



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
ANCHORAGE MERGER SUB
INC.

Defendants.

C.A. No. 2022-1001-KSJM

PUBLIC VERSION

EFILED FEBRUARY 1, 2023

VERIFIED AMENDED CLASS ACTION COMPLAINT

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Plaintiff Sjunde AP-Fonden (“Plaintiff”), individually and on behalf of a class (the “Class”) of stockholders of Activision Blizzard, Inc. (“Activision” or the “Company”) common stock, excluding Defendants (as defined herein) and their affiliates, brings this Verified Amended Class Action Complaint (the “Complaint”) challenging Activision’s January 18, 2022 Agreement and Plan of Merger (the “Merger Agreement”) with Microsoft Corporation (“Microsoft”). Plaintiff seeks a declaration that Activision, Microsoft 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 the agreement of merger, (ii) the Board improperly delegated approval of terms of the agreement of merger, (iii) the Board did not properly submit the agreement of merger to the Activision stockholders for approval, (iv) Activision failed to provide the Activision stockholders with the entire agreement of merger, even after repeated requests from Plaintiff, and (v) Microsoft and Activision have indicated that they will allow the effectiveness of the Merger Agreement beyond the July 18, 2023 final Termination Date in the Merger Agreement (the “Drop-Dead Date”) without Activision stockholder approval. These violations will render Activision’s merger with Microsoft (the “Merger”) invalid if consummated. 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 and disclosure of the Merger, and in persisting in pursuit of the Merger though the Merger cannot close by the July 18, 2023 Drop-Dead Date. Plaintiff also brings a claim against Microsoft for aiding and abetting breaches of fiduciary duty and civil conspiracy.

The allegations of the Complaint 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"), 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

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.

(“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 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 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 ("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 has 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 spoke to Spencer three days after *Kotick Knew* was published, in response to Spencer's criticism, 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.

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*").

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

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 holding Kotick accountable and firing him for cause, the Board went along with the Merger Agreement to protect themselves and Kotick.

B. Defendants Violated Section 251 of the DGCL

5. Defendants violated 8 *Del. C.* § 251 (“Section 251”) because the Director Defendants did not properly adopt the Merger Agreement as required by Section 251(b). In purportedly approving the Merger Agreement, they failed to review and approve the disclosure schedules and the Company Disclosure Letter (the “CDL”) that are part of the agreement of merger. Section 251(b) requires the Board to approve the entire agreement of merger, not part of the agreement. The Director Defendants also violated Section 251(b) 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 seek regulatory approval to close the transaction.

6. The Defendants also violated Section 251(c) by purporting to submit the entire agreement of merger to the Activision stockholders for their approval, while omitting portions of that agreement, such as the CDL and disclosure schedules. Defendants also violated Section 251(c)(7) by refusing Plaintiff's repeated requests for a copy of the entire agreement of merger.

7. Because the adoption and approval of the agreement of merger did not comply with Section 251, consummation of the Merger will be invalid and an unlawful conversion of stockholders' shares. Defendants also have indicated they will extend or waive the Drop-Dead Date, which would amend the Merger Agreement in a manner adverse to Activision's stockholders, without a stockholder vote in violation of Section 251(d).

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

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 avoided his termination, prevented further damage to his reputation and legacy, and secured

for Kotick continuing employment and the prospect of an over \$400 million pay-out if the Merger occurs. Now the parties plan to amend the Merger Agreement to push back the Drop-Dead Date, which will keep Kotick employed even longer and keep his hope for a huge pay-out alive. The Merger Agreement also provides Kotick with materially greater indemnification, advancement and exculpation protection, including from Microsoft, and insulates him from claims arising out of the Harassment Scandal. The Merger will also extinguish derivative claims against Kotick for the Harassment Scandal.

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 would be 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.⁴

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 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. Though the parties knew 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 and with dividends suspended. As Activision recovered from the effects of the Harassment Scandal and its performance improved, all the benefit would go to Microsoft, not the Activision stockholders.

11. The Merger Agreement was signed on January 18, 2022 and approved by shareholders in a hurried, coercive and uninformed vote on April 28, 2022. It was structured to require a hasty, premature stockholder vote. It required a preliminary proxy statement to be filed within 20 business days of the Merger Agreement. Activision filed its preliminary proxy statement on February 18, 2022.

⁴ Incredibly, Kotick and the Board have claimed the Harassment Scandal had no role in bringing about the Merger.

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.

12. The Proxy was materially misleading and incomplete in numerous respects. The Proxy provided misleading partial disclosure concerning (1) the role of the Harassment Scandal in bringing about the Merger, (2) Allen & Co.'s conflicts, engagement and analysis and (3) 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 the Merger required antitrust approval from 16 countries, the identities of those 16 countries and the indemnification agreements Activision has which Microsoft will assume. The rushed vote forced stockholders to decide whether to seek appraisal long before the Merger would close, essentially denying them meaningful appraisal rights.

D. Further Delay and Increased Antitrust Risk Without Compensation

13. Kotick told employees on September 1 and November 8, 2022 that the Merger would not close until June 2023. The Merger has yet to obtain regulatory clearance, which was always likely to take at least 18 months and may not be obtained at all. A year after the Merger Agreement was signed, regulatory review is still nowhere near completion. After Microsoft refused to offer satisfactory antitrust concessions, the United Kingdom's Competition and Markets Authority ("CMA") concluded that the Merger raises "a realistic prospect of substantial lessening of competition (SLC)" and referred the Merger for a Phase 2 investigation which will last at least until April 26, 2023.⁵ The European Union's European Commission ("E.C.") made a similar determination, has launched a Phase 2 investigation which will not be completed until at least April 11, 2023, and is readying a statement of objections to the Merger to send to Microsoft in the coming weeks. Microsoft has

⁵ See *Anticipated acquisition by Microsoft Corporation of Activision Blizzard, Inc., Decision on relevant merger situation and substantial lessening of competition*, CMA (Sept. 1, 2022), https://assets.publishing.service.gov.uk/media/634536048fa8f5153767e533/MSFT.ABK_phase_1_decision_-_1.09.2022.pdf ¶ 1 ("Phase 1 Decision"); *Microsoft Corporation / Activision Blizzard Inc. Administrative Timetable*, CMA (Jan. 5, 2023), https://assets.publishing.service.gov.uk/media/63b5506ce90e073a3b7b9296/221222_Microsoft_Activision_Admin_Timetable.pdf.

acknowledged in a January 11, 2023 motion to stay in a private antitrust action in federal court in California that the Merger will not and cannot close while the CMA, E.C. proceedings and other regulatory reviews are pending.

14. On December 8, 2022, the United States Federal Trade Commission (the “FTC”) issued an administrative complaint initiating an antitrust proceeding against the Merger, which will be tried in a formal hearing before an Administrative Law Judge (the “FTC Suit”). The FTC Suit alleges that the Merger is “reasonably likely to substantially lessen competition or tend to create a monopoly in the Relevant Markets[.]”⁶ Trial is scheduled to begin on August 2, 2023—after July 18, 2023, the Drop-Dead Date for the Merger, even after the two extensions allowed by the Merger Agreement for obtaining antitrust clearance. An initial decision in the FTC Suit will not be issued until late 2023 or early 2024. The pendency of the FTC Suit: (i) means the Merger is unlikely to close before the July 18, 2023 Drop-Dead Date; (ii) increases the likelihood that the Merger will not close at all; (iii) provides Microsoft with an option to terminate the Merger Agreement under Sections 7.1(b)-(d) thereof because a Governmental Agency seeks to prohibit, make illegal or enjoin the Merger, and regulatory clearance cannot be obtained without a condition that

⁶ See Complaint, *In the Matter of Microsoft Corp.*, No. 9412 (F.T.C. Dec. 8, 2022), (the “FTC Complaint”) ¶¶ 96, 123.

Microsoft believes would reduce its expected benefits from the Merger (a “Burdensome Condition”); and (iv) will delay payment of the \$95 Merger consideration (assuming the Merger even closes) indefinitely even beyond July 18, 2023, which further decreases the value of the Merger to Activision stockholders. The FTC Suit also makes it more likely that other antitrust regulators, including the CMA and E.C., will challenge the Merger.

15. At a January 3, 2023 scheduling conference with the FTC’s Chief Administrative Law Judge, Microsoft and the FTC indicated there were no pending settlement discussions. Microsoft indicated it would not engage in settlement discussions with the FTC unless and until the Merger was approved by the CMA and E.C.

16. Because Microsoft and Activision have decided to fight the FTC Suit and a dozen other regulatory approvals are still lacking, it is highly unlikely the Merger will close prior to the Drop-Dead Date in Section 8.1(c) of the Merger Agreement. On December 8, 2022, Kotick announced in a letter to employees that the FTC Suit “will be heard by a judge” and Activision will “win this challenge.” He indicated Activision intends to continue to pursue the Merger in the face of the

FTC Suit and said he remains confident the Merger will close.⁷ On December 21, 2022, Kotick made a public statement that “[w]e believe we will prevail on the merits of the case.” Significantly, unlike prior letters and statements promising the Merger would close by June 30, 2023, Kotick’s December 8 and 21, 2022 statements do not identify any expected closing date.

