relationship. The *Financial Times* quoted Wasserman as explaining:

“Once an athlete is in a contract the only way to grow [that side of the business] is to add another athlete,” he says. The marketing and media part “is more scalable” – meaning it can increase in size without incurring substantial additional costs.²⁵

Thus, Microsoft is among Wasserman's largest sources of revenue. Significantly, neither the Proxy nor the Books and Records indicate that the Board was aware of or considered Wasserman's relationship with Microsoft. Because of his

²⁴ *Surface on the Sidelines, Microsoft in Brands*, WASSERMAN, <https://www.teamwass.com/work/surface-on-the-sidelines> (as of January 25, 2023); see also Max Simpson, *Microsoft's NFL Campaigns Culminate in Super Bowl Week Activision*, FRONT OFFICE SPORTS (Apr. 28, 2019), <https://frontofficesports.com/microsoft-super-bowl-nfl/> (Wasserman's Vice President of Marketing Services and Account Lead for Microsoft explaining that Wasserman facilitated Microsoft's collaboration with the NFL, which they branded Make Believe Happen). The collaboration continues to this day. See <https://www.teamwass.com/case-studies/surface-on-the-sidelines/>.

²⁵ Matthew Garrahan, *Wasserman, talks up LA's Olympic bid*, FINANCIAL TIMES (June 25, 2017), <https://www.ft.com/content/4c30189c-566c-11e7-80b6-9bfa4c1f83d2>.

relationships with Kotick, Activision and Microsoft, Wasserman was not an independent director.

44. The individual directors described above are referred to herein as the “Director Defendants.” The Director Defendants identified at paragraphs 33-34 and 36-43 (all of the Director Defendants, except Carr) served on the Activision Board during events that formed part of the Harassment Scandal, and approved the Draft Merger Agreement on January 17, 2022, at which time they were also named defendants in lawsuits, and/or implicated in investigations, arising out of the Harassment Scandal. Claims relating to the timing, negotiation and approval of the Merger and the Merger Agreement are brought against them. At the time of the negotiation and approval of the Draft Merger Agreement, all of these Director Defendants other than Kotick and Kelly owned approximately 600,000 of Activision’s over 775 million shares, less than one-tenth of one percent. Most of those shares were not purchased by them with their own funds, but were given to them for serving on the Activision Board.

45. The Director Defendants identified at paragraphs 33-36 and 38-42 above (Carr and all of the Director Defendants, except Hartong and Wasserman) served on the Activision Board when Activision continued the invalid Merger Agreement beyond July 18, 2023 and failed to fix the statutory defects with respect

to the Merger Agreement. At all of these times, all of these Director Defendants were named defendants in lawsuits arising out of the Harassment Scandal and the Merger. Claims related to the continuation of the Merger Agreement beyond the Termination Date, the Letter Agreement and the Board's continued failure to cure the statutory defects in the Merger and the Merger Agreement are brought against them. Between the execution of the Merger Agreement and the Merger's close, all of these Director Defendants, except for Kotick, received 6,206 shares of Activision common stock as director compensation for which they each received \$589,570 in the Merger.

46. Defendant Microsoft develops and supports a wide range of software, services, devices and solutions, including cloud-based solutions, operating systems, server applications, business solution applications, games, PCs, tablets, gaming and entertainment consoles, other intelligent devices and related accessories.²⁶ For over twenty years, Microsoft and its senior executives have developed and maintained an ongoing relationship and regular dialogue with Kotick and Activision. Microsoft was one of Activision's largest customers in 2020-2021. Microsoft is incorporated

²⁶ Microsoft Answer ¶¶ 2, 9, 18; Activision Answer ¶¶ 2, 9.

in Washington and headquartered in Redmond, Washington. Its common stock is listed on the NASDAQ under the ticker symbol “MSFT.”²⁷

47. Defendant Anchorage was formed by Microsoft on January 13, 2022, as a Delaware corporation and a wholly owned subsidiary of Microsoft for the purpose of effectuating the Merger. Anchorage was a party to the Merger Agreement. In the Merger, Anchorage merged with and into Activision, with Activision surviving the Merger as the successor to Anchorage.

48. Microsoft and Anchorage are collectively referred to as the “Microsoft Defendants.” The Director Defendants and Microsoft Defendants are collectively referred to herein as the “Defendants.”

III. FACTUAL BACKGROUND OF THE MERGER

A. Kotick Was Implicated In and Aware of the Harassment

49. Activision’s toxic culture existed for decades and Kotick and other senior managers were aware of it. *The Wall Street Journal* reported in *Kotick Knew* that Kotick and other senior managers were participants.²⁸ Indeed, numerous senior

²⁷ Microsoft Answer ¶ 18; Activision Answer ¶ 18.

²⁸ Kotick reportedly reached an out of court settlement with his former assistant after he left her a voicemail in 2006 threatening to have her killed. In July 2018, Kotick received an email from the lawyer for a former Activision employee who said she had been raped by her male supervisor. Activision reached an out of court settlement a few months later.

managers resigned or were forced out by their participation in, and/or knowledge of, misconduct at Activision. Harassment and discrimination were widely known in the industry and were so prevalent at Activision that it is reasonably conceivable and a fair inference that the Director Defendants were aware for an extended time that harassment and discrimination were occurring at Activision. It is also reasonably conceivable and a fair inference that at least some Director Defendants, particularly long-time Board members, attended one or more parties or events where improper activities occurred. Even after “Gamergate” in 2014 and harassment became a major issue as a result of scandals and the #MeToo movement, Kotick and the Board failed to control harassment and discrimination at Activision. Activision’s approach to addressing its toxic workplace has been a combination of denial and window-dressing.

50. The DFEH and EEOC began their investigations in 2018. Kotick knew about the investigations. So did the Board, as it acknowledged in a June 16, 2022 filing with the SEC. Yet harassment and discrimination continued at Activision and known perpetrators of this misconduct remained employed at Activision.

51. After more than two years of investigation, on June 15, 2021, the EEOC issued a letter of determination finding reasonable cause that Activision violated Title VII of the Civil Rights Act of 1964 by subjecting its employees to sexual

harassment, discrimination and retaliation.²⁹ On June 24, 2021, the DFEH issued a cause finding of Company-wide sexual harassment, discrimination and retaliation in violation of the California Fair Employment and Housing Act and the California Equal Pay Act.³⁰

52. Kotick hired senior managers to help contain the fallout from the investigations, including, during the first half of 2021, a Chief Compliance Officer (“CCO”), Frances Townsend (“Townsend”), and an overseer for “Corporate Social Responsibility,” Brian Bulatao (“Bulatao”). Meanwhile, managers who had failed to respond to complaints of harassment and discrimination left the Company quietly, including Activision’s then-CFO Dennis Durkin (“Durkin”), then-Chief Legal Officer (“CLO”) Chris B. Walther (“Walther”) and then-Senior Director of Securities and Corporate Governance Jeremy Wilson (“Wilson”), who were not of typical retirement age.

53. Kotick, however, remained. On April 29, 2021, Activision disclosed in a Form 8-K that on April 28, 2021 its Compensation Committee (*i.e.*, Morgado (Chair), Bowers and Ostroff) extended Kotick’s Employment Agreement from

²⁹ See *EEOC v. Activision Blizzard, Inc., et al.*, No. 2:21-cv-07682-DSF-JEM (C.D. Cal.) (“EEOC Action”).

³⁰ See *Dept. Of Fair Employment & Housing vs. Activision Blizzard, Inc., et al.*, No. 21STCV26571 (Cal. Super. Ct., L.A. Cty.) (“DFEH Action”).

December 31, 2021 to March 23, 2023, citing in the annual proxy statement filed the next day (the “2021 Proxy”) Kotick’s “leadership, vision, and operational expertise.” The Compensation Committee was aware of the EEOC and DFEH investigations when it praised Kotick and awarded him a contract extension.

54. The slow-motion Harassment Scandal train wreck quickened pace after the DFEH filed suit against Activision on July 20, 2021 (the “DFEH Action”). The DFEH Action triggered derivative suits and a class action against the Company, Kotick, the Director Defendants and officers.³¹ It also triggered Company-wide outrage and walkouts by Activision employees.

55. In a July 27, 2021 letter, Kotick said he “asked the law firm WilmerHale to conduct a review of our practices and procedures to ensure that we have and maintain the best practices to promote a respectful and inclusive workplace.” The selection of WilmerHale generated further opposition by Activision employees, who

³¹ See *Cheng v. Activision Blizzard, Inc. et al.*, No. 2:21-cv-06240-PA-JEM (C.D. Cal.) (the “Federal Securities Action”) (filed August 3, 2021, against Activision, Kotick, Durkin and Activision’s former CFO Spencer Neumann (“Neumann”), and adding Kelly and Activision’s CFO Armin Zerza (“Zerza”) as defendants on December 3, 2021); *York Cty. on Behalf of Cty. of York Ret. Fund v. Kotick et al.*, No. 21STCV28949 (Cal. Super. Ct., L.A. Cty.) (“York”) (consolidated actions filed August 6, August 10 and August 11, 2021, against the Director Defendants and Brack); *Kahnert v. Kotick et al.*, No. 2:21-cv-08968-PA-JEM (C.D. Cal.) (“Kahnert,” together with York, the “California Derivative Actions”) (filed November 15, 2021 against the Director Defendants, Durkin and Neumann); see also *Stichting Depositary APG Developed Mkts. Equity Pool et al. v. Activision Blizzard, Inc.*, No. 2021-0975-KSJM (Del. Ch.) (one of many Section 220 actions).

claimed the firm could not do an independent review and had a record of opposing workers. WilmerHale had performed legal work for Activision for many years, going back to at least 2007. Labor relations experts publicly questioned whether Activision was responding to the scandal in good faith by hiring a law firm two years after the DFEH investigation began.

56. It soon became clear that WilmerHale was not hired to improve Activision's practices and procedures but to defend those responsible for the Harassment Scandal. Between September 7 and November 18, 2021, WilmerHale appeared on behalf of Activision, Kotick, the Director Defendants and other former directors and officers in numerous lawsuits in which they were named defendants.

B. Others Forced or Driven to Leave, But Kotick Stays

57. In an August 3, 2021 press release, Activision announced that J. Allen Brack ("Brack"), president of Blizzard, who was identified in the DFEH complaint as having been aware of and failing to remediate complaints of harassment, discrimination and retaliation, was leaving. Jesse Meschuk ("Meschuk"), a high-level HR executive who was identified as having failed to pursue harassment complaints, also left that week. Blizzard game designers Luis Barriga ("Barriga"), Jesse McCree ("McCree") and Jonathan LeCraft ("LeCraft"), who were

photographed in the “Cosby Suite,”³² were let go on August 11, 2021. Jen Oneal (“Oneal”) was appointed a co-leader of Blizzard but resigned from her position three months later and left the Company before the end of the year. In a September email, she said she did not think Activision would remedy its toxic workplace, she had been sexually harassed earlier in her Activision career, she had attended a 2007 party with Kotick featuring scantily clad dancers on stripper poles, and she had been “tokenized, marginalized, and discriminated against.”³³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Kotick Knew* reported that senior women were leaving the Company because they had no faith in Kotick. Kotick still kept his position.

58. On September 20, 2021, *The Wall Street Journal* reported that the SEC was investigating Activision, and had subpoenaed the Company, Kotick and others

³² Activision male employees infamously drank and harassed women in a hotel room they nicknamed the Cosby suite, after Bill Cosby.

³³ *Kotick Knew*.

³⁴ [REDACTED]

and was asking for minutes of board meetings since 2019 and Kotick's communications regarding complaints of harassment and discrimination. Kotick claimed in a press release that Activision was cooperating with the SEC's subpoena.

59. Activision's Chief People Officer ("CPO") Claudine Naughton ("Naughton") left Activision on September 20, 2021 with a Separation Agreement for over \$1.3 million in salary and bonus, a cash out of 43,436 options and continued vesting of 21,896 RSUs. Kotick stayed in his job.

60. On September 27, 2021, the EEOC filed its suit against Activision (the "EEOC Action"). The EEOC also filed a [Proposed] Consent Decree it negotiated with Activision to settle the EEOC Action, which, among other provisions, required Activision to pay \$18 million to harassment claimants. Kotick offered more hollow promises of reform and kept his job (the "EEOC Consent Decree").

61. On July 21, 2021, Activision's stock closed at \$90.63. By September 27, 2021, the stock price had declined to \$76.64.

C. Kotick's Pay Cut Agreement, the October 28, 2021 Board Meeting and Long-Range Plan

62. On Thursday, October 28, 2021, Kotick issued a letter to all employees which was distributed as an Activision press release (the "October Press Release"). He admitted that Activision, on his watch, had failed to put systems, policies, people and guardrails in place to establish a safe and inclusive workplace. He said the

EEOC investigation, public discourse and employee reports “helped shine a light” on sexist and discriminatory practices. But Kotick had not been in the dark; he had just turned a blind eye to years of misconduct.

63. Kotick also stated in his October 28, 2021 letter that he had asked the Board to reduce his total compensation to \$62,500 per year “until the Board had determined that we have achieved the transformational gender-related goals and other commitments” he had announced (the “Pay Cut Agreement”). The press release had its intended effect: it was widely reported that Kotick was taking an almost complete pay cut.

64. On October 28, 2021, the Activision Board met. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³⁵ Activision_0000825-833.

³⁶ *Id.* at 825.

[REDACTED]

[REDACTED] Indeed, all of the Activision directors—not just Kotick—were obligated to address Activision’s toxic environment. As the 2021 Proxy acknowledged: (i) the Audit Committee’s (Corti, Hartong and Nolan) responsibilities included overseeing risk investigation, overseeing compliance with legal and regulatory requirements, monitoring Activision’s ethics and compliance program and regularly receiving reports from senior management with respect to significant risks and controls and investigation plans with respect to those risks; (ii) the Compensation Committee (Morgado, Bowers and Ostroff) was responsible for overseeing Activision’s human capital, including diversity, equity and inclusion initiatives; (iii) the Corporate Governance Committee (Morgado, Meyer and Wasserman) was responsible for overseeing social and governance strategies, practices, policies and reporting; and (iv) the Board was responsible for overseeing overall risk management and delegating certain risk management oversight to a standing committee of the Board.

65. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

66. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³⁷ *Id.* at 825-826.

³⁸ *Id.* at 826-828; Activision_0000645 at 703-791.

³⁹ Activision_0000645 at 705.

⁴⁰ *Id.*

⁴¹ *Id.* at 721, 728-730, 742, 754-755, 766, 776.

[REDACTED]

[REDACTED]

[REDACTED]

67. [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

⁴² *Id.* at 746.

⁴³ *Id.* at 719.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

[REDACTED]

68. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Proxy contains no description of the October 28, 2021 Board meeting.

69. The reason for and timing of Kotick’s announcement of his Pay Cut Agreement became clear when, four days later, Activision announced that it was delaying the release of two key products: Blizzard’s *Overwatch 2* and *Diablo IV*. Activision’s November 2, 2021 investors presentation acknowledged that *Overwatch 2* and *Diablo IV* were “two of the most eagerly anticipated titles in the industry,” and that the delayed releases would in turn delay Activision’s anticipated “financial uplift[.]” Activision’s stock price tanked, falling 14% from \$77.67 to \$66.75 in a single day.

⁴⁸ Activision_0000835-838.

70. Activision claimed in its November 2, 2021 investors presentation that the delays were intended to “giv[e] the teams some extra time to complete production and continue growing their creative resources to support the titles after launch[.]” Activision failed to mention, however, that the teams needed “extra time” because of the Harassment Scandal. *Diablo IV*’s lead designers were Barriga and McCree, who left Activision after photos of them in the Cosby Suite were made public. *Overwatch* and *Overwatch 2*’s director and lead game designer Jeff Kaplan (“Kaplan”) left in April 2021 after nineteen years. Further, *Overwatch 2*’s producer Tracy Kennedy (“Kennedy”) blamed Kotick for these departures, writing to Kotick on Twitter: “almost entire teams [at *Overwatch*] are turning over and citing you as the reason.”⁴⁹

71. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴⁹ Tracy Kennedy (@RiotLavalier), TWITTER (Jan. 19, 2022, 1:41 pm), <https://twitter.com/RiotLavalier/status/1483872301175107584?lang=en>.

⁵⁰ Activision_0000645 at 764.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

It is fair inference and reasonably conceivable that the delays in the release of *Overwatch 2* and *Diablo IV* were largely related to the departures and fallout triggered by the Harassment Scandal.

72. Also on November 2, 2021, Activision announced that Oneal was leaving the Company, which analysts noted likely contributed to the 14% fall in Activision's stock price that day. The stock price decline caused by the

⁵¹ *Id.* at 765-766.

⁵² *Id.* at 769.

⁵³ *Id.* at 770.

⁵⁴ *Id.* at 776.

announcement of the Harassment Scandal related delay in *Diablo IV* and *Overwatch 2* was a further reason why November 2021 was not an appropriate time to be negotiating a sale of Activision.

73. Kotick knew when he announced his Pay Cut Agreement on October 28, 2021 that Activision was about to announce the delayed releases of *Overwatch 2* and *Diablo IV*, as well as Oneal's resignation, and that these announcements would likely have yet another detrimental impact on the Company. Kotick announced his Pay Cut Agreement to soften the fallout he might suffer.

D. The November 16, 2021 *Wall Street Journal* Article and Activision's Response

74. On November 15, 2021, Activision's stock closed at \$70.01. On November 16, 2021, *The Wall Street Journal* published *Kotick Knew*, stating that "Activision CEO Bobby Kotick Knew for Years About Sexual Misconduct Allegations at Videogame Giant." *Kotick Knew* reported that "people with knowledge of the board" said Kotick had not informed the Board of the 2018 rape reports and that he had told directors and other executives he was not aware of many misconduct allegations and had downplayed others. It is a fair inference and reasonably conceivable that "people with knowledge of the board" refers to Activision directors.

75. *Kotick Knew* cited “people familiar with the matter and internal documents,” including memos, emails and regulatory requests. Those documents and “interviews with former employees and others familiar with the company” showed Kotick knew about many allegations of employee misconduct but did not fully inform the Board even after regulators began investigating the incidents in 2018. *Kotick Knew* reported:

The board of directors was blindsided by the California lawsuit’s allegations ... according to people familiar with the board. Directors questioned Mr. Kotick about what he knew and why they hadn’t been better informed. He has told them any cultural issues were centered at the company’s Blizzard Entertainment unit, which he said he had resolved years earlier, these people said.

76. It is a fair inference and reasonably conceivable the “people familiar with the board” refers to Activision directors. The California lawsuit’s allegations had been known since July 2021, so if the Board had been “blindsided” it was as of July 2021. The DFEH investigation included the directors’ knowledge and handling of the sexual harassment and discrimination allegations and how the directors worked with Activision’s senior executives. DFEH subpoenaed Activision’s directors. By November 16, 2021, the Board knew full well about the Harassment Scandal. The article does not say when the directors questioned Kotick “about what

he knew and why they hadn't been better informed." But certainly, they had that opportunity nearly three weeks earlier at the October 28, 2021 Board meeting.

77. In an interview given shortly before the *Kotick Knew* article, Kotick claimed he had been transparent with the Board and had given them as much information as they required. On November 16, 2021, Activision spokeswoman Helaine Klasky said in a written statement that Kotick was not "informed of every report of misconduct at every Activision Blizzard Company," that Activision's Board had been "informed at all times with respect to the status of regulatory matters" and that Kotick had not said the problems were only at Blizzard. Thus, the Board claimed to have been blindsided and not fully informed by Kotick, while Kotick claimed he had been transparent and had fully informed the Board. In short, both Kotick and the Board recognized the exposure they faced as a result of the Harassment Scandal and sought to cover for themselves by implicating the others.

78. Contrary to Kotick's claim that harassment and discrimination had only happened, and had been resolved, years ago, *Kotick Knew* reported that thirty women employees wrote an email in 2020 (that Kotick was aware of) complaining of "unwanted touching, demeaning comments, exclusion from important meetings and unsolicited comments on their appearance."

79. In response to *Kotick Knew*, over one-hundred current and former employees participated in a protest that same day and demanded that Kotick resign. Activision shares fell 6% on November 16, 2021 after *Kotick Knew* was published, closing at \$66.14.

80. The same day that *The Wall Street Journal* published *Kotick Knew*, Activision and Kotick, as well as the Activision Board, issued press releases defending Kotick. In a tone-deaf response, Activision said it was disappointed by *Kotick Knew*, which it described as “a misleading view of Activision Blizzard and our CEO.” Defending Kotick, Activision claimed: “Instances of sexual misconduct that were brought to his attention were acted upon.”⁵⁵ Thus, Activision admitted that instances of misconduct had been brought to Kotick’s attention. Apparently to Kotick and Activision, a quick, quiet settlement of rape charges constituted “acting upon” sexual misconduct. *The Wall Street Journal* noted in another article published on November 16, 2021 that Activision’s statement did not challenge the facts reported in *Kotick Knew*.⁵⁶

⁵⁵ *Activision Blizzard Issues Statement Regarding Recent Article*, ACTIVISION BLIZZARD (Nov. 16, 2021) (emphasis added), <https://investor.activision.com/news-releases/news-release-details/activision-blizzard-issues-statement-regarding-recent-article>.

⁵⁶ See Sarah E. Needleman, *Activision Blizzard Employees Demand CEO Bobby Kotick’s Resignation*, WALL ST. J. (Nov. 16, 2021), <https://www.wsj.com/articles/activision->

81. Activision’s press release also touted changes underway at Kotick’s direction, but left unexplained Kotick’s failure to make changes for years even when there were multiple ongoing investigations. Activision attempted to portray Kotick as part of the solution when he was a major part of the problem.

82. The Board’s November 16, 2021 press release focused on changes “[u]nder Bobby Kotick’s leadership,”⁵⁷ also attempting to portray Kotick as part of the solution, while ignoring the failure of that “leadership” to make real changes for many years. The Board’s press release gave Kotick a complete and unqualified endorsement:

The Board remains confident that Bobby addressed workplace issues brought to his attention . . . The Board remains confident in Bobby Kotick’s leadership, commitment and ability to achieve these goals.⁵⁸

Thus, the Board admitted that “workplace issues” had been brought to Kotick’s attention. This admission makes it reasonably conceivable that the Board knew of

blizzard-employees-demand-ceo-bobby-koticks-resignation-11637102139?mod=Searchresults_pos2&page=1.

⁵⁷ *Activision Blizzard Board of Directors Issues Statement Regarding Recent Article*, ACTIVISION BLIZZARD (Nov. 16, 2021), <https://investor.activision.com/news-releases/news-release-details/activision-blizzard-board-directors-issues-statement-regarding>.

⁵⁸ *Id.*

the misconduct at Activision, but, for Kotick's protection and its own, claimed that Kotick's responses were proper, though the Board knew otherwise.

83. The responses of Activision and its Board to the *Kotick Knew* article raise a fair inference and make it reasonably conceivable that by November 16, 2021, the Board knew that Kotick had been aware of instances of sexual misconduct but had determined to join Kotick and his flacks in a campaign of denial and minimization in order to protect Kotick and the Board.

84. In the wake of *Kotick Knew*, even more employees, investors and others demanded that Kotick resign. Nearly 1,900 Activision employees—almost 20% of all employees—signed a petition calling for Kotick to resign. Dan Bunting (“Bunting”), co-head of Activision Publishing's *COD* studio Treyarch, who was identified in *Kotick Knew* as among the harassers that Kotick had protected, resigned on November 16, 2021. After July 27, 2021, over thirty employees were pushed out of Activision and over forty received written reprimands. Yet the Board declined to hold Kotick accountable.

85. Most ominously, Activision's most important business partners, Microsoft and Sony, were highly critical of Activision and sought to distance themselves from the Company. Microsoft manufactures the Xbox console and Sony manufactures the PlayStation console, the videogame industry's two leading

consoles.⁵⁹ Activision’s largest franchise, *COD*, became successful largely based on Microsoft’s Xbox Live platform and most of Activision’s other games were published on Xbox consoles. On November 18, 2021, Microsoft then-VP of Gaming Spencer sent an email to Microsoft employees that referred to *Kotick Knew* and indicated that he and Microsoft’s gaming leadership were “disturbed and deeply troubled by the horrific events and actions” at Activision, saying that:

This type of behavior has no place in our industry.⁶⁰

Spencer said Microsoft was reevaluating its relationship with Activision in light of the Harassment Scandal.⁶¹

86. Sony’s PlayStation Chief Jim Ryan (“Ryan”) also sent a note to Sony employees saying he and his leadership team were “disenchanted and frankly stunned to read” of Activision’s “deep-seated culture of discrimination and

⁵⁹ Microsoft Answer ¶¶ 26, 28-29, 66; Activision Answer ¶¶ 26, 28-29, 66.

⁶⁰ Jason Schreier, *Xbox Chief says He’s Evaluating Relationship with Activision*, BLOOMBERG (Nov. 18, 2021), <https://www.bloomberg.com/news/articles/2021-11-18/xbox-chief-says-he-s-evaluating-relationship-with-activision>.

⁶¹ *Id.*; Kirsten Grind, Cara Lombardo and Ben Fritz, *Activision Blizzard’s Workplace Problems Spurred \$75 Billion Microsoft Deal*, WALL ST. J. (Jan. 18, 2022), <https://www.wsj.com/articles/activision-blizzard-microsoft-deal-11642557922>.

harassment.”⁶² In response to the stinging criticism and threats to change business relationships with Activision by two of its most important business partners, Activision issued a statement that it valued feedback from its “valued partners” and would be “engaging with them further.”⁶³

87. The growing controversy over Kotick and Activision caused JPMorgan Chase to cut its recommendation on Activision’s stock, observing that the recent negative headlines had created uncertainty.⁶⁴

88. *The Wall Street Journal* reported that at a meeting with Company executives on Friday, November 19, 2021, Kotick said he might leave the Company if the sexual misconduct issues could not be fixed quickly.⁶⁵ Thus, Kotick conceded the Harassment Scandal could force him to have to leave the Company.

⁶² Jason Schreier, *PlayStation Chief Criticizes Activision’s Response to Crisis*, BLOOMBERG (Nov. 17, 2021), <https://www.bloomberg.com/news/articles/2021-11-17/playstation-chief-criticizes-activision-response-to-allegations#xj4y7vzkg>.

⁶³ Jason Schreier, *Xbox Chief says He’s Evaluating Relationship with Activision*, BLOOMBERG (Nov. 18, 2021), <https://www.bloomberg.com/news/articles/2021-11-18/xbox-chief-says-he-s-evaluating-relationship-with-activision>.

⁶⁴ Dan Weil, *Activision Shares Fall, as J.P. Morgan Downgrades to Neutral*, THE STREET (Nov. 18, 2021), <https://www.thestreet.com/investing/activision-shares-fall-as-jp-morgan-downgrades-to-neutral>.

⁶⁵ Kirsten Grind, Ben Fritz & Sarah E. Needleman, *Activision Blizzard CEO Bobby Kotick Tells Colleagues He Would Consider Leaving if He Can’t Quickly Fix Problems*, WALL ST. J. (Nov. 21, 2021), <https://www.wsj.com/articles/activision-blizzard-ceo-bobby-kotick-tells-colleagues-he-would-consider-leaving-if-he-cant-quickly-fix-problems-11637533064>.

E. Kotick Could and Should Have Been Fired for Cause

89. Kotick's October 1, 2016 Employment Agreement provides in Section 7(d) that his employment "shall be terminated" for:

Cause. By the Company, for cause, but only upon a vote of a majority of the entire Board at a meeting duly called at which Executive shall have the right to be present and be heard. The term "**Cause**" means ... (iii) willful misconduct or gross negligence by the Executive in connection with the performance of his duties that has caused or is likely to cause severe harm to the Company; (iv) intentional dishonesty by the Executive in the performance of his duties hereunder which has a material adverse effect on the Company; or (v) a material breach by the Executive of his material obligations.

90. Kotick's contribution to and handling of sexual harassment at Activision constituted "willful misconduct or gross negligence" which "caused or is highly likely to cause severe harm to the Company," including numerous investigations and suits and the dramatic drop in Activision's stock price, damage to Activision's business relationships and reputation, exposure to investigations and litigation and the revolt and revulsion among its employees. His attempts to minimize and cover up the scandal, his public statements concerning the scandal and his failure to inform the Board fully and candidly involved "intentional dishonesty" which had "a material adverse effect on the Company." His conduct represented a material breach of material obligations under the Employment Agreement.

91. Under Sections 9(c)(i)-(ii) of Kotick’s Employment Agreement, upon termination for Cause, Kotick would only be entitled to Accrued Obligations and all vested options would expire.⁶⁶ According to the Proxy and Activision’s 2022 annual proxy statement, if Kotick had been fired for Cause, he would have forfeited 2,201,878 unvested options and any unvested Performance Stock Units. Moreover, under Section 1(a)(13) of Kotick’s Employment Agreement, for an Employment Violation (*i.e.*, any material breach of his Employment Agreement), Kotick would be subject to forfeiture of outstanding PSUs or Vested Shares and a clawback of a Recapture Amount consisting of the gross realized or unrealized gain from the vesting of PSUs or delivery of Vested Shares within a Look-Back Period of twelve months.

92. Kotick had been granted PSUs by the Compensation Committee on December 28, 2018, August 12, 2019 and December 31, 2020 that were to vest in March 2022. The Committee also granted him PSUs on September 9, 2020 and December 31, 2020 that vested on March 1, 2021. According to the 2021 Proxy, the fair value of Kotick’s 2020 and 2021 equity grants was \$149,856,770. Kotick’s

⁶⁶ “Accrued Obligations” under Section 9(a)(1) of Kotick’s agreement only include “Base Salary through the Date of Termination, any earned but unpaid Annual Bonus for any prior fiscal year, any reimbursement due to Executive.”

outrageous compensation caused stockholders to solicit votes “AGAINST” his pay, and a Glass Lewis recommendation of a “no” vote on Say on Pay, at the 2021 annual meeting. Activision failed to achieve the required vote on Say on Pay at its June 14, 2021 annual meeting but extended the voting and claimed on June 21, 2021 it had scrounged up enough votes to pass the proposal.

93. In light of the Harassment Scandal on his watch, Kotick and other Director Defendants would have faced even more widespread stockholder dissent at Activision’s 2022 annual meeting. The Merger, however, would provide an excuse to hold a rushed vote on the Merger Agreement before the 2022 annual meeting and save Kotick’s job.

F. Microsoft Takes Advantage of the Precarious Position of Kotick and the Board

94. According to the Proxy, Activision and Microsoft have developed and maintained a relationship for over twenty years. Kotick engaged in a “regular dialogue”⁶⁷ with Microsoft’s Spencer, with whom Kotick said he had “a great relationship[.]”⁶⁸ Kotick also had a relationship with Microsoft’s CEO Satya

⁶⁷ Proxy at 32.

⁶⁸ Dean Takahashi, *Bobby Kotick interview: Why Activision Blizzard did the deal with Microsoft*, VENTUREBEAT (Jan. 18, 2022), <https://venturebeat.com/games/bobby-kotick-interview-why-activision-blizzard-did-the-deal-with-microsoft/>.

Nadella (“Nadella”), with whom Kotick spoke “[f]rom time to time[.]”⁶⁹ On November 19, 2021, three days after *Kotick Knew* was published, and the day after Spencer said Microsoft was reevaluating its relationship with Activision, Kotick spoke with Spencer.

95. The Proxy and the December 3, 2021 minutes describe the “conversation” but do not say whether it was in person, by videoconference or by telephone, who initiated the conversation or how it came about. Both indicated that the conversation was “on a different topic”⁷⁰ but do not identify what that topic was. However, on November 18, 2021 Spencer had severely criticized Activision and told Microsoft employees that Microsoft was reconsidering its relationship with Activision and Activision had responded by saying it would be reaching out to its valued partners. Thus, it is not only reasonably conceivable but likely that Kotick initiated the conversation, and that the unidentified topic was Microsoft’s reaction to the Harassment Scandal and *Kotick Knew*, which had been published three days earlier.

⁶⁹ Proxy at 32.

⁷⁰ *Id.*; Activision_0000567 at 568-569.

96. While the Proxy and minutes suggested that “in the course of a [November 19] conversation”⁷¹ Spencer raised the idea of Microsoft acquiring Activision “out-of-the blue” while he and Kotick were discussing something else, it is reasonably conceivable (and far more likely) that Kotick and Spencer did not ignore the elephant in the room (*i.e.*, Kotick’s and Activision’s plight in light of the Harassment Scandal and *Kotick Knew*), and Spencer’s acquisition overture had been invited by Kotick or was Spencer’s response as a solution to that plight. The Proxy was deliberately misleading because it omitted that the Harassment Scandal led to Microsoft’s acquisition overture.

97. Spencer recognized that the negative attention and pressure on Kotick would make the beleaguered CEO eager to sell Activision. Activision relied on Microsoft and Sony for a substantial portion of its revenue. Activision’s 10-K annual report for 2021 (the “10-K”) explained that Microsoft and Sony provide hardware platforms, digital platforms and video game consoles for consumers to use and pay for Activision’s games. The 10-K stated: “Due to our reliance on third-party platforms, platform providers are frequently able to influence our products and costs” with respect to consumer access and pricing. The 10-K explained on page 22:

⁷¹ *Id.*

The control that these platform providers have over consumer access to our games, the fee structures and/or retail pricing for products and services for their platforms and online networks and the terms and conditions under which we do business with them could impact the availability of our products or the volume of purchases of our products made over their networks and our profitability. The networks provided by these platform providers are the exclusive means of selling and distributing our content on these platforms . . . If the platform provider establishes terms that restrict our offerings on its platform, significantly alters the financial terms on which these products or services are offered, or does not approve the inclusion of content on its platform, our business could be negatively impacted . . . If these platforms deny access to our games, modify their current discovery mechanisms, communication channels available to developers, operating systems, terms of service, or other policies (including fees), our business could be negatively impacted.

98. The 10-K also stated on the same page:

The success of our console business is driven in large part by our ability . . . to develop commercially successful products for these consoles. We also rely on . . . the continued support for these consoles by their manufacturers, including our ability to reach consumers via the online networks operated by these console manufacturers . . . If the consoles for which we develop new software products or modify existing products do not attain significant consumer acceptance, we may not be able to recover our development costs, which could be significant.

99. Because of its commercial power over Activision, Microsoft had significant leverage during the Merger negotiations. If Microsoft distanced itself from Kotick and his mishandling of the Harassment Scandal by restricting consumers' access to Activision's games or manipulating the price of Activision's games, that would affect Activision's profitability. At the time of Kotick's November 19, 2021 conversation with Spencer, Microsoft and Sony had both denounced Kotick and his mishandling of the Harassment Scandal. Microsoft therefore had the upper hand: Kotick could sell Activision to Microsoft at the price that Microsoft wanted or risk Microsoft making changes to Activision's consumer access and fees. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Proxy, however, did not describe these aspects of the CDL or the major role of the Harassment Scandal in the Merger.

100. Microsoft, moreover, was eager to buy Activision. "Microsoft's all-in on gaming."⁷² Indeed, "[g]aming is the biggest and fastest-growing entertainment industry in the world."⁷³ Access to AAA content is crucial for Microsoft, and the

⁷² FTC Complaint ¶ 116 (quoting Nadella) (emphasis in original).

⁷³ Microsoft Answer at 2.

company strives to ensure it provides new AAA content to its consumers on a regular basis.⁷⁴ AAA games, however, are difficult and costly to produce because of the creative talent, budgets and time required to develop them.⁷⁵ Acquiring Activision—one of the Big 4 that reliably produces AAA games and owns some of the most valuable intellectual property in the gaming industry, including *COD*⁷⁶—would not only give Microsoft access to the constant stream of AAA games it needs, but make Microsoft a dominant player in the gaming industry. Acquiring Activision would also give Microsoft a presence “in mobile gaming, which is the fastest-growing segment of gaming and the place where 94% of gamers spend their time today.”⁷⁷ “[I]n 2020[,] the gaming industry was worth \$165 billion, with \$85 billion coming from mobile gaming[.]”⁷⁸ Microsoft, however, had “next to no presence in mobile gaming,”⁷⁹ while “three quarters of Activision’s gamers and more than a third of [Activision’s] revenues come from mobile offerings.”⁸⁰

⁷⁴ *Id.* ¶ 51; FTC Complaint ¶ 51.

⁷⁵ *See* FTC Complaint ¶ 3.

⁷⁶ *See id.* ¶ 46; Microsoft Answer ¶ 46.

⁷⁷ Microsoft Answer at 1.

⁷⁸ *Id.* ¶ 22.

⁷⁹ *Id.* at 1.

⁸⁰ *Id.* at 2.

101. During their November 19, 2021 conversation, Spencer asked Kotick to schedule a call with Nadella to take place the next day. In the wake of *Kotick Knew*, Microsoft and its senior management saw a company, a Board and a long-time friend in crisis and swooped in, knowing a CEO in an untenable position with whom Microsoft had a close relationship would jump at the chance for a big payment, rather than resigning in disgrace. Microsoft also knew that as Activision's most important business partner it had the upper hand in negotiations with Activision, particularly given its threat to reevaluate its relationship with Activision in light of the Harassment Scandal.

102. On November 20, 2021, Kotick had a call where Nadella affirmed Microsoft's interest in acquiring Activision. Kotick did not call a Board meeting to discuss Microsoft's overture until eighteen days later on December 3, 2021. Instead, Kotick "promptly"⁸¹ and selectively reported his November 19, 2021 conversation with Spencer to defendants Kelly and Morgado. The Proxy said that Kotick and Kelly spoke to Allen & Co. on November 19 after Kotick's call with Spencer and that Kotick spoke with Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") on November 20 after his call with Nadella. The December 3, 2021 minutes indicate

⁸¹ Proxy at 32.

[REDACTED]

[REDACTED]

103. The Proxy rationalized Kotick’s decision to disclose Microsoft’s overture to (i) Kelly, because he is Activision’s Chairman, (ii) Morgado, because he is Activision’s lead independent director and (iii) Allen & Co., because it “provided strategic financial advice to Activision”⁸² on other occasions. Kelly and Morgado, however, have worked with Kotick for over thirty years, and Kotick could count on them to help him orchestrate the deal and steer the Board into a Microsoft merger. Kotick could similarly rely on Allen & Co., who has been Kotick’s go-to financial advisor for years.

G. Allen & Co. Was Not Disinterested and Independent

104. Allen & Co. is a small firm known for building success by “patiently [], as Allen & Co. habitually does, [working] to build a client relationship.”⁸³ Its CEO Herb Allen (“Herb”), who has run the firm since 2002, and banker Nancy

⁸² *Id.*

⁸³ Carol J. Loomis, *Inside the Private World of Allen & Co. Putting a premium on personal ties, this family firm thrives in the land of giants*, CNN MONEY (June 28, 2004), https://money.cnn.com/magazines/fortune/fortune_archive/2004/06/28/374371/index.htm.

Peretsman (“Peretsman”), who has been with Allen & Co. since 1995, have nurtured their relationship with Kotick.

105. In 2007, Allen & Co. landed the job as Activision’s sole financial advisor on the \$18 billion Vivendi Merger. Herb and Peretsman advised Activision and Kotick was responsible for hiring them. The proxy filed in connection with the Vivendi Merger (the “Vivendi Merger Proxy”)⁸⁴ disclosed that Kotick and Kelly were working with Allen & Co. at least one month before discussing the potential merger with the Board. The Vivendi Merger Proxy also disclosed that Allen & Co. had been advising Activision “in connection with other potential transactions”⁸⁵ since 2002. Kotick, given his position as CEO and then-Chairman, would have engaged Allen & Co. since before 2002 on those other transactions.

106. By 2010, Kotick was regularly attending Allen & Co.’s exclusive “Sun Valley Conference,” otherwise known as “The Billionaire’s Summer Camp.”⁸⁶ The

⁸⁴ See Activision, Schedule 14A (Proxy Statement) (June 6, 2008).

⁸⁵ Vivendi Merger Proxy at 86. The Vivendi Merger Proxy states that Activision paid Allen & Co. a fee upon delivering a fairness opinion to the Board, and would pay Allen & Co. a further cash fee upon the completion of the transaction. The proxy does not otherwise disclose the financial terms of that agreement.

⁸⁶ Lucinda Shen, *From Ferrari to Facebook: The Incredible Client List of Wall Street’s Most Secretive Firm*, BUS. INSIDER INDIA (Oct. 21, 2015), <https://www.businessinsider.in/from-ferrari-to-facebook-the-incredible-client-list-of-wall-streets-most-secretive-firm/articleshow/49484550.cms>.

conference is invite-only for CEOs, institutional investors, Hollywood stars and their families; Allen & Co. pays the entire bill; and according to media reports, many of Allen & Co.'s deals are “birthed”⁸⁷ during the Sun Valley Conference.

107. In July of 2012, Activision was the talk of the Sun Valley Conference after reports emerged that Vivendi wanted to sell its then-61% stake in Activision. Kotick and Kelly promptly formed ASAC to acquire Vivendi's Activision shares, and engaged Allen & Co. to advise them. Thus, Allen & Co. advised ASAC, which was adverse to Activision's then-special committee of directors on which Morgado served.

108. Allen & Co.'s Peretsman also advertises herself as advising Kotick personally. Peretsman has a biography in connection with her membership with the American Academy of Arts & Sciences (“AAAS”). Her AAAS biography touts her work as advising tech and media giants (*e.g.*, Facebook, Google and Amazon) and on business deals (*e.g.*, Time Warner Cable's merger with Charter Communications) and then highlights her work for two individuals, stating that “[h]er extensive advisory practice includes a portfolio of assignments for many leading entrepreneurs

⁸⁷ *Id.*

of this generation, including Barry Diller and Bobby Kotick.”⁸⁸ Indeed, in 2009, Allen & Co. started a private wealth-management business overseeing the personal fortunes of technology entrepreneurs like Kotick.⁸⁹

109. Kotick also served as a director on the board of The Coca-Cola Company (“Coke” or “Coca-Cola”) (the “Coke Board”) with Allen & Co.’s former CEO and Herb’s father Herbert Allen Jr. (“Herbert”), as well as Herb. Herbert was a Coke director for thirty-nine years from 1982 until August 2021. Kotick was a Coke director alongside Herbert from 2012 until Herbert’s resignation. Then, on December 17, 2021—in the midst of the Merger negotiations—the Coke Board nominated Herb to fill his father’s vacant seat. Kotick was a member of the Coke Board’s Committee on Directors and Corporate Governance (“DGC”) that nominated Herb in the middle of the Merger negotiations. In addition, according to Coke’s SEC filings, Allen & Co. has historically served as one of Coke’s significant financial advisors, a decision that Kotick, as a long tenured Coke director, would have been involved in.

⁸⁸ Ms. Nancy Beth Peretsman, AMERICAN ACADEMY OF ARTS & SCIENCES, <https://www.amacad.org/person/nancy-beth-peretsman>.

⁸⁹ Miles Weiss, *Allen & Co. Shuts \$850 Million Arbitrage Fund*, CHICAGO TRIBUNE (Sep. 15, 2015), <https://www.chicagotribune.com/news/sns-wp-blm-news-bc-allen15-20150915-story.html>.

110. Allen & Co. is a repeat advisor to Activision (significantly influenced by Kotick) and Kotick. Allen & Co. was not going to risk this lucrative and patiently nurtured relationship by advising Kotick inconsistent with his wishes.

111. In addition, as discussed below, [REDACTED]

[REDACTED]

[REDACTED]

H. Kotick Signals to Microsoft that Activision is for Sale for \$90

112. On November 22, 2021, Kotick and Kelly spoke to Microsoft's Spencer. After the call, they informed Corti about Microsoft's interest in acquiring the Company. The Proxy rationalizes Kotick and Kelly's decision to tell Corti because he was Chair of the Audit Committee. Corti, however, was also among Activision's longest-standing, most conflicted directors.

113. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹⁰ This indicates that Kotick and Kelly, as well as Morgado and Corti, communicated with the Board on November 22 about forming and announcing the WRC. Indeed, the minutes from the December 3 Board meeting state that [REDACTED]

[REDACTED] Thus, either Kotick and Kelly on November 22 opted only to tell Corti and not the remaining directors of Microsoft's interest in acquiring Activision or the Proxy and minutes are incorrect and they told other directors about Microsoft's interest on November 22. Hartong's family trust purchased Activision shares on November 23. It is reasonably conceivable the timing of that purchase was not a coincidence.

114. The absence of any mention in the Proxy of the November 22, 2021 Board action concerning the WRC is likely (and reasonably conceivably) a part of Defendants' deliberate effort to separate the Merger from the Harassment Scandal and pretend the scandal and its fallout had no role in the hasty sale of Activision to

⁹⁰ See *Activision Blizzard Board of Directors Continues to Build Upon Its Ongoing Oversight With New "Workplace Responsibility Committee" to Ensure Implementation of Initiatives to Eliminate Harassment and Discrimination in the Workplace*, ACTIVISION BLIZZARD (Nov. 22, 2021), <https://investor.activision.com/news-releases/news-release-details/activision-blizzard-board-directors-continues-build-upon-its#:~:text=22%2C%202021%2D%2D%20The%20Activision,new%20policies%2C%20procedures%2C%20and%20commitments.>

⁹¹ Activision_0000567 at 568.

Microsoft. However, the severity of the scandal, its impact on Activision and its employees, business partners, customers, stockholders and stock price, the timing of the sale discussions and the participation of WilmerHale in Board meetings and other discussions involving the Merger show otherwise. The Company Disclosure Letter provides further evidence that Defendants intentionally sought to obscure the role of the Harassment Scandal in causing Kotick and the Board to push Activision into the Merger. It specifically references employee walkouts, material sexual harassment settlements and claims, and investigations arising out of the scandal that the Proxy does not mention.⁹²

115. On November 26, 2021, Kotick and Kelly spoke to Spencer, who told them Microsoft was considering making a bid for \$80 per share. Kotick and Kelly discussed Microsoft's offer with Corti and Morgado (the "Gang of Four"). According to the Proxy, this Gang of Four purportedly "discussed potential ranges at which the full Activision Board may be willing to consider an acquisition proposal taking into consideration, among other factors, Activision Blizzard's historical trading prices, selected research analysts' estimates for Activision Blizzard and relative trading multiples of Activision Blizzard and its peers."⁹³ Of course, the

⁹² See CDL I (defined herein) at [REDACTED]

⁹³ Proxy at 32.

appropriate way to determine the range at which the full Activision Board would be willing to consider a sale of the Company would be to call a meeting of the full Board, present a detailed analysis of the value of the Company and have the full Board determine whether to put the Company up for sale and, if so, at what price range. Instead, Kotick and Kelly and two long-time cronies apparently made an *ad hoc*, seat-of-their-pants determination that Activision should be sold at a range of \$90-105 per share. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] It is reasonably conceivable that the Proxy's reference to historical trading prices, analysts' estimates and trading multiples was made up when the Proxy was drafted to make it appear the Gang of Four had some financial reasoning for the \$90-105 range. Significantly, (i) the Proxy contains no disclosure of the historical trading prices, selected research analysts' estimates and trading multiples on which the Gang of Four supposedly based their \$90 to \$105 range and (ii) the Proxy disclosure indicates the Gang of Four did not consider the [REDACTED]

[REDACTED]

[REDACTED] Any consideration of historical trading prices would include the decreased Activision stock prices since July 28, 2021 as a result of the Harassment

Scandal. Any consideration of analysts' estimates would include the decreased estimates resulting from the Harassment Scandal, which would also affect Activision's trading multiples. Thus, to the extent the Gang of Four purported to consider the value of Activision, they were evaluating the Company as damaged goods as a result of the Harassment Scandal.

116. The Proxy said that on November 28, 2021, Kotick told Spencer the Activision Board would consider a Microsoft proposal in a range of \$90 to \$105 per share. Thus, without Board authorization, Kotick communicated to Microsoft that Activision was for sale for as little as \$90. The Proxy contained no further description of this communication. Unsurprisingly, Microsoft quickly made a \$90 per share offer.

117. On November 29, 2021, Spencer communicated to Kotick and Kelly that although Microsoft would negotiate between \$90 and \$105, Microsoft wanted to negotiate at the lower end of the range. Seeking to take advantage of the crisis at Activision, Microsoft pressed Kotick and Kelly for quick action before an upcoming Microsoft board meeting.

I. Kotick Involves More Conflicted Directors

118. Sometime after their discussion with Spencer, Kotick and Kelly communicated Microsoft's \$90 per share offer to Morgado and Corti and also

Hartong and Nolan. The Proxy states that Kotick and Kelly told Hartong and Nolan because they were the “remaining members of the Audit Committee”⁹⁴ without explaining why membership on the Audit Committee would entitle them to learn of the merger negotiations before the rest of the Board. Nolan and Hartong were included, like Morgado and Corti before them, because of their ties to Kotick. Kotick wanted to lobby and line-up a pro-merger coalition of his most loyal directors—constituting a majority of the directors before informing the full Board.

119. In addition, each of Hartong and Nolan, as directors and members of the Audit Committee, knew or should have known about Kotick’s involvement in, and failure to prevent or contain, the Harassment Scandal. Notwithstanding, and in the midst of employee and stockholder sentiment that Kotick step down from his role, Hartong and Nolan, along with Morgado and Corti, allowed Kotick to continue to run the Company.

J. Kotick Pushes the Board to Hire Conflicted Advisors

120. On December 1, 2021, Kotick and Spencer discussed introductions between “the parties’ respective legal teams and potential financial advisors,”⁹⁵ as well as the timing of Activision’s delivery of its financial forecasts. Thus, Kotick

⁹⁴ Proxy at 33.

⁹⁵ *Id.*

had selected the Board's advisors, including Allen & Co. and Skadden, before informing the Board about the Merger.

121. On December 3, 2021, Kotick and Kelly finally convened the Board via Zoom to discuss the Merger they had been negotiating for two weeks.⁹⁶ The meeting attendees included WilmerHale, Allen & Co., Skadden and Sard Verbinen & Co. ("Sard Verbinen"), a crisis management public relations firm. Neither the Proxy nor the Books and Records explain why WilmerHale and Sard Verbinen were invited to and attended the meeting or reflect any Board decision or authorization to retain WilmerHale or Sard Verbinen to represent the Company. WilmerHale, however, was purportedly conducting an investigation into the scandal and was defending Activision, Kotick, the Director Defendants and various other current and former Activision officers in litigation arising out of the Harassment Scandal. It is reasonably conceivable that Sard Verbinen had been retained to manage the public relations crisis created by the Harassment Scandal. Although the Board claims it did not consider Kotick's involvement in the Harassment Scandal in connection with the Merger, WilmerHale's presence for the entire meeting (and all other meetings at which the Board discussed the Merger), Sard Verbinen's presence and [REDACTED]

⁹⁶ The Board met ten times between December 3, 2021 and January 17, 2022 to discuss the Merger. The minutes from each of those meetings reflect that the Board met over Zoom.

otherwise.

122. Skadden appeared at the December 3, 2021 Board meeting and subsequent meetings. Neither the Proxy nor the Books and Records reflect any Board authorization that Skadden represent the Company. This confirms that Kotick single-handedly chose Skadden as the Company's legal advisor.

123. Allen & Co.'s Peretsman attended the Executive Session of the meeting. As with WilmerHale and Skadden, the Books and Records do not reflect any Board authorization for Allen & Co. to represent the Company. The Proxy, in contrast, said that after Morgado told the Board about the Company's discussions with Microsoft, the Board discussed formally engaging financial advisors. The Proxy stated:

After discussing the relevant experience and qualifications of various potential financial advisors, the Activision Blizzard Board of Directors decided to work with Allen & Company. The Activision Blizzard Board of Directors selected Allen & Company on the basis of, among other factors, Allen & Company's qualifications and reputation, extensive experience in advising software companies in connection with potential strategic transactions (including in which Microsoft was a counterparty), its knowledge and understanding of Activision Blizzard's business and industry from its previous work with Activision Blizzard,

and the absence of any known material conflicts with respect to Microsoft.⁹⁷

124. The minutes from the December 3 meeting, however, do not reflect the Board’s “selection” of Allen & Co. or consideration of Allen & Co.’s “previous work” for Activision or “conflicts with respect to Microsoft.” Instead, the meeting minutes only state that the Board discussed:



The Proxy therefore creates the false impression that the Board approved Allen & Co.’s engagement and made a determination that Allen & Co. had no material conflicts at the December 3, 2021 Board meeting. This false impression was material, considering Kotick continued to involve Allen & Co. as though the Board had approved Allen & Co.’s engagement and considered its conflicts when the Board had not.

⁹⁷ Proxy at 33.

⁹⁸ Activision_0000567 at 569.

125. According to the minutes, [REDACTED]

[REDACTED]

[REDACTED] The Proxy did not contain any mention of those subjects but just stated that Morgado provided the Board with an “update” on discussions with Microsoft regarding a potential acquisition of the Company. However, based on the Proxy, there was nothing to update because some Board members were already privy to the discussions and the rest did not know there had been any discussions. While the Proxy indicates that Kotick and Kelly reported the Microsoft discussions to Hartong and Nolan, the minutes indicate that [REDACTED]

[REDACTED]

126. The minutes state that [REDACTED]

[REDACTED]

[REDACTED] The Proxy did not indicate that the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁹⁹ *Id.*

[REDACTED] Neither the minutes nor the Proxy indicated that the Board authorized negotiation within that range.

127. The discrepancies between the minutes and the Proxy reflect an effort to obscure that Allen & Co. was actually retained by Kotick without Board authorization, to pretend Allen & Co. was retained by the Board on December 3, 2021 when it was not and to claim Kotick and Kelly based the \$90 to \$105 range on some reasoned analysis rather than a spit-balled estimate. The minutes reflect that

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

128.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

129. Further, neither the Proxy nor the December 3, 2021 meeting minutes indicate that the Board authorized Kotick to continue pursuing discussions with Microsoft or otherwise gave Kotick any guidance on how to proceed. Apparently, it was so obvious that Kotick would and could proceed as he pleased that the Board did not bother to give him authorization or guidance and just let the conflicted CEO continue the negotiations.

K. *Morningstar* Observes the Board Should but Will Not Push Kotick Out

130. On December 3, 2021, the same day Kotick told the Board about the Merger, *Morningstar* issued a scathing report.¹⁰⁰ The report recounted the Harassment Scandal and the numerous related departures from Activision, which contributed to the Company's delayed releases of Activision's key products. The report also described Kotick's role in and mishandling of the Harassment Scandal

¹⁰⁰ See *Without Changes, ESG Issues Will Hamper Activision Blizzard*, MORNINGSTAR (Dec. 3, 2021) ("Morningstar ESG Report").

and the numerous calls for Kotick’s resignation, including by nearly 20% of the employees. *Morningstar* concluded that “the best course to help Activision Blizzard move forward and unlock the value in its stock would be to replace Kotick.”¹⁰¹

131. The Morningstar ESG Report also said that “if Kotick tries to hang on at all costs, significant value destruction could occur.”¹⁰² The Report stated that “[a] change at the top is the best way forward,” observing:

Despite Kotick attempting to holding onto the job, we think all parties (other than perhaps Kotick) would be best served with a change at the top. Given the flood of allegations and management missteps since July, we believe that Kotick and his senior team have lost the confidence of a significant portion of employees along with consumers and investors. This loss of confidence along with the allegations that Kotick covered up harassment complaints and prevented the firing of executives, damages Kotick’s ability to make changes at Activision Blizzard.

We think that if Kotick remains in his role, the firm will continue to struggle attracting and retaining talent, particularly within the development ranks.¹⁰³

132. Later, the report observed:

We believe that by staying in the CEO role, Kotick is likely to not only hurt the firm’s ability to compete for

¹⁰¹ *Id.* at 1.

¹⁰² *Id.* at 10.

¹⁰³ *Id.*; see also *id.* at 15 (“Replacing the CEO Is Critical”).

talent but also limit the growth potential for the core franchises. We think that the board needs to look outside of Activision Blizzard to find a new leader who could enact the cultural change necessary to ensure that sexual harassment and misconduct do not occur.¹⁰⁴

133. *Morningstar* correctly predicted that, given the composition of the Board and the ties between Kotick and the directors, the Board would not push Kotick out. Indeed, by its own admission, the Board did not consider pushing Kotick out. People familiar with the Board told the *The Wall Street Journal* that the Board was not willing to pursue this alternative:

[D]irectors who had stood by Mr. Kotick during the crisis were individually beginning to get anxious . . . Some directors didn't believe shareholders and employees would be comfortable without a major change but weren't willing to try to oust Mr. Kotick.¹⁰⁵

134. Instead, the Board claimed in a public statement that it did not consider Kotick's status when it considered the Merger. It never considered whether the highest value for Activision might be without Kotick as CEO. The wrongdoing at Activision did not relate to the basic operation of its gaming business. Other

¹⁰⁴ *Id.* at 12.

¹⁰⁵ See Kirsten Grind, Cara Lombardo and Ben Fritz, *Activision Blizzard's Workplace Problems Spurred \$75 Billion Microsoft Deal*, WALL ST. J. (Jan. 18, 2022), <https://www.wsj.com/articles/activision-blizzard-microsoft-deal-11642557922>.

companies, such as Google, have survived such scandals. The Merger was not the only realistic option.

L. Microsoft Makes a \$90 Offer; Kotick Brushes Off Other Bidders

135. The Proxy represents that on December 3, 2021, after the Activision Board meeting, Kotick and Kelly received an email from the CEO of another gaming company, which the Proxy calls Company A, addressed to the Activision Board expressing interest in exploring a potential strategic transaction. As described below, the other gaming company was likely [REDACTED] Kotick received an additional communication from that CEO requesting a meeting the following week. Though the email was addressed to the Board, the Proxy and Board minutes indicate that Kotick and Kelly did not disclose it to the Board until a Board meeting on December 10, 2021. Unlike their approach with Microsoft, Kotick and Kelly did not immediately follow up with Company A.

136. On December 6, 2021, Activision and Microsoft entered into a mutual non-disclosure agreement (the “NDA”). The Proxy and minutes indicate that at its December 3, 2021 meeting, the Board did not authorize Activision to enter into an NDA with Microsoft. [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] This restricted Activision's approach to a potential sale of the Company. For example, Activision could not trigger a bidding war between Microsoft (with its Xbox) and Microsoft's leading competitor Sony (with its PlayStation) over Activision (with its industry leading games) by disclosing to Sony that it was in discussions with Microsoft.

137. After the NDA had been entered into, Kotick's management team shared with Microsoft Activision's LRP for Activision's financial performance for fiscal years 2021 through 2024.

138. According to the Proxy, on December 7, 2021, Activision (including Kotick and Kelly), Allen & Co. and Skadden met with Microsoft (including Spencer) and Microsoft's financial advisor and counsel to discuss, among other things, Activision's LRP. The portion of the minutes of the December 10, 2021 Activision Board meeting recounting Kelly's report on the December 7 meeting indicate [REDACTED]

[REDACTED]

[REDACTED] The Proxy blandly said Activision and Microsoft "discussed various other

¹⁰⁶ See Activision_0000473 at 473 (defining "Evaluation Material").

aspects of Activision Blizzard’s business.”¹⁰⁷ The December 10 minutes state that

[REDACTED]

[REDACTED]

[REDACTED] It is reasonably conceivable that the Harassment Scandal was among the [REDACTED] discussed and that the Proxy disclosure was part of a deliberate plan by Defendants to hide the fact that the Harassment Scandal was a major, if not the primary, factor to the Merger Agreement.

139. On December 8, 2021, Spencer told Kotick that the Microsoft board had authorized a proposal to acquire Activision. On December 10, 2021, Kotick and Kelly convened the Board, with WilmerHale, Skadden and Allen & Co. in attendance. Kelly told the Board about the December 7 meeting and December 8 communication from Microsoft. The Board purportedly discussed others who might be interested in exploring a potential transaction with the Company but rationalized why a deal with those parties would not work, including “regulatory hurdles”¹⁰⁹ and why the Board should favor Microsoft. Significantly, neither the Proxy nor the

¹⁰⁷ Proxy at 34.

¹⁰⁸ Activision_0000575 at 576.

¹⁰⁹ *Id.*

minutes reflect any concerns about “regulatory hurdles” a transaction with Microsoft might face.

140. Kotick and Kelly also discussed with the Board on December 10, 2021 that they received emails from the CEO of a company code-named “Elate” expressing a desire to explore a potential transaction and to meet with Kotick in person.¹¹⁰ The minutes state that, unlike Kotick’s quick and secretive reaction to Microsoft’s proposal, Kotick told the Board [REDACTED]

[REDACTED] Rather than open-mindedly exploring a potential combination with an interested gaming company, the Proxy and minutes indicate the Board immediately began coming up with reasons not to pursue the opportunity, including that a transaction involving a significant stock component would not be comparable to an all-cash offer. The Board purportedly concluded it was unlikely that a transaction with Elate would be competitive with an all-cash offer from Microsoft, even though there was no information on what a transaction with Elate would look like and Microsoft’s cash offer was for only \$80 per share. The Proxy and minutes claim the Board discussed

¹¹⁰ Elate is likely [REDACTED]

¹¹¹ *Id.*

“trading multiples of the two companies”¹¹² but do not say what those multiples were and the Board had received no analysis of trading multiples. In short, Kotick and the Board simply made up excuses for not pursuing a transaction with Elate. Although the Board instructed Kotick to meet with Elate’s CEO, the Board had already decided a transaction with Elate was unlikely.

141. The Proxy states that during the afternoon of December 10, 2021, Spencer told Kotick and Kelly that Microsoft would be sending a non-binding indication of interest to acquire Activision for \$90 (*i.e.*, the low end of the \$90 to \$105 range that Kotick gave Microsoft on November 28). Microsoft subsequently delivered its \$90 offer in writing, which was addressed to Kotick. The offer opened

[REDACTED]

¹¹² *Id.*; Proxy at 34.

¹¹³ Activision_0000485.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

[REDACTED]

[REDACTED]

[REDACTED] The Proxy's two sentence description of Microsoft's offer does not mention any of the points described above.

142. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

143. The Board met on December 12, 2021 to discuss Microsoft's \$90 per share offer. According to the minutes of the December 12, 2021 Board meeting,

[REDACTED]

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 486.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Microsoft and Activision later publicly disclosed their assessments: the Merger would face regulatory hurdles until the end of Microsoft’s 2023 fiscal year.

144. The Proxy did not describe Kotick’s December 12, 2021 report on his December 10 conversation with Spencer. Rather, it misrepresented that Morgado “described Messrs. Kotick’s and Kelly’s recent conversations with Mr. Spencer”¹¹⁹ without disclosing any information about the content of that call, [REDACTED]

[REDACTED]

[REDACTED]

¹¹⁸ Activision_0000578 at 581.

¹¹⁹ Proxy at 35.

[REDACTED]

[REDACTED]

Disclosure of this information would have been important to a reasonable Activision stockholder in evaluating the \$95 merger price. First, armed with this information, a reasonable stockholder might conclude that the basis for Microsoft's \$90 offer was that Kotick told Microsoft on November 28 the Company was for sale for as low as \$90, so Microsoft was not going to offer much more than that.

145. Second, a reasonable stockholder would consider it important that during the week of December 10, 2021 and on the evening of December 10, Kotick and Activision believed the LRP justified a higher valuation than \$90. A reasonable stockholder would consider this information important in evaluating the legitimacy of Activision management's downward revision of the LRP on December 14, 2021. A reasonable stockholder could conclude that the downward revision was done to justify a lower sale price after Microsoft indicated it would not pay much more than \$90 per share.

146. Third, a reasonable stockholder would consider Activision's and Microsoft's discussion about the Merger's regulatory risks important. Those risks had a direct impact on how long Activision and its stockholders would be subject to the restrictive covenants of the Merger Agreement, when stockholders would receive

the Merger consideration and if that consideration adequately compensated them for the risk of that delayed payment.

147. At the December 12, 2021 meeting, Skadden and Allen & Co., said Microsoft’s advisors said that Microsoft wanted to move quickly. Microsoft was cornering Activision into a quick deal.

148. Rather than having any independent representative control the sale of the Company, the Board allowed Kotick to (i) continue negotiating with Microsoft, (ii) contact three large-cap tech companies [REDACTED] to gauge their interest in quickly acquiring the Company and (iii) to meet with the CEO of Elate on December 14, 2021.

149. The Board never formed an independent committee or involved an independent director to negotiate with Microsoft or third parties. They never engaged, let alone considered engaging, an independent financial advisor to take Allen & Co.’s place or neutralize its conflicts. They never considered firing Kotick.

M. The Board Approves Depressed Forecasts and Accepts Allen & Co.’s Deficient Conflicts Disclosure

150. The Board met again on December 14, 2021, with WilmerHale, Allen & Co. and Skadden in attendance. Senior management presented the Board with financial forecasts for the Company’s long-term performance, which management had created by depressing the Company’s LRP. The Proxy states the LRP “had been

downwardly adjusted” to account for . . . the “passage of time”;¹²⁰ but the Board approved the LRP only six weeks earlier, and just four days earlier Kotick had asserted to Microsoft that the LRP warranted an offer above \$90 per share, a conversation he had recounted to the Board just two days before the December 14 meeting and at the last Board meeting.

151. The December 14, 2021 minutes indicate that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Proxy and minutes indicate that management told the Board: the updated financial forecasts were “**not** intended to constitute a revised [LRP],” “did **not** reflect any adjustments that Activision [] might make in its strategy in response to Activision Blizzard’s performance in the fourth quarter of 2021[,]” and management “would **not** typically refresh the outlook for years beyond 2022 at this stage of Activision Blizzard’s typical financial planning process”¹²² The Proxy conceded that the forecasts had been adjusted downward so the Board could use

¹²⁰ *Id.* at 37.

¹²¹ Activision_0000583 at 583-84.

¹²² *Id.* at 584; Proxy at 37 (emphases added).

them “for purposes of considering the potential transaction with Microsoft.”¹²³ The minutes (but not the Proxy) reflect that the Board instructed that Allen & Co. base its valuation analysis on the negatively revised forecasts.

152. It is reasonably conceivable and a fair inference that after Spencer made it clear that Microsoft would not pay much more than the \$90 Kotick had suggested as the low end of his range, Kotick had management revise the forecasts to justify a sale to Microsoft toward the lower end of his \$90-105 range.

153. Kotick also reported on his discussions with [REDACTED] and the December 14, 2021 meeting minutes reflect that regulatory risks were raised as a concern by two of the three companies he had contacted. The Proxy’s account of Kotick’s report did not mention regulatory risks.

154. The Proxy states that before the December 14, 2021 meeting ended, the Board considered “certain information”¹²⁴ regarding Allen & Co.’s material relationships with Microsoft and Activision that Allen & Co. had provided, but did not describe that information; yet the Proxy states that the Board concluded, “based

¹²³ Proxy at 37.

¹²⁴ *Id.*

on such information, there were no material conflicts that would preclude Allen & Co[.] from continuing to serve as financial advisor to Activision Blizzard.”¹²⁵

155. Allen & Co.’s December 12, 2021 conflicts disclosure memo only addressed the absence of any work for Activision or Microsoft in the past two years and did not even mention Allen & Co.’s prior work for Activision. It did not address Allen & Co.’s relationship with Kotick, Kelly, ASAC or any other directors and officers (*i.e.*, Nolan). It did not mention that Herb Allen was serving on the Coke Board with Kotick. The conflicts disclosure memo admitted that:

A large rectangular area of the document has been completely redacted with black ink, obscuring several lines of text.

156. The Proxy said that Allen & Co.’s “experience and familiarity with Activision Blizzard”¹²⁷ was a major factor in the Company’s selection of the firm as financing advisor. Having raised that experience and familiarity, the Board was required to provide a full and fair summary of that experience and familiarity. The Proxy never disclosed Allen & Co.’s involvement with Kotick and Activision in

¹²⁵ *Id.*

¹²⁶ Activision_0000839 at 848.

¹²⁷ Proxy at 57.

connection with the Vivendi Merger or Kotick, Kelly and Nolan, including in connection with ASAC. The Board simply ignored that Kotick and Kelly involved Allen & Co. in Activision's transformative transactions, including the Vivendi Merger, and advising Kotick, Kelly and Nolan in negotiations opposite the Company when Vivendi exited the Company.

157. Allen & Co.'s conflicts disclosure memo did, however, disclose that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

158. The December 14, 2021 minutes indicate that [REDACTED]

[REDACTED]

¹²⁸ Activision_0000839 at 848-849. Microsoft's stock price closed at an adjusted closing price of \$335.76 on December 10, 2021.

[REDACTED] The minutes indicate that

[REDACTED]

[REDACTED]

[REDACTED] In contrast, the Proxy said that based on the disclosure memo, there were no conflicts that would prevent Allen & Co. “from continuing to serve as financial advisor.”¹³¹

159. Kotick met on December 14, 2021 with the CEO of Elate. The Proxy states that the Elate CEO indicated that a strategic combination would benefit both companies, but did not communicate any requests or propose specific actions by Activision. The Proxy does not indicate that Kotick gave any report on this December 14 meeting at the December 15, 2021 Board meeting. The December 15, 2021 minutes indicate Kotick only reported that he met with the Elate CEO on December 14, and the Elate CEO did not communicate any request or propose specific actions for the Company or Kotick. The minutes do not indicate that Elate’s CEO had suggested a strategic combination. Neither the Proxy nor the minutes reflect any responses or reactions of Kotick during the December 14 meeting with

¹²⁹ Activision _0000583 at 586.

¹³⁰ *Id.*

¹³¹ Proxy at 37.

Elate's CEO. Activision never contacted Elate again. It is a fair inference and reasonably conceivable that Kotick did not wish to pursue a combination with Elate because a sale to Microsoft would better protect him from the Harassment Scandal and allow him to cash out of Activision.

160. At the December 15, 2021 meeting, Allen & Co. presented its financial analyses of Microsoft's \$90 per share offer and advised the Board on its potential responses. The Proxy stated that the Activision Board was provided with "financial forecasts of Activision Blizzard's long-term financial performance as extended through fiscal year 2026," and that Allen & Co.'s presentation was "based on the updated risk-adjusted financial forecasts approved by the [Board] on December 14, 2021, as extended through fiscal year 2026."¹³² Thus, management apparently revised again the forecasts it had just revised for the Board meeting the day before. There is no discussion of the purpose or effect of the second revision in two days.

161. Allen & Co.'s presentation showed [REDACTED]

[REDACTED]

[REDACTED]

¹³² *Id.* at 38.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

162. Allen & Co.'s presentation also reflects [REDACTED]

[REDACTED]

¹³³ Activision_0000505 at 506.

¹³⁴ *Id.* at 508.

¹³⁵ *Id.*

¹³⁶ *Id.* at 511.

exclusivity agreement at that price.¹³⁸ Unsurprisingly, Nadella quickly accepted the \$95 per share price. Thus, Kotick and Microsoft finalized the \$95 price in the twenty-four-hour period between the evenings of December 15 and December 16.

166. The Board met on December 17, 2021, with Allen & Co., WilmerHale and Skadden. Kotick and Kelly told the Board about their \$95 agreement with Microsoft. The meeting minutes state that the Board authorized management, “led by Mr. Kotick,”¹³⁹ to negotiate exclusively with Microsoft for thirty-days based on the \$95 term sheet and such other terms as management deemed appropriate. The Board let Kotick finalize his deal with Microsoft. The exclusivity agreement was executed on December 20, 2021 (the “Exclusivity Agreement”) and included a term sheet for the \$95 per share Merger.¹⁴⁰ The Exclusivity Agreement stated that [REDACTED]

[REDACTED]

167. The Exclusivity Agreement required [REDACTED]

[REDACTED]

[REDACTED]

¹³⁸ Proxy at 39.

¹³⁹ Activision_0000592 at 595.

¹⁴⁰ Activision_0000496-504.

¹⁴¹ *Id.* at 497.

[REDACTED]

[REDACTED]

168. Activision and Microsoft's

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

169. As discussed below, [REDACTED]
[REDACTED] was not included in the Merger Agreement. Instead, it was hidden in the CDL, which was not provided to the Activision stockholders, and was not described in the Proxy.

170. The Board met for [REDACTED] on December 21, 2021, and was informed of the Exclusivity Agreement and Term Sheet. Thus, in one month, Kotick and the Board agreed to sell Activision for \$95 per share. The Board would not meet again until January 7, 2022, eighteen days later.

N. The Board Approves an Incomplete Draft Merger Agreement; Activision and Microsoft Sign the Merger Agreement

171. On Friday, January 7, 2022, the Board met with Allen & Co., WilmerHale and Skadden. Kotick updated the Board on the status of the deal.

172. On Friday, January 14, 2022, the Board met with WilmerHale, Allen & Co. and Skadden to get an update. There were again “updated”¹⁴² (*i.e.*, reduced) forecasts aimed at justifying selling the Company for \$95 per share.

173. The minutes state that [REDACTED]
[REDACTED]
[REDACTED]

¹⁴² Proxy at 41.

[REDACTED]

[REDACTED]

[REDACTED] The CDL indicates that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The minutes [REDACTED]

[REDACTED] Neither does the Proxy's description of the

January 14, 2022 Board meeting.

174. The Proxy said that Skadden gave a presentation on what the Proxy describes as “the key terms of the draft merger agreement,” including “director and officer indemnification” and “Microsoft’s regulatory undertakings.”¹⁴⁶ The portion of the minutes relating to the summary of the Merger Agreement is entirely redacted. The minutes and Proxy say the Board discussed “regulatory considerations” concerning the Microsoft deal, but the Proxy does not say what was discussed and the portion of the minutes describing that discussion is redacted.¹⁴⁷

¹⁴³ Activision_0000531 at 532-533.

¹⁴⁴ See CDL I at [REDACTED]

¹⁴⁵ Activision_0000531 at 533.

¹⁴⁶ Proxy at 42.

¹⁴⁷ *Id.*; Activision_0000600 at 603.

175. The minutes from the meeting say [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The presentation and description thereof in the minutes have been withheld from the Books and Records as privileged.

176. The Proxy states that on January 14, 2022, Skadden sent Microsoft’s counsel an initial draft of Activision’s confidential disclosure schedules to the merger agreement. The schedules were negotiated through multiple drafts “[b]etween January 14, 2022 and January 18, 2022,” and there were “multiple conversations outstanding matters under the merger agreement.”¹⁴⁹ No disclosure schedules were provided to the Board. No disclosure schedules were included in the copy of the Execution Version of the Merger Agreement attached to the Proxy. Their contents were not described in the Proxy.

¹⁴⁸ See Activision_0000600 at 603-04.

¹⁴⁹ Proxy at 42.

177. The Board met at [REDACTED] on Monday, January 17, 2022, [REDACTED] to approve the Merger. Allen & Co. provided its fairness presentation. As part of its review of the Company’s stock trading history, Allen & Co. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

178. Although Skadden purportedly reviewed the “key terms”¹⁵¹ of the Merger Agreement on January 17, 2022, the Board did not review or approve the entire agreement of merger. Instead, at the January 17 meeting, the Board reviewed the incomplete, Draft Merger Agreement. The Draft Merger Agreement did not identify the Merger consideration or include the CDL, disclosure schedules or Exhibit A to the Merger Agreement (the certificate of the surviving corporation).¹⁵² Footnotes to the Draft Merger Agreement confirm that the Company Disclosure

¹⁵⁰ Activision_0000550 at 555.

¹⁵¹ Proxy at 42.

¹⁵² Activision_0000862-962.

Letter was still being drafted.¹⁵³ Though the Proxy indicates multiple drafts of the disclosure schedules were exchanged from January 14 through January 17, 2022, the Board was not even provided with a draft of those schedules. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The January 17 Draft Merger Agreement did not even refer to Activision; it referred to “[Denali]” as the “Company,”¹⁵⁶ including on the first page. It was labelled “STB Draft 01/17/22” and “Dated as of January [17], 2022.”¹⁵⁷ It defined the Merger consideration as “\$[•]”.¹⁵⁸

179. The Proxy reveals that between January 14 and January 18, 2022, Activision and Microsoft “exchanged multiple drafts of the merger agreement.”¹⁵⁹ Kotick’s representations to the Activision Board show that they were not reviewing

¹⁵³ *Id.* at 880 n.1, 899 n.2, 925 n.3.

¹⁵⁴ Activision_0000862 at 865, 962 (emphasis in original).

¹⁵⁵ [REDACTED]

¹⁵⁶ *See, e.g., id.* at 862, 866.

¹⁵⁷ *Id.* at 862.

¹⁵⁸ *Id.* at 876.

¹⁵⁹ Proxy at 42.

the same draft of the merger agreement that Microsoft had purportedly approved.

The January 17, 2022 minutes state that [REDACTED]

[REDACTED] [REDACTED]
[REDACTED]
[REDACTED] So, Microsoft's

board approved a different draft of the Merger Agreement than the Draft Merger Agreement the Activision Board approved and neither approved the Execution Version of the Merger Agreement or a Section 251-compliant agreement of merger.

180. The Proxy does not indicate when, if ever, the board of Anchorage approved some version of the Merger Agreement. The Proxy indicates drafts of the Merger Agreement were still being exchanged on January 17 and 18, 2022.¹⁶¹ Therefore, it is highly unlikely that the board of Anchorage approved the Merger Agreement before it was executed “[e]arly in the morning on January 18, 2022.”¹⁶²

181. Skadden told Plaintiff during negotiations over the Books and Records production that “the confidential disclosures and Company Disclosure Letter are not

¹⁶⁰ Activision_0000606 at 607. The Proxy did not say when the Microsoft Board or the board of Merger Sub approved a draft of the merger agreement.

¹⁶¹ See Proxy at 42.

¹⁶² *Id.*

[] board-level material,” conceding the Board never reviewed them. Defendants admitted in their briefing in this Action that the Activision Board only reviewed a “draft”¹⁶³ of the Merger Agreement. In addition, the Proxy states the disclosure schedules were still being negotiated through January 18, 2022, when the Merger Agreement was “finalized.”¹⁶⁴ The Board, however, did not reconvene later on January 17 or early on January 18, 2022 to approve the “finalized” Merger Agreement. The Board could have easily done so: it conducted all ten of its Merger-related Board meetings over Zoom.