17. Microsoft also has refused to comment on the expected closing date for the Merger in light of the FTC Suit, but has indicated its intention to go to trial on August 2, 2023—after the Drop-Dead Date. At Microsoft’s December 13, 2022 annual meeting, Microsoft President Brad Smith (“Smith”) outlined the case Microsoft intends to present at trial. He indicated that the FTC had refused Microsoft’s offer to enter into a legally binding consent decree to keep Activision’s marquee game “*Call of Duty*” available to competitors for ten years. Microsoft has made it clear it will view any further conditions as burdensome and will instead fight the FTC Suit. On December 22, 2022, each of Activision and Microsoft filed a respective Answer and Defenses to the FTC Complaint raising the same affirmative and other defenses to the FTC Complaint.⁸

⁷ Given that Kotick issued the letter at 2:51 p.m. the same day the FTC Suit was filed, any decision of the Board to continue with the Merger was necessarily hasty and uninformed.

⁸ On January 4, 2023, Activision and Microsoft each filed an Amended Answer and Defenses to the FTC Complaint that withdrew defenses that the FTC proceedings

18. Microsoft and Activision have not indicated they will adopt the high-risk strategy of attempting to close the Merger without regulatory approval. Their publicly announced positions and Answers establish that Microsoft and Activision have determined to extend or waive the Drop-Dead Date under the Merger Agreement. However, they have not acknowledged that stockholder approval is required to extend or waive the Drop-Dead Date. Under 8 *Del. C.* § 251(d), an amendment of the Merger Agreement to extend or eliminate the Drop-Dead Date, and any extension or waiver of the Drop-Dead Date, requires approval by Activision stockholders because it will adversely affect them. Similarly, any elimination or waiver of the regulatory approval condition without stockholder approval would violate Section 251(d).

19. Extension or waiver of the Drop-Dead Date will result in missed dividends and substantial delay in the possible receipt of the \$95 Merger consideration even beyond the 18 months contemplated by the Merger Agreement, further eroding the value of the Merger to Activision stockholders. While indicating they will extend the Merger Agreement beyond the Drop-Dead Date, Microsoft and Activision have not provided for interest or increased consideration to compensate

are unconstitutional, but were otherwise identical to the December 22, 2022 answers. The “Initial Answers” and “Answers” refer to Activision and Microsoft’s December 22, 2022 and January 4, 2023 answers to the FTC Complaint, respectively.

Activision's stockholders for the loss of dividends and the additional substantial delay in receipt of consideration, if the Merger does eventually close.

20. Kotick and Activision did not seek any interest, resumption of dividends or any other benefit for the Activision stockholders before announcing Activision would continue with the Merger even beyond the current Drop-Dead Date. Meanwhile, Activision and its stockholders will remain subject to the stringent restrictions of the Merger Agreement beyond July 18, 2023, and Microsoft will essentially get an indefinite free option on the shares of Activision's stockholders. Kotick will draw additional compensation as CEO while the Merger Agreement lingers. The Activision directors got restricted stock units ("RSUs") in June 2022 which will entitle them to additional Merger consideration and, consistent with past practice, will grant themselves additional RSUs after the 2023 annual meeting. So while Kotick and the Board get compensated, the stockholders get nothing.

E. The Unfair Merger Price Becomes Even Less Valuable

21. The \$95 Merger price only approximated Activision's stock price before the scandal disclosures. [REDACTED]

[REDACTED] Moreover, the Merger was never worth \$95 per share to the stockholders because the Defendants knew the Merger consideration

would not be received for at least 12 to 18 months after the signing of the Merger Agreement and might not be received at all. Indeed, since the announcement of the Merger, Activision's stock has generally traded under \$80 per share, reflecting the market's view that this high-risk, uncertain and delayed Merger is not worth anywhere near \$95 per share. In the fall of 2022, Activision stock traded in a range from approximately \$71 to about \$78 and since December 2022 has largely been trading in the mid-seventies. Moreover, the Merger Agreement required the suspension of dividends after the payment of a \$0.47 regular annual dividend in early 2022. Therefore, the 2023 annual dividend will not be paid. The extension or waiver of the Drop-Dead Date also may result in the forfeit of the 2024 annual dividend. Further, in October and November 2022, Activision released highly anticipated and successful games, as well as positive quarterly earnings, but the Company's performance is not reflected in the Merger price or Activision's stock trading price. The Merger has put Activision and its stockholders in a state of limbo. Stockholders may or may not receive \$95 per share for their Activision stock in late 2023 or even 2024 and are stuck with Kotick as CEO for the indefinite future.

F. Aiding and Abetting by Microsoft

22. 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. 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. Microsoft has acknowledged that it performed due diligence with respect to the Harassment Scandal, so it had full knowledge of the scandal the Merger would help cover up. 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. 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 seek regulatory approval, and as an initial officer of Activision after the Merger closes (if it ever does). It now appears Kotick will get as much as 2 to 3 years of lucrative employment before the Merger could possibly close. 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. Microsoft insisted on the rushed vote and reviewed and approved the deliberately misleading disclosures in the Proxy.

II. PARTIES

23. Plaintiff is a beneficial owner of Activision common stock and has held such stock at all material times alleged in this Complaint.

24. 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.⁹ Activision’s AAA games include the popular franchises *Diablo* and *Overwatch*, and the marquee franchise *Call of Duty* (“COD”).¹⁰ Activision is known as one of the “Big 4” of the industry’s limited top tier of independent AAA publishers.¹¹ Activision is incorporated in Delaware and headquartered in Santa Monica, California.¹² Activision’s common stock is listed on the NASDAQ Global Select Market (“NASDAQ”) under the ticker symbol “ATVI.”

⁹ 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. Each of Activision and Microsoft’s Initial Answer and Answer contains the same Introduction, General Responses and Specific Responses.

¹⁰ Activision Answer ¶ 4; Microsoft Answer ¶ 4.

¹¹ FTC Complaint ¶ 46; Microsoft Answer ¶ 46.

¹² FTC Complaint ¶ 19; Activision Answer ¶ 19; Microsoft Answer ¶ 19.

25. Defendant Kotick has been a Company director and Activision's CEO since February 1991. Kotick invested in Activision in 1990, acquiring a 25% stake in the Company with his co-defendant Brian Kelly ("Kelly"). Kotick was also Chairman of the Board from 1991 to 2008. Since July 2021, Kotick has been the focus of employee protests, Department of Justice ("DOJ") and SEC investigations, shareholder opposition and lawsuits arising out of the Harassment Scandal that have put his job, lucrative compensation, reputation and legacy at risk. In connection with the Merger, Kotick will receive an over \$400 million payout for his Company stock and options and remain CEO at least while the Merger is pending, which prevents 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 has 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, 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.¹³ Despite Kotick's October 28, 2021 pledge to only receive minimal compensation because of the Harassment Scandal, he still received \$826,549 in compensation during 2021 (after

¹³ *Game CEO Pay in 2020*, GAMES ONE, <https://gamesone.co/ceo-pay/>.

receiving \$154,613,318 of compensation in 2020). Activision has not disclosed Kotick's compensation for 2022. Based on Activision's representations in connection with the 2022 annual meeting, Activision has decided to release Kotick from his reduced compensation commitment and paid him substantial compensation in 2022 and will continue to do so in 2023. Given Kotick's conflicting interests, as well as his possible tipping of friends concerning insider information regarding Activision and the Merger negotiations, Kotick was not disinterested and independent when he (i) pressed for and approved the Merger Agreement and (ii) decided to extend the effectiveness of the Merger Agreement beyond the Drop-Dead Date without Activision stockholder approval.

26. Defendant Reveta Bowers ("Bowers") has been a Company director since January 2018. Bowers has 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.

27. Defendant Kerry Carr ("Carr") has served as a Company director and member of the Audit committee since June 2022. Carr is Senior Vice President at Bacardi Ltd. ("Bacardi"), where she has worked since 2014.

28. Defendant Robert Corti ("Corti"), age 71, has served as a Company director and Chair of the Audit Committee since joining the Board in December 2003. Corti also served as a member of the Board's Nominating and Corporate Governance Committee in 2021. Corti has been a professional director, including at Bacardi, since retiring in 2006.

29. 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.

30. Defendant Kelly is a Company director and Chairman of the Board. For decades, Kotick and Kelly have been business partners and co-investors. Kelly has run the Company with Kotick since they co-invested in Activision together in 1990. Over the years, Kelly has 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 since 2012. Thus, Kelly has run the Company alongside Kotick since 1991 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”).¹⁴ Prior to that 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.¹⁵ In 2016 and 2017, ASAC distributed its Activision shares to limited partners and members. Kotick and Kelly co-managed, and continue to co-manage, ASAC’s general partner ASAC II, LLC (“ASAC GP”).

31. Defendant Barry Meyer (“Meyer”) has been a Company director and member of the Board’s Nominating and Corporate Governance Committee since January 2014. 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,”¹⁶ where Kotick lives. Meyer’s daughter Elizabeth Brink (“Brink”) is a senior executive at San Francisco-based architecture and design firm Gensler, which the Books and Records indicate Activision has engaged. Brink is Co-Regional Managing Principal

¹⁴ *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1035 (Del. Ch. 2015).

¹⁵ *Id.*

¹⁶ 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>.

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.

32. Defendant Robert Morgado ("Morgado"), age 78, has been a Company director since February 1997 and Lead Independent Director since 2018. Morgado has served on the Compensation Committee since June 1998, including as Chairman since 2002. Morgado's Compensation Committee has consistently granted Kotick substantial compensation, making Kotick by 2013 among the highest paid CEOs in the gaming industry.¹⁷ By 2020, Morgado's Compensation Committee made Kotick the second-highest paid CEO in the gaming industry.¹⁸ Morgado has also been Chair of the Nominating and Corporate Governance Committee since 2006. Morgado has 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 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

¹⁷ 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>.

¹⁸ *Game CEO Pay in 2020*, GAMES ONE, <https://gamesone.co/ceo-pay/>.

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.

33. Defendant Peter Nolan (“Nolan”) was an Activision director from 2003 to 2008, and has been a Company director since October 2013. Nolan has served on the Audit Committee since 2019. 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.¹⁹ 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

¹⁹ See *Activision*, 124 A.3d at 1036.

recognized that it “value[s] its relationship with Kotick and Kelly.”²⁰ As one of Nolan’s partners observed, the “[m]ain reason to even consider [joining] is if Bobby/Brian really want it.”²¹

34. Defendant Dawn Ostroff (“Ostroff”) has been a Company director since June 2020. She has served on the Compensation Committee since 2021 and the WRC since its November 22, 2021 formation.

35. 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

²⁰ *Id.*

²¹ *Id.*

agency. Microsoft is one of Wasserman's most important clients and largest sources of revenue. Wasserman's website highlights the "Authentic Tech Partnership" it has had with Microsoft since 2013. The website touts:

Microsoft and Wasserman leveraged the Make Believe Happen campaign to launch with a wide-ranging brand activation during Super Bowl Week in Atlanta. Throughout the week, fans were treated to unique experiences (with the Microsoft Surface, the NFL's official tablet) focused on the themes of style, music, entertainment and culture.²²

The agency's website also touts, in connection with a different project, "Surface on the Sidelines":

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 technology passed all the necessary tests, we worked with Microsoft and the NFL to distribute the tablets to teams across the country.²³

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

²² *Implementing an Authentic Tech Partnership, Microsoft in Brands*, WASSERMAN, <https://www.teamwass.com/work/implementing-an-authentic-tech-partnership>.

²³ *Surface on the Sidelines, Microsoft in Brands*, WASSERMAN, <https://www.teamwass.com/work/surface-on-the-sidelines>.

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.²⁴

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.

36. The individual directors described above are referred to herein as the “Director Defendants.” The Director Defendants identified at paragraphs 25-26 and 28-35 (all of the Director Defendants, except Carr) served on the Activision Board during events that formed part of the Harassment Scandal, and approved the Merger on January 18, 2022, at which time they were also named defendants in lawsuits arising out of the Harassment Scandal. Claims relating to the timing, negotiation and approval of the Merger Agreement are brought against them. At the time of the negotiation and approval of the Merger Agreement, all of these Director Defendants other than Kotick and Kelly owned approximately 600,000 of Activision’s over 775

²⁴ Matthew Garrahan, *Wasserman, talks up LA’s Olympic bid*, FINANCIAL TIMES (June 25, 2017), <https://www.ft.com/content/4c30189c-566c-11e7-80b6-9bfa4c1f83d2>.

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. The Director Defendants identified at paragraphs 25-28 and 30-34 above (Carr and all of the Director Defendants, except Hartong and Wasserman) served on the Activision Board when it decided to pursue the Merger after the Drop-Dead Date, and extend the effectiveness of the Merger Agreement beyond the Drop-Dead Date, without any vote of, or compensation to, the Activision stockholders, at which time all of these Director Defendants (except Carr) were also defendants in lawsuits arising out of the Harassment Scandal and the Merger. Claims related to the extension of the Merger Agreement and continued pursuit of the Merger are brought against them.

37. 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.²⁵ 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

²⁵ 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.”²⁶

38. Defendant Anchorage is a Delaware corporation and a wholly owned subsidiary of Microsoft. Microsoft formed Anchorage on January 13, 2022 for the purpose of effectuating the Merger.

39. 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

40. Activision’s toxic culture has 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.²⁷ Indeed, numerous senior managers have resigned or been 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

²⁶ Microsoft Answer ¶ 18; Activision Answer ¶ 18.

²⁷ 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.

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.

41. *Kotick Knew* reported that 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. Kotick did not inform the Board.

42. The DFEH and EEOC began their investigations in 2018. After more than two years of investigation, the EEOC issued a letter of determination on June 15, 2021, 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.²⁸ Activision began negotiating a resolution with the EEOC. On June

²⁸ See *EEOC v. Activision Blizzard, Inc., et al.*, No. 2:21-cv-07682-DSF-JEM (C.D. Cal.) (“EEOC Action”).

24, 2021, the DFEH issued a cause finding on June 24, 2021 that Activision discriminated against its employees on the basis of sex.²⁹ 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, including in senior managerial positions.

43. In the first half of 2021, Kotick hired managers to help contain the fallout from the investigations. In a March 2, 2021 press release, Activision announced that it had hired Frances Townsend (“Townsend”), who worked in counterterrorism during the Bush Administration, as its Executive Vice President for Corporate Affairs and Chief Compliance Officer (“CCO”). Townsend’s chief duty was sending letters defending Kotick’s outrageous compensation, as indicated by Schedule 14As that Activision filed with the SEC on May 28 and June 11, 2021. The Company also hired Brian Bulatao (“Bulatao”), a former COO for the Central Intelligence Agency, to oversee “Corporate Social Responsibility.” As a part of Activision’s response to the EEOC and DFEH actions, Bulatao would assist Kotick in opposing employees’ attempts to unionize.

²⁹ See *Dept. Of Fair Employment & Housing vs. Activision Blizzard, Inc., et al.*, No. 21STCV26571 (Cal. Super. Ct., L.A. Cty.).

44. Meanwhile, managers who had failed to respond to complaints of harassment and discrimination left the Company quietly. In the spring of 2021, Activision's then-CFO Dennis Durkin ("Durkin") (age 50) and then-Chief Legal Officer ("CLO") Chris B. Walther ("Walther") (age 54) retired, though they were not close to normal retirement age. Jeremy Wilson, Senior Director of Securities and Corporate Governance, left in May 2021. Given the SEC filings related to the various departures and hirings, including two of the five named executive positions, the Director Defendants were aware of these changes and, it is reasonably conceivable, of their relationship to the pending DFEH and EEOC investigations. The personnel changes were a clear indication to the Board that senior managers were implicated in the existence and cover-up of, and the failure to remedy, the toxic environment at Activision.

45. Others also left Activision but Kotick remained. Indeed, 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 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's leadership and vision and awarded him a contract extension.

46. Activision's 2021 Proxy contained a hypocritical letter from Kotick and Kelly bragging about Activision "Continuing to Foster Inclusive Workplaces" and acknowledging their "clear responsibility to make our workplaces . . . more diverse, equitable and inclusive." However, the 2021 Proxy did not mention the EEOC and DFEH investigations.

47. As the 2021 Proxy acknowledged: (i) the responsibilities of the Audit Committee (Corti, Hartong and Nolan) include the primary role in 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) is responsible for overseeing Activision's human capital including diversity, equity and inclusion initiatives; (iii) the Corporate Governance Committee (Morgado, Meyer and Wasserman) is responsible for overseeing social and governance strategies, practices, policies and reporting; and (iv) the Board is responsible for overseeing overall risk management and delegating certain risk management oversight to a standing committee of the Board. Thus, all

the Activision directors had duties obligating them to address aspects of the risks and issues raised by Activision's toxic environment.

48. The slow-motion Harassment Scandal train wreck quickened pace after the DFEH filed suit against Activision on July 20, 2021 for violations of the California Fair Employment and Housing Act and the California Equal Pay Act. The DFEH action triggered derivative suits and a class action against the Company, Kotick, the Director Defendants and officers.³⁰ Activision's CCO Townsend sent a Company-wide email, actually drafted by Kotick, attacking the DFEH suit. This prompted outrage and a walkout by Activision employees, forcing Townsend to resign from her leadership role in a Company women's group, and Kotick to admit in a July 27, 2021 letter to all employees that the Company's initial response (which he did not admit to writing) was "tone deaf." Thus, Kotick threw Townsend under the bus for an email he drafted and authorized.

³⁰ See *Cheng v. Activision Blizzard, Inc. et al.*, No. 2:21-cv-06240-PA-JEM (C.D. Cal.) (filed August 3, 2021, against Activision, Kotick, Durkin and Activision's former CFO Spencer Neumann ("Neumann"), and adding Kelly and 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.) (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.) (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).

B. Kotick’s “Investigation” Was a Cover-Up

49. Kotick’s July 27, 2021 letter 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.” His letter invited employees to speak to Stephanie Avakian (“Avakian”) of WilmerHale on “a confidential basis.” Avakian is not an employment lawyer, but a securities lawyer who had been the director of the SEC’s enforcement division.

50. The selection of WilmerHale generated further opposition by Activision employees, who claimed the firm could not do an independent review and had a record of opposing workers. WilmerHale has 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.