182. Moreover, despite the Draft Merger Agreement’s obvious flaws, the Board did not ask for, or receive, a legal opinion that the Draft Merger Agreement and the Board’s approval thereof satisfied the applicable merger statute under Delaware law. The minutes from the January 17, 2022, meeting [REDACTED]

[REDACTED]

The minutes only state that [REDACTED]

[REDACTED]

¹⁶³ See, e.g., Trans. ID 71118873 (Activision Defendants’ Answering Brief in Opposition to Plaintiff’s Motion for Partial Summary Judgment (Oct. 18, 2023)) at 15.

¹⁶⁴ Proxy at 42.

¹⁶⁵ Activision_0000606 at 609.

[REDACTED]

183. It is reasonably conceivable and a fair inference that the Board rushed to approve the incomplete Draft Merger Agreement on January 17, 2022—because Microsoft’s Exclusivity Agreement [REDACTED]

[REDACTED]

184. The resolutions the Activision Board purportedly approved on January 17, 2022 reflect that the Board was approving the Draft Merger Agreement. The resolutions [REDACTED]

[REDACTED] The resolutions authorize [REDACTED]

[REDACTED]

[REDACTED] This was an impermissible delegation to officers of the Board’s non-delegable statutory obligation under Section 251 to approve the terms of the agreement of merger.

185. The January 17, 2022 Board minutes admit that the amount of the 2022 and 2023 dividends Activision could pay was [REDACTED] and a committee of the Board (Morgado, Kelly and Corti) was delegated to negotiate that

issue.¹⁶⁶ What dividends Activision could pay its stockholders during the up to eighteen months (which became twenty-one months) for the Merger Agreement to be consummated was a key financial term that affected the value of the Merger to the Activision stockholders. The Proxy said Kotick discussed with Nadella and the *ad hoc* committee approved “the resolution of the outstanding dividend issue[.]”¹⁶⁷ However, under 8 *Del. C.* § 141(c), a board committee cannot adopt a provision of an agreement of merger. Section 5.2(e) of the Merger Agreement provided that Activision may only pay “one regular cash dividend on the Company Common Stock in an amount per share of Company Common Stock not in excess of \$0.47.” The limitation on and suspension of dividends during the lengthy regulatory review process would significantly reduce the value of the Merger. Activision stockholders had historically received an annual dividend in the early part of each year. Because the Merger would not close until the end of 2023 or the first half of 2024, the 2023 annual dividend would be missed. Plaintiff alleged in its Amended Complaint that “unless Activision insists that the dividends resume and the stockholders receive interest, the net value of the Merger is less than \$95 per share, assuming it is

¹⁶⁶ Activision_0000606 at 607; *see also* Proxy at 42 (amount of dividends was “one remaining open issue” and was delegated to an *ad hoc* committee).

¹⁶⁷ Proxy at 42.

consummated, and given the increased regulatory risk, particularly in light of the FTC Suit, it is worth significantly less than that.”¹⁶⁸

186. After the Board’s approval of the Draft Merger Agreement at the January 17, 2022 meeting, Activision and Microsoft “finalized the merger agreement,”¹⁶⁹ which was executed early in the morning on January 18, 2022. The Board did not review the Execution Version of the Merger Agreement before it was signed. Activision announced the Merger in a press release issued at 8:28 a.m. Eastern Time (5:28 a.m. Pacific Time) on January 18.¹⁷⁰

187. The representations in the Merger Agreement and the Proxy that the Activision Board approved the Merger Agreement were false. The Board only approved the Draft Merger Agreement.

O. The Terms of the Merger Protect Kotick and the Director Defendants from the Fallout of the Harassment Scandal

188. The terms of the Merger Agreement provided Kotick and the Board with material benefits not shared with Activision’s public stockholders.

¹⁶⁸ AC ¶ 168.

¹⁶⁹ Proxy at 42.

¹⁷⁰ See *Microsoft to Acquire Activision Blizzard to Bring the Joy and Community of Gaming to Everyone, Across Every Device*, ACTIVISION BLIZZARD (Jan. 18, 2022), <https://investor.activision.com/news-releases/news-release-details/microsoft-acquire-activision-blizzard-bring-joy-and-community>.

Accordingly, the Merger Agreement was not approved by a majority of disinterested and independent directors.

1. The Merger Agreement Protected Kotick's Job and Compensation

189. The Merger Agreement protected Kotick's tenuous position as Activision's CEO and allowed him to remain in office. Section 5.1(iii)(B) required Activision to "keep available the services of its current officers and key employees."¹⁷¹ Section 5.2(g) of the Merger Agreement provided Kotick with immediate job security. It precluded Activision from terminating any employee at the level of Senior Vice President or above without Microsoft's approval. Section 2.6(b) provided that Activision's officers before the Merger would be Activision's officers after the Merger. When Activision and Microsoft announced the Merger on January 18, 2022, they stated in a press release that day that "Bobby Kotick will continue to serve as CEO of Activision Blizzard" and that "he and his team" would continue to run the Company. Microsoft and Activision also agreed that on or after

¹⁷¹ As with numerous other provisions in the Merger Agreement, Section 5.1 of the Merger Agreement contains an exception for items "set forth in Section 5.1 or Section 5.2 of the Company Disclosure Letter." The CDL, as produced by Activision to Plaintiff pursuant to 8 *Del. C.* § 281(c)(7), does not contain any Section 5.1 schedule. Activision did not disclose, and the Board did not review or approve, the CDL. The terms of the Merger Agreement were therefore incomplete and neither the Board nor the stockholders could evaluate the significance of the many exceptions. *See* Counts, *infra*.

July 18, 2022, the Board could extend Kotick's Employment Agreement by another twelve months. Kotick remained CEO of Activision. The Letter Agreement then extended the Merger Agreement and therefore Kotick's continued employment through the Merger's October 13, 2023 closing. Kotick did not resign until December 29, 2023. The Merger enabled him to ride the Activision gravy train for over two years after *Kotick Knew's* publication.

190. The Merger therefore protected Kotick's compensation. If Kotick was fired for Cause, he would forfeit 2,201,878 unvested options and PSUs, not receive any severance and only be entitled to insurance benefits valued at approximately \$41,000. The Merger Agreement, in contrast, prevented Kotick from being fired even for Cause.

191. The Merger, moreover, provided Kotick with better compensation while the Merger was pending. As set forth above, on October 28, 2021, Kotick announced his purported Pay Cut Agreement with Activision to reduce his base salary and waive any bonuses and equity grants "until the Board" determined the Company had "achieved" the goals and commitments Kotick described in the October Press Release. Activision and Microsoft agreed, in blatant violation of the October Pay Cut Agreement, that if the Board's two-member WRC:

concludes and reports publicly that Activision [] has made appropriate progress toward the achievement of the transformational gender-related goals and other commitments described in Activision Blizzard’s press release on October 28, 2021, then the [] Board [] may, no earlier than six months after the date of the merger agreement, in its discretion [pay Kotick his usual salary under his Employment Agreement, up to \$875,000, a bonus of up to \$1.75 million and an annual award of equity compensation up to \$22 million per year].¹⁷²

192. Activision’s agreement with Microsoft was more favorable to Kotick than his October Pay Cut Agreement, which provided that his base salary would be reduced and he would not receive any bonus or equity compensation until the Board determined Activision “achieved” the goals in the October Press Release. Under Activision’s arrangement with Microsoft, Kotick’s salary would only be reduced until the WRC determined Activision had made “appropriate progress” toward those goals. The goals and commitments the Company needed to “achieve” under Kotick’s October agreement was a far more rigorous standard than merely making “appropriate progress,” a term so vague as to be meaningless.

¹⁷² Proxy at 61 (emphasis added). Activision and Microsoft memorialized this agreement in [REDACTED] of the CDL. Activision produced what purports to be the CDL to Plaintiff on March 27, 2024.

2. The Merger Agreement Provides Kotick and the Director Defendants with Materially Greater Rights to Indemnification and Advancement

193. The Merger Agreement affords Kotick, the Director Defendants and other current and former directors and officers materially greater right to indemnification and other protection than they would otherwise have had under Activision's Certificate and bylaws.

194. Section 6.8 of the Merger Agreement contains three pages on "Directors' and Officers' Exculpation, Indemnification and Insurance."

195. The first sentence of Section 6.8(a) of the Merger Agreement provides:

Indemnified Persons. The Surviving Corporation will (and Parent shall cause the Surviving Corporation to) honor and fulfill, in all respects, the obligations of the Company pursuant to any indemnification agreements set forth on Section 6.8(a) of the Company Disclosure Letter in effect on the date of this Agreement between the Company, on the one hand, and any of its current or former directors and officers, on the other hand, and the indemnification, exculpation and advancement of expenses provisions set forth in the Charter and the Bylaws as in effect on the date of this Agreement with respect to any of the Company's current or former directors and officers (collectively, the "**Indemnified Persons**").

196. The first sentence of Section 6.8(a) can be broken down as follows:

<u>Title:</u>	<i>Indemnified Persons</i>
---------------	----------------------------

Indemnitors:

“The Surviving Corporation”
will (and Parent shall cause the
Surviving Corporation to)”

Obligations to
Indemnify:

“honor and fulfill, in all respects,
the obligations of the Company”

First Source of
Company
Indemnification:

“pursuant to any indemnification
agreements set forth on Section
6.8(a) of the Company
Disclosure Letter in effect on the
date of this Agreement between
the Company, on the one hand,
and any of its current and former
directors and officers, on the
other hand”

Second Source of
Company
Indemnification:

“and the indemnification,
exculpation and advancement of
expenses provisions set forth in
the Charter and Bylaws as in
effect on the date of this
Agreement”

Indemnified Persons:

“with respect to any of the
Company’s current or former
directors and officers
(collectively, the ‘**Indemnified
Persons**’).”

197.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] However, because the Company Disclosure Letter referenced in the Merger Agreement was not provided to the stockholders, the stockholders did not know how many existing indemnification agreements there were. Plaintiff sought indemnification agreements in its 220 Demand and repeatedly pressed Activision to produce all such agreements. Activision's Books and Records production only contained [REDACTED]

198. The CDL [REDACTED]

[REDACTED] Activision's public filings confirm and provide examples of Activision's other indemnification agreements with its officers and directors. Section 18 of Kotick's Employment Agreement contains the following provision on indemnification and insurance:

Indemnification and Attorneys' Fees. During the Employment Period and thereafter, the Company shall indemnify, hold harmless and defend the Executive to the fullest extent permitted by Delaware law and the Company's articles of incorporation and by-laws in effect from time to time from all damages, claims, losses, and costs and expenses (including reasonable attorney's fees) arising out of, in connection with, or relating to all acts or omissions taken or not taken by the Executive in good

faith while performing services for the Company, and shall further promptly reimburse the Executive for all expenses (including attorney's fees) incurred in (i) enforcing this Agreement and (ii) to a maximum, of \$80,000, in negotiating and drafting this Agreement. The Company shall use its best efforts to continue to maintain an insurance policy covering the officers and directors of the Company against claims and/or lawsuits, at least as favorable as such policy that is currently in effect, and shall cause the Executive to be covered under such policy upon the same terms and conditions as other similarly situated officers and directors during the Employment Period and for a period of at least six (6) years thereafter.

199. Durkin, Walther, Naughton and Activision's former President and COO Daniel Alegre ("Alegre") have the following indemnification provision in Section 12 of their employment agreements:

The Employer agrees that it shall indemnify and hold you harmless to the fullest extent permitted by Delaware law from and against any and all third-party liabilities, costs and claims, and all expenses actually and reasonably incurred by you in connection therewith by reason of the fact that you are or were employed by the Activision Blizzard Group, including, without limitation, all costs and expenses actually and reasonably incurred by you in defense of litigation arising out of your employment hereunder.

This provision appears limited to third-party litigation.

200. The first sentence of Section 6.8(a) of the Merger Agreement creates a new contractual obligation of Microsoft to cause indemnification, advancement and

exculpation of current and former Microsoft officers and directors under existing indemnification agreements and the Certificate and Bylaws in effect when Microsoft entered into the Merger Agreement. That obligation is not limited to acts or omissions prior to the Merger, discussions, the signing of the Merger Agreement or even the consummation of the Merger.

201. The second and third sentences of Section 6.8(a) provide:

In addition, during the period commencing at the Effective Time and ending on the Sixth anniversary of the Effective Time, the Surviving Corporation will (and Parent will cause the Surviving Corporation to) cause the certificates of incorporation, bylaws and other similar organizational documents of the Surviving Corporation to contain provisions with respect to indemnification, exculpation and advancement of expenses that are at least as favorable to the Indemnified Persons as the indemnification, exculpation and advancement of expenses provisions set forth in the Charter and the Bylaws as of the date of this Agreement. During such six-year period, such provisions may not be repealed, amended or otherwise modified in any manner except as required by applicable Law.

202. The second and third sentences of Section 6.8(a) can be broken down as follows:

Additions to First Sentence:

“In addition”

Time Frame:

“during the period commencing at the Effective Time and ending

on the Sixth anniversary of the Effective Time,”

Indemnitors:

“the Surviving Corporation will (and Parent will cause the Surviving Corporation to)”

Documents:

“cause the certificates of incorporation, bylaws and other similar organizational documents of the Surviving Corporation”

Provisions Required:

“to contain provisions with respect to indemnification, exculpation and advancement of expenses”

Standard for Provisions:

“that are at least as favorable to the Indemnified Persons as the indemnification, exculpation and advancement of expenses provisions set forth in the Charter and the Bylaws as of the date of this Agreement.”

No Modification:

“During such six-year period, such provisions may not be repealed, amended or otherwise modified in any manner except as required by applicable Law.”

203. Rights under the second sentence are “[i]n addition” to the rights under the first sentence and apply during a six-year period after the closing of the Merger. The second sentence requires that Activision for six years maintain Certificate and

Bylaw provisions “at least as favorable” for directors and officers as the provisions in existence before the Merger. Microsoft, which would become Activision’s 100% stockholder in the Merger, agreed to an absolute prohibition against repeal, amendment or modification in any manner unless required by Law. In contrast, Article VI Section 6.3 of Activision’s Certificate as of the date of the Merger Agreement permitted certificate amendments to the exculpation and indemnification provisions of Sections 6.1 and 6.2 that were prospective. It also permitted stockholder amendments that did “not adversely affect any limitation on the personal liability of a director or officer of the Corporation existing at the time of such appeal [sic] on [sic] modification.”¹⁷³ Section 7.7 of Activision’s Bylaws, as of the date of the Merger Agreement, also permitted prospective repeal or amendment that adversely affected the indemnification rights of Section 7.1 and 7.2. It only limited adversely affecting such rights “with respect to any proceeding involving any occurrence or alleged occurrence of any action or omission to act that took place prior to such amendment or repeal.” Microsoft and Activision (through Kotick and the Board) agreed to eliminate the stockholders’ ability to limit or eliminate indemnification, advancement and exculpation under the Certificate and Bylaws as

¹⁷³ The end of the phrase presumably should read “repeal or modification.”

of the date of the Merger Agreement. Section 6.8(a) of the Merger Agreement creates a broader obligation to continue indemnification, advancement and exculpation rights of directors and officers than the then-existing Certificate and Bylaws. Thus, the second sentence goes beyond the then-existing rights under the Certificate and Bylaws for conduct occurring before the Merger. Moreover, the indemnification, exculpation and advancement rights under the second sentence of Section 6.8(a) are not limited to conduct occurring before the Merger.

204. Section 2.6(b) provided that the initial officers of Activision after the Merger would be officers of Activision immediately before the Merger. Therefore, under the Merger Agreement, Kotick and other Activision officers gained additional rights that applied to conduct after the Merger.

205. Section 5.2(a) of the Merger Agreement prohibited Activision from amending or otherwise changing the Certificate or Bylaws as of the date of the Merger Agreement. Thus, Microsoft and Activision (through Kotick and the Board) violated the rights of the stockholders under 8 *Del. C.* §§ 109(a) and 242(b)(1), Article V, Section 6.3 of the Certificate and Article VIII, Section 8.4 of the Bylaws to amend the Certificate and Bylaws.

206. The first sentence of Section 6.8(b) of the Merger Agreement provides:

Indemnification Obligation. Without limiting the generality of the provisions of Section 6.8(a) during the period commencing at the Effective Time and ending on the sixth anniversary of the Effective Time, the Surviving Corporation will (and Parent will cause the Surviving Corporation to) indemnify and hold harmless, to the fullest extent permitted by applicable Law or pursuant to any indemnification agreements set forth on Section 6.8(b) of the Company Disclosure Letter with the Company or any of its Subsidiaries in effect on the date of this Agreement, each Indemnified Person from and against any costs, fees and expenses (including attorneys' fees and investigation expenses), judgments, fines, losses, claims, damages, liabilities and amounts paid in settlement or compromise in connection with any Legal Proceeding, whether civil, criminal, administrative or investigative, to the extent that such Legal Proceeding arises, directly or indirectly, out of or pertains, directly or indirectly, to (i) any action or omission, or alleged action or omission, in such Indemnified Person's capacity as a director, officer, employee or agent of the Company or any of its Subsidiaries or other Affiliates (regardless of whether such action or omission, or alleged action or omission, occurred prior to, at or after the Effective Time); and (ii) the Merger; as well as any actions taken by the Company, Parent or Merger Sub with respect thereto, except that if, at any time prior to the sixth anniversary of the Effective Time, any Indemnified Person delivers to Parent a written notice asserting a claim for indemnification pursuant to this Section 6.8(b) then the claim asserted in such notice will survive the sixth anniversary of the Effective Time until such claim is fully and finally resolved.

207. The first sentence of 6.8(b) can be broken down as follows:

<u>Title:</u>	<i>“Indemnification Obligation”</i>
---------------	-------------------------------------

<u>No Limit of 6.8(a):</u>	“Without limiting the generality of the provisions of <u>Section 6.8(a)</u> ”
<u>Duration of Right:</u>	“during the period commencing at the Effective Time and ending on the sixth anniversary of the Effective Time,”
<u>Indemnitors:</u>	“the Surviving Corporation will (and Parent will cause the Surviving Corporation to)”
<u>Core Contractual Promise:</u>	“indemnify and hold harmless”
<u>Extent of Scope of Indemnification:</u>	“to the fullest extent permitted by applicable Law or pursuant to any indemnification agreements set forth on <u>Section 6.8(b)</u> of the Company Disclosure Letter with the Company or any of its Subsidiaries in effect on the date of this Agreement,”
<u>Indemnitees:</u>	“each Indemnified Person”
<u>Indemnifiable Items:</u>	“from and against any costs, fees and expenses (including attorneys’ fees and investigation expenses), judgments, fines, losses, claims, damages, liabilities and amounts paid in settlement or compromise”
<u>Proceedings Covered:</u>	“in connection with any Legal Proceeding, whether civil,

criminal, administrative or investigative,”¹⁷⁴

<u>Genesis of Proceeding:</u>	“to the extent that such Legal Proceeding arises, directly or indirectly, out of or pertains, directly or indirectly, to”
<u>Focus of Proceeding (i):</u>	“(i) any action or omission, or alleged action or omission, in such Indemnified Person's capacity as a director, officer, employee or agent of the Company or any of its Subsidiaries or other Affiliates (regardless of whether such action or omission, or alleged action or omission, occurred prior to, at or after the Effective Time);”
<u>Focus of Proceeding (ii):</u>	“and (ii) the Merger; as well as any actions taken by the Company, Parent or Merger Sub with respect thereto,”
<u>Extension of Indemnification Period:</u>	“except that if, at any time prior to the sixth anniversary of the Effective Time, any Indemnified Person delivers to Parent a written notice asserting a claim for indemnification pursuant to this <u>Section 6.8(b)</u> then the claim

¹⁷⁴ Section 1.1(vv) of the Merger Agreement defines Legal Proceeding to include “any claim, action, charge, lawsuit, litigation, hearing, investigation, inquiry, or other similarly formal legal proceeding.”

asserted in such notice will survive the sixth anniversary of the Effective Time until such claim is fully and finally resolved.”

208. Section 1.1 (uu) of the Merger Agreement defines “Law”:

“**Law**” means any federal, state, local, municipal, multi-national or other law, statute, constitution, ordinance, code, decree, order (including any executive order), directive, judgment, rule, regulation, ruling or requirement issued, enacted, adopted, promulgated, implemented or otherwise put into effect by or under the authority of any Governmental Authority and any order or decision of an applicable arbitrator or arbitration panel.

209. The first sentence of Section 6.8(b) indicates that it does not limit Section 6.8(a). It creates an additional contractual obligation by Microsoft and Activision to indemnify current or former Activision directors and officers for six years after the Merger. The indemnification obligation is not tied to Activision’s Certificate or Bylaws as of the date of the Merger Agreement or in the future. Unlike Section 6.8(a), it not only covers indemnification agreements “of the Company” set forth in the Company Disclosure Letter, but also such agreements with any Activision subsidiary. The indemnification applies to actions or omissions regardless of whether they occurred “prior to, at or after, the [Merger].” The indemnification is not limited to what is permitted by Delaware law, but extends “to

the fullest extent permitted by applicable Law,” which includes “any federal, state, local, municipal, multi-national or other law.” Thus, Section 6.8(b) mandates indemnification if any law permits the indemnification.¹⁷⁵

210. The first sentence of Section 6.8(b) provides indemnification rights beyond the rights under Activision’s Certificate and Bylaws, as of the date of the Merger Agreement. Indemnification under Article VI, Section 6.2 of the Certificate and Article VII, Section 7.1 of the Bylaws is limited to what is permitted by 8 *Del. C.* § 145 (“Section 145”). The then-existing indemnification rights were subject to Section 145(a)’s good faith and reasonable belief requirements and limited by Section 145(b)’s restriction of indemnification in actions by or in the right of the corporation to expenses.

211. Section 6.8(b) adds “investigation expenses,” and “losses, claims [and] damages” to Section 145(a)’s list of indemnifiable items. It does not contain Section 145(a)’s “actually and reasonably incurred” limitation. Nor does it contain Section 145(a)’s requirement that the person be made a party or be threatened to be made a

¹⁷⁵ Several Activision subsidiaries are incorporated under the laws of the U.K., the Netherlands, Malta and Sweden.

party to a proceeding. Section 6.8(b) also applies to actions as an employee or agent and to actions prior to, at or after the Merger.¹⁷⁶

212. The second sentence of Section 6.8(b) provides:

In the event of any such Legal Proceeding, (A) the Surviving Corporation will have the right to control the defense thereof after the Effective Time; (B) each Indemnified Person will be entitled to retain his or her own counsel (the fees and expenses of which will be paid by the Surviving Corporation), whether or not the Surviving Corporation elects to control the defense of any such Legal Proceeding; (C) the Surviving Corporation will advance all fees and expenses (including fees and expenses of any counsel) as incurred by an Indemnified Person in the defense of such Legal Proceeding, whether or not the Surviving Corporation elects to control the defense of any such Legal Proceeding upon receipt of an undertaking by or on behalf of such Indemnified Person to repay such amount if it is ultimately determined that such Indemnified Person is not entitled to be indemnified; and (D) no Indemnified Person will be liable for any settlement of such Legal Proceeding effected without his or her prior written consent.

213. The second sentence of Section 6.8(b) can be broken down as follows:

Surviving Corporation's
Control:

“In the event of any such Legal Proceeding, (A) the Surviving Corporation will have the right to control the defense thereof after the Effective Time;”

¹⁷⁶ Under Article VII, Section 7.6 of the Bylaws, indemnification of employees and agents is permissible, not mandatory.

Indemnatee's Counsel:

“(B) each Indemnified Person will be entitled to retain his or her own counsel (the fees and expenses of which will be paid by the Surviving Corporation), whether or not the Surviving Corporation elects to control the defense of any such Legal Proceeding;”

Advancement of Expenses:

“(C) the Surviving Corporation will advance all fees and expenses (including fees and expenses of any counsel) as incurred by an Indemnified Person in the defense of such Legal Proceeding, whether or not the Surviving Corporation elects to control the defense of any such Legal Proceeding upon receipt of an undertaking by or on behalf of such Indemnified Person to repay such amount if it is ultimately determined that such Indemnified Person is not entitled to be indemnified;”

Settlement:

“and (D) no Indemnified Person will be liable for any settlement of such Legal Proceeding effected without his or her prior written consent.”

214. The second sentence of Section 6.8(b) gives each current or former Activision director or officer the right to retain individual counsel. The Certificate and Bylaws as of the date of the Merger Agreement did not confer such a right.

215. The third sentence of Section 6.8(b) provides:

Notwithstanding anything to the contrary in this Agreement, none of Parent, the Surviving Corporation nor any of their respective Affiliates will settle or otherwise compromise or consent to the entry of any judgment with respect to, or otherwise seek the termination of, any Legal Proceeding for which indemnification may be sought by an Indemnified Person pursuant to this Agreement unless such settlement, compromise, consent or termination includes an unconditional release of all Indemnified Persons from all liability arising out of such Legal Proceeding.

216. The third sentence of Section 6.8(b) gives every current or former Activision director or officer the right to veto any settlement or other termination of litigation by Microsoft, Activision or any of their respective Affiliates unless the settlement or termination includes “an unconditional release” of all Indemnified Persons from all liability. Section 1.1(d) of the Merger Agreement contains a broad definition of Affiliate. The third sentence of Section 6.8(d) creates a new contractual right to require Microsoft, Activision and others to extract a complete and unconditional release for every Indemnified Person from all potential liability in order to be able to settle or terminate any civil, criminal, administrative or

investigative proceeding. For example, if Activision wants to settle or resolve any lawsuits, SEC investigations or other proceedings involving the Company, it must secure a complete release for Kotick. The Certificate and Bylaws as of the date of the Merger Agreement did not give directors and officers an individual veto right over the ability of Activision, other directors and officers and other entities or persons to resolve proceedings.

217. Section 6.8 also expands the range of “officers” of Activision entitled to mandatory indemnification and advancement. Article IV, Section 4.1 of the Bylaws in effect as of the date of the Merger Agreement provided that the Board shall elect the CEO, President, Secretary and Treasurer and may elect other officers, with all officers required to be elected at the Board’s annual meeting or at such other time the Board determines. It provided that the Board may empower the CEO to appoint officers other than the four required to be elected by the Board. Thus, when Article VII, Sections 7.1 and 7.2 of the Bylaws conferred mandatory indemnification and advancement rights on a person who is an “officer of the Corporation,” that was limited only to persons elected as officers of Activision by the Board or appointed by Kotick as CEO, pursuant to the Board authorization.¹⁷⁷

¹⁷⁷ Article I, Section 1.1 of the Bylaws defines Activision Blizzard, Inc. as the “Corporation.”

218. Section 6.8(a) of the Merger Agreement, in contrast, requires Microsoft and Activision to honor indemnification agreements between “the Company” and “its current or former directors” and the indemnification and advancement provisions of the Certificate and Bylaws with respect to the Company’s “current or former directors and officers”¹⁷⁸ as of the date of the Merger Agreement. Section 6.8(a) does not limit the term “officers” to those elected by the Board or appointed by the CEO pursuant to Board authorization. Rather, it provides indemnification and advancement rights to any current or former officers. Thus, it makes any current or former officer—including, for example, Brack, who left Activision after his failure to address sexual harassment was exposed, an Indemnifiable Person under Section 6.8.

219. Section 6.8(b) requires Microsoft and Activision to indemnify not only pursuant to indemnification agreements “with the Company,” but also indemnification agreements with “any of its Subsidiaries.” Thus, if, as part of his departure from Blizzard, Brack entered into an indemnification agreement with Blizzard, Section 6.8(b) would require Microsoft and Activision to provide indemnification pursuant to that agreement.

¹⁷⁸ The Merger Agreement designates Activision Blizzard, Inc. as the “Company.”

220. Section 6.8(c) of the Merger Agreement requires Activision and Microsoft to maintain for six years after the Merger Activision's current D&O insurance, subject to a 350% cap on annual premiums. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Section 7.5 of Activision's Bylaws as of the date of the Merger Agreement permitted, but did not require, Activision to maintain coverage. Section 18 of Kotick's Employment Agreement only requires Activision to use its best efforts to maintain D&O coverage at least as favorable as the coverage in effect when the agreement was signed on October 1, 2016 and to cause Kotick to be covered "upon the same terms and conditions as other similarly situated officers and directors."

221. Section 6.8 also contains provisions (i) requiring successors or assigns of Microsoft or Activision in a merger or sale of substantially all assets to assume all obligations under Section 6.8; (ii) precluding termination or modification of the Section 6.8 obligations; (iii) conferring third party beneficiary rights on the directors and officers; and (iv) indicating that the rights under Section 6.8 are in addition to,

and not in substitution for, other such rights, and do not release or impair such rights.¹⁷⁹

222. The provisions of Section 6.8 materially increased the indemnification, advancement, and insurance rights of Kotick and Activision's other directors, including their former colleagues like Brack who left Activision in the wake of the scandal. The expanded protection for Kotick and other officers would also help protect the directors by encouraging Kotick and other officers to fight any claims.

223. Importantly, these additional protections were not added on a clear day, but in the midst of the Harassment Scandal that, at the time the Board approved the Merger, had already generated three government investigations, two government lawsuits, numerous stockholder suits, demands for Kotick's resignation and the resignation or removal of various officers and employees who were defendants in one or more lawsuits, the subject of one or more investigations and/or otherwise subject to assertions of misconduct. Moreover, Section 6.8 of the Merger Agreement contains provisions that contravene Delaware law and Activision's Certificate and Bylaws, as of the date of the Merger Agreement.

¹⁷⁹ Merger Agreement, §§ 6.8 (d)-(f).

3. The Merger Agreement Requires Microsoft to Approve the Settlement of Lawsuits Against Kotick and the Board Arising Out of the Harassment Scandal

224. The terms of the Merger Agreement addressed the lawsuits arising out of the Harassment Scandal, including lawsuits filed against the Director Defendants.

225. Section 5.2(i) of the Merger Agreement stated that, except as approved by Microsoft, Activision:

will not, and will not permit any of its Subsidiaries . . . to . . . (i) settle, release, waive or compromise any pending or threatened Legal Proceeding (which shall include Specified Litigation) against the Company or its Subsidiaries or agree to any remedies with respect to any Legal Proceeding or settlement thereof, except for the settlement of any Legal Proceedings or series of Legal Proceedings arising out of the same type of act or occurrence solely for monetary damages in an amount (1) not in excess of \$10,000,000 for such Legal Proceedings or series of Legal Proceedings or (2) that does not exceed that which is reflected or reserved against in the Audited Company Balance Sheet[.]

226. By requiring Microsoft's approval for the settlement of Specified Litigation, Section 5.2(i) of the Merger Agreement gave Microsoft a veto right.¹⁸⁰

¹⁸⁰ Section 6.13(a) of the Merger Agreement also required Activision to provide Microsoft with material updates to Specified Litigation and consult with Microsoft about the defense and settlement of Specified Litigation.

227. Section 1.1(sss) of the Merger Agreement defined “Specified Litigation” as “any of the matters set forth on Section 1.1(sss) of the Company Disclosure Letter.” [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

228. The exception in Section 5.2(i) of the Merger Agreement to Microsoft’s control over settlements would not apply to the Specified Litigation listed in the CDL because [REDACTED]

[REDACTED]

[REDACTED]

229. Activision and Microsoft negotiated terms of the Merger Agreement and CDL that gave Microsoft rights concerning the many lawsuits and investigations directed against the Director Defendants arising out of the Harassment Scandal. Further, Activision and Microsoft anticipated that additional lawsuits might be filed against the Director Defendants.¹⁸² These provisions demonstrate that Defendants recognized, and specifically contemplated, that the Director Defendants were the beneficiaries of the super-indemnification, exculpation, advancement and insurance protections Microsoft was to provide under the Merger Agreement. These provisions created a conflict of interest for the Director Defendants when approving, proceeding with and extending the Merger. If the Director Defendants took positions, made decisions or took actions regarding the Merger that displeased Microsoft, Microsoft might refuse to approve settlements, releases, waivers or

¹⁸¹ Under Section 1.1(g) of the Merger Agreement, the “Audited Company Balance Sheet” is Activision’s consolidated balance sheet as of December 31, 2020, which would not reflect reserves for litigation filed in 2021.

¹⁸² More suits were filed. On May 26, 2022, another derivative lawsuit arising from the Harassment Scandal was filed against Kotick and the Director Defendants in California. See *Lesley Warren Savage vs. Bobby Kotick, et al.*, C.A. No. 22STCV17478 (Cal. Super.) (“*Savage*,” and referred to herein as a “California Derivative Action”).

remedies in one of the many proceedings that were Specified Litigation or might contest their right to advancement, indemnification and insurance protection under the Merger Agreement.

230. Section 6.13(b) of the Merger Agreement gave Microsoft a similar veto right over “Transaction Litigation.” It provided:

The Company may not compromise, settle or come to an arrangement regarding, or agree to compromise, settle or come to an arrangement regarding, any Transaction Litigation unless Parent has consented thereto in writing.

231. Section 1.1(bbbb) of the Merger Agreement defined “Transaction Litigation” as

any Legal Proceeding against the Company or any of its . . . directors or otherwise relating to, involving or affecting the Company . . . arising from or otherwise relating to the Merger or any other transaction contemplated by this Agreement

232. “Transaction Litigation” includes this Action.

P. The Reaction to the Merger’s Announcement and Kotick’s *VentureBeat* Interview

233. On January 18, 2022, Activision and Microsoft issued a joint press release announcing the Merger, which immediately caused heightened scrutiny from employees, investors and analysts. In an interview with *VentureBeat*, Kotick spun various reasons and rationales for the Merger. *VentureBeat* asked Kotick about the

purpose, timing and price of the deal. Kotick used Activision's workforce as a scapegoat, taking no accountability for the Harassment Scandal or its effect on Activision, the stock price or the opportunistic timing of Microsoft's offer.

234. Kotick told *VentureBeat* that when Spencer called Kotick about the Merger, Kotick had just realized that Activision did not have the “thousands of people”¹⁸³ in machine learning and data analytics that Activision needed to execute its future plans, but Microsoft did. Kotick claimed Activision was “starting to think about all these skills that we need, that we don't have and that were really necessary”¹⁸⁴ to realize the Company's long-range plan. Kotick went on: “so when Phil called, it happened to be at a time where we were ***getting ready to start our long range planning process***, and realizing that these were going to be issues and challenges.”¹⁸⁵

235. However, when Spencer called Kotick on November 19, 2021, management had already completed and the Board had already approved the LRP on November 2, 2021. Further, the LRP the Board approved on November 2,

¹⁸³ Dean Takahashi, *Bobby Kotick Interview: Why Activision Blizzard did the Deal with Microsoft*, VENTUREBEAT (Jan. 18, 2022), <https://venturebeat.com/games/bobby-kotick-interview-why-activision-blizzard-did-the-deal-with-microsoft/> (“*VentureBeat*”).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* (emphasis added).

contemplated [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

Thus, when Spencer called Kotick, Activision was not “getting ready to start” its long range planning process; rather, that process was complete, including management’s plan to meet “issues and challenges” with talent.

236. Then, purporting to explain to *VentureBeat* why he said “yes” to Microsoft’s offer, Kotick told *VentureBeat* that Microsoft “made this offer that was incredibly attractive at [a] 45% premium over the stock price[.]”¹⁸⁷ In response to Kotick’s comment about the “premium,” *VentureBeat* asked if the “the sexual harassment investigation [was a] factor in this, as it certainly seemed to affect stock price.”¹⁸⁸ Kotick answered no. Kotick blamed the drop in Activision’s stock price on the Company’s November 2, 2021 announcement that it was delaying the release of *Overwatch 2* and *Diablo IV*. The delayed releases, however, were part of the fallout from the Harassment Scandal, as *Overwatch 2* and *Diablo IV*’s leaders left because of their involvement with the Cosby Suite. In response to Kotick’s comment

¹⁸⁶ Activision_0000645 at 725.

¹⁸⁷ *VentureBeat*.

¹⁸⁸ *Id.*

to *VentureBeat*, *Overwatch 2*'s producer Kennedy took to Twitter on January 19, 2022 and told the world that Kotick was to blame. Kennedy wrote:

Bobby, tell everyone about the random projects for OW1 you all would shove on us, the team would do [overtime] for only them to get cancelled and for months of OW2 dev[elopement] to have been lost. ***Or how almost entire teams are turning over and citing you as the reason.*** Don't be shy . . . Oh wait that's right you hide behind scapegoats because you're a coward, my mistake.¹⁸⁹

237. Kennedy's Tweet was consistent with *Morningstar*'s conclusion, set forth in its December 3, 2021 report, that the exodus of Activision leaders because of the Harassment Scandal contributed to the delays, and as such: "the best course to help Activision Blizzard move forward and unlock the value in its stock would be to replace Kotick."¹⁹⁰ Unnamed *Diablo IV* insiders would later tell the press that *Diablo IV*'s process was "plagued by mismanagement" and "leadership changes at Activision Blizzard and on the 'Diablo IV' team."¹⁹¹

¹⁸⁹ @RiotLavalier, TWITTER (Jan. 19, 2022, 1:41 p.m.), <https://twitter.com/seamoosi/status/1455638325453336579> (emphasis added).

¹⁹⁰ Morningstar ESG Report at 1.

¹⁹¹ Shannon Liao, 'Diablo IV' Developers Work Long Hours, Bracing for Impending Release, WASH. POST (Dec. 8, 2022), <https://www.washingtonpost.com/video-games/2022/12/08/diablo-iv-release-date-crunch/>. *Diablo IV* insiders also told *The Washington Post* that, under Barriga's leadership, *Diablo IV*'s script included a character raping a love interest whose primary description was "the raped woman." *Id.*

238. *Morningstar* also issued a report on January 18, 2022, responding to the Merger’s announcement. *Morningstar* commented that “Kotick and the board found a path around [Kotick’s] potential expulsion by engaging with Microsoft.”¹⁹² *Morningstar* described Kotick as “radioactive” and Microsoft’s decision to allow Kotick to remain as Activision’s CEO as “a concession to close the deal.”¹⁹³

239. Also on January 18, 2022, Microsoft announced that it promoted Spencer to the new role of CEO of Gaming. Thus, when the Merger closed, Kotick and Activision management would report directly to Spencer, who now oversees Microsoft’s entire gaming business.

Q. It Is Reasonably Conceivable That Hartong Tipped the Hartong Trust to the Merger Negotiations

240. On March 23, 2022, shortly after reports that the DOJ and SEC had launched investigations into potential insider-trading of Activision stock,¹⁹⁴ Hartong filed a Form 4 with the SEC reporting trades in Activision stock from August 27, 2021 to January 18, 2022, by the Susan Hartong Revocable Trust, a trust for

¹⁹² Neil Macker, *Activision Blizzard Purchased by Microsoft*, MORNINGSTAR (Jan. 18, 2022) at 1, <https://www.morningstar.ca/ca/news/218202/activision-blizzard-to-be-acquired-by-microsoft.aspx> (“Morningstar Merger Report”).

¹⁹³ *Id.*

¹⁹⁴ The DOJ and SEC investigated potential insider trading by Kotick allies Barry Diller, Alexander von Furstenberg and David Geffen.