51. The sham nature of WilmerHale’s investigation soon became apparent. In an amended complaint filed on August 23, 2021, DFEH indicated that Activision had retained WilmerHale to have confidential interviews with Activision employees and then obstructed DFEH’s investigation by withholding documents and communications related to complaints and investigations claiming that because an attorney was involved the materials were privileged. The retention of WilmerHale

was not for the purpose of investigating harassment and discrimination, but for the purpose of covering it up. No report by WilmerHale on harassment and discrimination has ever been made public. Indeed, Kotick has withheld a summary of disciplinary actions.

52. The real reason for selecting Avakian, a securities practitioner and former SEC enforcement lawyer, became even more evident in September 2021. On September 7 and 8, 2021, WilmerHale appeared on behalf of Activision, Kotick, the Director Defendants and other former directors and officers who are named defendants in derivative lawsuits in California. In a September 21, 2021 press release, Activision revealed that the Company, Kotick and other current or former executives or employees had been subpoenaed by the SEC. On September 28, 2021, WilmerHale entered an appearance on behalf of Activision, Kotick, Activision's CFO Armin Zerza ("Zerza"), Chairman Kelly and former Activision officers Dunkin and Neuman. WilmerHale appeared for the defendants in the California federal derivative case on November 18, 2021. WilmerHale was not hired to improve Activision's practices and procedures but to defend those responsible for the Harassment Scandal.

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

53. In an August 3, 2021 press release, Activision announced that J. Allen Brack (“Brack”), president of Activision’s subsidiary Blizzard Entertainment, Inc. (“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. Game designers Luis Barriga (“Barriga”), Jesse McCree (“McCree”) and Jonathan LeCraft (“LeCraft”), who were photographed in the “Cosby Suite,”³¹ were let go on August 11, 2021. Jen Oneal (“Oneal”) and Mike Ybarra (“Ybarra”) were appointed co-leaders of Blizzard. Oneal would resign from her position three months later, on November 2, 2021, and leave the Company before the end of the year. In a September email she said (i) she did not think Activision would remedy its toxic workplace, (ii) she was paid less than Ybarra, (iii) she had been sexually harassed earlier in her Activision career, (iv) she had attended a 2007 party with Kotick featuring scantily clad dancers on stripper poles, and (vi) she had been “tokenized, marginalized, and discriminated against.”³² *Kotick Knew* reported that senior

³¹ Activision male employees infamously drank and harassed women in a hotel room they nicknamed the Cosby suite, after Bill Cosby.

³² *Kotick Knew*.

women were leaving the Company because they had no faith in Kotick. Kotick still kept his position at the Company.

54. Claire Hart, Chief Legal Officer at Blizzard, left on September 17, 2021, having been identified as another manager who was ineffective in addressing harassment complaints. On September 20, 2021, *The Wall Street Journal* reported that the SEC was investigating Activision, and had subpoenaed the Company, Kotick and others and was asking for minutes of board meetings since 2019 and Kotick's communications regarding complaints of harassment and discrimination. Kotick claimed in a September 21, 2021 press release that Activision was cooperating with the regulators to address workplace complaints and complying with the SEC's subpoena, though the release said Activision "is confident in its prior disclosures." He offered more empty promises about reform at Activision and announced the appointment of Julie Hodges as new Chief People Officer ("CPO") in September 2021.

55. Activision's prior 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. The Separation Agreement provided that the Board and executive leadership would not disparage Naughton and that she gave a general release.

Naughton remained bound by her confidentiality agreement. In contrast, Kotick stayed in his job.

56. On September 27, 2021, the EEOC filed its complaint against Activision for violations of Title VII of the Civil Rights Act, as well as a [Proposed] Consent Decree, which, among other provisions, required Activision to pay \$18 million to harassment claimants. Activision's September 27, 2021 press release characterized the Consent Decree with the EEOC as a mere "agreement" to settle claims. Kotick offered more hollow promises of reform and kept his job.


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

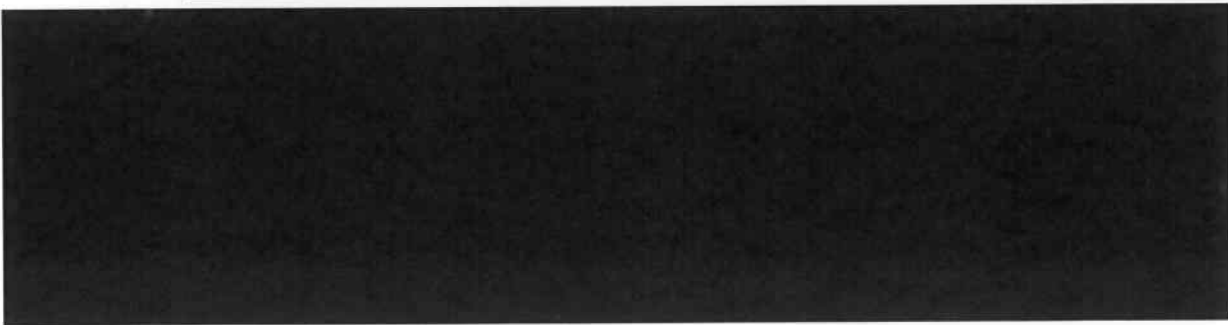
D. Kotick's Pay Cut Agreement, the October 28, 2021 Board Meeting and Long Range Plan

58. 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. Kotick pledged "a new zero-tolerance harassment policy" but did not explain why there had been a policy of tolerance for

years, even during lengthy investigations by regulators. He announced that within the next five years, the percentage of women and non-binary employees would be increased by 50%, from 23% to more than 33%.

59. 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”). He emphasized that the reduction included bonuses and equity grants, not just salary. Kotick did not say when he had made his request or what the Board’s response was. However, the press release had its intended effect: it was widely reported that Kotick was taking an almost complete pay cut.

60. On October 28, 2021, beginning at 12 noon eastern time, the Activision Board met. 



³³ Activision_0000825-833.

³⁴ *Id.* at 825.

[REDACTED]

[REDACTED]

61.

[REDACTED]

[REDACTED]

[REDACTED]

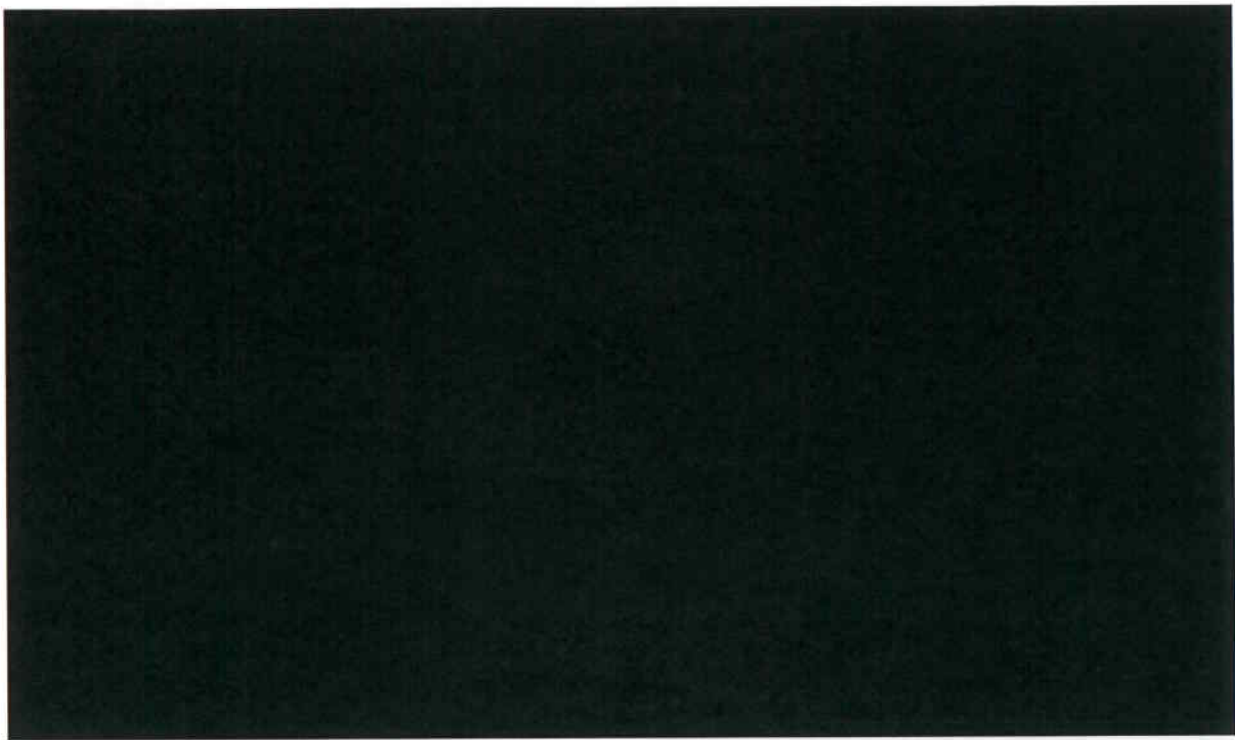
[REDACTED]

³⁵ *Id.* at 825-826.

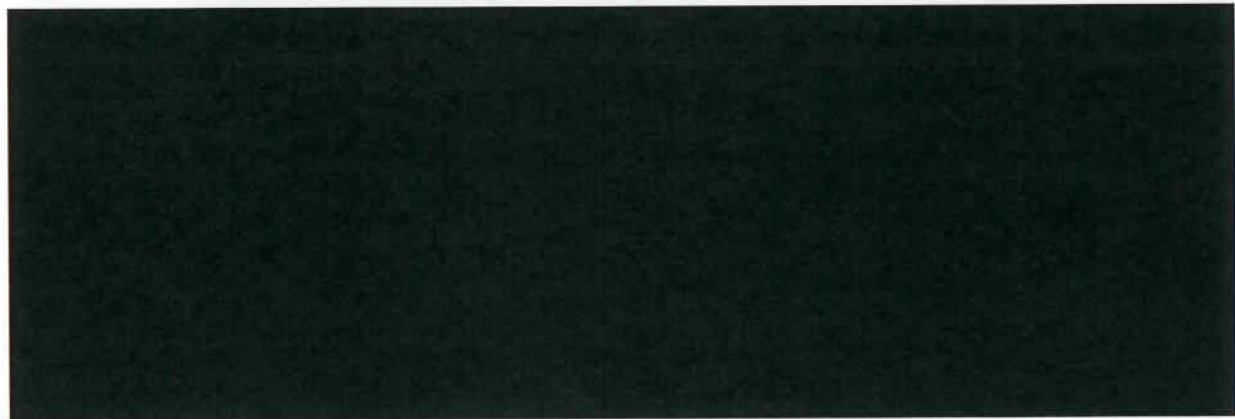
³⁶ *Id.* at 826-828; Activision_0000645 at 703-791.

³⁷ *Id.* at 705.

³⁸ *Id.*



62.



³⁹ *Id.* at 721, 728-730, 742, 754-755, 766, 776.

⁴⁰ *Id.* at 746.

⁴¹ *Id.* at 719.

⁴² *Id.*

[REDACTED]

[REDACTED]

63.

[REDACTED]

[REDACTED]

[REDACTED]

The Proxy contains no description of

the October 28, 2021 Board meeting.

64. 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: *Overwatch 2* and *Diablo 4*. Activision's November 2, 2021 investors presentation acknowledged that *Overwatch 2* and

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Activision_0000835-838.

Diablo 4 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.

65. 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 4*’s lead game designer was Barriga, who left Activision in August 2021 after photos of him in the Cosby Suite were made public. *Diablo 4*’s lead level designer was McCree, who left in August 2021 after a group chat in which he made jokes about the Cosby Suite, and a photo of him in the Cosby Suite (with Barriga), was made public. *Overwatch* and *Overwatch 2*’s director and lead game designer Jeff Kaplan (“Kaplan”) left in April 2021 after 19 years. Further, *Overwatch 2*’s producer Tracy Kennedy (“Kennedy”) blamed Kotick for these departures, writing to Kotick on Twitter that “almost entire teams [at *Overwatch*] are turning over and citing you as the reason.”⁴⁷ The delayed releases of these games

⁴⁷ Tracy Kennedy (@RiotLavalier), TWITTER (Jan. 19, 2022, 1:41 pm), <https://twitter.com/RiotLavalier/status/1483872301175107584?lang=en>.

and lost stockholder value was the direct result of the mishandling of the Harassment Scandal by Kotick and the Board.

66. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴⁸ Activision_0000645-824 at 764.

⁴⁹ *Id.* at 765-766.

⁵⁰ *Id.* at 769.

⁵¹ *Id.* at 770.

⁵² *Id.* at 776.

It is fair inference and reasonably conceivable that the delays in release of *Overwatch 2* and *Diablo 4* were largely related to the departures and fallout triggered by the Harassment Scandal.

67. 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 announcement of the Harassment Scandal related delay in *Diablo 4* and *Overwatch 2* was a further reason why November 2021 was not an appropriate time to be negotiating a sale of Activision.

68. 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 4*, 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. The risk he faced from the delay in *Overwatch 2* and *Diablo 4*, however, paled in comparison to the risks he would face after the publication of *Kotick Knew*.

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

69. 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.

70. *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.

71. 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.

72. 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 require. 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.⁵³ 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,

⁵³ *Kotick Knew*.

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 other.

73. 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."

74. In response to *Kotick Knew*, over 100 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.

75. 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. Displaying the same tone-deaf approach as its response to the DFEH complaint, 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.***" (Emphasis added). 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 constitutes “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*.⁵⁴

76. 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. Once again, Activision attempted to portray Kotick as part of the solution when he was a major part of the problem.

77. The Board’s November 16, 2021 press release focused on changes “[u]nder Bobby Kotick’s leadership,” 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.

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

⁵⁴ 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-blizzard-employees-demand-ceo-bobby-koticks-resignation-11637102139?mod=Searchresults_pos2&page=1.

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

78. 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. The directors claimed that Kotick had not kept them informed, that they were "blindsided" when they learned that harassment and discrimination were occurring at Activision and that Kotick had assured them the misconduct was only at Blizzard and was resolved years earlier, so the Board was blameless.

79. In the wake of *Kotick Knew*, even more employees, investors and others demanded that Kotick resign. Nearly 1900 Activision employees—almost 20% of all employees—signed a petition calling for Kotick to resign. Dan Bunting ("Bunting"), co-head of Activision's Treyarch studio, who was identified in *Kotick Knew* as among the harassers that Kotick had protected, resigned on November 16, 2021. After July 27, 2021 over 30 employees were pushed out of Activision and over 40 received written reprimands. Yet the Board declined to hold Kotick accountable.

80. 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.⁵⁵ Activision's largest franchise, *Call of Duty*, 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.⁵⁶

Spencer said Microsoft was reevaluating its relationship with Activision in light of the Harassment Scandal.⁵⁷

⁵⁵ Microsoft Answer ¶¶ 26, 28-29, 66; Activision Answer ¶¶ 26, 28-29, 66.

⁵⁶ 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>.

⁵⁷ *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>.

81. Sony's PlayStation Chief Jim 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 harassment."⁵⁸ 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."⁵⁹

82. 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.⁶⁰

83. *The Wall Street Journal* reported that at a meeting with Company executives on Friday, November 19, 2021, Kotick said he might leave the Company

⁵⁸ 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>.

⁵⁹ 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>.

⁶⁰ 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>.

if the sexual misconduct issues could not be fixed quickly.⁶¹ Thus, Kotick conceded the Harassment Scandal could force him to have to leave the Company.

F. Kotick Could and Should Have Been Fired for Cause

84. 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.

85. 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

⁶¹ 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>.

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.

86. 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.⁶² 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 12 months.

⁶² “Accrued Obligations” under Section 9(a)(1) of Kotick’ 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.”

87. 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 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.

88. 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.

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

89. According to the Proxy, Activision and Microsoft have developed and maintained a relationship for over 20 years. Kotick engages in a “regular dialogue”⁶³ with Microsoft’s Spencer, with whom Kotick says he has “a great relationship[.]”⁶⁴ Kotick also has a relationship with Microsoft’s CEO Satya Nadella (“Nadella”), with whom Kotick speaks “[f]rom time to time[.]”⁶⁵ 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.

90. 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” 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

⁶³ Proxy at 32.

⁶⁴ 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/>.

⁶⁵ Proxy at 32.

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.

91. While the Proxy and minutes suggest that “in the course of a [November 19] conversation”⁶⁶ 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 is deliberately misleading because it omits that the Harassment Scandal led to Microsoft's acquisition overture.

92. Spencer recognized that the negative attention and pressure on Kotick would make the beleaguered CEO eager to sell Activision. Activision relies on Microsoft and Sony for a substantial portion of its revenue. Activision's 10-K annual report for 2021 (the “10-K”) explains that Microsoft and Sony provide

⁶⁶ Proxy at 32.

hardware platforms, digital platforms and video game consoles for consumers to use and pay for Activision's games. The 10-K states: "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 explains on page 22:

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.

93. The 10-K also states 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.

94. 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.

95. Microsoft, moreover, was eager to buy Activision. "Microsoft's *all-in on gaming*."⁶⁷ Indeed, "[g]aming is the biggest and fastest-growing entertainment industry in the world."⁶⁸ Access to AAA content is crucial for Microsoft, and the company strives to ensure it provides new AAA content to its consumers on a regular

⁶⁷ FTC Complaint ¶ 116 (quoting Nadella) (emphasis in original).

⁶⁸ Microsoft Answer at 2.

basis.⁶⁹ AAA games, however, are difficult and costly to produce because of the creative talent, budgets and time required to develop them.⁷⁰ 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*⁷¹—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.”⁷² “[I]n 2020[,] the gaming industry was worth \$165 billion, with \$85 billion coming from mobile gaming[.]”⁷³ Microsoft, however, has “next to no presence in mobile gaming,”⁷⁴ while “three quarters of Activision’s gamers and more than a third of [Activision’s] revenues come from mobile offerings.”⁷⁵

96. 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*

⁶⁹ *Id.* ¶ 51; FTC Complaint ¶ 51.

⁷⁰ *See* FTC Complaint ¶ 3.

⁷¹ *See id.* ¶ 46; Microsoft Answer ¶ 46.

⁷² Microsoft Answer at 1.