Hartong's spouse (the "Hartong Trust"). The Hartong Trust, which had not previously owned Activision shares, began acquiring shares from August 27 through September 21, 2021, then sold those shares on September 23 through September 30, 2021. The Hartong Trust began acquiring shares again on November 23, 2021, and acquired additional shares on November 30 and December 13, 14, 16 and 21, 2021, at prices ranging from \$58.70 to \$63.01. A relatively small and odd number of shares were purchased on these various dates, but the Form 4 reveals there were multiple purchases at a range of prices on each of these dates. For example, rather than purchasing 275 shares on December 16, 2021 in a single transaction, the Hartong Trust purchased 276 shares in multiple transactions at prices ranging from \$61.17 to \$61.49. It is reasonably conceivable these multiple purchases of a small number of shares through a trust was designed to disguise insider trading by Hartong or someone related to the Hartong Trust he had tipped to the Merger negotiations. Significantly, Activision shares were bought (i) on November 23, 2021, shortly after Merger negotiations began and the day after the Activision Board created the WRC; (ii) on November 30, 2021, the day after the Proxy says Hartong was told of the \$90-105 range of the Microsoft Merger discussions, and (iii) on December 13, 14, 16 and 21 amidst a series of Activision Board meetings on the Merger that Hartong attended on December 10, 12, 14, 15, 17 and 21.

241. The Hartong Trust sold seventy-four Activision shares on January 18, 2022 after the price rose to \$81.79 following the announcement of the Merger. The Form 4 claimed an “investment manager” effected all the numerous small trades over more than four months without Hartong’s knowledge. However, that seems unlikely given that Hartong placed the Activision shares in the trust and the investment manager presumably knew Hartong was an Activision director. Hartong said he paid the Company \$5,031.68 in recoverable profits on the sale of the seventy-four shares. However, the Hartong Trust purchased 295 shares between November 23 and December 21, 2021 and the Form 4 indicates the trust continued to own 221 shares.¹⁹⁵ Thus, the Hartong Trust profited from the sale of those shares either before or when the Merger closed.¹⁹⁶ On April 16, 2022, Hartong notified the Company he would not stand for reelection at the 2022 annual meeting. It is reasonably conceivable that the Hartong Trust’s purchase and sales were the result of tips from Hartong, that Hartong belatedly reported the trades because of the SEC and DOJ insider trading investigations and that he drafted the Form 4, paid the \$5,031.68 in short-swing profits and left the Activision Board to cover-up his wrongdoing.

¹⁹⁵ The March 23, 2022 Form 4 is the last Form 4 Hartong filed with the SEC.

¹⁹⁶ From the Merger’s announcement through its closing, Activision’s stock price traded higher than the prices at which the Hartong Trust bought its shares.

242. The timing of the purchases by the Hartong Trust in November and December 2021 indicates knowledge of the Microsoft negotiations, and certainly makes it a fair inference and reasonably conceivable that the purchases were based on insider knowledge, knowledge that Hartong as an Activision director would have had and could pass on to his spouse and/or the supposed investment manager of the trust. The Form 4 claims the trustee of the Hartong Trust directed the investment manager not to engage in further transactions in Activision stock, but does not identify the trustee or the investment manager. It is reasonably conceivable that Susan Hartong is the trustee of the Susan Hartong Revocable Trust and that the investment manager is Susan Hartong or an entity with which she (and perhaps Hartong) may be involved, such as Parish Partners LLC, which is registered at the Hartong's residence on Parish Lane in New Canaan, Connecticut.

243. The timing and nature of the sale of seventy-four of the Hartong Trust's shares just after the Merger announcement and the over two months that elapsed between that January 18, 2022 sale and the March 23, 2022 filing of the Form 4 raises reasonably conceivable scenarios concerning what actually happened. Hartong's vague assertion in the Form 4 that he "recently" became aware of trades that occurred from August of 2021 until January of 2022 does not reveal when he actually learned of the trades. He could have known of trades in December; he could

have learned of trades on or about January 18 and stopped further sales, but delayed two months and filed the Form 4 only after the SEC had launched an insider trading investigation; he could have learned of the trades in March, 2022, but that would not explain why trades stopped after January 18, 2022.

R. Defendants Rush the Special Meeting in the Face of Protracted Antitrust Scrutiny They Expected

244. Upon its announcement, the Merger immediately faced stringent scrutiny from antitrust regulators. Given the antitrust climate, and the size and nature of the Merger, it was no surprise that the Merger caused heavy and protracted scrutiny from antitrust regulators, including the FTC and the United Kingdom’s CMA. Defendants expected this would happen when they entered into the Merger Agreement. So did [REDACTED] who declined to engage in discussions with Activision because of the obvious regulatory risks that merging with Activision would pose. On February 1, 2022, it was reported that the FTC would review the Merger for antitrust issues rather than the DOJ. As part of its review of the Merger, on March 3, 2022, the FTC asked Activision and Microsoft for additional information as part of its regulatory review (a “Second Request”). This Second Request extended Defendants’ waiting period under the Hart-Scott Rodino Act (“HSR Act”) for closing the Merger until the 30th day after Activision and Microsoft

“substantially compl[ied]”¹⁹⁷ with the FTC’s Second Request. Accordingly, as the Proxy disclosed, Activision and Microsoft did not expect to close the Merger until “Microsoft’s fiscal year ending June 30, 2023,”¹⁹⁸ an expectation that proved optimistic. Ultimately, the regulatory proceedings substantially delayed the Merger and resulted in the Letter Agreement extending the time for completing the Merger until October 18, 2023.

245. Despite expecting and facing protracted regulatory approval of the Merger, Defendants rushed the Special Meeting of stockholders to approve the Merger. On March 21, 2022, after limited SEC review of a preliminary proxy statement filed on February 18, 2022, Activision issued the Proxy, and scheduled the Special Meeting for April 28, 2022. Defendants rushed the Merger vote before stockholders would have the opportunity to vote on Kotick’s compensation and directorship at the Company’s 2022 annual meeting.

246. Defendants scheduled the premature Merger vote though they knew there would be protracted regulatory review of the Merger. Thus, the stockholders were forced to vote on the Merger Agreement and decide whether to exercise

¹⁹⁷ Proxy at 70.

¹⁹⁸ *Id.*

appraisal rights without any indication of the length of the antitrust review or the severity of the risk of an antitrust challenge.

247. The Proxy did not contain a Section 251-compliant agreement of merger. Instead, Annex A of the Proxy only included the Execution Version of the Merger Agreement. The Merger Agreement did not include the CDL, disclosure schedules or Survivor's Certificate, which were required parts of a Section 251 agreement of merger.

248. Meanwhile, leading up to the Special Meeting, Activision made purported corporate governance improvements that were mere window-dressing. On April 16, 2022, Hartong and Wasserman notified the Company they would not stand for reelection at the 2022 annual meeting and the Board temporarily expanded its size from nine to eleven members, elected Lulu C. Meservey ("Meservey") to serve as a new director and nominated Carr for election as a director at the 2022 annual meeting. Carr is a Senior Vice President at Bacardi and therefore reports to Corti, a Bacardi director, who was not disinterested and independent with respect to the Company or the Merger. As a member of the Board's Nominating and Corporate Governance Committee, Corti would have participated in selecting Carr as an Activision director. In addition, Meservey subsequently resigned from the Board on

October 6, 2022 to become Activision's Executive Vice President, Corporate Affairs and Chief Communications Officer.

249. Activision held the Special Meeting on April 28, 2022. In advance of the meeting, and as pled in detail below, Plaintiff attempted to use "the tools at hand" by demanding to inspect Books and Records before the Special Meeting. Activision, however, dragged its feet on responding and producing documents in response to Plaintiff's Section 220 Demand. Activision did not produce any documents to Plaintiff until after the Special Meeting.

250. The Company reported in a Form 8-K filed on April 28, 2022 that on that date a majority of Activision's shares were present in person or by proxy and approved the Merger. Only 68.2% of Activision's stockholders voted in favor of the Merger Agreement. Almost 30% of Activision's stockholders chose not to vote and nearly 31% voted against, abstained or did not vote. The Proxy advised stockholders that not voting was equivalent to voting against the Merger Agreement. Stockholders were coerced into voting for the Merger to avoid remaining invested in an Activision that continued to be run by Kotick. When faced with the Hobson's choice of remaining invested in Activision (with Kotick in charge) or accepting a suboptimal merger price, they voted to extricate themselves from Kotick rather than on the merits of the Merger. Moreover, as pled below, the disclosures in the Proxy

were materially inadequate and misleading, and as such the stockholder vote was not fully informed. Furthermore, the Merger closed based on a stale stockholder vote that occurred more than one-and-a-half years earlier.

S. Defendants Absolve Themselves of Wrongdoing and Prepare for the 2022 Annual Meeting

251. Wasting no time, on April 29, 2022, the day after the Special Meeting, Activision filed its annual proxy statement (the “2022 Proxy”) scheduling its annual meeting for June 21, 2022 (the “2022 Annual Meeting”). The 2022 Proxy solicited stockholders to approve the election of directors and an advisory proposal on executive compensation. In its summary of executive compensation, the 2022 Proxy disclosed that Kotick agreed to reduce his compensation in October, which could be restored according to the terms of his Employment Agreement if certain conditions were met. The 2022 Proxy, however, described those conditions based on the improved compensation terms that Activision agreed to with Microsoft in connection with the Merger. The 2022 Proxy did not disclose the terms of the October Pay Cut Agreement and therefore obscured that Activision’s agreement with Microsoft violated it.

252. Proposal 5 in the 2022 Proxy for the 2022 Annual Meeting was a stockholder proposal submitted by the New York State Retirement Fund, a holder of 1,552,194 shares of Activision Common Stock. The proposal requested that the

Board oversee an annual public report on the effectiveness and outcomes of Activision's efforts to prevent harassment and discrimination, including disclosure of relevant metrics and targets. The responses by Activision and the Board demonstrated that Kotick and the Board continued to deny, minimize and rationalize Activision's toxic culture, and to exonerate Kotick and the Board from responsibility, in the hope that they could run out the clock and use the Merger to eliminate claims against them while having the super indemnification, advancement, exculpation and insurance rights under the Merger Agreement.

253. In response to Proposal 5, the Board issued a series of statements absolving Kotick and the Board and blaming DFEH and the media for calling out Activision's sordid history of harassment and discrimination. The Board also highlighted reforms that were implemented in response to the Harassment Scandal,¹⁹⁹ most of which were required components of the EEOC Consent Decree.²⁰⁰ Despite intense lobbying by Activision, Kotick and the Board, Proposal 5 passed.

¹⁹⁹ Activision, Form 8-K (Current Report) (June 16, 2022).

²⁰⁰ See EEOC Consent Decree, available at <https://investor.activision.com/consent-decree-with-EEOC>.

T. The Harassment Scandal Abates and New Games are Launched as the Merger Faces More Regulatory Hurdles

254. On August 1, 2022, Activision issued a press release announcing that its teams had “made strong progress on a broad pipeline of new content,” and would therefore be releasing *Overwatch 2* on October 4 and *COD: Modern Warfare II* (“*COD:MW2*”) on October 28. Around the same time, the Merger faced protracted regulatory review, as Defendants expected. The benefits from mitigating the Harassment Scandal and the release of new games would go to Microsoft, not Activision’s stockholders.

255. On September 1, 2022, the CMA announced that it had concluded its Phase 1 investigation of the Merger and determined that the Merger may substantially lessen competition in U.K. markets for gaming consoles, multi-game subscription services, and cloud gaming services. Kotick’s response to the CMA’s September 1, 2022 announcement conceded that Defendants always expected protracted investigations and review of the Merger by antitrust regulators.²⁰¹

²⁰¹ A Letter from CEO Bobby Kotick Regarding Activision Blizzard’s Merger with Microsoft, ACTIVISION BLIZZARD (Sept. 1, 2022), <https://investor.activision.com/news-releases/news-release-details/letter-ceo-bobby-kotick-regarding-activision-blizzards-merger>.

256. On September 15, 2022, after Microsoft informed the CMA that it was not offering any concessions, the CMA announced that it was performing a protracted Phase 2 investigation of the Merger.²⁰² The CMA had a March 1, 2023 deadline for completing its investigation that it subsequently extended to April 26.

257. On October 4, 2022, Activision released *Overwatch 2* on schedule, a stark contrast from its performance eleven months prior. Within one month of its release, *Overwatch 2*'s average daily player numbers had more than doubled that of its predecessor.²⁰³

258. On October 28, 2022, Activision released *COD:MW2* on schedule. *COD:MW2* delivered more than \$800 million in worldwide sell-through in its first three days and was the #1 top-selling opening weekend in franchise history.²⁰⁴ *COD:MW2* also topped worldwide box office openings of 2022, including *Top Gun*:

²⁰² See generally *Anticipated Acquisition by Microsoft Corporation of Activision Blizzard Inc., Decision to Refer*, CMA (Sept. 15, 2022), https://assets.publishing.service.gov.uk/media/634536048fa8f5153767e533/MSFT.ABK_phase_1_decision_-_1.09.2022.pdf (“Decision to Refer”).

²⁰³ See *Activision Blizzard Announces Third Quarter 2022 Financial Results*, ACTIVISION BLIZZARD (Nov. 7, 2022), <https://investor.activision.com/news-releases/news-release-details/activision-blizzard-announces-third-quarter-2022-financial>.

²⁰⁴ *Modern Warfare II Tops \$800 Million Sell-Through in Three Days, Delivers Largest Opening Weekend in Franchise History*, ACTIVISION BLIZZARD (Nov. 1, 2022), <https://investor.activision.com/news-releases/news-release-details/modern-warfare-ii-tops-800-million-sell-through-three-days>.

Maverick and *Doctor Strange in the Multiverse of Madness* combined.²⁰⁵ In its first ten days, *COD:MW2* crossed \$1 billion in sell-through. It was the highest grossing entertainment launch in 2022, the fastest game in franchise history to cross \$1 billion and ultimately became the highest-selling game in the U.S. in 2022.²⁰⁶

259. On November 8, 2022, the European Commission (“E.C.”) announced it was opening an “in-depth” Phase 2 investigation of the Merger.²⁰⁷ The E.C. expressed the same concerns about the Merger as the CMA. The E.C. stated it had a March 23, 2023 deadline to complete its investigation and make a decision on the Merger, but then extended the deadline to April 11, 2023.

260. On December 8, 2022, the FTC filed its suit challenging the Merger and scheduled a trial that would not begin until August 2, 2023,²⁰⁸ after the Termination Date. That same day, each of Activision and Microsoft stated they would fight the FTC Suit.²⁰⁹

²⁰⁵ *Id.*

²⁰⁶ See *id.*; *Timeline: An Infographic History of Activision Blizzard*, ACTIVISION (Oct. 26, 2023) (“Infographic”), <https://newsroom.activisionblizzard.com/p/timeline-an-infographic-history-of>.

²⁰⁷ *Mergers: Commission opens in-depth investigation into the proposed acquisition of Activision Blizzard by Microsoft*, EUR. COMM’N (Nov. 8, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_6578.

²⁰⁸ FTC Complaint at Notice.

²⁰⁹ @lulumesurvey, TWITTER (Dec. 8, 2022, 2:30 p.m.), <https://twitter.com/lulumesurvey/status/1600935946291412992>; *A Letter from CEO*

261. As discussed below, the pending FTC Suit meant that a condition to closing the Merger would not be met before the July 18, 2023 Termination Date for the Merger Agreement. Activision and Microsoft therefore recognized that the Merger would be substantially delayed. They filed joint papers in federal court stating that the FTC’s process would take “several years.”²¹⁰ Activision and its senior officers planned accordingly. On December 13, 2022, five days after the filing of the FTC Suit, Activision’s President and COO Alegre notified the Company he planned to leave when his employment agreement expired on March 31, 2023.

262. On December 18, 2022, Activision’s Compensation Committee approved adding Zerza (CFO), Bulatao (Chief Administrative Officer) and Dixon (Chief Legal Officer) to Activision’s Enhanced Severance Plan. The Compensation Committee also approved the acceleration into December 2022 of cash and equity

Bobby Kotick Regarding Activision Blizzard’s Merger with Microsoft, ACTIVISION BLIZZARD (Dec. 8, 2022), <https://investor.activision.com/news-releases/news-release-details/letter-ceo-bobby-kotick-regarding-activision-blizzards-merger-1>; @BradSmi, TWITTER (Dec. 8, 2022, 2:46 p.m.), <https://twitter.com/BradSmi/status/1600939963377254400>; Sarah E. Needleman, *Microsoft Prepares to Go to Battle With FTC Over Activision Deal*, WALL ST. J. (Dec. 17, 2022) (“*Microsoft Prepares to go to Battle*”), <https://www.wsj.com/articles/microsoft-prepares-to-go-to-battle-with-ftc-over-activision-deal-11671283792?siteid=yhoof2&ypr=yahoo> (“*Microsoft Prepares to go to Battle*”).

²¹⁰ See *Fed. Trade Comm’n v. Microsoft Corp., et al.*, Case No. 3:23-cv-02280, Dkt. 56 (N.D. Cal. June 14, 2023) (“*FTC PI Action*”) (Defendants’ Notice of Motion and Motion for Expedited Case Management Conference) at 3:24-4:5; see also *id.* at 5:16-6:3.

awards that would have been payable on or prior to the closing of the Merger, including \$5,301,346 and 58,013 shares to Zerza, \$5,303,680 and 9,910 shares to Bulatao and \$839,513 and 12,450 shares to Dixon. These rushed payments reflected that the Merger's close would be delayed indefinitely so these executives got immediate payment rather than having to wait for the Merger to close.

263. On January 31, 2023, the E.C. issued a formal statement of objections to the Merger that mirrored the CMA's and FTC's concerns.²¹¹

264. On February 6, 2023, Activision announced exceptional fourth quarter 2022 results,²¹² with all three of its segments outperforming historical metrics and the wider industry. *Overwatch 2*'s in-game net bookings were the highest level to date for *Overwatch*.²¹³ *COD:MW2* set the highest opening quarter in franchise history with \$1.85 billion in net revenue, which was \$694 million more than its

²¹¹ Leah Nylen, Jillian Deutsch & Dina Bass, *Microsoft Receives EU's List of Concerns About Activision Deal*, BLOOMBERG (Feb. 1, 2023), <https://www.bloomberg.com/news/articles/2023-02-01/microsoft-receives-eu-s-list-of-concerns-about-activision-deal?leadSource=uverify%20wall>; Samuel Stolton, *EU Issues Antitrust Warning Against Microsoft's \$69 Billion Activision Bid*, POLITICO (Feb. 1, 2023), <https://www.politico.eu/article/eu-issues-antitrust-charge-sheet-against-microsofts-69-billion-activision-bid/>.

²¹² See Activision, Form 8-K (Current Report) (Feb. 6, 2023) (filed at 16:13:49), Ex. 99.1.

²¹³ See Gerrick L. Johnson, *Deal or No Deal, These Are Very Good 4Q Results*, BMO CAPITAL MARKETS (Feb. 8, 2023) ("4Q Results").

fourth quarter the year before.²¹⁴ King’s *Candy Crush* was the top-grossing game franchise in the U.S. app stores for the twenty-second quarter in a row.²¹⁵ Activision beat consensus estimates by wide margins for net bookings, adjusted EPS and revenue.²¹⁶ Wells Fargo described Activision as “Firing on All Cylinders.”²¹⁷ Wedbush noted: “[Activision] Delivers Massive Upside in Q4, With Microsoft Smiling from a Distance.”²¹⁸ Wedbush noted further: “Should the deal fail, investors should see a rapid rebound in share price as arbitrageurs depart and conventional investors return.”²¹⁹ Wedbush was referring to the fact that Activision’s stock price—which was trading below \$95 per share—reflected the market’s view of whether the Merger would close, as opposed to Activision’s value.

²¹⁴ Zack Patraw, *When is Call of Duty Modern Warfare III Release Date?*, ESPORTS ILLUSTRATED (Aug. 7, 2023), <https://esi.si.com/call-of-duty/modern-warfare-iii-release-date>.

²¹⁵ *See 4Q Results*.

²¹⁶ Activision’s (i) net bookings were \$3.57 billion, as compared to consensus estimates of \$3.08 billion; (ii) adjusted EPS was \$1.87, as compared to consensus estimates of \$1.52; and (iii) revenue was \$3.6 billion, as compared to consensus estimates of \$3.2 billion. Jason Schreier, *Activision Blizzard Bookings Beat Estimates on New Call of Duty*, BLOOMBERG (Feb. 6, 2023); Nick McKay & Michael Pachter, *Activision Blizzard (ATVI), Delivers Massive Upside in Q4, with Microsoft Smiling from a Distance*, WEDBUSH (Feb. 7, 2023) (“*Massive Upside*”).

²¹⁷ Brian Fitzgerald & Robert Coolbrith, *Activision Blizzard Inc. (ATVI), ATVI:4Q—Firing on All Cylinders. Reiterate Overweight, \$95 PT*, WELLS FARGO (Feb. 7, 2023).

²¹⁸ *Massive Upside*.

²¹⁹ *Id.*

265. On February 8, 2023, the CMA issued its provisional finding that the Merger was expected to result in a substantial lessening of competition in cloud gaming services and cloud gaming consoles (the “Provisional Findings”). The CMA also issued a Notice of Possible Remedies to the Merger (“Notice of Possible Remedies”): (i) prohibiting the Merger; (ii) divesting the business associated with *COD*; (iii) divesting Activision Publishing; or (iv) divesting Activision Publishing and Blizzard. Of course, Microsoft was not going to divest *COD*, Activision Publishing or Blizzard. These assets were among Microsoft’s primary reasons for acquiring Activision.

266. Despite Activision’s exceptional Q4 results, which the Company announced just two days prior, Activision’s stock price dropped on February 8, 2023, after the CMA issued its Provisional Findings.

267. On April 26, 2023, the CMA issued its final decision and report on the Merger (the “Final Report”), which reaffirmed the CMA’s Provisional Findings. The CMA was prohibiting the Merger.²²⁰ Microsoft immediately announced that it

²²⁰ The CMA issued an interim order prohibiting the Merger, effective May 5, 2023 (the “Interim Order”), and a final order, effective August 22, 2023.

would appeal (the “CMA Appeal”).²²¹ Within a few hours, Activision stated that it would “fully support”²²² that appeal.

U. Kotick Vows to do “Everything He Personally Can” to Close Merger While Conceding Activision’s Performance is “Exceptional”

268. Also on April 26, 2023, Kotick sent an email to Activision employees, reiterating that Activision would support the CMA Appeal. Kotick also expressed his personal commitment to the Merger. Kotick wrote:

I’m going to do everything I personally can to advocate for us and help regulators understand the competitive dynamics in our industry.²²³

269. Unable to restrain himself from touting Activision’s strong performance, Kotick also wrote:

What gives me confidence is that, whether on our own or united with another company, we are one of the strongest companies in our industry, poised for continued growth, and building on our incredible IP.²²⁴

²²¹ Katharine Gemmell, *Microsoft’s \$69 Billion Activision Deal Blocked by UK Watchdog*, BLOOMBERG EDITORIAL (Apr. 26, 2023, 7:06 a.m.) (available on BLOOMBERG terminal).

²²² Activision, Current Report (Form 8-K) (Apr. 26, 2023), Ex. 99.1 (the “April 26 Press Release”) at 2.

²²³ Bobby Kotick, *We’ll Keep Pressing Our Case for a Microsoft Deal*, ACTIVISION BLIZZARD (Apr. 26, 2023) (“Pressing Our Case”), <https://newsroom.activisionblizzard.com/p/microsoft-deal-cma-decision>.

²²⁴ *Id.*

Thus, unlike the story he told *VentureBeat* on January 18, 2022, about how Activision “needed” Microsoft’s “thousands of people,”²²⁵ Kotick admitted that Activision did not “need” Microsoft. Indeed, by then, Activision had proven *Morningstar*’s theory correct: its issues were governance, not business, and fixable.

270. On April 26, 2023, Activision announced its second consecutive quarter of record-breaking performance, which Kotick described as “exceptional[.]”²²⁶ Activision beat consensus revenue estimates and set new records for revenue and EPS. Activision’s performance was being fueled by its pipeline of new games, including *COD:MW2* and *Overwatch 2*.

271. Activision’s Q1 2023 Financial Results.²²⁷

	Analyst Estimates ²²⁸	Actual Results	Year-Over-Year Growth
Net Revenue*	\$2.11 billion	\$2.38 billion	35%
Earnings Per Share*	N/A	\$0.93	86%
Net Bookings	\$1.77 billion	\$1.86 billion	25%
Activision Publ. revenue	\$556.3 million	\$580 million	28%
Blizzard revenue	\$435.9 million	\$443 million	62%

²²⁵ See ¶ 234, *supra*.

²²⁶ April 26 Press Release.

²²⁷ The “*” denotes record-breaking first quarter results.

²²⁸ Wallace Witkowski & Ciara Linnane, *Activision Blizzard’s stock drops as U.K. block of Microsoft deal overshadows earnings beat*, MARKETWATCH (Apr. 26, 2023), <https://www.marketwatch.com/story/activision-blizzards-q1-earnings-blow-past-estimates-5fbaf1c?mod=moneyishl>. MARKETWATCH did not report consensus estimates for the Company’s earnings per share.

King mobile revenue*	\$689.9 million	\$739 million	8.3%
----------------------	-----------------	---------------	------

V. Defendants Hold the 2023 Annual Meeting Without Fixing the Merger’s Statutory Defects

272. On May 1, 2023, Activision issued a notice and proxy statement (the “2023 Proxy”) for a June 21, 2023 annual meeting (the “2023 Annual Meeting”). As discussed below, during the six months preceding the issuance of the 2023 Proxy, Plaintiff repeatedly explained in pleadings, briefs and letters to Defendants’ counsel why the Merger failed to comply with Section 251. Plaintiff also repeatedly told Activision and the Director Defendants that they had the opportunity to fix the Merger’s statutory defects, including by having the Board approve a Section 251-compliant agreement of merger and submitting that agreement to a vote of Activision stockholders at the 2023 Annual Meeting. Defendants ignored Plaintiff. The 2023 Proxy failed to alert stockholders of the possible statutory infirmities with the Merger. The 2023 Proxy did not reference this litigation.²²⁹

273. The 2023 Proxy disclosed that on April 25, 2023, and effective as of March 30, 2023, Kotick’s employment agreement had been extended by twelve months to March 31, 2024.²³⁰ Kotick had successfully used the Merger to save his

²²⁹ Activision held the 2023 Annual Meeting without a vote to fix the defects. See Activision, Form 8-K (Current Report) (June 21, 2023).

²³⁰ 2023 Proxy at 104.

job, compensation, financial benefits and reputation for years following *Kotick Knew*.

274. With respect to Kotick's compensation, the 2023 Proxy repeated the misleading disclosure in the 2022 Proxy about Kotick's Pay Cut Agreement. The 2023 Proxy did not disclose whether the WRC had restored Kotick's compensation in 2023. Now that the Merger has closed, Activision will never disclose the compensation that Kotick received during Activision's 2023 fiscal year.²³¹

W. Activision Releases More Blockbuster New Games and Its Employees Continue Calling for Kotick's Ouster

275. On June 6, 2023, Activision finally released *Diablo IV*.²³² Leading up to its launch, Activision's developers wanted gamers focused on *Diablo IV*, not questioning whether to play the game or boycott the Company as a result of the Harassment Scandal. Instead, Kotick dredged up the scandal.

²³¹ Activision has historically disclosed executive compensation in its annual proxy statement.

²³² See *See You in Hell on June 6, 2023! Pre-Purchase for Blizzard Entertainment's Diablo IV Available Now*, ACTIVISION BLIZZARD (Dec. 8, 2022), <https://investor.activision.com/news-releases/news-release-details/see-you-hell-june-6-2023-pre-purchase-blizzard-entertainments>.

276. In a May 31, 2023 interview that some called “bizarre,”²³³ Kotick talked with *Variety* about the Harassment Scandal.²³⁴ He took no accountability for the scandal and blamed DFEH, the EEOC, the media and Activision’s workforce for the scandal. Kotick told *Variety* that Activision “did not have a systemic issue with harassment—ever.”²³⁵ He said the Harassment Scandal was really just “mischaracterizations reported in the media.”²³⁶ He blamed those mischaracterizations on “a very aggressive labor movement working hard to try and destabilize the company.”²³⁷ Thus, as he had done in his January 18, 2022 *VentureBeat* interview, he blamed the Harassment Scandal on his workforce. He essentially called them liars. It was Kotick, however, who was factually incorrect: Activision employees began unionizing after DFEH filed its lawsuit, not before. Moreover, Kotick’s self-serving absolution flew in the face of: (i) the EEOC and

²³³ Adam Morgan, *To Hell and Back: Inside the Tumultuous Making of Diablo IV*, ESQUIRE (June 12, 2023) (“Hell and Back”), <https://www.esquire.com/entertainment/a44132115/diablo-iv-video-game/>.

²³⁴ See Cynthia Littleton, *Bobby Kotick Breaks His Silence: Embattled Activision CEO Addresses Toxic Workforce Claims as Microsoft Deal Hangs in the Balance*, VARIETY (May 31, 2023) (“Kotick Breaks His Silence”), <https://variety.com/2023/digital/news/activision-blizzard-ceo-addresses-toxic-workforce-claims-microsoft-deal-1235628361/>.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

DFEH Actions, filed after two-years of investigations; (ii) the exodus of high-profile employees; (iii) Kotick's October 2021 concession that a light had been shined on the Company's sexist and discriminatory practices; (iv) his November 19, 2021 acknowledgement that he may have to resign; and (v) Activision's payment of over \$100 million in settlements, including in the EEOC Action, DFEH Action and the SEC Investigation (described below), plus substantial costs in remedial measures.

277. Kotick also addressed the Merger. *Variety* reported: "he is only focused on guiding the deal through the regulatory roadblocks."²³⁸ Thus, despite the looming Termination Date, Kotick was not considering Activision's strategic alternatives. Despite admitting in his April 26, 2023 email that Activision was one of the strongest companies in the industry, Kotick was not considering Activision's viable option of terminating the Merger and remaining an independent company. Moreover, Kotick reiterated that viable course to *Variety*, stating:

We have a great company. We have an enormous amount of momentum, and we have an extraordinary balance sheet . . . And we can continue to be successful alone like we have been for the last 30 years.²³⁹

²³⁸ *Kotick Breaks His Silence* (emphasis added).

²³⁹ *Id.* (emphasis added).

278. *Diablo IV* was immediately another blockbuster hit. Activision announced on June 6, 2023, that *Diablo IV* was live, and, based on pre-launch sales since early access started on June 1, was Blizzard’s fastest-selling game of all time.²⁴⁰ Within five days of its June 6 launch, *Diablo IV* had blown past \$666 million in sales and was the best-selling opening in Blizzard’s history, the box-office equivalent of the biggest opening week of the year and out-grossed worldwide box office horror films released in 2023.²⁴¹

279. The week after *Diablo IV*’s release, on June 12, 2023, *Esquire* published an article in which Blizzard employees reacted to Kotick’s May 31 *Variety* interview. *Esquire* titled the article: “*To Hell and Back: Inside the Tumultuous Making of Diablo IV.*”²⁴² *Esquire* based the article on interviews with more than two dozen current and former Blizzard employees, including *Diablo IV* developers.

²⁴⁰ *Diablo IV Launches, Immediately Sets New Record as Blizzard Entertainment’s Fastest-Selling Game of All Time*, ACTIVISION BLIZZARD (June 6, 2023), <https://investor.activision.com/news-releases/news-release-details/diabl-or-iv-launches-immediately-sets-new-record-blizzard>.

²⁴¹ *Infographic; Diablo IV Crosses \$666 Million Sell-Through Within Five Days of Launch, Setting New Blizzard All-Time Record*, ACTIVISION BLIZZARD (June 12, 2023), <https://investor.activision.com/news-releases/news-release-details/diabl-or-iv-crosses-666-million-sell-through-within-five-days>; *Diablo IV Earns More Than \$666M in Sales in First Five Days, Setting a New Blizzard Record*, ACTIVISION BLIZZARD (June 12, 2023), <https://newsroom.activisionblizzard.com/p/diablo-iv-launch-sales-record>.

²⁴² *Hell and Back*.

Esquire reported that Activision employees were “livid” with Kotick and “furious and depressed”²⁴³ by his comments to *Variety*. They debunked Kotick’s theory that the Harassment Scandal was mere fiction. They told *Esquire* about their experiences at *Diablo IV* under Barriga and McCree, how Activision enabled Barriga and McCree to facilitate systemic harassment and the “traumatizing”²⁴⁴ impact it had. They said that since the DFEH Action exposed the Harassment Scandal and Barriga and McCree were forced out, conditions at *Diablo IV* had vastly improved. *Esquire* reported that employee retention was up across all business units, Activision’s games remained on schedule and Activision’s teams remained committed to exceeding player expectations. Employees made clear, however, that they did not attribute Activision’s improvements to senior management. Rather, they attributed those improvements to “employee-led efforts across Activision.”²⁴⁵ *Esquire* reported that employees were “still pushing for changes at the corporate level[.]”²⁴⁶ In other words, Activision’s workforce still wanted Kotick out.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

X. Defendants Extend the Merger Agreement After Activision Proves Its Problems Were Fixable Without Microsoft

280. The pendency of the CMA Appeal, CMA Interim Order and FTC Suit meant that conditions to closing the Merger under Section 7.1 of the Merger Agreement were not going to be met by the Termination Date. Activision would therefore be able to walk away from the Merger and collect a \$3 billion termination fee from Microsoft. That might have been a good result for Activision's public stockholders. Activision and Microsoft had negotiated the Merger when Activision's stock price, operations and financial performance were suffering from the Harassment Scandal. Circumstances had changed significantly in the twenty-one-months since. The Harassment Scandal had been largely mitigated. Activision had implemented a number of reforms, including, among others, investing \$250 million to expand gaming and technology for marginalized communities, waiving the requirement for arbitration of sexual harassment and discrimination claims, hiring more developers, and engaging a third-party equal opportunity consultant. Activision was performing exceptionally well. The industry was focused on Activision's new games and upcoming games. The narrative had changed from the Harassment Scandal. As discussed below, Activision was worth more than \$95 per share as of the Termination Date.

281. However, under the No Solicitation provision of Section 5.3(a) of the Merger Agreement, Activision could not explore alternatives to the Merger prior to the termination of the Merger Agreement. Under Section 8.1(c) of the Merger Agreement, Activision would be able to terminate the Merger Agreement after 11:59 p.m. Pacific Time on July 18, 2023. Instead, Kotick, who had publicly committed to proceeding with the Merger, signed the Letter Agreement on July 18, 2023.

282. The Letter Agreement (i) extended the Merger Agreement until at least October 18, 2023, (ii) extinguished Activision's right to collect \$3 billion on the Termination Date, (iii) narrowed Activision's rights to terminate the Merger Agreement prior to the Amended Termination Date and (iv) narrowed the conditions to closing, which made it easier for the Defendants to close the Merger.

1. Activision Could Have Terminated the Merger Agreement and Collected a \$3 Billion Termination Fee

283. Section 7.1(b) of the Merger Agreement provided that the obligations of Microsoft and Activision to consummate the Merger were subject to the conditions that:

(b) *Competition Approvals* . . . all requisite clearances, consents and approvals pursuant [to the other Laws set forth in Section 7.1(b)²⁴⁷ of the Company Disclosure

²⁴⁷ The antitrust laws set forth in Section 7.1(b) of the CDL included [REDACTED]

Letter] will have been obtained in each case, without the imposition, individually or in the aggregate, of a Burdensome Condition.

284. The CMA Appeal therefore meant that all requisite antitrust clearances, consents and approvals that were conditions to closing the Merger under Section 7.1(b) of the Merger Agreement would not be met by the Termination Date. As of July 18, 2023, the CMA had not approved the Merger. Further, the CAT, which would preside over the CMA Appeal, had scheduled a multi-day hearing that would not even start until October 23, 2023.

285. In addition, Section 7.1(d) of the Merger Agreement provided that the closing of the Merger was subject to condition that:

No Prohibitive Laws or Injunctions. No temporary restraining order, preliminary or permanent injunction or other judgment or order issued by an court of competent jurisdiction or other legal or regulatory restraint or prohibition preventing the consummation of the Merger will be in effect, nor will any action have been taken by any Governmental Authority of competent jurisdiction, and no . . . regulation or order will have been . . . entered . . . that . . . (i) prohibits, makes illegal, or enjoins (or seeks to prohibit make illegal or enjoin) the consummation of the Merger or (ii) imposes or seeks to impose a Burdensome Condition.

286. The CMA's Interim Order and the pendency of the FTC Suit therefore meant that a condition to closing the Merger under Section 7.1(d) would not be met

by the Termination Date. The Interim Order was a regulatory restraint preventing consummation of the Merger. The FTC Suit was an action taken by a Governmental Authority of competent jurisdiction that seeks to prohibit, make illegal or enjoin the consummation of the Merger. While a federal district court had denied the FTC’s motion to enjoin the Merger until the outcome of the FTC Suit, the FTC appealed that decision to the Ninth Circuit on July 13, 2023.²⁴⁸

287. Section 8.1(c) of the Merger Agreement provided that the Merger Agreement could be validly terminated by either Activision or Microsoft if the Effective Time had not occurred by 11:59 p.m., Pacific Time, on July 18, 2023. Section 8.1(c) did not provide for any extensions of the Termination Date beyond 11:59 p.m. Pacific Time on July 18, 2023. Activision and Microsoft jointly told the federal district court when opposing the FTC’s injunction motion: the Merger Agreement “expire[d] on July 18, 2023,”²⁴⁹ and “require[d] the parties to close by July 18, 2023.”²⁵⁰ The CMA Appeal, Interim Order and FTC Suit meant that the

²⁴⁸ See *FTC v. Microsoft Corp., et al.*, 23-15992 (9th Cir. July 13, 2023) (Dkt. 1). On September 26, 2023, the FTC entered an order providing that the evidentiary hearing in the FTC Suit will commence twenty-one days after the Ninth Circuit issues its appellate decision.

²⁴⁹ See *FTC PI Action*, Dkt. 108 (Defendants’ Memorandum of Law in Opposition to Motion for Preliminary Injunction) at 4:13-14.

²⁵⁰ See *id.*, Dkt. 56 (Motion for Expedited CMC) at 5:2 (underlining added).

Effective Time was not going to occur by the Termination Date. The Merger Agreement was set to expire.

288. Moreover, upon the Merger Agreement's expiration, Activision would have the right to collect a \$3 billion termination fee from Microsoft. Section 8.3(c) of the Merger Agreement provided:

Parent Termination Fee. If this Agreement is terminated pursuant to . . . Section 8.1(c) and all conditions to this Agreement are satisfied . . . , other than the conditions set forth in Section 7.1(b) or Section 7.1(d) (solely in connection with an Antitrust Law), . . . then Parent shall promptly pay (or cause to be paid) to the Company . . . if such termination notice is provided at any time after April 18, 2023, an amount equal to \$3,000,000,000

2. Activision Executes the Letter Agreement Extending the Merger Agreement

289. Instead of letting the Merger Agreement expire on the Termination Date, collecting a \$3 billion termination fee and exploring strategic alternatives, Activision executed the Letter Agreement. The Letter Agreement changed numerous terms of the Merger Agreement, which benefitted the Defendants. The Letter Agreement was signed by Kotick, as CEO.