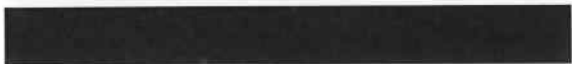

⁷³ *Id.* ¶ 22.

⁷⁴ *Id.* at 1.

⁷⁵ *Id.* at 2.

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.

97. 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"⁷⁶ 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



⁷⁶ Proxy at 32.

98. The Proxy rationalized Kotick's decision to disclose Microsoft's overture to (1) Kelly, because he is Activision's Chairman, (2) Morgado, because he is Activision's lead independent director and (3) Allen & Co., because it "provided strategic financial advice to Activision"⁷⁷ 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.

H. Allen & Co. Was Not Disinterested and Independent

99. Allen & Co. is a small firm known for building success by "patiently [], as Allen & Co. habitually does, [working] to build a client relationship."⁷⁸ Its CEO Herb Allen ("Herb"), who has run the firm since 2002, and banker Nancy Peretsman ("Peretsman"), who has been with Allen & Co. since 1995, have nurtured their relationship with Kotick.

⁷⁷ Proxy at 32.

⁷⁸ 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.

100. 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") 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"⁷⁹ since 2002. Kotick, given his position as CEO and then-Chairman, would have engaged Allen & Co. since before 2002 on those other transactions.

101. By 2010, Kotick was regularly attending Allen & Co.'s exclusive "Sun Valley Conference," otherwise known as "The Billionaire's Summer Camp."⁸⁰ The conference is invite-only for CEOs, institutional investors, Hollywood stars and their

⁷⁹ 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.

⁸⁰ 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>.

families; Allen & Co. pays the entire bill; and according to media reports, many of Allen & Co.'s deals are "birthed"⁸¹ during the Sun Valley Conference.

102. 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.

103. 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 of this generation, including Barry Diller and Bobby Kotick."⁸² Indeed, in 2009,

⁸¹ *Id.*

⁸² *Ms. Nancy Beth Peretsman, AMERICAN ACADEMY OF ARTS & SCIENCES*, <https://www.amacad.org/person/nancy-beth-peretsman>.

Allen & Co. started a private wealth-management business overseeing the personal fortunes of technology entrepreneurs like Kotick.⁸³

104. 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 39 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.

105. 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.

⁸³ 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>.

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

106. 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 is Chair of the Audit Committee. Corti, however, is also among Activision's longest-standing, most conflicted directors.

107. [REDACTED]

[REDACTED]

[REDACTED] Ostroff and Bowers were two members of the Compensation Committee that in April 2021 had extended Kotick's Employment Agreement by 15 months while the EEOC and DFEH investigations were nearing a close.⁸⁴ This indicates that Kotick and Kelly, as well as Morgado and Corti, likely communicated with the Board on November 22 about forming and announcing the WRC. 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

⁸⁴ Once again, with the formation of the WRC, the Board's focus was on changes that might be made, reflecting Activision's "forget about the past" mentality.

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, 2021.

108. The absence of mention in the Proxy and minutes 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 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 shows otherwise.

109. 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 (p. 32), 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." Of course, the

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] 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.

110. 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.

111. 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.

J. Kotick Involves More Conflicted Directors

112. 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”⁸⁵ 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 before informing the full Board.

113. 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.

K. Kotick Pushes the Board to Hire Conflicted Advisors

114. On December 1, 2021, Kotick and Spencer discussed introductions between “the parties’ respective legal teams and potential financial advisors,”⁸⁶ as well as the timing of Activision’s delivery of its financial forecasts. Thus, Kotick

⁸⁵ Proxy at 33.

⁸⁶ *Id.*

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

115. On December 3, 2021, Kotick and Kelly finally convened the Board to discuss the Merger they had been negotiating for two weeks. The meeting attendees included WilmerHale, Allen & Co., Skadden and Sard Verbinnen & Co., a crisis management public relations firm. Neither the Proxy nor the Books and Records explain why WilmerHale and Sard Verbinnen & Co were invited to and attended the meeting or reflect any Board decision or authorization to retain WilmerHale or Sard Verbinnen & Co. 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. 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) suggests otherwise.

116. 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.

117. 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, says that after Morgado told the Board about the Company's discussions with Microsoft, the Board discussed formally engaging financial advisors. The Proxy states:

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.⁸⁷

118. 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:

[REDACTED]

⁸⁷ Proxy at 33.



The Proxy therefore creates the false impression that the Board approved Allen & Co.'s engagement and 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.

119. According to the minutes,



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

⁸⁸ Activision_0000567 at 569.

minutes indicate that [REDACTED]

120. The minutes state that [REDACTED]

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

[REDACTED] Neither the minutes nor

the Proxy indicated that the Board authorized negotiation within that range.

121. 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

122. [REDACTED]

[REDACTED]

[REDACTED]

123. 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.

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

124. On December 3, 2021, the same day Kotick told the Board about the Merger, *Morningstar* issued a scathing report.⁸⁹ 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 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."⁹⁰

125. The Morningstar ESG Report also said that "if Kotick tries to hang on at all costs, significant value destruction could occur."⁹¹ 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

⁸⁹ See *Without Changes, ESG Issues Will Hamper Activision Blizzard*, MORNINGSTAR (Dec. 3, 2021) ("Morningstar ESG Report").

⁹⁰ *Id.* at 1.

⁹¹ *Id.* at 10.

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.⁹²

126. 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 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.⁹³

127. *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

⁹² *Id.*; see also *id.* at 15 ("Replacing the CEO Is Critical").

⁹³ *Id.* at 12.

would be comfortable without a major change but weren't willing to try to oust Mr. Kotick.⁹⁴

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

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

129. 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

⁹⁴ 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>.

meeting on December 10, 2021. Unlike their approach with Microsoft, Kotick and Kelly did not immediately follow up with Company A.

130. 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] 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.

131. 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.

132. 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] The Proxy blandly said Activision and Microsoft "discussed various other aspects of Activision Blizzard's business."⁹⁵ The December 10 minutes state that [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.

133. 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

⁹⁵ Proxy at 34.

⁹⁶ Activision_0000575 at 576.

why a deal with those parties would not work, including “regulatory hurdles”⁹⁷ and why the Board should favor Microsoft. Significantly, neither the Proxy nor the minutes reflect any concerns about “regulatory hurdles” a transaction with Microsoft might face.

134. 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.⁹⁸ 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

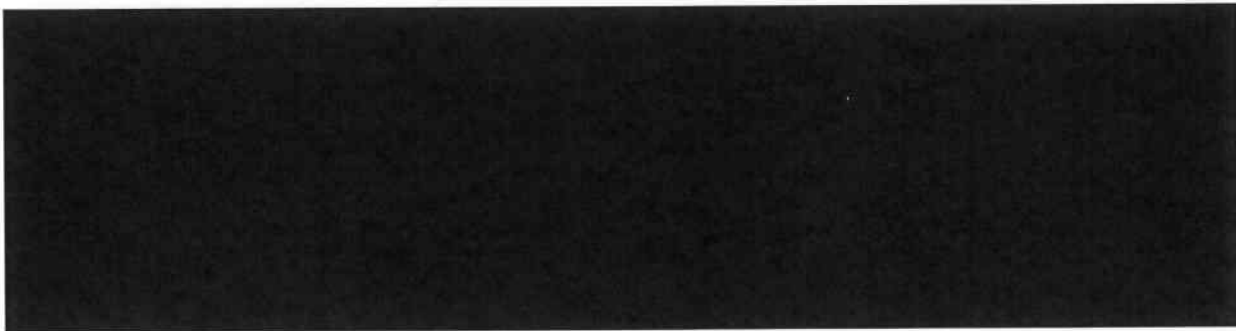
⁹⁷ *Id.*

⁹⁸ Elate is likely [REDACTED]

⁹⁹ Activision_0000575 at 576.

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 "trading multiples of the two companies"¹⁰⁰ 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.

135. 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



¹⁰⁰ *Id.*; Proxy at 34.

¹⁰¹ Activision_0000485.

¹⁰² *Id.*

[REDACTED]

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

136. [REDACTED]

[REDACTED]

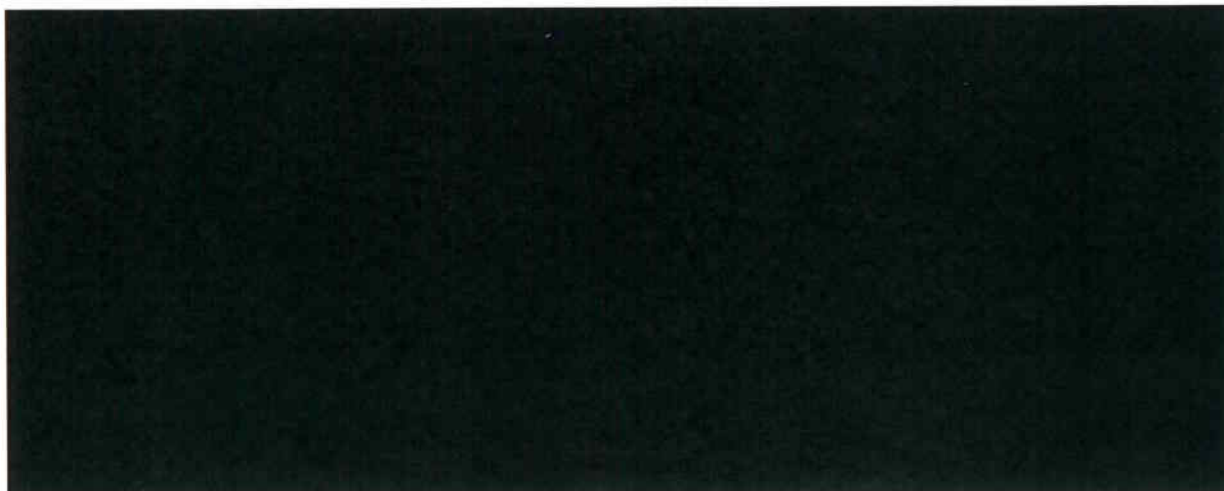
[REDACTED]


¹⁰³ *Id.*

¹⁰⁴ *Id.*


¹⁰⁵ *Id.* at 486.

137. 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,



138. 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"¹⁰⁶ without disclosing any information about the content of that call, 



 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

¹⁰⁶ Proxy at 35.

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.

139. 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.

140. 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.


141. Rather than having any independent representative control the sale of the Company, the Board allowed Kotick to (1) continue negotiating with Microsoft, (2) 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.

142. 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.

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

143. 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”;¹⁰⁷ 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.

144. The December 14, 2021 minutes indicate that 



¹⁰⁷ *Id.* at 37.

[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”¹⁰⁹ The Proxy conceded that the forecasts had been adjusted downward so the Board could use them “for purposes of considering the potential transaction with Microsoft.”¹¹⁰ The minutes (but not the Proxy) reflect that the Board instructed that Allen & Co. base its valuation analysis on the negatively revised forecasts.

145. 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.

¹⁰⁸ Activision_0000583 at 583-84.

¹⁰⁹ *Id.* at 584; Proxy at 37 (emphases added).

¹¹⁰ Proxy at 37.

146. 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.

147. The Proxy states that before the December 14, 2021 meeting ended, the Board considered "certain information"¹¹¹ 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 on such information, there were no material conflicts that would preclude Allen & Co[.] from continuing to serve as financial advisor to Activision Blizzard."¹¹²

148. 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 Coca-Cola Board with Kotick. The conflicts disclosure memo admitted that:

[REDACTED]

¹¹¹ *Id.*

¹¹² *Id.*

[REDACTED]

149. The Proxy said that Allen & Co.’s “experience and familiarity with Activision Blizzard”¹¹⁴ 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 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.

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

[REDACTED]

[REDACTED]

The minutes indicate that

[REDACTED]

¹¹³ Activision_0000839 at 848.

¹¹⁴ Proxy at 57.

¹¹⁵ Activision_0000583 at 586.

[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.”¹¹⁷

151. 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 reflects any responses or reactions of Kotick during the December 14 meeting with 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.

¹¹⁶ *Id.*

¹¹⁷ Proxy at 37.

152. 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.”¹¹⁸ 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.

153. Allen & Co.’s presentation showed [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹¹⁸ *Id.* at 38.

¹¹⁹ Activision_0000505 at 506.

¹²⁰ *Id.* at 508.

[REDACTED]

[REDACTED]

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

[REDACTED]

[REDACTED]

The decreased numbers were intended to support the price Kotick had already signaled to Microsoft. The Board told Kotick to counter at \$100 per share, but authorized management to settle for \$95 per share. This makes it reasonably conceivable that while the Board pretended to be negotiating with Microsoft, it understood that Kotick and Microsoft had already settled on a \$95 price.

¹²¹ *Id.*

¹²² *Id.* at 511.

155. Once again, the minutes reflect [REDACTED]

[REDACTED]

The minutes and Proxy do not reflect any discussion of the regulatory risks of a transaction with Microsoft.

156. During the evening of December 15, 2021, Kotick and Kelly spoke to Spencer and countered with \$100 per share.

157. On December 16, 2021, Nadella said Microsoft would increase its offer to \$93. Kotick immediately said he was authorized to agree to \$95 with a 30-day exclusivity agreement at that price.¹²⁴ Unsurprisingly, Nadella quickly accepted the \$95 per share price. Thus, Kotick and Microsoft finalized the \$95 price in the 24-hour period between the evenings of December 15 and December 16.

158. 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,”¹²⁵ to negotiate exclusively with Microsoft for 30-days based on the

¹²³ Activision_0000588 at 589, 591.

¹²⁴ Proxy at 39.

¹²⁵ Activision_0000592 at 595.

\$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 and included a term sheet for the \$95 per share Merger.¹²⁶

159. Activision and Microsoft's exclusivity term sheet, annexed to the exclusivity agreement, acknowledged the risks the Defendants would face in obtaining antitrust approval. The term sheet provided: (1) Microsoft would make reasonable best efforts to obtain antitrust clearances; (2) the outside date for the merger agreement would be 18-months from signing in the event the only outstanding closing condition was the receipt of regulatory approvals; and (3) an antitrust termination fee. The Proxy only vaguely referred to a reverse termination fee and other regulatory related provisions to be included in the definitive Merger Agreement.

160. The Board met for 31 minutes 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.

¹²⁶ Activision_0000496-504.

O. Activision and Microsoft Sign the Merger Agreement

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

162. On Friday, January 14, 2022, the Board met with WilmerHale, Allen & Co. and Skadden to get an update. There were again “updated”¹²⁷ (*i.e.*, reduced) forecasts aimed at justifying selling the Company for \$95 per share.

163. 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.”¹²⁸ 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.¹²⁹

164. The minutes from the meeting say 


¹²⁷ Proxy at 41.

¹²⁸ *Id.* at 42.

¹²⁹ *Id.*; Activision_0000600 at 603.

[REDACTED]

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

165. 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," along with "outstanding matters under the merger agreement."¹³¹ These schedules were not provided to the Board or included in the copy of the Merger Agreement attached to the Proxy. Their contents were not described in the Proxy.

166. The Board met on Monday, January 17, 2022 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]

¹³⁰ See Activision_0000600 at 603-04.

¹³¹ Proxy at 42.

[REDACTED]

[REDACTED]

167. Although Skadden purportedly reviewed the “key terms”¹³³ of the Merger Agreement on January 17, 2022, the Board did not review or approve the entire agreement of merger. At the January 17 meeting, the Board reviewed a draft merger agreement that did not include the CDL, disclosure schedules or Exhibit A to the merger agreement (the certificate of the surviving corporation).¹³⁴ Footnotes to the draft Merger Agreement confirm that the Company Disclosure Letter was still being drafted.¹³⁵ The January 17 draft Merger Agreement does not even refer to Activision; it refers to “[Denali]” as the “Company.”¹³⁶ It is labelled “STB Draft 01/17/22” and is “Dated as of January [17], 2022.”¹³⁷ Further, Skadden told Plaintiff during negotiations over the Books and Records production that “the confidential disclosures and Company Disclosure Letter are not [] board-level material,”

¹³² Activision_0000550 at 555.

¹³³ Proxy at 42.

¹³⁴ Activision_0000862-962.

¹³⁵ *Id.* at 880 n.1, 899 n.2, 925 n.3.

¹³⁶ *See, e.g., id.* at 862, 866.

¹³⁷ *Id.* at 862.

conceding the Board never reviewed them. In addition, the Proxy states the disclosure schedules were still being negotiated through January 18, 2022, when the Merger Agreement was “finalized.”¹³⁸

168. 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.¹³⁹ What dividends Activision could pay its stockholders during the up to 18 months (or much longer, as is now the case) 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 agreed to and the *ad hoc* committee approved “the resolution of the outstanding dividend issue[.]”¹⁴⁰ 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 provides 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 significantly

¹³⁸ Proxy at 42.

¹³⁹ 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).

¹⁴⁰ Proxy at 42.

reduces the value of the Merger. Activision stockholders have historically received an annual dividend. Because the Merger cannot possibly close until the end of 2023 or the first half of 2024, several dividends will be missed. Thus, 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 consummated, and given the increased regulatory risk, particularly in light of the FTC Suit, it is worth significantly less than that.

169. After the Board's approval of the Merger Agreement at the January 17, 2022 meeting, Activision and Microsoft "finalized the merger agreement,"¹⁴¹ which was executed on January 18, 2022.

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

170. The terms of the Merger Agreement provide Kotick and the Board with material benefits not shared with Activision's public stockholders. Accordingly, the Merger Agreement was not approved by a majority of disinterested and independent directors.

¹⁴¹ *Id.*

1. The Merger Protects Kotick's Job and Compensation

171. The Merger Agreement protects Kotick's tenuous position as Activision's CEO and allows him to remain in office. Section 5.1(iii)(B) requires Activision to "keep available the services of its current officers and key employees."¹⁴² Section 5.2(g) of the Merger Agreement provided Kotick with immediate job security. It precludes Activision from terminating any employee at the level of Senior Vice President or above without Microsoft's approval. Section 2.6(b) provides that Activision's officers before the Merger will 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 July 18, 2022, the Board can extend Kotick's Employment Agreement by another 12 months. Kotick remains CEO of Activision. The extension or waiver of the Drop-Dead Date will extend Kotick's continued employment through all of 2023

¹⁴² As with numerous other provisions in the Merger Agreement, Section 5.1 of the Merger Agreement contains an exception for items listed in the CDL. Activision has not disclosed, and the Board did not review or approve, the CDL. The terms of the Merger Agreement are therefore incomplete and cannot be determined. *See* Count I, *infra*.

and probably into 2024. He will end up riding the Activision gravy train for about two years or more.