290. The Letter Agreement extinguished Activision's right to terminate the Merger Agreement on the Termination Date. Section 2(a) of the Letter Agreement provided:

Each of Parent and the Company hereby unconditionally and irrevocably waives any right to terminate the Merger Agreement pursuant to Section 8.1(c) of the Merger Agreement prior to 11:59 p.m. (Pacific time) on October 18, 2023 (the “Waiver Period”).

Section 2(a) deleted the July 18, 2023 Termination Date in the Merger Agreement and re-wrote and extended that date by three months, to 11:59 p.m. Pacific Time on October 18, 2023.

291. At the same time, the terms of the Merger Agreement that the Letter Agreement did not address, including forbearance covenants such as the No Solicitation provision, remained unaffected. Section 5 of the Letter Agreement provided:

Subject to the terms of this Letter, all terms, conditions and provisions of the Merger Agreement, Company Disclosure Letter and Parent Disclosure Letter shall remain in full force and effect.

292. The provisions of the Merger Agreement that protected Kotick’s job and compensation were therefore extended. At the time, Kotick knew that employees were still calling for his resignation. The super-exculpation, advancement, indemnification and insurance provisions in the Merger Agreement that protected Kotick and the Director Defendants were also extended. At the time, they were still litigating Specified Litigation: (i) California Derivative Actions (*York*

and *Savage*) were still pending against Kotick and the Director Defendants, (ii) the Ninth Circuit was considering DFEH's attempt to overturn the trial court's approval of the EEOC Consent Decree, (iii) DFEH was prosecuting the DFEH Action and (iv) the Federal Securities Action against Kotick and Kelly was on appeal in the Ninth Circuit. Kotick and the Director Defendants therefore received material benefits from extending the Merger that were not shared with Activision's former public stockholders.²⁵¹

293. The stockholders, on the other hand, remained subject to the stringent forbearance covenants in the invalid Merger Agreement for an extended period of time. In addition, the value of the \$95 per share Merger consideration was reduced by the further delay of receipt of that consideration.

294. The Letter Agreement extinguished Activision's right to collect a \$3 billion termination fee from Microsoft on the Termination Date. Section 2(g) of the Letter Agreement provided:

the Company hereby unconditionally and irrevocably waives any right to the Parent Termination Fee during the Waiver Period

²⁵¹ Activision had settled other Specified Litigation matters. Activision paid a \$35 million penalty to the SEC to settle the SEC Investigation, and \$18 million to claimants as part of the EEOC Consent Decree.

For Activision’s public stockholders, \$3 billion was approximately \$3.80 per share.

295. The Letter Agreement narrowed Activision’s rights to terminate the Merger Agreement before the Amended Termination Date. Section 2(b) of the Letter Agreement provided that Microsoft and Activision “unconditionally and irrevocably” waived the right to terminate the Merger Agreement “pursuant to any section of Article VIII of the Merger Agreement” other than Sections 8.1(a) or (c).²⁵² Section 2(b) of the Letter Agreement therefore deleted Section 8.1(b) of the Merger Agreement. Section 8.1(b) had provided that Activision could terminate the Merger Agreement:

if (i) any permanent injunction or other judgment or order issued by any court of competent jurisdiction or other legal or regulatory restraint or prohibition preventing the consummation of the Merger will be in effect, or any action has been taken by any Governmental Authority of competent jurisdiction, that, in each case, prohibits, makes illegal or enjoins the consummation of the Merger and has become final and non-appealable; or (ii) any statute, rule, regulation or order will have been enacted, entered, enforced or deemed applicable to the Merger that prohibits, makes illegal or enjoins the consummation of the Merger

²⁵² Section 8.1(a) of the Merger Agreement provided for termination upon Activision and Microsoft’s mutual written agreement.

296. The Letter Agreement changed the conditions to closing the Merger under Sections 7.1(b)-(c) of the Merger Agreement, making it easier for Defendants to close the Merger. Section 2(c) of the Letter Agreement provided:

Each of Parent, Merger Sub and the Company unconditionally and irrevocably waives any failure of the conditions to Closing set forth in Section 7.1(b) and Section 7.1(c) of the Merger Agreement, in each case, other than with respect to the United Kingdom.

Section 2(c) of the Letter Agreement eliminated the provision of Section 7.1(b) of the Merger Agreement (except with respect to the U.K.) making FTC approval a condition to closing the Merger.

297. Moreover, Section 2(d) of the Letter Agreement provided:

Each of Parent, Merger Sub and the Company unconditionally and irrevocably waives any failure of the condition to Closing set forth in Section 7.1(d) of the Merger Agreement due to (i) any Governmental Authority seeking to prohibit, make illegal or enjoin the consummation of the Merger or seeking to impose a Burdensome Condition (emphasis added).

Section 2(d) of the Letter Agreement deleted the portion of Section 7.1(d) of the Merger Agreement that prevented the Defendants from closing the Merger while the FTC Suit was pending.

298. The Letter Agreement incorporated the sections of the Merger Agreement governing amendments and waivers, which enabled the Defendants to

serially and indefinitely amend and extend the Merger Agreement. Section 6 of the Letter Agreement stated that Sections 8.4 and 8.5 of the Merger Agreement applied to the Letter Agreement, “*mutatis mutandis*, as if set forth herein.” Sections 8.4 and 8.5 of the Merger Agreement governed amendments and waivers.

3. Activision Announces Its Third Consecutive Quarter of Record-Breaking Financial Results

299. The same day that Activision announced the Letter Agreement, it announced its third consecutive quarter of exceptional financial performance: Q2 2023. As reflected in the chart below, Blizzard and King beat analysts’ estimates and set new second-quarter records. Blizzard did exceptionally well, with revenue growing 164% and operating income more than tripling year-over-year, which Activision attributed to *Diablo IV*. Activision explained that *Diablo IV* had sold-through more units than any other Blizzard title at an equivalent stage of release, and Blizzard’s teams were making strong progress on expansions that would deliver major new features and continue the game’s acclaimed narrative for years. Activision also announced that Blizzard’s *Overwatch* team would be releasing *Overwatch 2: Invasion* on August 10, and would be the largest seasonal update yet.

300. Activision’s Q2 2023 Financial Results:²⁵³

²⁵³ The “*” denotes record-breaking second quarter results.

	Analyst Estimates ²⁵⁴	Actual Results	Year-Over-Year Growth
Net Revenues	N/A	\$2.2 billion	34%
Earnings Per Share	N/A	\$0.74	106%
Net Bookings	\$2.32 billion	\$2.46 billion	50%
Activision Publ. revenue	\$578.2 million	\$574 million	17%
Blizzard revenue*	\$987.7 million	\$1.06 billion	164%
King mobile revenue*	\$706 million	\$747 million	9%

Y. Defendants Close the Merger

301. On August 22, 2023, the CMA announced that Microsoft had submitted a restructured deal to the CMA for consideration (the “Restructured Merger”).²⁵⁵ Under the Restructured Merger, Microsoft would divest certain cloud gaming rights for existing and future Activision games to Ubisoft Entertainment SA (“Ubisoft”). The CMA stated that it was reviewing the Restructured Merger anew.

302. On October 13, 2023, the CMA announced that it approved the Restructured Merger. Wasting no time, Microsoft and Activision completed the purported Merger on October 13 by filing the Certificate of Merger (the “Merger Certificate”) with Delaware’s Secretary of State. As described below, the Merger

²⁵⁴ *Activision Blizzard 2Q Net Bookings Beats Estimates: Snapshots*, BLOOMBERG AUTOMATION (July 19, 2023) (available at BLOOMBERG online). BLOOMBERG did not report consensus estimates for the Company’s net revenues for earnings per share.

²⁵⁵ The CMA’s findings, reports and statements about the Restructured Deal are available at the CMA’s Restructured Deal-dedicated webpage: <https://www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-ex-cloud-streaming-rights-merger-inquiry>.

Certificate and the certificate attached thereto were false. The Merger Certificate also misrepresented that the Merger Agreement “has been approved, adopted, executed and acknowledged by each of the constituent corporations in accordance with Section 251” of the DGCL.

303. After the Merger closed, Kotick stayed at Activision for two months, reporting to Spencer.²⁵⁶ On December 20, 2023, Kotick sent an email to employees stating that he would resign from the Company, effective December 29.

304. Also after the Merger closed, the lawsuits against the Kotick and the Director Defendants arising from the Harassment Scandal were resolved. On November 15, 2023, the plaintiffs in the California Derivative Actions (*York* and *Savage*) voluntarily dismissed their actions, because the Merger had extinguished their claims. Thus, Kotick and the Director Defendants obtained a benefit from the Merger the stockholders did not share. On January 17, 2024, Activision settled the DFEH Action through a negotiated consent decree, pursuant to which Activision would pay eligible claimants \$54.8 million.²⁵⁷ On January 25, the DFEH withdrew its appeal of the EEOC Action.

²⁵⁶ Bobby Kotick, *Bobby Kotick: A New Chapter for Activision Blizzard*, ACTIVISION BLIZZARD, (Oct. 13, 2023), <https://newsroom.activisionblizzard.com/p/a-new-chapter>.

²⁵⁷ On January 19, 2024 the Ninth Circuit affirmed the dismissal of the Federal Securities Action against Kotick and Kelly.

305. All in all, despite Kotick and the Director Defendants’ denial of responsibility for the Harassment Scandal, the Company paid over \$100 million to resolve Specified Litigation that implicated them: (i) \$18 million to resolve the EEOC Action, (ii) \$35 million to resolve the SEC Investigation and (iii) \$54.8 million to resolve the DFEH Action. The Company also spent substantial additional costs: legal fees, implementing remedial measures and costs related to the Merger.

IV. PLAINTIFF’S LITIGATION CHALLENGING THE MERGER AND DEFENDANTS’ COMPLIANCE WITH SECTION 251

A. Plaintiff’s Section 220 Investigation and Section 220 Action

306. Plaintiff attempted to use Section 220 to investigate its claims and obtain a complete copy of the agreement of merger before being forced to vote on the Merger at the rushed Special Meeting. Plaintiff served its 220 Demand on March 7, 2022, seeking inspection of, among other documents, “documents specifically referenced in the Merger Agreement, which are necessary to understand the terms of the Merger Agreement.” In particular, Plaintiff requested documents that were necessary to have the entire agreement of merger: (i) the CDL and the disclosure schedules to the Merger Agreement, (ii) the Parent Disclosure Letter, and (iii) indemnification agreements set forth in Sections 6.8(a) and (d) of the CDL. The 220 Demand pointed out that the Merger Agreement contained numerous representations, warranties and covenants that are conditions to closing and stated:

However, the scope and effect of the representations, warranties, covenants and conditions cannot be determined from the Merger Agreement. Their scope and effect is affected by documents such as the Company Disclosure Letter, which has not been provided.

The 220 Demand also requested the CDL sections and schedules related to indemnification that are referred to in the Merger Agreement.

307. Plaintiff also demanded drafts of the Merger Agreement exchanged between Activision and Microsoft and Formal Board Materials²⁵⁸ concerning *Kotick Knew*, Activision’s stock price and/or the potential liability of any current or former Company director or officer in connection with the Harassment Scandal. Activision let the March 15, 2022 statutory deadline for responding to the 220 Demand lapse, and on March 17, 2022 sent Plaintiff a written response refusing to produce documents (the “Refusal”). On March 21, 2022, Activision issued the Proxy and scheduled the Special Meeting for April 28, 2022.

308. Plaintiff filed a Section 220 complaint on March 24, 2022, after Activision ignored Plaintiff’s request to discuss the Refusal.²⁵⁹ Activision denied

²⁵⁸ The 220 Demand defined “Formal Board Materials” consistent with the meanings ascribed in *Lebanon Cty. Emps.’ Ret. Fund v. AmerisourceBergen Corp.*, 2020 WL 132752, at *24 (Del. Ch. Jan. 13, 2020), *aff’d*, 243 A.3d 417 (Del. 2020), and *Gross v. Biogen Inc.*, 2021 WL 1399282, at *16 n.124 (Del. Ch. Apr. 14, 2021).

²⁵⁹ See *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, C.A. No. 2022-0281-KSJM (Del. Ch.) (the “220 Action”).

Plaintiff's inspection rights, ignored Plaintiff's request to discuss the Refusal and rushed the Merger vote at the Special Meeting. After Plaintiff filed its Section 220 complaint, Activision agreed to meet and confer.

309. Between March 24 and April 6, 2022, Plaintiff negotiated the scope of a Books and Records production with Activision. Activision refused to produce the CDL and disclosure schedules to the Merger Agreement, among other documents. On April 1, 2022, Plaintiff again specifically requested the CDL, disclosure schedules and indemnification agreements. On April 16, 2022, Activision told Plaintiff it would only agree to complete its production within sixty days of the execution of a confidentiality agreement. Activision did not start its production until May 12, 2022 (*i.e.*, after the Special Meeting) and did not complete its production until June 21, 2022. Books and Records the Company produced, however, should have been readily available in the minute book or files used to prepare the Proxy.²⁶⁰

310. After the Company's initial production, Plaintiff, on July 22, 2022, sought further documents, including again asking for the CDL and disclosure schedules that are specifically incorporated in the Merger Agreement. In written

²⁶⁰ The initial production included Board books, meeting minutes and presentations, written consents, director and officer questionnaires and documents specifically referenced in the Proxy such as the December 6 NDA, Microsoft's December 10, 2021 bid letter and Allen & Co.'s conflicts disclosures.

correspondence dated August 7, 2022, Activision agreed to (i) produce “any non-privileged drafts of the Merger Agreement . . . that were considered by the [Board]”; (ii) review “all Board and committee materials from the relevant time period to determine if there is any additional responsive information” regarding any meeting concerning *Kotick Knew* or the potential liability of any current or former Company director or officer in connection with the Harassment Scandal; and (iii) to “provide certain Indemnification Agreements[.]” However, with respect to Plaintiff’s repeated demand to inspect the CDL and disclosure schedules,²⁶¹ the Company refused and wrote: “[t]hese requests are not for board-level material[.]” The Company thereby conceded the Board never reviewed the CDL or confidential disclosure schedules to the Merger Agreement. However, Activision did produce the Parent Disclosure Letter.

311. On August 2, 2022, the Company produced additional Books and Records to Plaintiff. The production included the Draft Merger Agreement dated January 17, 2022, which, based on Activision’s representations, was therefore the only draft of the Merger Agreement the Board considered. The production did not

²⁶¹ Plaintiff repeatedly demanded to inspect the CDL and disclosure schedules to the Merger Agreement in Plaintiff’s 220 Demand, in negotiations with Activision over the scope of its initial production, and in written correspondence following the completion of Activision’s initial production.

include any Formal Board Materials concerning *Kotick Knew* or the potential liability of any current or former Company director or officer in connection with the Harassment Scandal. This confirms the Board's public statement that it did not consider Kotick's status when considering the Merger. The production also included 2003 indemnification agreements for each of Corti, Nolan and Morgado. Thus, Activision did not produce any other indemnification agreements, including those referenced in [REDACTED] of the CDL.

B. Plaintiff's Prosecution of Its Statutory and Conversion Claims

312. On November 3, 2022, Plaintiff filed its Complaint challenging the Merger. In Count I, Plaintiff alleged that (i) the Draft Merger Agreement and Merger Agreement were not a Section 251-compliant agreement of merger; (ii) the Activision Board's approval of the Draft Merger Agreement did not comply with Section 251(b); (iii) the Execution Version of the Merger Agreement was not a Section 251-compliant agreement of merger and its execution did not comply with Section 251(b); and (iv) the submission of the Merger Agreement to the Activision stockholders did not comply with Section 251(c). Therefore, the Merger Agreement and the Merger, if consummated, were invalid and void and constituted an unlawful conversion of the Activision stockholders' shares. In Count II, Plaintiff alleged that the Director Defendants' failure to comply with Section 251 was a breach of

fiduciary duty.²⁶² On November 14, 2022, Plaintiff served Activision, Kotick and each of the Director Defendants with its Complaint, pursuant to Delaware law.²⁶³

313. On January 25, 2022, Plaintiff filed its Amended Complaint. In Count I, Plaintiff re-pleaded its claims against the Defendants for violations of Section 251 and conversion. In Count II, Plaintiff (i) re-pleaded that the Director Defendants' failure to comply with Section 251 was a breach of fiduciary duty; and (ii) pleaded that the Director Defendants' continued failure to comply with Section 251—even after Plaintiff's Complaint pointed out the statutory defects—was a deliberate breach of their duty of loyalty, intentional misconduct and a knowing violation of law.²⁶⁴ Plaintiff also alleged that the Defendants could fix the Merger's statutory defects before the Merger closed, including by submitting a Section-251 compliant agreement of merger to a vote of the Activision stockholders at the 2023 Annual Meeting. The Defendants, however, deliberately disregarded their opportunity to fix the Merger's statutory defects.

²⁶² See Compl. ¶ 310. Counts I and II also alleged other breaches of fiduciary duty by Kotick and the other directors.

²⁶³ See Trans. ID 68388000. Plaintiff served Anchorage and Microsoft with a copy of its Complaint on November 14 and November 15, 2022, respectively. *See id.*

²⁶⁴ See AC ¶¶ 374, 376. The Amended Complaint also alleged other fiduciary breaches.

314. On February 23, 2023, Activision filed its 2022 annual report on Form 10-K (the “2022 Annual Report”). The 2022 Annual Report referenced this Action and included the following description of Plaintiff’s claims:

On November 3, 2022 a lawsuit captioned, *Sjunde AP-Fonden v. Activision Blizzard, Inc. et al.*, C.A. No. 2022-1001-CM (Del. Ch.) was filed under seal in the Court of Chancery of the State of Delaware on behalf of a class of stockholders of the Company. The complaint names the Company, our directors, Microsoft and Merger Sub as defendants . . . The complaint also alleges that the Merger was not approved in compliance with the requirements of 8 *Del. C.* § 251, and seeks a declaration that the Merger would be invalid if consummated . . . On January 25, 2023, an amended complaint was filed in the Sjunde AP-Fonden action.²⁶⁵

Kotick, Bowers, Carr, Corti, Kelly, Meyer, Morgado, Nolan and Ostroff signed the 2022 Annual Report.²⁶⁶

315. On March 24, 2023, Activision, Kotick and the Director Defendants filed a motion to stay Plaintiff’s action until regulatory review of the Merger was complete and the Merger closed,²⁶⁷ which the Microsoft Defendants joined.²⁶⁸ On

²⁶⁵ 2022 Annual Report at F-52.

²⁶⁶ *Id.* at E-5.

²⁶⁷ Trans. ID 69612668 (the “Stay Motion”).

²⁶⁸ Trans. ID 69633674.

April 11, Plaintiff opposed Defendants’ motion.²⁶⁹ Plaintiff explained that Section 251 violations had already occurred and could still be fixed.²⁷⁰

316. On May 1, 2023, Plaintiff filed a motion for limited expedited proceedings on its Section 251 claims, and asked the Court to schedule a preliminary injunction hearing in July 2023.²⁷¹ Plaintiff explained in its opening and reply papers that the Director Defendants (i) did not comply with Section 251 and (ii) could fix the Merger’s statutory defects, including by submitting a Section 251-compliant agreement of merger to a vote of the Activision stockholders at the June 21, 2023 Annual Meeting.²⁷² Each of the Defendants opposed Plaintiff’s motions.²⁷³

317. On May 15, 2023, Plaintiff’s counsel sent a letter to Skadden urging Activision and the Director Defendants to cure the statutory defects before the Merger closed. Plaintiff’s counsel wrote:

Plaintiff is troubled and puzzled by the Activision Defendants’ continuing refusal to cure their failure to

²⁶⁹ Trans. ID 69730417.

²⁷⁰ *See id.* ¶¶ 19-20.

²⁷¹ Trans. ID 69902281 (the “Expedition Motion”).

²⁷² *See id.* ¶¶ 3-4, 8-17 (“Defendants have been aware of Plaintiff’s § 251 claims for months, but have not remedied their multiple statutory violations.”); *see also* Trans. ID. 69965691 ¶¶ 1-4, 6, 10.

²⁷³ Trans. ID 69992045 (Activision, Kotick and the Director Defendants); Trans. ID 69993283 (the Microsoft Defendants).

comply with 8 *Del. C.* § 251 . . . It is still not too late to fix the defects.

318. At a May 16, 2023 hearing on Plaintiff’s Expedition Motion, Plaintiff’s counsel reiterated that Activision and the Activision Board had “a fair chance to fix the [statutory] problems; they did not.”²⁷⁴ Plaintiff’s counsel also reiterated that Activision and the Director Defendants could have submitted the agreement of merger to a stockholder vote at the 2023 Annual Meeting but had not.²⁷⁵

319. On June 5, 2023, Activision and the Director Defendants filed a Motion to Stay Discovery and For Protective Order (the “Second Stay Motion”), as well as a Motion to Dismiss, for which they sought an over five-month briefing schedule followed by argument and a decision in 2024,²⁷⁶ which the Microsoft Defendants joined.²⁷⁷ Again, the Defendants sought to delay disposition of Plaintiff’s statutory and conversion claims. Plaintiff opposed Defendants’ proposed schedule, filed a motion for partial summary judgment on its statutory and conversion claims, and

²⁷⁴ Transcript at 7:15-17; *see also id.* at 15:3-7 (Plaintiff’s counsel: “we filed our complaint . . . We suggested to them: Why don’t you fix this at the 2023 annual meeting?”); *see id.* at 58:16-17 (Plaintiff’s counsel: “they don’t explain [] why haven’t they fixed the problems.”).

²⁷⁵ *Id.* at 8:1-3; *see also id.* at 21:7-9.

²⁷⁶ *See* Trans. ID 70065796, 70137202.

²⁷⁷ *See* Trans. ID 70137057, 70142407.

sought a prompt disposition of its motion on a sixty-two-day briefing schedule with argument in September 2023.²⁷⁸ Defendants, however, successfully urged the Court to schedule oral argument for November 2023.

320. Plaintiff submitted its opening papers in support of its motion for partial summary judgment on September 8, 2023.²⁷⁹ Plaintiff's papers explained that Activision and the Activision Board violated Section 251, so the Merger, if consummated, would be invalid and constitute the unlawful conversion of the Activision stockholders' shares.²⁸⁰

321. Defendants closed the Merger on October 13, 2023, without fixing the statutory defects. Given the plain terms of Section 251 and Plaintiff's detailed explanations for nearly a year of why there had not been compliance with the statute, Defendants' failure and repeated refusal to comply with Section 251 was a breach of the duty of loyalty, a knowing violation of law and intentional misconduct.

322. On March 27, 2024, Activision finally produced to Plaintiff what purports to be the CDL, disclosure schedules, Survivor's Certificate and Execution Version of the Merger Agreement.

²⁷⁸ See Trans. ID 70155930.

²⁷⁹ Trans. ID 70719068.

²⁸⁰ See *id.*

V. CLASS ACTION ALLEGATIONS

323. Plaintiff brings this Action pursuant to Court of Chancery Rule 23, individually and on behalf of other former holders of Activision common stock, except the Defendants herein and any person(s), firm, trust, corporation or other entity related to or affiliated with them and their successors in interest (the “Class”) who held Activision shares at any time from the announcement of the Merger Agreement through the closing of the Merger and were injured as a result of Defendants’ wrongful actions.

324. This Action is properly maintainable as a class action.

325. The Class is so numerous that joinder of all members is impracticable. The Company had hundreds, if not thousands, of stockholders scattered throughout the United States. The number of shares of Activision stock outstanding on the following dates were:

January 13, 2022	779,057,360
March 14, 2022	780,922,900
July 24, 2023	786,798,320

Approximately 7.7 million shares were issued largely to directors, officers and employees during the twenty-one-month pendency of the Merger.

326. There are questions of law and fact common to the Class, including, *inter alia*, the following:

- a. Whether an agreement of merger was validly adopted and approved by the Board under Section 251(b) and was submitted to the stockholders as required by Section 251(c), and whether the Merger was valid;
- b. Whether the Merger Agreement and the Merger constituted the unlawful conversion of the Activision stockholders' shares;
- c. Whether the Merger was entirely fair to the Class and whether the Director Defendants breached their fiduciary duties to Plaintiff and the Class and engaged in a knowing violation of the law and intentional misconduct;
- d. Whether the Microsoft Defendants aided and abetted and conspired in the Director Defendants' breaches of fiduciary duty, knowing violation of the law and intentional misconduct; and
- e. Whether Plaintiff and the Class are entitled to equitable relief, damages or other relief as a result of Defendants' wrongful conduct.

327. Plaintiff is committed to prosecuting the Action and has retained competent counsel experienced in litigation of this nature. Plaintiff's claims are

typical of the claims of the Class, and Plaintiff has the same interests as other members of the Class. Accordingly, Plaintiff is an adequate Class representative.

328. The prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the Class that would establish incompatible standards of conduct for Defendants, or adjudications with respect to individual members of the Class, which would as a practical matter be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

329. Defendants have acted or refused to act on grounds generally applicable to and causing injury to the Class, therefore making appropriate final declaratory relief with respect to the Class as a whole.

330. The common questions of law and fact predominate over questions affecting individual Class members and a class action is superior to other adjudication methods.

COUNT I

Individual and Class Claims Against Activision and the Director Defendants for Violations of Section 251 and for a Declaratory Judgment That the Requirements for a Valid Agreement of Merger and Merger Under Section 251 Have Not Been Met

331. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

332. The Delaware General Corporation Law in Section 251(a) only empowers Delaware corporations to merge “pursuant to an agreement of merger . . . complying and approved in accordance with this section.” Under 8 *Del. C.* § 251, a valid merger requires that three statutorily required acts be performed in the correct sequence: (i) the board must approve an agreement of merger containing the terms and conditions of the merger and the mode of carrying it into effect, (ii) the agreement of merger as approved by the board must be executed and acknowledged in accordance with 8 *Del. C.* § 103, and (iii) the executed and acknowledged agreement of merger as properly approved by the board must be submitted to the stockholders for approval.

333. When the Director Defendants approved the Draft Merger Agreement on January 17, 2022, they did not review or approve a Section 251-compliant agreement of merger, as required by Section 251(b). Instead, they approved the Draft Merger Agreement, which did not contain required terms and elements of an

agreement of merger under 8 *Del. C.* § 251(b). In further violation of Section 251(b), the Director Defendants improperly delegated determination and approval of a critical financial term of the agreement of merger (*i.e.*, dividends) to an *ad hoc* committee of Kotick cronies. But Kotick, who was not on the *ad hoc* committee, actually negotiated the dividend term. The Merger Agreement that was, according to the Proxy, executed on January 18, 2022 and was attached as Annex A to the Proxy, also was not the agreement of merger Section 251(b) requires. The Company did not submit for approval and the stockholders did not approve a Section 251-compliant agreement of merger at the Special Meeting, as required by Section 251(c). Instead, they approved the Merger Agreement, which omitted portions of the agreement of merger required by Section 251.

A. Violation of Section 251(b)’s Requirement for Board Approval of the Agreement of Merger

334. Section 251(b) required the Board to adopt an agreement of merger that set forth all of the terms of the Merger. As Section 9.5 of the Merger Agreement acknowledges, the agreement of merger included the Company Disclosure Letter, disclosure schedules and Exhibit A to the Merger Agreement, the Survivor’s Certificate. The Board, however, only reviewed the incomplete January 17, 2022 Draft Merger Agreement, which omitted the Merger consideration, CDL, the

disclosure schedules and Exhibit A. The Board did not otherwise review or approve the CDL or disclosure schedules.

335. The Company Disclosure Letter is referred to forty-five times in the Merger Agreement, including the following:

- (a) Section 1.1’s definitions of “Company Material Adverse Effect”; “Company Stock Plans”; “Knowledge” (“the actual knowledge of the individuals set forth in Section 1.1(h) of the Company Disclosure Letter”); “Material Contract”; “Significant Customer”; “Significant Vender”; “Specified Litigation”; and Subsidiary.”
- (b) The qualifications that Activision’s representations and warranties are except “as set forth in the Company Disclosure Letter” (Article III);
- (c) Sections 3.4, 4.4, 6.2(a)-(b), 7.1(b)-(c) referring to the required government approvals “set forth in Section 7.1(b) and Section 7.1(c) of the Company Disclosure Letter”;
- (d) “Section 3.7(d) of the Company Disclosure Letter” containing a list of outstanding options and stock awards;
- (e) Section 3.13(a) of the Company Disclosure Letter listing Material Contracts;
- (f) Section 3.16(a) of the Company Disclosure Letter listing Material Intellectual Property; and
- (g) Exceptions to Activision’s affirmative obligations and forbearance covenants for interim operations of the Company set forth in Sections 5.1 and 5.2 of the Company Disclosure Letter.

336. Section 1.4(a) of the Merger Agreement provides:

The information set forth in each Section or subsection of the Company Disclosure Letter will be deemed to be an exception to (or, as applicable, a disclosure for purposes of) (i) the representations and warranties (or covenants, as applicable) of the Company that are set forth in the corresponding Section or subsection of this Agreement; and (ii) any other representation and warranties (or covenants, as applicable) of the Company that are set forth in this Agreement.

337. Activision refused to produce the CDL in response to Plaintiff's March 7, 2022 Section 220 Demand, Plaintiff's repeated requests during Section 220 negotiations and Plaintiff's initial document request served on May 3, 2023. Defendants finally produced what purports to be the CDL to Plaintiff on March 27, 2024 as part of the complete agreement of merger Plaintiff had been seeking for two years. The CDL, as produced by Activision to Plaintiff, contained [REDACTED]

[REDACTED] It contains a wealth of information including on [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Under Section 251, this information

should have been provided to the Activision directors and the Activision stockholders before they considered the Merger Agreement. It was not.

338. Section 5.2 of the Merger Agreement precluded Activision from engaging in a wide range of corporate activities, including amending its Certificate or Bylaws. There were exceptions, “as set forth in Section 5.2 of the Company Disclosure Letter.” Of course, since Defendants did not provide Plaintiff or Activision’s other former stockholders with the CDL or the disclosure schedules, the stockholders did not know the extent of Section 5.2’s prohibitions. Other portions of Section 5.2 of the Merger Agreement were also affected by the withheld Company Disclosure Letter.²⁸¹

339. While Section 5.2(a) of the Merger Agreement purported to prohibit Activision from amending or otherwise changing the Company’s bylaws, Section 109(a) of the DGCL provides that a corporation’s bylaws can be amended by the stockholders. In addition, Section 8.4 of Activision’s bylaws provided that the bylaws may be altered, amended, changed, added to, repealed or rescinded, and new bylaws may be made by the stockholders. [REDACTED]

²⁸¹ See, e.g., Section 5.2(l) (“the capital budget set forth in Section 5.2(l) of the Company Disclosure Letter” and “agreements in effect prior to the date of this Agreement and set forth on Section 5.2(l) of the Company Disclosure Letter”); Section 5.2(t) (“any agreement of the type listed on Section 5.2(l) of the Company Disclosure Letter”).

[REDACTED] Therefore, Section 5.2(a) of the Merger Agreement eliminated the stockholders' statutory and bylaw rights to amend the bylaws.

340. The CDL contained [REDACTED]

[REDACTED]

[REDACTED] This information was not provided to the Activision Board or the Activision stockholders before they considered the Merger Agreement.

341. Section 9.5 of the Merger Agreement provides that the Merger Agreement and the documents referred to in the Merger Agreement, specifically including the Company Disclosure Letter, constitute the entire agreement.

342. The Board did not review, approve and adopt the Company Disclosure Letter, the disclosure schedules, Exhibit A or the Merger Agreement. Therefore, the Board did not adopt the agreement of merger required by Section 251(b). Because there was no valid adoption of the agreement of merger by the Board, the agreement of merger was not adopted and approved by the Board as required by Section 251(b). Furthermore, the agreement of merger was not executed and acknowledged as required by Section 251(b) because the Merger Agreement that was executed on January 18, 2022 was not a proper board-approved agreement of merger. Therefore, the Merger violated Section 251(b) and was invalid.

B. Improper Delegation in Violation of Section 251(b)

343. The Board failed to approve a key financial term of the Merger Agreement: the number and amount of dividends the Activision stockholders would receive during the lengthy pendency of the Merger. The January 17, 2022 Board minutes indicate that [REDACTED]

[REDACTED] Thus, as of the January 17, 2022 Board meeting, this key open term had not been determined and therefore was not approved by the Board at that meeting.

344. On January 17, 2022, the Board purportedly delegated the negotiation, determination and approval of the dividend term to an *ad hoc* committee of Kotick’s cohorts (Kelly, Morgado and Corti). The Proxy at page 42 and the April 15, 2022 Form 8-K (the “Supplemental Disclosure”), purportedly supplementing and revising page 42 of the Proxy, admit that Kotick discussed the resolution of the dividend issue with Microsoft on the evening of January 17, 2022 and that the *ad hoc* committee then approved Kotick’s resolution of the issue. Thus, Activision and its Board admit that Kotick negotiated the dividend term and the *ad hoc* committee, not the Board,

²⁸² Activision_0000606 at 607.

approved the dividend term of the Merger Agreement.²⁸³ However, 8 *Del. C.* § 141(c)(1) controls what tasks the Board can delegate to a committee.

345. Section 141(c)(1) provides that for companies incorporated in Delaware before July 1, 1996 “no . . . committee shall have the power or authority in reference to . . . adopting an agreement of merger.” Under 8 *Del. C.* § 141(c)(2), which Plaintiff believes applies to Activision Board committees, “no . . . committee shall have the power or authority in reference to the following matter: (i) approving or adopting, or recommending to the stockholders, any action or matter . . . expressly required by this chapter to be submitted to stockholder for approval . . .” Section 251(c) of the DGCL expressly requires that an agreement of merger be submitted to the stockholders for approval. Therefore, no committee of the Activision Board had the power or authority to approve an agreement of merger.

346. Section 251(b) required the Board to adopt a resolution approving an agreement of merger, including “the terms and conditions of the merger” and “the

²⁸³ The Proxy, Supplemental Disclosure and Books and Records do not reflect that the *ad hoc* committee ever met and approved or executed a unanimous consent approving the dividend term. It is reasonably conceivable that Kotick simply informed the individual members of the committee of his resolution of the dividend issue and they did not disagree. Kotick and Microsoft’s Nadella were presumably on the West Coast when they discussed the dividend “during the evening of January 17, 2022,” and the Merger Agreement was executed “[e]arly in the morning of January 18, 2022[.]” Proxy at 42.

mode of carrying it into effect.” The restriction on dividends was a term of the Merger. It was a covenant of the Company, the satisfaction of which was a condition to the Merger under Section 7.2(b) of the Merger Agreement. It was part of the mode of carrying the Merger into effect. Therefore, the number and amount of dividends that could be paid pending consummation of the Merger was a term of the agreement of merger that had to be approved by the Board. The Board could not delegate approval of that term to a committee.

347. Particularly because it was expected that the Merger would be subject to lengthy regulatory review, Activision’s ability to pay dividends prior to the Merger was a vital financial term that significantly affected the value of the Merger to the Activision stockholders. For example, under the Merger Agreement, Activision was only permitted to pay a \$0.47 dividend per share in the first quarter of 2022, but could not pay the annual dividend for 2023 and would not be able to pay any further dividends before the Merger closed. Plaintiff therefore alleged in its Amended Complaint: “[t]he value of the purported \$95 Merger is reduced by the missed dividends and what could have been earned on that money.”²⁸⁴ The invalid Merger Agreement contained an improper term on dividends that was not approved

²⁸⁴ AC ¶ 341.

by the Board. It therefore imposed impermissible restrictions on the Activision stockholders' ability to receive dividends.

C. Failure to Submit a Complete Agreement of Merger Complying With Section 251(b) for a Stockholder Vote, As Required by Section 251(c)

348. Section 251(c) required the Board to submit an agreement of merger approved in accordance with Section 251(b) to stockholders for approval. Only an agreement of merger satisfying the requirements of 8 *Del. C.* § 251(b) may be submitted to the shareholders under § 251(c). The entire agreement of merger containing the required elements must be submitted to the stockholders. The Board, however, had not properly approved the agreement of merger under Section 251(b) and only submitted the incomplete Merger Agreement for approval by the stockholders. The Board did not submit to the stockholders for approval, or even describe the contents of, the Company Disclosure Letter, disclosure schedules or Exhibit A which are required parts of the agreement of merger under Section 251. Therefore, stockholders did not approve the agreement of merger required by Section 251(b), as Section 251(c) requires. Therefore, there was no valid authorization of the agreement of merger by the stockholders. The Merger was invalid.

D. The Section 251 Violations Vitiating Appraisal Rights

349. Defendants' failure to comply with Section 251 vitiating appraisal rights for the Activision stockholders. Under 8 *Del. C.* § 262(b), "[a]ppraisal rights shall be available . . . in a merger . . . to be effected pursuant to § 251" Section 262(b)(2) provides for the availability of appraisal rights when stockholders "are required by the terms of an agreement of merger . . . pursuant to Section 251" to accept cash as merger consideration. However, in the Activision/Microsoft Merger, there was no agreement of merger pursuant to Section 251, and the Merger was not effected pursuant to Section 251 because Defendants did not comply with that statutory section. Aspects of the appraisal process are also tied to the stockholders' meeting to vote on the Section 251 agreement of merger and the effective date of the merger. Because of the Section 251 defects, there were no effective appraisal rights or legitimate appraisal process. Therefore, Plaintiff and the Class are entitled to a quasi-appraisal of the fair value of their shares on the closing date of October 13, 2023.

COUNT II
Conversion
(Against Microsoft, Activision, the Director Defendants and Kotick as an Officer)

350. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

A. Conversion by Merger

351. At the time of the closing of the Merger, Plaintiff and the Class held a property interest in the outstanding stock of Activision and had a right of possession to that stock. Defendants converted that stock by wrongfully exerting dominion and control over the stock through a merger that was not authorized as required by the DGCL. Through the Merger, Defendants took the Activision shares of Plaintiff and the Class and replaced them with the right to receive \$95 per share in cash. The taking of the shares without compliance with Section 251 was in disregard, violation and denial of the rights of Plaintiff and the Class as stockholders of Activision.

352. To effect a valid merger between them, Activision and Anchorage were required by 8 *Del. C.* § 251(a) to act “pursuant to an agreement of merger . . . complying and approved in accordance with [Section 251].” Microsoft was the 100% owner of Anchorage and controlled Anchorage. As the 100% stockholder of

Anchorage, a constituent corporation to the Merger, Microsoft was required by Section 251(c) to approve the Merger.

353. The Activision directors, as the board of directors of the Company, were required by Section 251(b) to approve an agreement of merger that stated the terms and conditions of the Merger, the mode of carrying it into effect, the changes to the certificate of incorporation of Activision, as the surviving corporation that would be effected by the Merger, and the consideration to be received in the Merger for Activision's shares. The Draft Merger Agreement that the Activision Board purportedly approved on January 17, 2022 did not contain items Section 251(b) required. The Activision directors, as the Activision Board, improperly delegated determination of the dividend term of the Merger Agreement to an *ad hoc* committee of the Board in violation of 8 *Del. C.* § 141(c) and § 251(b). Defendants Kelly, Morgado and Corti, as the *ad hoc* committee, permitted Kotick, who was not on the committee, to negotiate the dividend term.

354. Kotick negotiated the dividend term, though under Section 141(c) and 251 and the Board's resolutions he was not authorized to do so. Kotick, as Activision's CEO, executed the Merger Agreement on behalf of Activision, though it was not a Section 251-compliant agreement of merger that was "so adopted" by the Board, as required by Section 251(b).

355. Activision, the Activision directors, “By Order of the Board of Directors,” Kotick as CEO and Kelly as Chairman of the Board submitted the Merger Agreement to the Activision stockholders and recommended its approval, though the Merger Agreement was not the agreement of merger required by Section 251(b). Therefore, the submission of the Merger Agreement to the Activision stockholders did not comply with Section 251(c).

356. The defects in the Draft Merger Agreement, which had been provided to the Activision directors, were apparent on the face of the document. The DGCL is part of the contract among the corporation, directors, officers and stockholders. Just as stockholders are presumed to have knowledge of, and have assented to the contract, (i) Activision, (ii) its directors, who have a fiduciary duty to ensure that they and the corporation comply with the corporate contract and the law, and (iii) Kotick, as an officer, must be presumed to know, and have assented to the contract, including the terms of Section 251. From the face of the Draft Merger Agreement, the Activision directors, and Kotick as both a director and officer, had actual or constructive knowledge it did not comply with Section 251. Moreover, in pleadings and filings served on Kotick and the other directors, the non-compliance with Section 251 and Section 141(c) were specifically called to their attention, as well as to the attention of Activision, Microsoft and Anchorage.

357. Corporations seeking to consummate a transaction under Section 251 know the requirements from the outset, given the existence of the statute. Under Delaware law, knowledge of the corporation's directors and officers is imputed to the corporation itself.

358. When he executed the Merger Agreement as an Activision officer on January 18, 2022, it was apparent to Kotick that it was not the Draft Merger Agreement that he and the other directors had considered and purportedly approved on January 17, 2022. The defects in the Execution Version of the Merger Agreement, including the absence of the Company Disclosure Letter and Survivor's Certificate, were obvious when Kotick executed the Merger Agreement and when it was subsequently submitted by Activision, the Board and Kotick to the Activision stockholders. Reasonable stockholders would assume the corporation, Board and CEO would not knowingly submit for a vote a transaction that they knew violated the DGCL.

359. Because of the obvious defects in the Draft Merger Agreement, and in the approval, execution and submission of the Merger Agreement, Activision, its Board, Kotick, Microsoft and Anchorage could not have reasonably believed the approval and effectuation of the Merger was in compliance with Sections 251 and 141(c), particularly after Plaintiff for nearly a year pointed out the specific defects.

The defects were a matter of public record in this Action and in Activision's SEC filings.²⁸⁵

360. Microsoft, Activision, Anchorage (to which Activision is successor) and the Activision directors proceeded to close the Merger on October 13, 2023, even though Plaintiff in multiple pleadings and filings for nearly a year prior to the closing had pointed out in detail (i) the multiple defects in the Merger Agreement and the board approval, execution and submission to stockholders of the Merger Agreement and (ii) the multiple failures of the Merger to comply with Section 251 and 141(c) of the DGCL.

361. By engaging in the actions described above, Microsoft, Activision, the Activision directors and Kotick committed intentional conversion of the Activision shares of Plaintiff and the Class.

362. Plaintiff and the Class have suffered damages as a result of the conversion by merger of their Activision shares. The fair market value of all Activision's outstanding shares on January 18, 2022 was at least \$95 per share, as shown by Microsoft's agreement to pay that price. In the approximately twenty-one

²⁸⁵ See Activision, Annual Report (Form 10-K) (Feb. 23, 2023) (year ending December 31, 2022) at F-52; Activision, Quarterly Report (Form 10-Q) (May 4, 2023) (quarter ending March 31, 2023) at 26; Activision, Quarterly Report (Form 10-Q) (July 31, 2023) (quarter ending June 30, 2023) at 33.

months from January 18, 2022 until the closing of the Merger on October 13, 2023, the fair market value of all the outstanding shares of Activision stock increased substantially because the Harassment Scandal was mitigated, highly successful new versions of several Activision games had been released and Activision's performance had substantially improved. Consequently, the fair market value of all Activision's outstanding shares at the time of the closing of the Merger was significantly more than \$95 per share.

363. Defendants' failure to comply with Sections 251 and 141(c) effectively denied stockholders a vote on a Section 251-compliant agreement of merger, rendered the disclosure of the Merger Agreement and the notice of appraisal rights materially misleading and incomplete and effectively rendered appraisal rights meaningless. As a result, Plaintiff and the Class are entitled to quasi-appraisal.

364. Plaintiff and the Class have no adequate remedy at law.

B. Conversion by the Merger Agreement's Denial of the Stockholder Rights of Plaintiff and the Class

365. By approving and entering into the Merger Agreement, Microsoft, Activision, Anchorage, the Activision directors and Kotick committed conversion of the Activision shares of Plaintiff and the Class by restricting and prohibiting the exercise of their rights as holder of those shares.

366. The Merger Agreement imposed direct and indirect restrictions and prohibitions on the rights of Activision stockholders. Section 5.2(a) of the Merger Agreement prohibited the stockholders from amending the bylaws or voting on certificate amendments, as Sections 109(a) and 242(b)(2) of the DGCL authorized them to do. Section 5.2(b) of the Merger Agreement prohibited the Activision stockholders from adopting a plan of dissolution, merger or recapitalization, as they were empowered to by Sections 242(a)(3), 242(b)(2), 251(c) and 275(b) of the DGCL. Section 5.2(d) of the Merger Agreement prohibited the stockholders from selling their stock back to Activision or exchanging their common stock for other stock or securities of Activision, as permitted by Section 160(a) of the DGCL. The Activision Board had previously authorized a stock repurchase program for Activision to repurchase up to \$4 billion of Activision stock until February 23, 2023.

367. Section 5.2(e)(A) of the Merger Agreement precluded stockholders from adopting stock splits, reverse stock or share reclassifications transactions that Sections 242(a)(3) and 242(b)(2) of the DGCL empowered the stockholders to vote on. Section 5.2(e)(B) of the Merger Agreement prevented the stockholders from receiving dividends or distributions in shares or property entirely and restricted cash dividends to one regular cash dividend not to exceed \$0.47, in disregard of their rights to dividends and distributions pursuant to Section 170(a) of the DGCL.

Section 5.2(q) of the Merger Agreement would not allow stockholders to vote to approve a sale of substantially all Activision's assets, a right Section 271(a) of the DGCL confers. Finally, the No Solicitation provisions of Section 5.3 of the Merger Agreement heavily restricted the stockholders' right to sell their Activision shares in any alternative transaction to the Microsoft Merger. Through the Merger Agreement, Microsoft, Activision and the Activision directors exercised control over the Activision shares of Plaintiff and the Class. That constituted conversion of their shares in disregard, violation and denial of their rights as stockholders.

368. The disregard, violation and denial of the Activision stockholder's rights imposed by Sections 5.2 and 5.3 of the Merger Agreement began on January 18, 2022 and lasted until October 13, 2023, a period of twenty months and twenty-five days. The Activision stockholders continued to hold a property interest in their shares during this period of conversion by deprivation of rights. The limitation and denial of rights continued for nearly a year after November 2, 2022, when Plaintiff filed its Complaint pointing out the Section 251 and 141(c) violations. The extended duration of the interference reinforces that conversion occurred. Because the Merger Agreement was invalid, it wrongfully imposed restrictions and prohibitions on Activision's stockholders in disregard, violation and denial of their rights to vote, sell their shares, receive dividends and approve fundamental corporate transactions.

Therefore, the invalid Merger Agreement constituted a conversion of the Activision stockholders' shares.

369. Because of the conversion of their Activision shares by the Merger Agreement extending for nearly twenty-one months, Plaintiff and the Class are entitled to damages. On the date of conversion, January 18, 2022, the fair market value of all outstanding Activision shares was at least \$95 per share, the price Microsoft agreed to pay. Plaintiff and the Class are entitled to interest at the legal rate on the fair market value of their Activision shares from January 18, 2022 through the date of payment of the Merger consideration after the closing of the Merger on October 13, 2023.

C. Conversion by Merger Through Filing a False Certificate of Merger in Violation of Section 103 and Section 251(c)(4)

370. On October 13, 2023, Activision, Microsoft and Anchorage consummated the purported Merger by filing a Certificate of Merger with Delaware's Secretary of State ("SOS"). The Merger Certificate stated that it was "Pursuant to Sections 103 and 251" of the DGCL. The Merger Certificate, however, was false and violated Sections 103 and 251 of the DGCL. The Certificate did not attach the Survivor's Certificate that Section 251(b)(3) and (c)(4) requires. Activision falsely certified in the Merger Certificate, in violation of Section 103, that the Certificate of Incorporation of the Surviving Corporation attached as Exhibit A

to the Merger Certificate was the Survivor's Certificate from the Merger Agreement when it was not. Activision's filing of the Merger Certificate to close the Merger constituted unlawful conversion of the Activision shares of Plaintiff and the Class.

1. Merger Agreement Provisions Concerning the Survivor's Certificate and Certificate of Merger

371. The Merger Agreement in Section 2.5(a) provided that Activision's certificate of incorporation would be amended and restated in the Merger "in the form attached" to the Merger Agreement as Exhibit A and would be the certificate of the surviving corporation.

372. Section 2.2 of the Merger Agreement provided for "the Merger to be consummated pursuant to the DGCL by filing a certificate of merger" with the Secretary of State "in accordance with the applicable provisions of the DGCL."

2. The Requirements of Sections 251(b)(3) and 251(c)(4)

373. Section 251(b)(3) requires an agreement of merger to set forth:

such amendments or changes in the certificate of incorporation of the surviving corporation as are as desired to be effect by the merger (which amendments or changes may amend and restate the certificate of incorporation in its entirety), or, if no such amendments are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation[.]

374. Section 251(c) permits that, in lieu of filing the agreement of merger with the SOS, a merger may be consummated by filing a certificate of merger containing required elements with the SOS. Section 251(c)(4) specifies one element that a merger certificate must contain:

(c) If the agreement [required by this Section] shall be so adopted and certified by each constituent corporation [as required by this Section], it shall then be filed and shall become effective, in accordance with § 103 of this title. In lieu of filing the agreement of merger or consolidation required by this section, the surviving or resulting corporation may file a certificate of merger or consolidation, executed in accordance with § 103 of this title, which states:

(4) In the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation[.]

375. The language of Section 251(c)(4) and Section 251(b)(3) is identical. Section 251(c)(4) therefore requires that when a certificate of merger is filed with the SOS in lieu of filing the agreement of merger, the certificate of merger must contain the same survivor's certificate that is part of the agreement of merger.

376. Pursuant to Section 2.2 of the Merger Agreement, Activision filed a certificate of merger with the SOS to effectuate the Merger. Section 251(c)(4) required that the Merger Certificate contain the Survivor's Certificate that was Exhibit A to the Merger Agreement.

3. The Requirements of Section 103

377. Section 103 of the DGCL governs the filing of instruments with the SOS. Section 103(a)(2) provides that an instrument that is required to be filed with the SOS must be executed by an authorized officer of the corporation. Section 103(b) provides that a document filed with the SOS may be acknowledged by:

(2) The signature, without more, of the person or persons signing the instrument, in which case such signature or signatures shall constitute the affirmation or acknowledgment of the signatory, under penalties of perjury, that the instrument is such person's act and deed or the act and deed of the corporation, and that the facts stated therein shall be true at the time such instrument becomes effective in accordance with this chapter. (Emphasis added).

378. Activision was required to execute the Merger Certificate when filing it with the SOS. Activision's CFO Zerza executed the Merger Certificate on behalf of Activision. The signature page to the Merger Certificate provided:

IN WITNESS WHEREOF, Activision Blizzard, Inc. has caused this Certificate of Merger to be executed in its corporate name this 13 day of October, 2023.

ACTIVISION BLIZZARD, INC.

By: [DocuSigned by Armin Zerza]

Name: Armin Zerza

Title: Chief Financial Officer

4. Activision Consummated the Purported Merger by Filing a Merger Certificate That Violated Section 251(c)(4) and Section 103

379. The Merger Certificate did not contain the Survivor's Certificate that was part of the agreement of merger, as Section 251(c)(4) required.

380. Article Fifth of the Merger Certificate certified that:

The certificate of incorporation of the Surviving Corporation shall be amended and restated to read in its entirety as set forth in Exhibit A attached hereto, and so amended and restated, shall be the certificate of incorporation of the Surviving Corporation until further amended or changed pursuant to the provisions of the DGCL.

381. However, Exhibit A to the Merger Certificate (the "False Survivor's Certificate") was not the Survivor's Certificate. It was a different document.

382. Pursuant to Section 251(c)(7), Activision, as the surviving corporation of the Merger, was required to provide Plaintiff with a copy of the agreement of merger. With the Court's strong encouragement, Activision supplied Plaintiff with

what purports to be the Merger Agreement, including Exhibit A, which was the Survivor's Certificate. Plaintiff compared the Survivor's Certificate to the False Survivor's Certificate that was attached to the Merger Certificate and filed with the SOS.

383. Article VII of the Survivor's Certificate, as produced by Activision to Plaintiff, provided:

The personal liability of the directors of the Corporation is hereby eliminated to the fullest extent permitted by paragraph (7) of subsection (b) of Section 102 of the DGCL, as the same may be amended and supplemented.²⁸⁶

384. Article VII of the False Survivor's Certificate that was filed with the SOS included the following underlined language that was not in the Survivor's Certificate:

The personal liability of the directors and officers of the Corporation is hereby eliminated to the fullest extent permitted by paragraph (7) of subsection (b) of Section 102 of the DGCL, as the same may be amended and supplemented.

385. The False Survivor's Certificate was therefore a different document that included a provision eliminating the personal liability of Kotick and Activision's other officers (including Zerza) for a breach of the duty of care that the Survivor's

²⁸⁶ See Activision_0000151 at 152.

Certificate did not. Section 102(b)(7) of the DGCL was amended, effective August 1, 2022, to allow for such a provision. It is therefore reasonably conceivable and a fair inference that the False Survivor's Certificate was created, and this provision was added to it, while the Merger was pending. Activision did not, however, amend its own Certificate of Incorporation to include such a provision while the Merger was pending. That would have required a vote of Activision's stockholders, pursuant to Section 242 of the DGCL. Instead, someone simply added the additional language to the False Survivor's Certificate.

386. Article IV of the Survivor's Certificate also provided:

The total number of shares of capital stock which the Corporation shall have authority to issue is 100 shares of common stock, par value \$0.01 per share (the "**Common Stock**").²⁸⁷

387. However, Article IV of the False Survivor's Certificate provided:

The total number of shares of capital stock which the Corporation shall have authority to issue is 1,200,000,000 shares of common stock, par value \$0.01 per share (the "**Common Stock**").

²⁸⁷ *Id.* (bold in original).

388. The False Survivor's Certificate therefore represented that Activision could issue up to 1.2 billion shares of common stock, while the Survivor's Certificate only provided for a maximum issuance of 100 shares.

389. Because the Merger Certificate did not contain the Survivor's Certificate that was part of the Merger Agreement, Activision's filing of the Merger Certificate was a violation of Section 251(c)(4).

390. Activision's filing of the Merger Certificate also violated Section 103. Zerza executed the Merger Certificate, on behalf of Activision, which provided that "Activision Blizzard, Inc., a Delaware corporation, does hereby certify" the statements in the Merger Certificate. By signing the Merger Certificate, Zerza and Activision certified that the statements in the Merger Certificate were true and correct, under penalty of perjury. Activision knew that the Merger Certificate did not contain the Survivor's Certificate.

391. Activision marked the Survivor's Certificate "Confidential," pursuant to the Confidentiality Order in this Action.²⁸⁸ Activision therefore knew that the Survivor's Certificate had not been made public and therefore was not the same as the False Survivor's Certificate that Activision attached to the Merger Certificate

²⁸⁸ See Trans. ID 72566852.

and publicly filed. Activision knowingly violated Section 251(c)(4) and Section 103 by filing the Merger Certificate and the False Survivor's Certificate and certifying that it was pursuant to Sections 103 and 251 of the DGCL.

392. Activision's conduct illustrates why requiring the agreement of merger to include amendments to the certificate of the surviving corporation is important even in a cash out merger. Otherwise, it is unlikely stockholders would be able to detect that the survivor's certificate may contain provisions beneficial to the corporation's officers, directors or particular stockholders.

393. Activision's filing of a fraudulent Merger Certificate attaching the False Survivor's Certificate in order to consummate the Merger constituted unlawful conversion of the Activision shares of Plaintiff and the Class for which there is no adequate remedy at law.

COUNT III

Individual and Class Claims for Breaches of Fiduciary Duty and Lack of Entire Fairness Against Kotick and the Director Defendants²⁸⁹

394. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

²⁸⁹ The Director Defendants against whom Count III is brought are Kotick, Kelly, Morgado, Corti, Hartong, Wasserman, Nolan, Ostroff, Meyer and Bowers.

A. Kotick and the Activision Board Were Not Disinterested and Independent When It Approved an Incomplete Version of the Agreement of Merger

395. The Director Defendants, as Activision directors, and Kotick, as an Activision director and officer, owed the Company's public stockholders fiduciary duties of loyalty and care. In determining whether to pursue a sale of the Company and in approving the Merger Agreement, the Director Defendants had a duty not to benefit themselves at the expense of Activision's public stockholders. In connection with pursuing the Company's sale, they also had a duty to implement a fair process, negotiate a fair price and maximize stockholder value.

396. The Director Defendants were not disinterested and independent with respect to determining to pursue the Merger and on what terms. Kotick was conflicted because he initiated and negotiated the Merger in the midst of and in response to the Harassment Scandal. Kotick knew that employees and investors were tired of his greed and excessive compensation, disgusted with his role in and lack of leadership concerning the Harassment Scandal and determined to force him out of the Company. A termination for Cause would be a huge financial loss for Kotick and destroy what remained of his already tarnished reputation. The Merger, however, would solve Kotick's crisis. It would allow him to keep his job during the lengthy period the Merger would be pending, avoid getting fired for Cause and

forfeiting millions of dollars of unvested options and other financial benefits, entitle him to a huge cash-out of incentive compensation and other change in control benefits, and preserve his legacy. Because of his interest in continued employment and a change-in-control payout, Kotick's interests differed from those of Activision stockholders.

397. The Merger Agreement Kotick ultimately negotiated with Microsoft was structured to further his self-interest. The Merger Agreement protected his tenuous position as CEO and allowed him to remain in office. Section 5.1(iii)(B) of the Merger Agreement required Activision to “keep available the services of its current officers and key employees” and Section 5.2(g) prohibited termination of the CEO. Section 2.2(b) provided that Activision's officers before the Merger would be the officers of Activision after the Merger. The broad indemnification, exculpation, advancement and insurance provisions of Sections 6.8(a)-(b) provide Kotick with materially greater protections, including in connection with claims arising out of the Merger and Harassment Scandal.

398. Microsoft also agreed that the Board could extend Kotick's Employment Agreement for twelve-months as of July 18, 2022, and restore his compensation pursuant to terms that violated the October Pay Cut Agreement.

399. Based on the minutes and the Proxy, in considering whether to pursue and in pursuing the Merger, the Board never considered Kotick's conflicts arising from the Harassment Scandal and his close relationship with Microsoft. They did not consider forcing Kotick to resign or firing him for Cause. That course could have been a valuable alternative to the Merger, considering Activision's stock price had tanked because of Kotick's mismanagement of the Harassment Scandal and not because of Activision's basic operations. Instead, the Board claims to have ignored the elephant in the room. The other Director Defendants also failed to control the sale process, allowed Kotick to choose the Board's advisors, including Allen & Co., and let Kotick negotiate the Merger.

400. The other Director Defendants have longstanding, lucrative and personal relationships with Kotick. They prioritized those relationships and demonstrated a lack of independence by letting Kotick negotiate the Merger at an inopportune time for Activision in order to save his skin.

401. The Director Defendants were also conflicted because they, like Kotick, were exposed by the Harassment Scandal. The scandal occurred on their watch. The DFEH, EEOC and SEC investigated the Board's knowledge, handling and disclosure of the Harassment Scandal, and how the directors worked with senior executives. The DFEH and SEC's subpoenas targeted the directors. The SEC

Investigation involved Activision's compliance and controls, and its disclosure of those controls, which implicated the Audit Committee.

402. The California Derivative Actions were filed against the entire Board; and the potential damages against them increased with each lawsuit and investigation that Activision paid to resolve. The Board minutes and the Proxy's descriptions thereof reflect no discussion of derivative claims, but nevertheless the Proxy claims that among the Board's reasons for approving the Merger Agreement and recommending that the stockholders approve the Merger Agreement was:

Derivative Litigation. The Activision Blizzard Board of Directors' consideration of the potential value to Activision Blizzard (and derivatively to Activision Blizzard Stockholders) of pending derivative litigation claims that have been brought against the Activision Blizzard's officers and directors, and, even assuming such litigation claims had material value, the Activision Blizzard Board of Directors' determination that the merger consideration of \$95.00 per share provided more than adequate value for such litigation claims.²⁹⁰

Thus, Kotick and the other Director Defendants have represented that they considered the potential damages against them from derivative claims against them as directors and officers and decided that the Merger consideration would include adequate payment by Microsoft for the derivative damages for which they might

²⁹⁰ Proxy at 44.

have been liable. So, by their own admission, part of the \$95 Merger consideration was payment for derivative claims against them.

403. The Director Defendants, including Kotick, also knew that the Merger would extinguish existing derivative claims against them, including those arising out of the Harassment Scandal.

404. The Director Defendants were also interested in the Merger because the terms of the Merger Agreement provided them super-exculpation, advancement, indemnification and insurance rights, as it did for Kotick.

405. Because the Merger Agreement and the Merger were not approved by a disinterested and independent majority of the Board, the business judgment rule is inapplicable and the entire fairness standard applies. Because no Section 251-compliant agreement of merger was submitted to the Activision stockholders and the Proxy was materially misleading and incomplete, the burden is on Kotick and the Director Defendants with respect to the multiple breach of fiduciary duty claims asserted below.

B. Kotick and the Board Breached Their Duty of Loyalty and Engaged in a Knowing Violation of Law and Intentional Misconduct by Failing to Approve a Section 251-Compliant Agreement of Merger and Closing an Invalid Merger

406. As alleged above:

- (a) The Director Defendants failed to approve a Section 251-compliant agreement of merger on January 17, 2022 through the closing of the Merger on October 13, 2023;
- (b) As directors and an officer of a Delaware corporation, Kotick and the other Director Defendants had a fiduciary duty of loyalty to comply with the corporate contract, including the DGCL;
- (c) The defects in the Draft Merger Agreement were apparent on its face and Kotick and the other Director Defendants had actual and constructive knowledge that the Draft Merger Agreement did not contain elements required by Section 251, including items such as the merger consideration, Survivor's Certificate and CDL, which were specifically referenced in the Draft Merger Agreement;
- (d) Kotick and the Director Defendants were served with numerous pleadings and filings between November 2022 through the October 13, 2023 closing of the Merger that pointed out the numerous Section 251 defects.

407. As alleged above, it was obvious to Kotick when he executed the Merger Agreement on January 18, 2022, that the Merger Agreement was

significantly different than the Draft Merger Agreement, but was still missing items specifically identified in the Merger Agreement (*i.e.*, the CDL and Survivor's Certificate), which were required by Section 251. Similarly, the same defects were obvious to Kotick and the other Director Defendants when they sent the Merger Agreement to the stockholders.

408. Kotick and the Director Defendants had a fiduciary duty of loyalty to manage Activision within the law and to ensure they and Activision complied with their legal obligations under Section 251. They could not act loyally by causing Activision and themselves to violate laws the Company and its directors were obligated to obey. They breached their duty of loyalty by knowingly violating Section 251 and knowingly causing Activision to violate Section 251. Their knowing violation of law was also intentional misconduct.

409. As alleged above, the Director Defendants improperly delegated determination of the dividend term to an *ad hoc* committee of the Board in violation of Sections 251 and 141(c) of the DGCL. Again, Kotick and the other Director Defendants had a fiduciary duty of loyalty to comply with the corporate contract, including the DGCL and Activision's bylaws, and had actual and constructive knowledge that the delegation violated the DGCL and the bylaws.

410. Activision Bylaw 3.9(b) provided that a committee could only exercise delegable powers of the Board and no committee could have the power and authority in reference to any action or matter that the DGCL expressly required to be submitted to the stockholders. [REDACTED]

[REDACTED] The January 17, 2022 minutes and the Proxy admit that negotiation and approval of the dividend term of the Merger Agreement was delegated to the *ad hoc* committee.

411. The Director Defendants certainly had knowledge of the Activision bylaws because [REDACTED]

412. The Director Defendants' delegation of the negotiation and approval of the dividend term of the Merger Agreement to the *ad hoc* committee was a knowing violation of Sections 251 and 141(c) of the DGCL and Bylaw 3.9 and a breach of their duty of loyalty. It was also intentional misconduct.

413. Kotick attended and participated in the January 17, 2022 Board meeting and therefore knew the negotiation of the dividend term had (improperly) been

delegated to the *ad hoc* committee, not to him. He deliberately breached his duty of loyalty and by negotiating the dividend term.

C. Kotick and the Board Breached Their Duty of Loyalty Because They Did Not Act Reasonably to Obtain the Best Transaction Reasonably Available

414. The fiduciary duty of loyalty of Kotick as an officer and all the Director Defendants as directors when pursuing a sale of the Company imposed on them the burden of demonstrating (i) the reasonableness of their decision-making process, including the information on which they based their decision, and (ii) the reasonableness of their actions in light of the circumstances then existing.

415. The potential sale of Activision had enormous consequences for Kotick. As described herein, Kotick suffered from disabling conflicts, including the need to preserve his job, the huge payout a merger would provide him, and the protections a merger could provide for claims against him arising out of the Harassment Scandal. Kotick had a substantial self-interest in a near term sale of Activision. As his discussions with Microsoft's Spencer and Nadella without Board authorization showed, Kotick favored a transaction with Microsoft from the outset. As the Proxy and minutes indicate, Kotick tilted the process in Microsoft's favor

throughout. Activision never entered into a non-disclosure or other agreement with any prospective bidder other than Microsoft.²⁹¹

416. The then-existing circumstances, as plead herein, create a reasonable inference that, in the sale of Activision to Microsoft, Kotick did not act reasonably in his hasty decision-making and actions because of his self-interest and lack of good faith. Kotick should have removed himself from any sale process. Instead, he initiated the process without Board authorization, conducted all negotiations with Microsoft, truncated discussions with other potential bidders, negotiated the dividend term when not authorized to do so, rushed the Board into approving a defective Draft Merger Agreement, executed the defective Merger Agreement and caused Activision to enter into the Letter Agreement. Kotick's self-interest and inappropriate role tainted the entire sale process from start to finish.

417. The Director Defendants were also motivated by their personal interests in limiting their exposure to the repercussions of the Harassment Scandal, protecting Kotick and avoiding a decision to terminate him. Like Kotick, they had personal motivations that differed from what was best for Activision and its stockholders. Like Kotick, they had personal interests in a near term sale. They insufficiently

²⁹¹ Proxy at 33-34.

checked an overbearing and conflicted CEO and allowed him to tilt the process in his preferred direction.

418. The sale process was short, limited and dominated by Kotick. Activision dealt not just preferentially, but as a practical matter, exclusively, with Microsoft. Discussions between Microsoft and Kotick, who had no Board authorization, began on November 19, 2021. Within ten days, Kotick and Spencer had agreed on a \$90 to \$105 price range—four days before the Activision Board met on December 3, 2021. By delaying a meeting of the Board for two weeks, Kotick prevented the start of any Board-centered sale process and gave Microsoft a substantial head start. The Board did not initiate any formal sale process at the December 3, 2021 Board meeting. The first contact from a potential bidder other than Microsoft was initiated by a gaming company (Company A), not Activision, on December 3, 2021, after Kotick had already been negotiating with Microsoft for two weeks. Microsoft entered into a non-disclosure agreement with Activision three days later, on December 8, 2021, and was immediately provided with Activision's LRP. On December 10, 2021, after the Board formally met for a second time, Microsoft had presented Activision with a \$90 offer and a draft exclusivity agreement. The Board did not institute a sale process at its December 10 meeting, delaying such process considerations if instead the Board should decide to engage

in discussions with Microsoft. But Kotick had already been engaged in discussions with Microsoft for three weeks. Microsoft reiterated its demand for exclusivity on December 16, and, by that evening, Activision's counsel sent a mark-up of the exclusivity agreement, which was negotiated over the next few days. Kotick and the Board knew Microsoft wanted to move fast to gain a competitive advantage over other potential bidders who might emerge. On December 17, 2021, the Activision Board authorized exclusive discussions with Activision at a \$95 price for up to a thirty-day period. By December 20, 2021, Activision had entered into the thirty-day Exclusivity Agreement with Microsoft.

419. Microsoft's head start and the skewed sales process enabled Microsoft to back-up Activision with an exclusivity agreement before other competing bidders could get started. While Company A contacted Kotick and Kelly on December 3, 2021, by an email addressed to the Board, Kelly and Kotick did not advise the Board of that overture and a December 6, 2021 unsolicited email from Individual B until December 10, 2021, the same day Microsoft provided its draft exclusivity agreement. The Board rejected Individual B's overture immediately and left it up to Kotick to meet with Company A, which he did not do until December 14, 2021.

420. On December 12, 2021 Allen & Co. suggested Companies C, D and E as potential bidders. Once again, the Board left it to Kotick, who had been

negotiating with the preferred buyer, Microsoft, for several weeks. Unsurprisingly, Kotick's perfunctory contacts with the three companies went nowhere, as Microsoft pressed him for exclusivity. Company D indicated to Kotick on Friday, December 17, 2021, it was keen to explore a transaction and a follow-up video conference was scheduled for December 20. However, later that same day, Spencer told Kotick he wanted exclusivity that very day and the exclusivity agreement was negotiated over that weekend. On December 20, 2021, Kotick told Company D circumstances had changed and Activision would very shortly not be able to continue discussions. There were no further discussions and Activision executed the Microsoft Exclusivity Agreement that same day.

421. It is a fair inference that (i) Kotick was tipping Microsoft as to the contacts with other potential bidders, leading Microsoft to push hard for exclusivity in order to cut-off potential competing bids; (ii) Kotick did not encourage other potential bidders; and (iii) the exclusivity agreement was pushed along on the weekend of December 17-19, 2021 to enable Kotick to push away Company D on December 20, 2021. Kotick did not just play favorites, he sidelined potential alternative players.

422. The sudden announcement of delays in game launchings in order to drive down Activision's stock price and the repeated modifications to projections

are further evidence of an unreasonable process and a bad faith effort to justify the price Microsoft wanted to pay.

423. The actions of Kotick and the Board fell outside the range of reasonableness. Kotick conducted himself like a beleaguered CEO who was thirsty for a sale that would rescue him, avoid further shame and trigger his immense change-in-control benefits. Because of his desire for a deal, he behaved in ways that undercut Activision's negotiating leverage and undermined Activision's ability to achieve the best value reasonably available for the stockholders. He delayed in scheduling Board meetings while he had private discussions and negotiations with Microsoft. His terse interactions with other potential bidders reflected his favoritism toward Microsoft.

424. The Board breached its duty of loyalty by failing to exercise control, active participation or even meaningful oversight of the sale of Activision. It did not initiate a formal sale process—at the December meeting, at its December 10, 2021 meeting, or ever. They did not exert control over the conflicted CEO and take control of discussions with Microsoft and other possible bidders. Instead, they let Kotick control discussions and negotiations and failed to engage in sufficient monitoring of his activities. They just went along for the ride.

D. Kotick and the Director Defendants Do Not Meet the Entire Fairness Standard

1. The Initiation, Timing, and Purpose of the Merger Were Unfair

425. Kotick initiated and timed the Merger for the purpose of saving his job and preserving his financial interest and legacy at a time when shareholders, employees and analysts were calling for his ouster and major business partners, including Microsoft, were reevaluating their relationships because of the Harassment Scandal. Three days after *Kotick Knew* was published, Kotick told Activision employees he might have to resign. That same day, Kotick spoke with Spencer about Microsoft acquiring Activision, which would offer Kotick a lifeline.

426. The timing for entering into the Merger Agreement with Microsoft was terrible for Activision. It was in the midst of the Harassment Scandal, the subject of numerous suits and investigations, confronted by massive employee unrest and had just announced a delay in two popular games (a delay which was related to departures due to the Harassment Scandal). Activision's stock price had been in free fall for months because of these factors.

427. In contrast, the timing of the Merger negotiations served Kotick's self-interest in preserving his job and benefits and providing a rich cash-out, rather than a resignation or termination in disgrace. For both Kotick and the other Director

Defendants, the Merger would also distract from the Harassment Scandal, avoid accountability and eliminate derivative suits.

2. The Negotiation of the Merger Was Not Fair Dealing

428. The negotiation of the Merger did not satisfy fair dealing. Kotick began negotiating without Board authorization, then involved Kelly and only disclosed the existence of negotiations to his long-time cronies, Morgado and Corti. The Board was not convened and advised of his unauthorized negotiations until two weeks later. Kotick involved conflicted directors (*e.g.*, Kelly, Corti and Morgado) and a conflicted advisor (Allen & Co.) at the outset of the discussions, before informing the full Board, so they could help him fashion his bailout that he would then serve up to the full Board for approval. Kotick had basically cut a deal before the Board ever convened.

429. Not only did the Board fail to terminate Kotick or press him to resign, but even after becoming aware of Kotick's unauthorized merger negotiations, the Board failed to take control of those negotiations, instead letting Kotick continue to fashion his own deal with his chosen advisors. There was no independent committee. Kotick conducted negotiations without the participation or supervision of any independent director or independent financial advisor. The Board acted in

bad faith by failing to cabin Kotick's conflict and by failing to learn about and cabin the conflicts of Allen & Co.

3. The Director Approval Did Not Satisfy Fair Dealing

430. As the descriptions of the December 2021 and January 2022 Board meetings above demonstrate, the Board approval process was flawed and the Proxy's disclosure of that process repeatedly conflicts with the minutes.

431. As discussed above, the Board approval process was invalid for failure to comply with Section 251(b). The failure to comply with Section 251 was a breach of fiduciary duty by the Director Defendants.

432. The defects in the Draft Merger Agreement, which had been provided to the Activision directors, were apparent on the face of the document. Kotick and the Director Defendants are presumed to know the terms of Section 251. From the face of the Draft Merger Agreement, the Activision directors, and Kotick as both a director and officer, had actual or constructive knowledge that the Draft Merger Agreement did not comply with Section 251. It was plainly a draft and did not include the CDL, disclosure schedules or Survivor's Certificate. In addition, Kotick and the Director Defendants were told that the dividend was an open issue. Moreover, they knew the Draft Merger Agreement they reviewed and approved was not the same version of the merger agreement that Microsoft's board approved. A

reasonable director would not have approved a contract for the sale of her home that was an incomplete draft with the consideration blank and required elements missing.

433. When Kotick executed the Execution Version of the Merger Agreement as an officer on January 18, 2022, Kotick could see from the face of the document that it was not the Draft Merger Agreement that he and the other directors considered and purportedly approved on January 17, 2022. It was also apparent that the Execution Version of the Merger Agreement did not include the Company Disclosure Letter and Survivor's Certificate. Because of the obvious defects in the Draft Merger Agreement, and the approval and execution of the Merger Agreement, Kotick and the Board could not have reasonably believed the approval of the Merger complied with Sections 251 and 141(c).

434. Kotick and the Director Defendants could have demanded to review and approve the final Merger Agreement on January 18, 2022. They could have sought and demanded to receive a legal opinion on whether their approval of the Draft Merger Agreement complied with Sections 251 and 141(c). They could have easily reconvened over Zoom to approve the Merger Agreement before it was executed. It is reasonably conceivable and a fair inference that Kotick and the Director Defendants rushed to approve the Draft Merger Agreement, and did not reconvene to approve the Merger Agreement, because the Exclusivity Agreement

with Microsoft expired on January 17. Instead of ensuring they complied with Delaware law, they wanted to ensure they approved the Merger Agreement that provided them non-ratable, material benefits, including the super-exculpation, indemnification, advancement and insurance protections. In doing so, they prioritized the interests of Kotick and themselves. This was a breach of their fiduciary duty of loyalty, intentional misconduct and a knowing violation of the law.

435. The descriptions of the various Board meetings show that the approval of the Board was also uninformed, and the Board acted in bad faith and with conscious disregard of the directors' duties. The Board failed to approve the agreement of the merger and, instead, only reviewed an incomplete draft and left the negotiation and approval of a key financial term (*i.e.*, the payment of dividends) up to an *ad hoc* committee of his cronies. Kotick, rather than the *ad hoc* committee, negotiated the dividend term and it is reasonably conceivable based on the known facts and circumstances that the committee never actually held a meeting or signed a unanimous consent approving the dividend term.

4. The Stockholder Vote Was Rushed, Coerced, Uninformed and Invalid

436. As discussed above, the stockholder vote was invalid because of the failure to comply with Sections 251(b) and (c). The Director Defendants

compounded their breaches of fiduciary duty by soliciting stockholders to approve the incomplete Merger Agreement which did not comply with Section 251.

437. The Director Defendants knew that the Execution Version of the Merger Agreement in the Proxy was not the Draft Merger Agreement they approved. They also knew that the Execution Version of the Merger Agreement submitted to Activision stockholders with the Proxy was not a Section 251-compliant agreement of merger. The Proxy was signed by Kotick and Kelly on behalf of the Board.²⁹² The Proxy contained the Notice of the Special Meeting, which Townsend signed “By Order of the Board of Directors.”²⁹³ Any director reviewing the Merger Agreement could see it did not include the CDL, disclosures schedules or Survivor’s Certificate. The Board knew the Execution Version of the Merger Agreement purported to be final, while the Draft Merger Agreement the Board approved did not. They therefore also knew that the stockholders’ approval of the Execution Version of the Merger Agreement did not comply with Section 251(c). A stockholder vote on an invalid Merger Agreement is meaningless and of no effect. It is no vote at all.

²⁹² Proxy, Letter to Stockholders at 3.

²⁹³ *Id.*, Notice at 3.

438. Kotick, in his capacity as an officer, signed the Execution Version of the Merger Agreement that was provided with the Proxy. He knew the Execution Version of the Merger Agreement he signed was not the Draft Merger Agreement the Director Defendants approved. He also knew that the Execution Version of the Merger Agreement did not include the CDL, disclosure schedules or Survivor's Certificate. He therefore knew, in his capacity as an officer, that the stockholders were being asked to approve a Merger Agreement that did not comply with Section 251(c).

439. The failure to provide or describe the Company Disclosure Letter and Survivor's Certificate deprived the stockholders of statutorily required material information. For example, the number of antitrust approvals required (apparently sixteen) and the identity of the countries was material to the stockholders' evaluation of the antitrust risk. As discussed below, the CDL, as produced by Activision to Plaintiff, contained terms that were not described in the Merger Agreement or Proxy. Particularly given the Harassment Scandal, Activision's indemnification agreements, as revealed in the Company Disclosure Letter, were material to the stockholders' assessment of director and officer independence and disinterest and the role of the Harassment Scandal in the pursuit of the Merger. Further, as discussed

below, the CDL made clear that the Harassment Scandal was not divorced from the Merger negotiations.

440. The stockholder vote on the Merger does not reflect an endorsement of the Merger's merits. Rather, it reflects the preference of some stockholders when they were forced to choose between two bad options: (i) Kotick continuing to run the Company as CEO, or (ii) selling their stock to Microsoft for an unfair price at some unknown date eighteen-months or more after the Merger Agreement was signed. The Board forced Activision's stockholders into a hasty Hobson's choice between a no-premium sale and an unattractive status quo.

441. Microsoft, Activision and the Director Defendants deliberately rushed the stockholder vote on the incomplete Merger Agreement. Section 6.3(a) of the Merger Agreement required Activision to file a preliminary proxy statement with the SEC within twenty business day of the January 18, 2022 Merger Agreement and to resolve SEC comments promptly and issue the definitive Proxy. Section 6.4(a) required Activision to hold a stockholder vote on the Merger Agreement "as promptly as reasonably practicable following the mailing of the Proxy Statement" and "on or around the 20th Business Day following the mailing of the Proxy Statement."

442. Kotick, the Board and Microsoft planned to and did rush the stockholders into a quick vote on the Merger before the antitrust risks and timing of payment of the Merger consideration were clear. The hastily scheduled vote on the Merger before more was known about the likely length and outcome of the antitrust review left the stockholders staring into a black box.

443. The prematurity of the stockholder vote was confirmed by subsequent events. As Defendants expected, the regulatory process was lengthy. The Merger did not close until October 13, 2023 because of regulatory proceedings. The FTC Suit is still pending. It is reasonably conceivable that the stockholders' view of the Merger Agreement might have been very different had the stockholder vote been delayed until more information concerning regulatory review and possible closing date was known. Activision could well have held the vote in the spring of 2023, rather than the spring of 2022.

444. The rushed stockholder vote also forced the stockholders to decide whether to exercise appraisal rights with no idea of when, if ever, the Merger might close or how many dividends might be missed before the Merger would or might close. Appraisal demands had to be made before the vote on the Merger—almost

two years before the Merger closed.²⁹⁴ A stockholder demanding appraisal had to hold the shares on the date of demand and continue to hold those shares until the effective time of the Merger, which was one-and-a-half years after the vote.²⁹⁵ An appraisal action could not be filed until the Merger became effective and would be based on the fair value of Activision at the time of the Merger. The appraisal decision, however, had to be made before Activision's results for 2022 and much of 2023 were known. Thus, in deciding before the Merger vote whether to demand appraisal, stockholders had to speculate concerning what Activision would be worth twenty-one months later. The rushed vote effectively deprived the stockholders of a fair opportunity to decide whether to seek appraisal.

445. The voting results from the Special Meeting reflected the unappetizing choice that stockholders faced. The Proxy solicited stockholders to approve in separate proposals the Merger and the Merger-related compensation proposal, which included Kotick's payout. According to Activision's April 28, 2022 Form 8-K, of the 780,922,900 shares entitled to vote at the Special Meeting, 539,332,512 shares voted "For" the Merger (68.2%), while the remaining 31.2% voted against, directly or by abstaining or declining to vote. Only 357,220,104 shares voted "For" the

²⁹⁴ Proxy at 8, 102.

²⁹⁵ *Id.*

Merger-related compensation proposal. The majority of Activision's stockholders did not approve Kotick's compensation.

5. The Proxy was Materially Misleading and Incomplete

446. The stockholder vote on the Merger did not reflect an endorsement of the Merger's merits for the additional reason that the Proxy contained numerous misleading and partial disclosures and omitted material facts that rendered the stockholder vote uninformed, including the failure to provide the complete agreement of merger.

a. Misleading Partial Disclosure Concerning the Merger Negotiations and the Role of the Harassment Scandal

447. The Proxy contained a misleading and incomplete summary of the Merger negotiations that concealed the role of the Harassment Scandal in those negotiations.²⁹⁶ The November 19, 2021 call between Kotick and Microsoft occurred (i) one day after Microsoft said it was reviewing its relationship with Activision because of the Harassment Scandal, (ii) three days after *Kotick Knew's* publication, (iii) when investors and employees were calling for Kotick's resignation

²⁹⁶ As described above, the Proxy's description of the Merger negotiations differed in a number of important respects from what was (or was not) contained in the minutes. In particular, the Proxy's description of the development of and basis for the \$90-105 range, Kotick's reasons for involving certain directors but not others, Kotick's December 12, 2021 report on his discussions two days earlier with Spencer and the revision of the LRP forecasts were misleading and incomplete.

and termination because of the Harassment Scandal and (iv) Kotick and the Director Defendants were implicated in multiple lawsuits and investigations by the SEC, DFEH, EEOC and investors arising out of the Harassment Scandal, and anticipated more. In determining whether to approve the Merger, a reasonable stockholder would have considered it important that the Harassment Scandal was a factor in the initiation and continuation of Merger discussions and the negotiation of the Merger.

448. The eleven-page “Background of the Merger” section of the Proxy did not mention the Harassment Scandal.²⁹⁷ Indeed, it misleadingly suggested that the Microsoft merger discussions resulted from regular review of strategic options and routine discussions with Microsoft about the gaming industry.²⁹⁸ The Proxy stated that on November 19, 2021 Spencer raised Microsoft’s interest in acquiring Activision with Kotick “in the course of a conversation on a different topic.”²⁹⁹ As discussed above, the timing and circumstances indicate that the “different topic” was the Harassment Scandal and Microsoft’s public position that it was reevaluating its relationship with Activision because of that scandal. But that crucial fact was not

²⁹⁷ *Id.* at 32-42.

²⁹⁸ *Id.* at 32.

²⁹⁹ *Id.*

disclosed to the Activision stockholders.³⁰⁰ The Proxy referenced that Activision and Microsoft had certain licensing arrangements and a business relationship of Activision games being carried on Microsoft's Xbox platform. However, it did not describe the financial and strategic importance of the Microsoft relationship or that Microsoft had said it was reevaluating that relationship because of the Harassment Scandal.

449. The remainder of the Proxy also avoided any indication that the Harassment Scandal had any influence on the initiation or pursuit of Merger discussions. Indeed, even the references to litigation arising out of the Harassment Scandal are carefully crafted to avoid mention of the Harassment Scandal.³⁰¹ The Execution Version of the Merger Agreement provided to stockholders in the Proxy

³⁰⁰ It is also reasonably conceivable that Kotick and Spencer discussed other matters relating to the Harassment Scandal, such as the creation of the WRC which occurred three days later on November 22, 2021. As noted above, the Proxy's description of the background of the Merger does not mention the WRC. The Proxy only mentions the WRC in discussing Kotick's compensation. *See id.* at 61.

³⁰¹ *See, e.g., id.* at 44 (Board considered "derivative litigation claims," without describing nature of those claims); *id.* at 72 (DFEH litigation "alleges violations of the California Fair Employment and Housing Act and the California Equal Pay Act" without describing nature of the violations); *id.* at 72-73 (federal class action asserts "claims under Sections 10(b) and 20(a) of the Exchange Act" without describing subject matter of those claims); *id.* at 73 (shareholder derivative actions "based on allegations similar to those in the DFEH Matter and in the securities class action"); Supplemental Disclosure, page 1 (describing Plaintiff's 220 Demand and 220 Complaint as seeking "to investigate purported breaches of fiduciary duty related to the Merger").

did not reference the Harassment Scandal. The Proxy fostered the misleading impression that the Merger discussions were divorced from the Harassment Scandal.

450. The Proxy listed twenty-four reasons for the Board's approval and recommendation of the Merger Agreement and thirteen potential negative factors without mentioning the Harassment Scandal.³⁰²

451. The Proxy did not disclose that key Activision officers had resigned or been terminated because of their misconduct in connection with the Harassment Scandal. It did not disclose whether they were given severance packages, indemnification agreements or releases.

452. The Harassment Scandal was also a factor at other points in the merger discussions, such as the December 7, 2021 discussion where Microsoft raised questions about potential challenges and Microsoft's December 10, 2021 offer letter

[REDACTED]

[REDACTED]

453. The Proxy also failed to mention the effect that the Harassment Scandal had on Activision, its financial and operating performance and its stock price. Allen & Co.'s December 15, 2021 and January 17, 2022 presentations to the Board

³⁰² Proxy at 43-48.

[REDACTED]

[REDACTED]

[REDACTED] This information was not disclosed even though (i) the first reason the Proxy gave for the Board’s recommendation of the Merger was the purported premium over market, and (ii) Allen & Co.’s analysis of Activision’s historical trading prices was referenced in the Proxy.

454. The Proxy repeatedly stated that the \$95 Merger price represented “(i) a premium of approximately 45.3% to Activision’s Blizzard’s closing price on January 14, 2022,” and “(ii) approximately 50.3% to the volume weighted average stock during the 30 trading days ended January 14, 2022.”³⁰³ These mathematically correct calculations were misleading partial disclosure without the further disclosure that the “premium” was based on stock prices following a substantial decline after the Harassment Scandal hit. Indeed, the thirty-trading-day period commenced in the aftermath of (i) Activision’s announcement that it was delaying the release of *Overwatch 2* and *Diablo IV*, which was the result of leadership departures because of the Harassment Scandal, and (ii) the series of disclosures culminating in *Kotick Knew*’s November 19, 2021 publication and Activision’s inadequate response.

³⁰³ *Id.*, Letter to stockholders from Kotick and Kelly; *see also id.* at 16.

455. The Proxy disclosed that the interests of Kotick and the other Director Defendants may be different from the interests of the stockholders, and that the Board was aware of and considered these interests in evaluating the negotiation of, approving and recommending, the Merger Agreement.³⁰⁴ However, the Proxy only described the accelerated vesting of equity compensation, the value of equity awards, potential termination payments and golden parachute compensation.³⁰⁵ This was misleading partial disclosure because it did not include other interests that Kotick and the other Director Defendants had, including (i) Kotick eliminating his risk of being terminated for Cause and forfeiting his then-outstanding equity awards and (ii) the Director Defendants' risk of liability. Indeed, the Proxy also omitted information about the consequences of Kotick being terminated for "Cause" under his employment agreement.

456. Having made disclosure concerning the genesis and background of the Merger, the Director Defendants were required to provide a complete and accurate summary. Having touted the premium over the recent market prices, the Director Defendants were obligated to disclose factors that had affected those prices. Having described certain benefits to Kotick and the other Board members from the Merger,

³⁰⁴ *Id.* at 8, 59.

³⁰⁵ *Id.* at 59-67.

the Director Defendants had to disclose other benefits, such as the elimination of and expanded protection against potential liability and prevention of possible loss of employment and compensation for Kotick. Having described certain conflicts that Kotick and the Director Defendants faced in connection with the Merger, the Director Defendants had to fully and completely disclose their conflicts, including Microsoft's control over litigation in which they were named defendants. Instead of complete and accurate information, the Director Defendants deliberately chose to make misleading partial disclosure that omitted mention of the Harassment Scandal.

457. A reasonable stockholder needed to know how the Harassment Scandal may have affected the sudden decision to sell the Company, the price of the sale and the interest of Kotick and the other Board members. This information was important in evaluating the Merger and deciding how to vote.

b. Misleading Partial Disclosure of the Terms of the Merger by Failing to Provide the Survivor's Certificate

458. The Survivor's Certificate was not contained in the Draft Merger Agreement that was approved by the Board, the Execution Version of the Merger Agreement signed by Kotick or the incomplete Merger Agreement that was submitted to the Activision stockholders. Among its amendments, the Survivor's Certificate confers exculpation rights on Activision officers (Article VII) and contains a savings clause (Article XI) that provides that if any portion of any

provision of the Survivor's Certificate is "held to be invalid, illegal or unenforceable" that will not affect the validity and enforceability of other portions of that provision or any other provisions. Moreover, Article XI provides that the remaining parts of the Certificate:

. . . shall be construed so as to permit the Corporation to protect its directors, officers, employees and agents from personal liability in respect of their good faith service or for the benefit of the Corporation to the fullest extent permitted by law.

459. Defendants' violation of Section 251(b)(3) by failing to provide the Survivor's Certificate resulted in the stockholders being deprived of information indicating Activision's directors and officers had secured for themselves increased liability protections.

c. Misleading Partial Disclosure of the Terms of the Merger by Failing to Completely and Accurately Describe Important Terms and Qualifications of the CDL

(i) The CDL: Introduction

460. Section 9.5 of the Merger Agreement acknowledged that the CDL was part of the parties' agreement. The CDL, as produced by Activision to Plaintiff, said

[REDACTED]

[REDACTED]

461. The CDL is referred to twenty-one times in the Proxy. However, the Proxy almost never described what the CDL actually contained. For example, in disclosing the interests of non-employee directors and executive officers in the accelerated vesting of equity compensation upon termination, the Proxy repeatedly stated that termination for “cause” is “defined in the confidential disclosure letter to the merger agreement” but never says what that definition is.³⁰⁸ Similarly, the Proxy

³⁰⁶ CDL I at 2.

³⁰⁷ *Id.*

³⁰⁸ Proxy at 59-61, 65.

referenced the right of executive officers and others to terminate their employment after the Merger and get acceleration and severance benefits “pursuant to the merger agreement (as modified by the confidential disclosure letter to the merger agreement)” but does not describe the modifications made by the CDL.³⁰⁹

462. The Proxy’s description of the terms of the Merger Agreement stated that “[t]he rights and obligations of the parties are governed by the express terms of the merger agreement (as qualified by the confidential disclosure letter to the merger agreement).”³¹⁰ It said that its description of Activision’s representations, warranties and covenant and the terms of the Merger Agreement were “subject to important qualifications, limitations and supplemental information” contained in the CDL.³¹¹ The stockholders were told not to rely on Activision’s covenants in the Merger Agreement “because the parties may take certain actions that are . . . expressly permitted in the confidential disclosure letter to the merger agreement.”³¹²

463. The Proxy’s description of factors that will not be deemed a “Material Adverse Effect” and descriptions of Activision’s representations, warranties and

³⁰⁹ *Id.* at 60.

³¹⁰ *Id.* at 74.

³¹¹ *Id.*

³¹² *Id.*

covenants said they were subject to “exceptions included in the confidential disclosure letter to the merger agreement” but those exceptions are not described in the Proxy.³¹³ The Proxy said Activision may not “enter into agreements of the types listed in the confidential disclosure letter to the merger agreement” but did not say what types of agreements were listed.³¹⁴

464. The Proxy said that the Merger Agreement provides that the surviving corporation (*i.e.*, Activision) will (and Microsoft will cause it to) fulfill “indemnification agreements that are set forth in the confidential disclosure letter to the merger agreement.”³¹⁵ Section 6.8(a) of the Merger Agreement contains the indemnification commitment for “any indemnification agreements set forth on Section 6.8(a) of the Company Disclosure Letter.” The Proxy and the Merger Agreement do not, however, identify any indemnification agreements. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³¹³ *Id.* at 79-82.

³¹⁴ *Id.* at 83.

³¹⁵ *Id.* at 88-89.

[REDACTED]

465. The Proxy said Activision was required to provide Microsoft updates on “certain litigation matters set forth in the confidential disclosure letter to the merger agreement.”³¹⁷

(ii) The CDL Shows the Proxy’s Disclosure Regarding the Sexual Harassment Scandal Was Misleading and Incomplete

466. In the Proxy, Defendants represented that:

In the Merger Agreement, Activision Blizzard has made customary representations and warranties . . . that are subject, in some cases, to . . . certain additional exception included in the confidential disclosure letter to the merger agreement.³¹⁸

The Proxy’s list of Activision’s representations and warranties in the Merger Agreement includes only general mention of “employee benefit plans,” “labor and employment matters,” and “the absence of legal proceedings and orders.”³¹⁹

³¹⁶ Section 6.8(a) of the Merger Agreement defines “Indemnified Person” as any current or former director or officer.

³¹⁷ Proxy at 89.

³¹⁸ *Id.* at 79-80.

³¹⁹ *Id.* at 80.

467. The Merger Agreement, which was attached to the Proxy as Annex A, contained several representations and warranties on these topics that were subject to exceptions set forth in the CDL. However, the Proxy made no disclosure concerning the exceptions contained in the CDL.

468. Section 3.19(b) of the Merger Agreement stated that, “[e]xcept as would not have a Company Material Adverse Effect,” Activision is in compliance and has complied since January 1, 2019 (January 1, 2018 as to California law) with employment laws.

469. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

470. Section 3.9(f), another supposedly customary representation in the Merger Agreement, suggested that there was no sexual harassment problem at Activision, representing:

(f) No Allegations of Sexual Harassment, Sexual Misconduct or Retaliation.

471.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

472. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Proxy, which included the Merger

Agreement’s “no sexual harassment” representation, was a materially incomplete

and misleading partial disclosure because there was no reference to the [REDACTED]

[REDACTED]

473. [REDACTED]

[REDACTED] The Proxy’s

disclosure concerning the Harassment Scandal was materially incomplete and

[REDACTED]

misleading because the Proxy also did not provide, or describe the contents of,

[REDACTED]

[REDACTED]

474. Moreover, because the Proxy did not provide or describe [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Thus, while a reasonable stockholder reading the Execution Version of the Merger Agreement knew that Microsoft's approval was required to settle Specified Litigation, a reasonable stockholder did not know that involved litigation against Kotick and the Director Defendants arising out of the Harassment Scandal.

(iii) The CDL: Failure to Disclose the Section 6.6 Covenants

475. The information in the CDL was not deemed to expand Activision's representations, warranties and covenants "except with respect to Section 6.6 of the [CDL]." ³²²

³²² CDL [REDACTED]

476. Section 6.6 of the Merger Agreement, a lengthy covenant which gave Microsoft access to Activision's books and records, contained the following sentence: "Following the execution and delivery of this Agreement, the Parties will use commercially reasonable efforts to take the actions set forth on Section 6.6 of the Company Disclosure Letter." Neither the Proxy nor the Merger Agreement contained any disclosure of what actions Activision and Microsoft agreed to take in Section 6.6 of the CDL. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

477. [REDACTED]

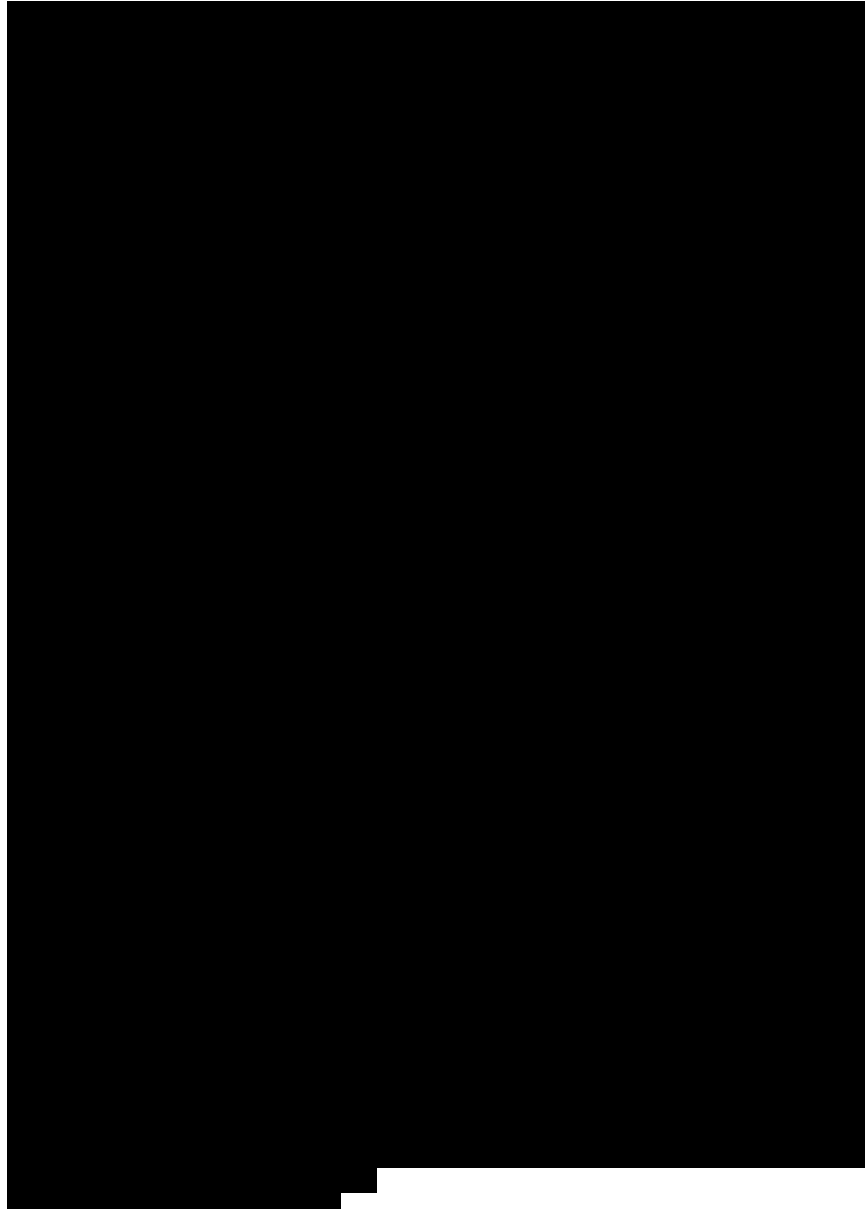
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



478. The Proxy contained no disclosure of the [REDACTED]

This covenant was a further reflection that the Harassment Scandal was a major consideration in the Merger.

[REDACTED]

(iv) The CDL: Failure to Disclose the Section 6.15

[REDACTED]

479. Section 6.15 of the Merger Agreement provided that:

If at any time after the Effective Time any further action is necessary or desirable to carry out the purposes of this Agreement or to vest the Surviving Corporation with full title to all properties, assets, rights, approvals, immunities and franchises of either the Company or Merger Sub, then the proper officers and directors of each Party will use their reasonable best efforts to take such action. Without limiting the foregoing, the Company shall take the actions set forth on Section 6.15 of the Company Disclosure Letter.

Neither the Merger Agreement nor the Proxy described what actions Activision was required to take under CDL Section 6.15.

480. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

481. Section 8.3(c) of the Merger Agreement provided for a \$2 billion Parent Termination Fee prior to January 18, 2023, a \$2.5 billion fee from January 18 to

April 18, 2023 and a \$3 billion fee after April 18, 2023. The Letter Agreement increased the Parent Termination Fee to \$3.5 billion after August 29, 2023 and to \$4.5 billion after September 15, 2023. The Letter Agreement did not amend, waive or modify Section 6.15 and provided in paragraph 5 that, subject to the Letter Agreement, all terms, conditions and provisions of the Merger Agreement and the CDL would remain in full force and effect.

482. The Proxy contained no disclosure concerning the [REDACTED]. The Proxy repeatedly referenced the Parent Termination Fee³²⁶ and described it in detail.³²⁷ [REDACTED]

[REDACTED] The only mention of “cloud-related agreements” in the Proxy was Allen & Co.’s disclaimer that its opinion did not address other terms of the merger, including “cloud-related agreements.”³²⁸

483. The Proxy indicated the Parent Termination Fee was the subject of significant negotiation³²⁹ and it was listed as one of the Board’s reasons for adopting

³²⁶ See Proxy at 13, 20, 31, 39-41, 45.

³²⁷ See *id.* at 93.

³²⁸ *Id.* at 54, Annex C at C-3.

³²⁹ *Id.* at 39-41.

the Merger Agreement and recommending it to the stockholders.³³⁰ Having made disclosure concerning the Parent Termination Fee, Defendants were obligated to provide a complete account, including the CDL provision [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

d. Misleading Partial Disclosure of Allen & Co.'s Conflicts, Engagement and Analysis

484. The Proxy failed to disclose Allen & Co.'s historical involvement with Activision and Kotick. The Proxy omitted any disclosure about Allen & Co.'s engagements in connection with the Vivendi Merger, ASAC, or other assignments for Kotick, Kelly and Activision. The Proxy further failed to disclose that Kotick was a co-director on the Coke Board with Herbert and Herb Allen, and that Kotick nominated Herb to the Coke Board during the Merger negotiations. Instead, the Proxy represented that Allen & Co. had no conflicts:

Allen & Company is not currently providing, and during the past two years has not provided, investment banking services to Activision Blizzard unrelated to the Merger or

³³⁰ *Id.* at 43, 45.

to Microsoft for which Allen & Company has received compensation[.]³³¹

485. The Proxy stated that Kotick promptly involved Allen & Co., “which had provided strategic financial advice to Activision Blizzard on other occasions.”³³² It claimed that the Board selected Allen & Co. as financial advisor based on factors including “its knowledge and understanding of Activision Blizzard’s business and industry from its previous work with Activision Blizzard.”³³³ The Proxy’s discussion of Allen & Co. stated it was selected as financial advisor based on its “experience and familiarity with Activision Blizzard.”³³⁴

486. The repeated statements about Allen & Co.’s previous advice, work, experience and familiarity was incomplete partial disclosure without a summary of those prior activities, including that Allen & Co. had advised ASAC (*i.e.*, Kotick, Kelly and Nolan). Given the repeated references to prior work, experience and familiarity, the disclosure of no services in the two years preceding the Board’s approval of the Merger was misleading partial disclosure without a summary of the substantial prior contacts.

³³¹ *Id.* at Annex C.

³³² *Id.* at 32.

³³³ *Id.* at 33.

³³⁴ *Id.* at 57.

487. A reasonable stockholder would consider the extent of Kotick’s relationship with Allen & Co. important when assessing why Kotick “promptly” called Allen & Co. after talking to Spencer, and whether Allen & Co. could render independent financial advice to Kotick or the Board. This was particularly so because the Board recommended that stockholders approve the Merger based on Allen & Co.’s fairness opinion.

488. The Proxy also provided misleading partial disclosure about the Board’s consideration of Allen & Co.’s conflicts and decision to engage Allen & Co. As pointed out earlier, the minutes contradicted the Proxy concerning the date of Allen & Co.’s engagement and whether Allen & Co. was consulted by Kotick before he gave Microsoft the \$90-105 range. The Proxy disclosed that on December 3, 2021, the Board considered Allen & Co.’s conflicts with respect to Activision and Microsoft and “decided to work with Allen & Company.”³³⁵ The Board, however, did not consider Allen & Co.’s conflicts until December 14, 2021—nearly one month after Allen & Co. had been working with Kotick, and after Allen & Co. attended a four-hour meeting with Microsoft about Activision’s LRPs, as well as Board meetings on December 3, December 10 and December 12, 2021. Further, the

³³⁵ *Id.* at 33.

Board did not decide to work with Activision until January 14, 2022, the Friday before the Board’s Monday vote on the Merger; and even then, the Board merely “developed” a “consensus”³³⁶ to engage Allen & Co.

489. These misleading, partial disclosures were material. They obscured that Kotick retained Allen & Co. without Board authorization. A reasonable stockholder, when deciding how to vote on the Merger, would consider it important that the Board bowed to Kotick’s prior choice of financial advisor before considering the advisor’s conflicts or ever authorizing its engagement.

490. The Proxy also provided misleading, partial disclosure about Allen & Co.’s conflicts with respect to Microsoft. The Proxy failed to disclose that [REDACTED] Instead, the Proxy mushed together its disclosure about the investments of Allen & Co. and its bankers, whether the investments were past or current, and whether the investments were in Activision or Microsoft. The Proxy represented:

Allen & Company as a broker-dealer and certain of its affiliates, directors and officers have invested or may invest, hold long or short positions and may trade, either on a discretionary or non-discretionary basis, for their own or beneficiaries’ accounts or for those of Allen & Company’s clients, in the debt and equity securities (or

³³⁶ Activision_0000600 at 604.

related derivative securities) of Activision Blizzard, Microsoft and/or their respective affiliates.³³⁷

491. A reasonable stockholder therefore could not discern that Allen & Co. bankers, who directly interfaced with and advised Activision and the Board, had significant personal investments in Microsoft and no investment in Activision. A reasonable stockholder would have considered this information important when deciding whether these bankers were providing independent financial advice, and whether the Board was vigilant in deciding to rely on that advice. Having traveled the road of partial disclosure regarding Allen & Co.'s conflicts in the Proxy, the Defendants were required to provide full and accurate disclosure.

492. The Proxy indicated that Allen & Co. reviewed Activision's trading prices but, as mentioned above, misleadingly failed to point out that the analysis showed the stock price had been adversely affected on days when significant events happened in the Harassment Scandal.

493. The Proxy stated that Allen & Co. conducted a Selected Price Targets Analysis, stating that Allen & Co. observed price targets for Activision indicating "an overall low to high target price range for Activision Blizzard common stock of \$54.00 to \$125.00 per share (with a mean of \$90.52 per share and a median of

³³⁷ *Id.*

\$90.00 per share).”³³⁸ However, the Proxy did not disclose the dates the analysts issued the price targets that Allen & Co. observed. The Appendix to Allen & Co.’s January 17, 2022 presentation revealed that all the price targets were published on or after November 2, 2021, after the Harassment Scandal had a significant negative impact on analysts’ price targets. Analyst reports issued prior to November 2, 2021 had significantly higher price targets. A reasonable stockholder would have considered this information important when determining whether the mean and median price targets, which would have been higher had Allen & Co. included earlier price targets, indicated the Merger price was fair.

e. Misleading Partial Disclosure of Kotick’s Employment Agreements with Microsoft

494. The Proxy disclosed that on October 28, 2021, Activision announced that Kotick told the Company he wanted his base salary to be reduced and not be awarded:

any bonuses or equity grants until the Workplace Responsibility Committee of the Activision Blizzard Board of Directors has determined that Activision Blizzard has made appropriate progress toward achievement of the transformational gender-related goals

³³⁸ *Id.* at 57.

and other commitments described in such announcement.³³⁹

495. This disclosure was false. As detailed above, the October Press Release stated that Kotick told the Board to reduce his compensation “until the Board” (not the WRC) “determined that we have achieved” (not made “appropriate progress towards”) “the transformational gender-related goals and other commitments” announced in the October Press Release. Indeed, the WRC was not formed until November 22, 2021. Kotick and Activision could not agree in October that the not-yet-formed WRC would decide if and when Kotick would receive bonuses and equity grants.

496. The Proxy also represented:

In connection with the merger, Activision Blizzard and Microsoft agreed that if the Workplace Responsibility Committee of the Activision Blizzard Board of Directors concludes and reports publicly that Activision Blizzard has made appropriate progress toward the achievement of the transformational gender-related goals and other commitments described in Activision Blizzard’s press release on October 28, 2021 . . . then the Activision Blizzard Board of Directors may, no earlier than six months after the date of the merger agreement, in its discretion [] grant an annual equity award to Mr. Kotick as set forth in his employment agreement (as may be extended) . . . [and] provide cash compensation to Mr.

³³⁹ *Id.* at 61 (emphasis added).

Kotick under the existing terms of his employment agreement (as may be extended)³⁴⁰

497. This disclosure, when coupled with the false disclosure about the October Press Release, was materially misleading. A stockholder reading this disclosure would think that Activision and Microsoft had agreed that Kotick's compensation would be consistent with his existing agreements with the Company pursuant to the October Pay Cut Agreement. However, Activision and Microsoft reached a watered-down, far less rigorous version of the October agreement that was more favorable to Kotick. A reasonable stockholder would consider this important considering that Kotick was the primary Merger negotiator.

498. Further, on April 15, 2022, Activision filed a Form 8-K providing supplemental disclosure. With respect to Kotick's employment agreements with Microsoft, the 8-K disclosed:

No discussions or negotiations regarding post-closing employment arrangements with Microsoft occurred between Microsoft and Mr. Kotick prior to the approval and execution of the merger agreement and the transactions contemplated thereby, or have occurred subsequent to such approval and execution, through the date hereof.

³⁴⁰ *Id.* (emphasis added).

499. While the 8-K addressed discussions concerning Kotick’s “post-closing employment,” Activision and Microsoft had agreed (i) to the terms of Kotick’s compensation while the Merger was pending, (ii) that the WRC could extend Kotick’s Employment Agreement for twelve months and (iii) that, under Section 2.6(a) of the Merger Agreement, the initial officers of Activision after the Merger would be the officers of Activision immediately before the Merger, including Kotick. A reasonable stockholder would consider the timing and circumstances of these negotiations important, considering these terms benefitted Kotick, who was the primary negotiator of the Merger. Further, the disclosure that no discussions about “post-closing employment” occurred were simply not credible when Kotick’s employment was discussed and he would remain an Activision officer after the Merger. He was not going to work for free. Having traveled the road of disclosure concerning the discussions of Kotick’s employment and compensation, the Defendants were required to provide a full and accurate summary.

6. The \$95 Merger Price Was Unfair and Activision Was More Valuable as an Independent Company

500. The Merger consideration was not a fair price for Activision’s stock on October 13, 2023.

501. The \$95 Merger price was approved on January 17, 2022 and did not take into account that the Merger was unlikely to close before June 2023 because of

antitrust risks. The Merger Agreement did not contain any provision for adjustment of the merger consideration. Consequently, the stock generally traded at or under \$80 per share after the Merger’s announcement, indicating the market was heavily discounting the Merger price both because of the substantial antitrust delays and the risks the Merger might not receive regulatory approval. During October 2022, Activision consistently traded below \$75 per share, closing at \$72.86 on October 28, 2022. The discounted present value on January 18, 2022 of \$95 that would not be received until eighteen months later was approximately \$85. The discounted present value on January 18, 2022 of \$95 twenty-one months later was less than \$83.

502. The risk of a delayed closing due to protracted regulatory review was obvious to Defendants throughout the Merger discussions, given the unfavorable antitrust climate and sheer size of the Merger. Microsoft’s Vice Chair Brad Smith told the press on February 9, 2022, “we recognize that there will be more scrutiny of any large acquisition that is being made by a large tech company.”³⁴¹ More than seven months after the Merger Agreement was signed, Kotick told Company employees in a September 1, 2022 letter, “the process with all of the regulators is

³⁴¹ Cat Zakrzewski, *In A Bid To Appease Regulators, Microsoft Announces New App Store Principles*, THE WASH. POST (Feb. 9, 2022), <https://www.washingtonpost.com/technology/2022/02/09/microsoft-app-store-principles/>.

generally moving along as we expected.” Kotick reiterated this statement on November 8.

503. The Merger Agreement also reflected that Defendants knew antitrust review could tie up Activision for at least eighteen months. The term sheet annexed to the December 20, 2021 exclusivity agreement and Microsoft’s initial December 29 draft of the merger agreement provided for a lengthy period of suspended animation for Activision. Section 8.1(c) of the Merger Agreement established an outside termination date of July 18, 2023. Extended “drop-dead”³⁴² dates reflected the risk of prolonged antitrust review and the potential that antitrust agencies would seek to block a transaction or require a remedy as a condition of clearance. The lengthy Termination Date reinforced that Defendants knew antitrust reviews would be lengthy. In addition, the Proxy disclosed that the target closing date would be sometime during Microsoft’s fiscal year 2023 (*i.e.*, between July 1, 2022 and June 30, 2023).

504. Even putting aside the unfairness of the Merger price in light of the antitrust delay, the \$95 deal was also unfair because it valued Activision only slightly

³⁴² *FTC and DOJ Announce Joint Review of Merger Guidelines*, SULLIVAN & CROMWELL LLP (Jan. 19, 2022), <https://www.sullcrom.com/sc-publication-ftc-and-doj-announce-review-of-merger-guidelines>.

above the stock's \$90.14 trading price on July 26, 2021, the day before the suit by California regulators was disclosed. The month preceding July 27, 2021, Activision stock traded between \$90.14 and \$95.61. Thus, the Merger price represented little or no premium over the market price of Activision stock prior to the disclosures relating to the Harassment Scandal. Activision's stock price declined significantly several times in the fall of 2021, as news articles and other disclosures concerning the misconduct allegations were made public.³⁴³ Activision's stock price never recovered and did not trade above the mid-sixties from November 16, 2021 through January 14, 2022, the last trading day before the announcement of the Microsoft deal.

505. The unfairness of the Merger price was also shown by the LRP and Allen & Co.'s DCF analysis. As of November 2, 2021, before Microsoft approached Kotick, the LRP estimated an implied value per share of [REDACTED]. [REDACTED] In addition, the LRP's sensitivity analysis for 2024 indicated an implied per share valuation range for Activision stock of [REDACTED].

³⁴³ On July 27, 2021 the stock closed at \$84.05, or \$6.09 lower than the \$90.14 closing price on July 26, 2021. The stock dropped from \$79.56 on September 17, 2021 to \$72.81 on September 22, 2021; from \$77.67 on November 2, 2021 to \$66.75 on November 3, 2021; and from \$70.43 on November 15, 2021 to \$62.67 on November 18, 2021.

[REDACTED]

[REDACTED]

[REDACTED] Management subsequently depressed the LRPs after Microsoft's approach for the purpose of negotiating the Merger. The Merger price also fell below the midpoint [REDACTED] of the DCF range of Allen & Co.'s final fairness opinion [REDACTED] which was based on the depressed LRPs.

506. The extension of the Merger Agreement beyond the Termination Date invalidated Allen & Co.'s fairness opinion. The opinion was based on the assumption that the Merger would be consummated "without waiver, modification or amendment of any material term, condition or agreement," and that:

. . . in the course of obtaining the necessary governmental, regulatory . . . approvals . . . no delay, limitation, restriction or condition . . . will be imposed or occur that would have an adverse effect on Activision Blizzard or the Merger.³⁴⁵

507. The unfairness of the Merger price was also reflected by analysts' pre-announcement price targets, several of which were above \$95 per share. Moreover, analysts lowered their target prices in response to the Harassment Scandal.

³⁴⁴ Activision_0000645 at 791.

³⁴⁵ Proxy at C-3.

508. The unfairness of the Merger price was also reflected by Activision's post-announcement performance, including its releases of *Overwatch 2*, *COD:MW2* and *Diablo IV*, which indicated that Activision was more valuable as a standalone, independent company. Activision's business plan as of January 18, 2022 included releasing these games, which should therefore be considered when evaluating Activision's standalone value.

509. While approving the Merger at an inopportune time and rushing stockholders to vote on the Merger, Kotick and the Director Defendants knew the Merger was not going to close for eighteen-months or longer because of antitrust review. Thus, Kotick and the Director Defendants, imprudently and in violation of their fiduciary duties, approved the highly risky Merger that would leave Activision adrift with Kotick at the helm.

510. As a result of Kotick and the Director Defendants' breaches of fiduciary duty, Plaintiff and the Class have suffered substantial harm, as alleged herein, for which there is no adequate remedy at law.

COUNT IV

Individual and Class Claims for Breaches of Continuing Fiduciary Duty and Lack of Entire Fairness Against Kotick and the Director Defendants in Connection with the Continuation of the Merger Agreement and the Letter Agreement³⁴⁶

511. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

A. The Activision Board Was Not Disinterested and Independent When It Persisted In Pursuit of the Merger

512. In determining whether to terminate the Merger Agreement, let it expire or continue it, the Director Defendants, as Activision directors, and Kotick, as an Activision director and officer, owed the Company's public stockholders continuing fiduciary duties of loyalty and care. Kotick and the other Director Defendants also had a fiduciary duty of loyalty and care in determining whether to fix the Merger's statutory defects before the Merger closed.

513. Kotick was conflicted because continuing the Merger Agreement, in effect, continued his compensation and protected his job, reputation, millions of dollars of unvested options and other benefits. The closing of the Merger would entitle him to cash-out his change in control benefits. If the Merger Agreement

³⁴⁶ The Director Defendants against whom Count IV is brought are Kotick, Kelly, Morgado, Corti, Nolan, Ostroff, Meyer, Bowers and Carr.

expired or was terminated, Kotick's fate at Activision was highly uncertain. As the July 18, 2023 Termination Date approached, Activision's employees were still calling for Kotick's ouster. The Specified Litigation arising out of the Harassment Scandal was still pending against Kotick, carrying the risk of potential personal liability and reputational damage. In addition, the Merger would provide him with materially greater indemnification, exculpation, advancement and insurance from lawsuits against him arising out of the Harassment Scandal and the Merger. If the Merger Agreement was terminated or expired, he would lose that enhanced protection. Closing the Merger would eliminate pending and potential derivative suits; if the Merger Agreement expired or was terminated, such suits would continue to be a threat.

514. Kotick was also conflicted as a result of his relationship with Microsoft. Amidst the Harassment Scandal, Microsoft had swooped in to help Kotick save his reputation, legacy and net worth, and change Activision's narrative from the Harassment Scandal to the Merger. It is reasonable to infer that Kotick felt a sense of owing-ness to Microsoft. He was not going to abandon the Merger and impose huge costs on Microsoft, including the Parent Termination Fee and wasted time, effort and money in pursuing the Merger, particularly the costly and lengthy regulatory review.

515. The Defendants who were directors as the Termination Date approached were also conflicted. Most of the Director Defendants had longstanding, lucrative ties and personal relationships with Kotick, which they prioritized and protected. Further, they also faced potential liability arising from, and were named defendants in lawsuits concerning their involvement in the Harassment Scandal and approval of the Merger, including this Action. As with Kotick, the Merger Agreement provided the Director Defendants materially greater rights to indemnification, advancement, exculpation and insurance if the Merger closed. Termination or expiration of the Merger Agreement would eliminate that increased protection. Closing the Merger would eliminate derivative suits; termination or expiration of the Merger Agreement would not.

516. Because the Merger Agreement would either expire or become terminable on July 18, 2023, the Board was again required to employ a reasonable decision-making process and act reasonably in light of this development. Because the decision to continue the Merger Agreement was not approved by a disinterested and independent majority of the Board, the entire fairness standard applies.

B. The Director Defendants' Decision to Continue the Merger Agreement and Not Fix the Merger's Statutory Defects Was a Breach of the Duty of Loyalty and Care, Intentional Misconduct and a Knowing Violation of the Law

517. The Activision directors, including Kotick, owed continuing fiduciary duties to Activision's stockholders. When fiduciaries have a means to get out of a deal commitment or get a better deal, they have an obligation to reconsider the transaction, make an informed judgment and act reasonably and in the best interests of the public stockholders. Kotick and the Director Defendants did not.

518. As discussed above, the Director Defendants' failure to approve, and submit for stockholders to approve, a Section 251-compliant agreement of merger violated Sections 251(b) and (c). Their decision to continue the invalid Merger Agreement beyond July 18, 2023 and their failure to fix the statutory defects with respect to the Merger Agreement, even after Plaintiff filed and served the Defendants with its Complaint, Amended Complaint, and numerous briefs pointing out the defects, was a deliberate breach of their duty of loyalty, intentional misconduct and a knowing violation of law.

519. For nearly a year between the filing of its Complaint and the Merger's October 13, 2023 Closing, Plaintiff repeatedly explained to the Director Defendants that the Merger violated Sections 251(b)-(c). Plaintiff insisted that the Director Defendants fix the statutory defects. Plaintiff pointed out that the Director

Defendants could fix the statutory defects before by submitting a Section 251-compliant agreement of merger for a vote at the 2023 Annual Meeting. The Director Defendants were served with Plaintiff's pleadings. They signed the 2022 Annual Report that identified this Action, and explained that Plaintiff alleged the Board did not comply with Section 251.

520. While Defendants have contended that, under Section 8.1(c), the Merger Agreement would not automatically expire at 11:59 p.m. Pacific Time on July 18, 2023,³⁴⁷ the July 17, 2023 Minutes [REDACTED]

[REDACTED] The Board intentionally allowed continuation of an invalid Merger Agreement when they were on notice that it was in violation of Delaware law.

521. The Director Defendants deliberately and intentionally left the invalid Merger Agreement in place without fixing the statutory defects. This was an intentional violation of the law, deliberate misconduct, and a breach of their duty of loyalty.

³⁴⁷ Activision Defendants' Opening Brief in Support of Their Motion to Dismiss Count I of the Verified Amended Class Action Complaint (Trans. ID 70823980), at 5-6, 14, 19, 44; Activision Defendants' Answering Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment (Trans. ID 71118873), at 39.

522. Activision’s public filings and public statements and the July 17, 2023 Minutes (defined and discussed below) [REDACTED]

[REDACTED] The Board’s failure to remedy the statutory defects indicates an unreasonable process. It is reasonably conceivable that the process was not reasonable.

C. Entry Into the Letter Agreement Was a Breach of the Duty of Loyalty and Duty of Care

1. The Timing and Purpose of the Letter Agreement Was Unfair

523. Terminating the Merger Agreement meant that (i) Kotick would have to face employees calling for his resignation, as well as lawsuits, and (ii) Kotick and the Director Defendants would forfeit the super-exculpation, indemnification, advancement and insurance protections of the Merger Agreement.

524. Kotick had publicly expressed that he was “only” focused on pushing the Merger through. Kotick committed to do all he personally could to advocate for the Merger.

525. The timing for continuing the Merger Agreement in July 2023 was terrible for Activision’s public stockholders. The Harassment Scandal had been mitigated. Activision’s performance in all segments was exceptional, and the Company was planning on releasing more new games. Activision had proven itself

to be one of the strongest companies in the industry. The regulatory fate of the Merger was still uncertain.

2. The Negotiation and Approval of the Letter Agreement Was Not Fair Dealing

526. Activision and the Director Defendants have not disclosed any direct information concerning the negotiation of the Letter Agreement. The terms of the Letter Agreement suggest Activision did not seek the best terms available. Most importantly, the \$95 Merger consideration remained the same, though eighteen months had passed and the Letter Agreement provided that the Merger Agreement would be left in place for three more months.

527. Activision's public statements, filings and July 17, 2023 Minutes [REDACTED]

[REDACTED]

The Letter Agreement, 8-K announcing it and July 17, 2023 Minutes [REDACTED]

[REDACTED] The July 17, 2023 Minutes [REDACTED]

[REDACTED] The Letter Agreement was signed by Kotick as CEO and represented only that it was "duly executed and delivered by duly authorized officers." Only Kotick and Meservey made a public statement about the Letter

[REDACTED]

Agreement. It is reasonably conceivable and a fair inference that Kotick controlled the negotiation of the Letter Agreement.

528. The July 17, 2023 Minutes [REDACTED]

[REDACTED] The July 17, 2023 Minutes

529. During this Action, Activision and the Director Defendants sent a July 19, 2023 letter to the Court providing an update on the Letter Agreement.³⁴⁹ Defendants' update did not state that the Board approved the Letter Agreement. Plaintiff asked Defendants in written correspondence dated July 31, 2023 (the "July 31 Letter") whether the Board approved the Letter Agreement, given the absence of any such evidence in the Letter Agreement, public filings, public statements and the

³⁴⁹ Trans. ID 70414830 (the "July 19 Court Update").

July 19 Update.³⁵⁰ After an August 9 phone conversation among counsel for Plaintiff and Defendants, counsel for Activision and the Director Defendants sent Plaintiff written correspondence on August 15 directing Plaintiff to rely on Activision’s “public filings and public statements.”³⁵¹

530. Of course, the stockholders were not consulted or permitted to vote on the Letter Agreement, though Activision held a stockholders’ meeting just a few weeks before. Disclosure was limited to filing the Letter Agreement as an exhibit to the 8-K summarizing its terms.

3. The Letter Agreement Was Unfair

531. The Letter Agreement was unfair to the Activision stockholders as of July 18, 2023 because it did not provide Activision’s public stockholders with increased Merger consideration compensating them for the increased value of their shares. Activision’s performance subsequent to January 18, 2022 demonstrated that the \$95 Merger price was unfair as of July 18, 2023. By that time, the Harassment Scandal had abated. Activision had announced three consecutive quarters of record-breaking financial performance and blockbuster new games. Activision had proven

³⁵⁰ See Plaintiff’s Opening Brief in Support of Its Motion for Partial Summary Judgment (Trans. ID 70719068) at Ex. E (the “July 31 Letter”).

³⁵¹ See *id.* at Ex. F (the “August 15 Letter”).

that its risks were in governance and leadership, and not its organic business or industry position. Analysts recognized Activision's strong performance, including Wells Fargo's recognition that Activision was firing on all cylinders. Activision was in a much better position on July 18, 2023, than on January 18, 2022 when Activision executed the Merger Agreement.

532. The lack of increased Merger consideration in the Letter Agreement was also unfair because extending the Merger Agreement beyond the Termination Date resulted in further reduction of the value of the already unfair Merger consideration. The \$95 per share Merger consideration would be worth less in October 2023 than it was on July 18, 2023. Any increase in Activision's value during that period would accrue to the benefit of Microsoft, not the Activision stockholders.

533. The Letter Agreement was unfair because extending the Termination Date subjected Activision and its stockholders to the continuation of the stringent restrictions of the Merger Agreement beyond July 18, 2023, including Sections 5.1, 5.2 and 5.3 of the Merger Agreement.

534. The Letter Agreement was also unfair because it extended Section 9.6 of the Merger Agreement, which provided that Activision's stockholders had no rights or remedies under the Merger Agreement. Thus, as a result of the Letter

Agreement, Activision's former stockholders were subject to the restrictions of the Merger Agreement for an extended period of time while having no rights under that agreement. The Letter Agreement was also unfair because [REDACTED]

[REDACTED]

[REDACTED]

535. As a result of Kotick and the Director Defendants' breaches of fiduciary duty, Plaintiff and the Class have suffered substantial harm, as alleged herein, for which there is no adequate remedy at law.

COUNT V

Individual and Class Claims Against Microsoft for Aiding and Abetting and Conspiracy in the Negotiation and Approval of the Merger and Merger Agreement

536. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

537. As alleged above, Kotick and the other Director Defendants owed and breached fiduciary duties of loyalty and care.

A. Microsoft Contributed to and Exploited the Conflicts Kotick and the Director Defendants Faced

538. Microsoft contributed to the conflicts Kotick and the Director Defendants faced in determining to pursue a sale of Activision and on what terms. Microsoft had reason to know that Kotick was pursuing a sale of Activision for his

own self-interest. Microsoft was aware of Kotick's desire to remain CEO, despite the Harassment Scandal and demands by employees and stockholders for his ouster. Activision's stock price was depressed by the Harassment Scandal. Microsoft leveraged Kotick's self-interest and Activision's impaired stock price for its benefit. It publicly stated that Microsoft was reevaluating its relationship with Activision in light of the Harassment Scandal, knowing that Kotick would be more likely to agree to a sale when facing a threat that Activision might lose a major customer and business partner. Predictably, Microsoft's threat prompted a discussion between Kotick and Spencer where they discussed a possible sale of Activision to Microsoft—an overture Spencer had already been authorized to make by Microsoft's CEO. Microsoft used its commercial leverage over Activision to offer Kotick a way to save his own skin in return for his support of the Merger at the expense of Activision's former public stockholders. Microsoft dictated a rapid pace for negotiations and demanded an Exclusivity Agreement in order to maximize the pressure on Kotick and the Board and prevent competition.

539. Having brandished its commercial stick at Kotick, Microsoft offered him a bunch of carrots: the ability to stay on as CEO during the lengthy pendency of the Merger and as an initial officer in the post-Merger entity, acceptance of his

change in control financial benefits that eliminated the risks he would be fired for Cause, and improved compensation terms.

540. Microsoft conducted due diligence on the Harassment Scandal and discussed it with Activision management. Microsoft took advantage of the Director Defendants' potential liability in pending lawsuits and investigations triggered by the Harassment Scandal by offering very broad and supplemental indemnification, exculpation, advancement and insurance rights for the Director Defendants. Microsoft conspired with Kotick and the Director Defendants to help them evade the personal and professional consequences of the Harassment Scandal through their negotiation and approval of an ill-timed, unfair Merger, which would extinguish derivative claims against Kotick and the other Director Defendants.

B. Microsoft's Knowing Participation in Kotick and the Board's Failure to Act Reasonably to Obtain the Best Transaction Reasonably Available

541. Kotick and the Director Defendants broadcast to Microsoft, through a series of signals, their desire to secure protections through the Merger and the Merger Agreement, at the expense of seeking the best transaction reasonably available for Activision's former public stockholders.

542. Microsoft conspired with Kotick and the Director Defendants to engage in rushed negotiations during a temporary crisis to effectively preclude a fair sale

process. The \$70 billion sale to Microsoft, including due diligence, was orchestrated in less than two months, on the heels of *Kotick Knew*, when Activision's stock price was depressed, and over the Thanksgiving, Christmas and New Year holidays. Microsoft negotiated with Kotick and Kelly for two weeks without Activision Board authorization, and, within ten days, had agreed with Kotick on a \$90-105 price range, four days before the Board even met. Rather than negotiate with the Board, Microsoft continued holding discussions with Kotick, including further price negotiations. Microsoft and Kotick agreed on a \$95 per share Merger price that Microsoft knew was [REDACTED] and a thirty-day Exclusivity Agreement that prevented Activision from engaging with other potential bidders. In mid-January 2022, Microsoft, Kotick and the Director Defendants rushed to finalize and announce the deal before the Merger Agreement was completed because the Exclusivity Agreement was about to expire. Microsoft knew this rushed process tilted Activision's sale in Microsoft's favor by (i) blocking Activision's ability to explore its strategic alternatives and engage with other bidders and (ii) locking up a deal long before the Harassment Scandal abated.

543. The Director Defendants also broadcast to Microsoft that they were not providing any meaningful oversight of Kotick. As the Proxy and the minutes make clear, Kotick almost exclusively handled Activision's negotiations with Microsoft,

which knew that Kotick had powerful incentives to sell the Company to protect himself. Given the repeated sequence where Kotick would have contact with potential bidders, promptly speak to Microsoft and then Microsoft would push for exclusivity, it is a fair inference that Microsoft conspired with Kotick to impede and eliminate competition.

C. Microsoft's Knowing Participation in Kotick and the Board's Failure to Employ a Fair Process With Fair Dealing

544. Microsoft knew the Merger did not result from a fair process because, with its ally Kotick, it largely controlled that process. Microsoft set the rushed timing of the sale process, and orchestrated that process with a conflicted CEO who had powerful financial incentives to sell the Company to Microsoft. Microsoft deliberately did not interact with the Activision Board, which Microsoft recognized had improperly deferred to a conflicted CEO pursuing selfish desires to pursue the Merger and gain the protections of the Merger Agreement.

D. Microsoft's Knowing Participation in the Rushed, Coerced, Uninformed and Invalid Stockholder Vote

545. Microsoft knew the Merger's antitrust risks and did not expect to obtain antitrust approval until the end of its 2023 fiscal year. Microsoft, however, agreed with Kotick and the Director Defendants to hold the Special Meeting as soon as possible in the spring of 2022. Doing so aligned with (i) Microsoft's interests, as it

wanted rapid stockholder approval to lock-up the deal and (ii) the Director Defendants' conflicts, because quick stockholder approval of the Merger Agreement would cloak Kotick and the Director Defendants with its protections. Microsoft extracted and agreed to contractual terms under the Merger Agreement that required Activision to rush the Special Meeting. Section 6.3 of the Merger Agreement required Activision to file a preliminary proxy within twenty business days of the Merger Agreement's execution and issue the Proxy promptly after the SEC approved the preliminary proxy. Section 6.4(a) required Activision to hold the Special Meeting within twenty business days of issuing the Proxy.

546. Microsoft collaborated with Kotick and the other Director Defendants to provide Activision's former public stockholders a misleading and incomplete Proxy, which pretended the Harassment Scandal was not a factor in the Merger and deliberately understated the antitrust risk. Microsoft knew that the Harassment Scandal had a significant role in the initiation and development of the Merger and the negotiation of the agreement of merger. Microsoft knew the "premium" disclosures were misleading partial disclosure without information on the effects of the Harassment Scandal on the market price of Activision's stock. It also knew that the Proxy failed to completely and accurately describe important terms and qualifications of the CDL. It knew the CDL and Survivor's Certificate were not

provided to Activision’s former public stockholders, though the plain statutory language of Section 251—which Microsoft, as a party to the Merger Agreement, had read—required the submission of a complete agreement of merger at the Special Meeting. Indeed, the Merger Agreement itself said the CDL was part of the agreement and that the Survivor’s Certificate was Exhibit A to the agreement. The Proxy contained no description of the CDL or the Survivor’s Certificate. The Proxy’s description of Microsoft’s agreement on Kotick’s compensation was also misleading and incomplete.

547. Microsoft exercised its right under Section 6.3 of the Merger Agreement to review and comment on the preliminary proxy statement, the Proxy and Supplemental Disclosure. Microsoft was obligated under Section 6.3(e)(ii) of the Merger Agreement to supply information for inclusion in the Proxy that was required to be disclosed in order to make the statements therein not misleading. However, it did not correct disclosures that it knew were misleading or incomplete. In addition, Microsoft did not exercise its right under Section 6.3 of the Merger Agreement to submit a copy of a Section 251-compliant agreement of merger to Activision’s stockholders.

E. Microsoft's Knowing Participation in Kotick and the Director Defendants' Failure to Secure a Fair Price

548. Microsoft acquired Activision for an unfair price that it negotiated twenty-one months before the Merger closed, when it knew from the outset that the Merger would face protracted antitrust review. The two automatic extensions for delayed regulatory clearance document that knowledge. To ensure that it would get the benefit of the delay and improved performance by Activision, Microsoft agreed with Kotick and the Board that there would be no adjustment to the Merger consideration.

COUNT VI

Individual and Class Claims Against Microsoft for Aiding and Abetting and Conspiring in Kotick and the Director Defendants' Continuing Breaches of Fiduciary Duty, Knowing Violation of the Law and Intentional Misconduct

549. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

550. As alleged above, Kotick and the other Director Defendants owed and breached continuing fiduciary duties of loyalty and care.

A. Microsoft Contributed to and Exploited Kotick and the Director Defendants' Continuing Conflicts

551. Microsoft knew that Kotick was still conflicted with respect to the Merger and the Merger Agreement as the July 18, 2023 Termination Date

approached. *Esquire* published an article in June 2023, in which Blizzard employees confirmed they were still seeking Kotick's resignation. Kotick was publicly pronouncing his commitment to the Merger. If the Merger Agreement was terminated and Activision remained an independent entity, Kotick's future with the Company was uncertain.

552. Microsoft knew that eight of the nine Director Defendants, including Kotick, continued to face potential liability in connection with pending Specified Litigation arising from the Harassment Scandal and the Merger. The Merger, however, would provide them with greater rights to exculpation, indemnification, advancement and insurance protections under the Merger Agreement. The Merger would also extinguish still-pending derivative claims against them. These conflicts were exacerbated by the Merger Agreement's requirement that Microsoft approve settlements, releases, waivers or remedies in Specified Litigation. These factors undermined Activision's ability to negotiate with Microsoft at arm's-length.

B. Microsoft's Knowing Participation and Conspiring in Kotick and the Director Defendants' Refusal to Fix the Merger's Statutory Defects and Continuation of the Merger Agreement

553. Like Kotick and the Director Defendants, Microsoft has known since Plaintiff filed its Complaint that the Merger Agreement and the approval of the Merger and the Merger Agreement by Activision's Board and former stockholders

did not comply with Section 251. Plaintiff served the Microsoft Defendants with all of its pleadings and filings in this Action. Microsoft read the plain statutory language of Section 251. It is reasonably conceivable and a fair inference that Microsoft (i) agreed with Activision, Kotick and the Director Defendants that they would refuse to fix the statutory defects in the Merger Agreement and approval process; and (ii) worked with and conspired with Activision, Kotick and the Director Defendants to close the Merger, despite the statutory defects. To obtain its objective of acquiring Activision, Microsoft conspired in a knowing violation of law, intentional misconduct and a breach of loyalty by Kotick and the other Director Defendants.

554. Section 6.13(b) of the Merger Agreement required Microsoft to consent in writing to any compromise, settlement or arrangement regarding Transaction Litigation, which includes this Action. Fixing the statutory defects would have compromised Plaintiff's claims, requiring Microsoft's written consent. Section 6.13(b) of the Merger Agreement also required Activision to "consult with [Microsoft] with respect to the defense, settlement and prosecution of any Transaction Litigation and [] consider in good faith [Microsoft's] advice with respect to such Transaction Litigation." It is reasonably conceivable and a fair inference that Microsoft did not advise Activision, Kotick or the Director Defendants to fix

the Merger's statutory defects before closing the Merger. In addition, Microsoft joined in the efforts of Activision, Kotick and the Director Defendants to (i) stay this Action indefinitely and (ii) delay the disposition of Plaintiff's statutory claims until after the Merger closed.

555. Microsoft knowingly exploited Kotick and the Director Defendants' conflicts when it continued in pursuit of the Merger after the July 18, 2023 Termination Date. Microsoft knew that Activision would have the opportunity to walk away from the Merger on the July 18, 2023 Termination Date because conditions to closing would not be met. The Merger Agreement would either expire automatically, as Microsoft contended in federal court; or, alternatively, Activision could exercise its termination rights under Section 8.1(c) of the Merger Agreement, as Microsoft admitted in pleadings in this Action. As discussed above, there is no indication from Activision's public statements or public filings that the Board employed a reasonable process in determining to continue the Merger Agreement beyond the Termination Date. Instead, the public record is full of Kotick's statements that he was focused on persisting in pursuit of the Merger. The July 17, 2023 Minutes [REDACTED]

[REDACTED] It is therefore reasonably conceivable that the Board did not employ a reasonable process in agreeing to continue the

invalid Merger Agreement. Microsoft would be acutely aware of Activision's process to the continuation of the Merger Agreement. Microsoft also had access to Activision's books and records under Section 6.6 of the Merger Agreement.

556. Microsoft knew that Activision's circumstances had improved considerably since the Merger Agreement's execution. Microsoft knew Activision had [REDACTED]

[REDACTED] The Board's decision to continue the Merger Agreement without employing a reasonable process demonstrated to Microsoft that Kotick and the Director Defendants were committed to protecting themselves, instead of securing a value-maximizing transaction.

C. Microsoft's Knowing Participation in Kotick's Agreement to the Unfair Letter Agreement

557. Microsoft exploited Kotick's continued self-interest in securing the protections of the Merger Agreement. Microsoft extracted Kotick's execution of the Letter Agreement (i) before the Termination Date, (ii) without any amendment or waiver of the No Solicitation forbearance covenant of the Merger Agreement, (iii) without paying the \$3 billion termination fee, (iv) without providing Activision's former public stockholders with an increase in the Merger consideration (v) with terms that made it easier for Microsoft to close the Merger and (vi)

[REDACTED]

COUNT VII

Individual and Class Claims Against Defendants for an [REDACTED]

558. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

559. On October 11, 2013, Activision acquired Vivendi S.A.’s Amber Holding Subsidiary Co. (“Amber”), which held 428,676,471 shares of Activision common stock.³⁵² These Activision shares were recorded and consistently reflected in Activision’s SEC filings for the next ten years as treasury stock.³⁵³ [REDACTED]

[REDACTED]

[REDACTED]

560. In Section 3.7(a) of the Merger Agreement, Activision represented and warranted that “779,057,360 shares of Company Common Stock were issued and outstanding (for the avoidance of doubt, excluding shares held in treasury)” and that “428,676,471 shares of Company Common Stock were held by the Company as

³⁵² Form 10-K for the year ended December 31, 2013 at 5, 44, 47-48, 70-70, F-7, F-46.

³⁵³ Exhibit 1.

³⁵⁴ Exhibit 2.

treasury shares.” Thus, the Merger Agreement [REDACTED]

[REDACTED]

561. Activision generates substantial amounts of cash. For example, from December 31, 2019 to December 31, 2021, just before the signing of the Merger Agreement, Activision’s cash position increased from \$5.794 billion to \$10.423 billion.³⁵⁵ Activision continued to accumulate cash during the pendency of the Merger Agreement.³⁵⁶ In the third quarter of 2022, Activision began putting billions of dollars of cash into “Held-to-Maturity Investments.”³⁵⁷ Essentially, Activision was parking cash in short-term government securities and money market accounts.³⁵⁸ By June 30, 2023, Activision’s cash position had swelled to over \$13.084 billion.³⁵⁹

562. Because of Activision’s huge cash position and continuing ability to generate cash, Activision’s ability to pay cash dividends while the Merger Agreement was pending was an important financial term. Because of the improper delegation of the resolution and approval of the dividend issue to an *ad hoc*

³⁵⁵ Exhibit 3.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ 10-Q for period ending 9/30/22 at 15, 56; 10-K for the period ending 12/31/22 at 57, 61; 10-Q for period ending 3/31/23 at 11, 45, 47; 10-Q for period ending 6/30/23 at 12-13, 67.

³⁵⁹ Exhibit 3.

committee, which improperly let Kotick negotiate the resolution, Activision was only permitted to pay one \$0.47 per share 2022 annual dividend on its outstanding shares, a total of \$366 million. After subtracting the \$366 million dividend, Activision accumulated \$2.661 billion in additional cash between December 31, 2021 and June 30, 2023. So, in the 18 months before the July 18, 2023 Termination Date, Activision only paid out in dividends to its stockholders approximately \$366 million of the approximately \$3.027 billion in additional cash it generated (about 12%).

A. The Section 205 Application and July 17, 2023 Minutes

563. On May 2, 2024, Microsoft and Activision filed a Verified Application of Microsoft Corporation and Activision Blizzard, Inc. for Relief Under 8 *Del C.* § 205 (the “Application”). Among the many exhibits to the Application was Exhibit P, July 17, 2023 Activision Board minutes adopting resolutions (the “July 17, 2023 Minutes”). Application ¶ 48 n.7.³⁶⁰

564. The July 17, 2023 Minutes state that [REDACTED]

[REDACTED] The Letter

³⁶⁰ For nine months, Plaintiff sought information concerning the Activision Board’s approval of the Letter Agreement. Defendants refused, even after this Court’s February 29, 2024 opinions. Only in their effort to sweep Plaintiff’s claims under the rug via a Section 205 order did Defendants disclose the July 17, 2023 Minutes.

Agreement provided that Activision could pay “one regular cash dividend for fiscal year 2023” in an amount per share not in excess of \$0.99 (the “2023 Dividend”).

565.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

566. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

361 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

567. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³⁶² Q2-2023 10-Q at 4, 9.

³⁶³ [REDACTED]

568. It is more than a fair inference and reasonably conceivable that the Activision directors knew [REDACTED]

[REDACTED] Mr. Kotick was CEO of Activision for many years. It is certainly a reasonable inference that he knew [REDACTED]

[REDACTED] Many of Activision's directors had served on the Board for many years: Bowers (5), Carr (1), Corti (20), Kelly (22), Kotick (32), Meyer (9), Morgado (25), Nolan (10), and Ostroff (3). Activision's annual proxies touted the business positions, business experience and sophistication of its directors. Form 10-Ks they signed and Proxy Statements they issued referred to [REDACTED]

[REDACTED] It is a fair inference and certainly reasonably conceivable that Kotick and the other Activision Defendants knew [REDACTED]

[REDACTED] If not, they would not belong on the board of a major public corporation.

569. Most of the Activision Directors had been on the Board for many years and had approved and declared many regular cash dividends on the outstanding

³⁶⁴ See e.g., 10-K for period ending 12/31/22 at 4, 17, F-3, F-7, F-8; 2023 Proxy at 1, 10, 14, 16, 39, 57, 63, 144, 151, 154, 155.

shares of Activision [REDACTED] It is reasonably conceivable and a fair inference that these directors knew [REDACTED]

[REDACTED]

[REDACTED]

B. Defendants Distribute Deliberately False Information Concerning the 2023 Dividend

570. The Letter Agreement Activision filed with its July 18, 2023 8-K (“8-K-LA”) stated that the Letter Agreement permitted Activision to pay “one regular cash dividend for fiscal year 2023 on Company Common Stock in an amount per share of Company Common Stock not in excess of \$0.99.” Section 2(f) of the Letter Agreement contained this same description of the 2023 Dividend. [REDACTED]

[REDACTED]

571. Activision filed a second 8-K on July 19, 2023 announcing its financial results for the second quarter of 2023 (the “8K-FR”). The 8-K stated that:

On July 18, 2023, the Company’s Board of Directors declared a cash dividend of \$0.99 per share of the Company’s outstanding common stock, payable on August 17, 2023, to shareholders of record at the close of business on August 2, 2023.

The press release accompanying the 8K-FR repeated:

³⁶⁵ Exhibit 2.

Also on July 18, 2023, the Company's Board of Director declared a cash dividend of \$0.99 per share of the Company's outstanding common stock, payable on August 17, 2023 to stockholders of record at the close of business on August 2, 2023 from cash on hand.

572. The press release quoted Kotick, so, presumably, he was aware of its contents. Thus, the 8K-FR and accompanying press release represented that the dividend was on outstanding stock [REDACTED]

573. The Q2-2023 10Q at page 30 represented that:

On July 18, 2023, our Board of Directors declared a cash dividend of \$0.99 per share of our outstanding common stock, payable on August 17, 2023, to shareholders of record at the close of business on August 2, 2023.

Again, the Activision Board represented that the 2023 Dividend was only on outstanding shares.

C. [REDACTED]

574. The version of the Letter Agreement filed with the 8K-LA did not contain Annex A, which included:

[REDACTED]

It is reasonably conceivable and a fair inference that Microsoft was well along in its negotiations with the UK antitrust regulators and strongly believed that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

575. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³⁶⁶ See ¶ 301, *supra*.

[REDACTED]

576.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

D.

[REDACTED]

577. On October 13, 2023, Activision filed an 8-K announcing the closing of the Merger and confirming that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

578. As this TAC details, Activision consummated the Merger by filing a false Merger Certificate and a false Survivor's Certificate with the Delaware Secretary of State.³⁶⁷ A key difference between the Survivor's Certificate that was part of the Merger Agreement and the Survivor's Certificate Activision filed is that Activision's post-merger authorized Common Stock is increased from 100 shares to 1.2 billion shares.³⁶⁸ The increase in authorized shares [REDACTED]
[REDACTED] However, the change in the Survivor's Certificate represented a change in an agreement of merger term required by Section 251(b)(3), which was not approved by the Activision Board or the stockholders.

579. Under Delaware law, [REDACTED]
[REDACTED]
[REDACTED]

580. The 2023 Dividend was a cash dividend. A cash dividend is a corporate distribution of cash assets to stockholders from the profits or surplus assets of the corporation. A cash dividend reduces the net assets of the corporation, transfers that amount of cash to its stockholders, severs a portion of the corporation's profits from

³⁶⁷ *Id.* ¶¶ 370, 379-393, *supra*.

³⁶⁸ *Id.* ¶¶ 387-388, *supra*.

the company and provides a current cash return on the stockholders' investment. A cash dividend must be paid equally on each share of outstanding stock.

581. The purpose and nature of cash dividends require that [REDACTED]

[REDACTED]

[REDACTED]

582. Under 8 *Del. C.* § 170(a), the Activision directors were authorized to declare and pay dividends upon shares of Activision's capital stock, subject to any restrictions in Activision's certificate of incorporation. The first sentence of 8 *Del. C.* § 173 provides:

No corporation shall pay dividends except in accordance with this chapter.

583. Delaware law reads the word "dividend" to mean a validly declared dividend. Sections 170 and 173 did not authorize Activision's directors to [REDACTED]

[REDACTED]

584. Section 4.3(a) of Activision's certificate of incorporation provided that:

Holders of Common Stock will be entitled to receive such dividends as may be declared by the Board of Directors.

Section 5.2(a) provides that the Board shall have the power "to fix the terms for the declaration and payment of dividends." Under Delaware law, when dividends are mentioned in the certificate, the word refers to dividends allowed and permitted by

the law. The certificate did not authorize the Activision Board [REDACTED]

585. The Activision Board lacked the corporate power under Sections 170, 173 and 174 and Activision's certificate to [REDACTED]

[REDACTED]

Activision and its directors violated Sections 170 and 173 and Activision's certificate. At the time of the unlawful dividend, Plaintiff and the Class had a claim for conversion of their shares resulting from the invalid dividend restriction contained in the invalid Merger Agreement and were therefore creditors of Activision.

586. Given the pendency of the Merger, the improper dividend was for the benefit of Microsoft. [REDACTED] was paid from cash Activision had accumulated during the pendency of the Merger and should have been distributed to the Activision stockholders, whose dividend rights had been impaired by the dividend term of the Merger Agreement improperly negotiated by Kotick after the Board's improper delegation of the dividend term to the *ad hoc* committee. It is a fair inference and reasonably conceivable that Microsoft extracted

the unlawful dividend at least partly in exchange for partially releasing the invalid restriction on dividends in the invalid Merger Agreement.

587. Defendants violated Delaware law by declaring, paying and receiving the proceeds of [REDACTED] Plaintiff and the Class were harmed because money available for dividends on outstanding shares was unlawfully diverted to [REDACTED]

COUNT VIII

Individual and Class Claims Against the Activision Directors for Breach of Fiduciary Duty of Loyalty and Knowing Violation of Law in Approving, Declaring and Having Activision Pay the Unlawful Dividend

588. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

589. The Activision Board approved the unlawful dividend [REDACTED] and appointed the same *ad hoc* committee of Kotick's cronies (Corti, Kelly and Morgado) as had approved the invalid dividend restriction in the invalid Merger Agreement to declare the dividend and fix the record and payment dates. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

590. It is reasonably conceivable and a fair inference that the Director Defendants knew it was highly irregular to pay a dividend on [REDACTED] and dividends should only be declared on outstanding shares. Indeed, [REDACTED]

[REDACTED] The directors had issued numerous proxy statements and signed 10-Ks indicating that only shares held by stockholders were outstanding shares [REDACTED]

591. The Draft Merger Agreement the Board purportedly approved, as well as the Merger Agreement, [REDACTED]

[REDACTED] Therefore, it is reasonably conceivable and a fair inference that the directors knew that [REDACTED]

³⁶⁹ *E.g.*, 2022 10-K at Cover page, 4, 17, F-3; May 1, 2023 Proxy Statement at 1, 10, 14, 16, 39, 57, 63, 144, 151, 154-155.

³⁷⁰ *See* Activision_0000862 at 897 (Draft Merger Agreement).

Dividend. They repeatedly told the stockholders the 2023 Dividend was a \$0.99 dividend on Activision's "outstanding" shares. Consequently, a reasonable stockholder would conclude that the 2023 Dividend was only paid to holders of Activision's outstanding shares. However, the Board had secretly redefined outstanding shares [REDACTED] The Director Defendants' representation that the 2023 Dividend was confined to outstanding shares was false and deliberately misleading.

595. The Director Defendants' unlawful actions [REDACTED]

[REDACTED] As a result, Plaintiff and the Class suffered damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment in its favor and in favor of the Class and against all Defendants as follows:

- a. Declaring this action is properly maintainable as a class action, and certifying Plaintiff as Class representative and its undersigned counsel as Class counsel;
- b. Declaring that the Merger Agreement and the Merger, including the approval of the Merger Agreement by the Director Defendants and

Activision's former public stockholders, did not comply with Section 251 and Section 141, rendering the Merger invalid;

- c. Declaring that the invalid Merger and invalid Merger Agreement constituted an unlawful conversion of stockholders' shares and award damages based on the conversion of the shares;
- d. Declaring the payment of the \$0.99 dividend [REDACTED] invalid;
- e. Declaring that Kotick and the Director Defendants have breached their fiduciary duties of loyalty and care and engaged in bad faith and intentional misconduct and knowing violations of law;
- f. Declaring that Microsoft aided and abetted and conspired in the breaches of fiduciary duty by Kotick and the Director Defendants;
- g. Awarding appropriate declaratory and equitable relief to remedy the violations of Section 251 and Section 141, [REDACTED] [REDACTED] and the breaches of fiduciary duty by Kotick and the other Director Defendants, including a quasi-appraisal of the fair value of the shares of Plaintiff and the Class on the date of the Merger;
- h. Awarding the Class damages, including pre-judgment and post-judgment interest;

- i. Awarding Plaintiff the costs and disbursements of this action, including reasonable attorneys' and experts' fees; and
- j. Granting such other and further equitable relief as the Court may deem just, proper and equitable.

PRICKETT, JONES & ELLIOTT, P.A.

OF COUNSEL:

KESSLER TOPAZ MELTZER
& CHECK, LLP

Lee D. Rudy
Eric L. Zagar
J. Daniel Albert
Lauren Lummus
280 King of Prussia Road
Radnor, Pennsylvania 19087
(610) 667-7706

/s/ Michael Hanrahan

Michael Hanrahan (ID No. 941)
Corinne Elise Amato (ID No. 4982)
Kevin H. Davenport (ID No. 5327)
Stacey A. Greenspan (ID No. 7056)
Kirsten M. Valania (ID No. 6951)
Christine N. Chappelle (ID No. 6844)
1310 N. King Street
Wilmington, Delaware 19801
(302) 888-6500

Counsel for Plaintiff

Dated: June 12, 2024

CERTIFICATE OF SERVICE

I, Stacey A. Greenspan, do hereby certify on this 20th day of June, 2024, that I caused a copy of the ***Public Version of Verified Third Amended Class Action Complaint*** to be served by File & ServeXpress upon the following counsel of record:

Edward B. Micheletti, Esquire
Lauren N. Rosenello, Esquire
Michelle L. Davis, Esquire
Peyton V. Carper, Esquire
Claire K. Atwood, Esquire
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Rodney Square
920 N. King Street
Wilmington, Delaware 19801

Elena C. Norman, Esquire
Daniel M. Kirshenbaum, Esquire
Y. Carson Zhou, Esquire
YOUNG CONAWAY STARGATT
& TAYLOR, LLP
Rodney Square
1000 North King Street
Wilmington, Delaware 19801

/s/ Stacey A. Greenspan
Stacey A. Greenspan (ID No. 7056)