172. The Merger therefore protects 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, prevents Kotick from being fired even for Cause.

173. The Merger, moreover, provides Kotick with better compensation while the Merger is 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. According to the Proxy, in blatant violation of the October Pay Cut Agreement, Activision and Microsoft agreed 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 equity compensation of up to \$22 million].¹⁴³

174. Activision's agreement with Microsoft is more favorable to Kotick than his October request. Under his October Pay Cut Agreement, 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 will only be reduced until the WRC determines Activision has 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.

175. On December 7, 2022 Activision released its 2022 representation data summary purportedly showing its progress toward increasing the number of women and non-binary employees by fifty percent over five years.¹⁴⁴ The data generally shows increases from 2021 to 2022 of 1% to 2% in the percentages of employees that are women/non-binary ("W/N") and from underrepresented ethnic groups

¹⁴³ Proxy at 61 (emphasis added).

¹⁴⁴ See *Activision Blizzard Releases YTD 2022 Representation Data*, Activision Blizzard (Dec. 7, 2022), <https://investor.activisionblizzard.com/news-releases/news-release-details/activision-blizzard-releases-ytd-2022-representation-data>. The representation data is available on Activision's website. See *id.*

(“UEG”). The data also reveals that the percentage of departures among W/N and UEG employees is nearly the same, the same or in some cases even greater than the percentage of hires. Moreover, the highest W/N and UEG percentages are at entry level positions and the percentages decline at the manager, director and vice-president level. In short, the data does not demonstrate that “the transformational gender-related goals” Kotick announced on October 28, 2021 have been achieved. Yet, Kotick is receiving far more compensation than the \$62,500 he agreed to in the Pay Cut Agreement.

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

176. 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.

177. Section 6.8 of the Merger Agreement contains three pages on “Directors’ and Officers’ Exculpation, Indemnification and Insurance.”

178. 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**").

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

<u>Title:</u>	<i>Indemnified Persons</i>
<u>Indemnitors:</u>	"The Surviving Corporation" will (and Parent shall cause the Surviving Corporation to)"
<u>Obligations to Indemnify:</u>	"honor and fulfill, in all respects, the obligations of the Company"
<u>First Source of Company Indemnification:</u>	"pursuant to any indemnification agreements set forth on <u>Section 6.8(a)</u> 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**’).”

180. Because the Company Disclosure Letter referenced in the Merger Agreement has not been publicly provided (or produced by Activision in response to Plaintiff’s 220 Demand), the number of existing indemnification agreements are not known. Plaintiff sought indemnification agreements in its 220 Demand and repeatedly pressed Activision to produce all such agreements. Activision only produced indemnification agreements from 2003 for Morgado, Corti and Nolan.

181. From public filings, it is apparent that Activision has other indemnification agreements with current and former 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.

182. Durkin, Walther, Naughton and Activision's 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.

183. 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.

184. 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.

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

Additions to First
Sentence:

“In addition”

<u>Time Frame:</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>Documents:</u>	“cause the certificates of incorporation, bylaws and other similar organizational documents of the Surviving Corporation”
<u>Provisions Required:</u>	“to contain provisions with respect to indemnification, exculpation and advancement of expenses”
<u>Standard for Provisions:</u>	“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.”
<u>No Modification:</u>	“During such six-year period, such provisions may not be repealed, amended or otherwise modified in any manner except as required by applicable Law.”

186. 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 will become Activision’s 100% stockholder in the Merger, agrees 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 current Certificate permits certificate amendments to the exculpation and indemnification provisions of Sections 6.1 and 6.2 that are prospective. It also permits stockholder amendments that do “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.”¹⁴⁵ Section 7.7 of Activision’s Bylaws also permits prospective repeal or amendment that adversely affects the indemnification rights of Section 7.1 and 7.2. It only limits 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) have agreed to eliminate the stockholders’ current ability to limit or eliminate indemnification, advancement and exculpation under the Certificate and Bylaws. Section 6.8(a) of the Merger Agreement creates a broader obligation to continue indemnification, advancement and exculpation rights of directors and

¹⁴⁵ The end of the phrase presumably should read “repeal or modification.”

officers than the existing Certificate and Bylaws. Thus, the second sentence goes beyond the 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.

187. Section 2.6(a) provides that the directors of the Merger Sub will be Activision's directors after the Merger. It is currently not known whether Kotick or other current Activision directors will be named as Merger Sub directors or appointed as post-Merger Activision directors. However, Section 2.6(b) provides that the initial officers of Activision after the Merger will be officers of Activision immediately before the Merger. Therefore, under the Merger Agreement, Kotick and other Activision officers gain additional rights that apply to conduct after the Merger.

188. Section 5.2(a) of the Merger Agreement prohibits Activision from amending or otherwise changing the Certificate or Bylaws. Thus, Microsoft and Activision (through Kotick and the Board) have 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.

189. 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.

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

Title:

“Indemnification Obligation”

<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,”¹⁴⁶

Genesis of Proceeding:

“to the extent that such Legal Proceeding arises, directly or indirectly, out of or pertains, directly or indirectly, to”

Focus of Proceeding (i):

“(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);”

Focus of Proceeding (ii):

“and (ii) the Merger; as well as any actions taken by the Company, Parent or Merger Sub with respect thereto,”

Extension of Indemnification Period:

“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

¹⁴⁶ 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.”

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

191. 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.

192. 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 current or future Certificate or Bylaws. 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.¹⁴⁷

193. The first sentence of Section 6.8(b) provides indemnification rights beyond the existing rights under Activision’s Certificate and Bylaws. 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 existing indemnification rights are 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.

194. 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 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.¹⁴⁸

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

¹⁴⁷ Several Activision subsidiaries are incorporated under the laws of the U.K., the Netherlands, Malta and Sweden.

¹⁴⁸ Under Article VII, Section 7.6 of the Bylaws, indemnification of employees and agents is permissible, not mandatory.

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.

196. 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;”

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.”

197. 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 do not confer such a right.

198. 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.

199. 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 do 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.

200. Section 6.8 also expands the range of “officers” of Activision entitled to mandatory indemnification and advancement. Under Article IV, Section 4.1 of the Bylaws, 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. 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 confer mandatory indemnification and advancement rights on a person who is an “officer of the Corporation,” that is limited only to persons elected as officers of Activision by the Board or appointed by Kotick as CEO, pursuant to the Board authorization.¹⁴⁹

201. 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.”¹⁵⁰ 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,

¹⁴⁹ Article I, Section 1.1 of the Bylaws defines Activision Blizzard, Inc. as the “Corporation.”

¹⁵⁰ The Merger Agreement designates Activision Blizzard, Inc. as the “Company.”

Brack, who left Activision after his failure to address sexual harassment was exposed, an Indemnifiable Person under Section 6.8.

202. 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.

203. 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. Section 7.5 of Activision’s Bylaws permits, but does 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.”

204. 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.¹⁵¹

205. The provisions of Section 6.8 materially increase 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 will also help protect the directors by encouraging Kotick and other officers to fight any claims.

206. 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 are 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.

¹⁵¹ Merger Agreement, §§ 6.8 (d)-(f).

Q. The Reaction to the Merger's Announcement and Kotick's *VentureBeat* Interview

207. 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.

208. Kotick told *VentureBeat* that when Spencer called Kotick about the Merger, Kotick had just realized that Activision did not have the "thousands of people"¹⁵² 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"¹⁵³ 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*

¹⁵² 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*").

¹⁵³ *Id.*

range planning process, and realizing that these were going to be issues and challenges.”¹⁵⁴

209. 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, contemplated a [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.

210. 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[.]”¹⁵⁶ 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

¹⁵⁴ *Id.* (emphasis added).

¹⁵⁵ Activision_0000645 at 725.

¹⁵⁶ *VentureBeat*.

price.”¹⁵⁷ 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 4*. The delayed releases, however, were part of the fallout from the Harassment Scandal, as *Overwatch 2* and *Diablo 4*’s leaders left because of their involvement with the Cosby Suite. In response to Kotick’s comment 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.¹⁵⁸

211. 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.”¹⁵⁹ Unnamed *Diablo 4* insiders would later tell the press that

¹⁵⁷ *Id.*

¹⁵⁸ @RiotLavalier, TWITTER (Jan. 19, 2022, 1:41 PM), <https://twitter.com/seamoosi/status/1455638325453336579> (emphasis added).

¹⁵⁹ Morningstar ESG Report at 1.

Diablo 4's process was "plagued by mismanagement" and "leadership changes at Activision Blizzard and on the 'Diablo IV' team."¹⁶⁰

212. *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."¹⁶¹ *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."¹⁶²

213. Also on January 18, 2022, Microsoft announced that it promoted Spencer to the new role of CEO of Gaming. If the Merger closes, Kotick and Activision management will report directly to Spencer, who now oversees Microsoft's entire gaming business.

¹⁶⁰ 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 4* insiders also told *The Washington Post* that, under Barriga's leadership, *Diablo 4*'s script included a character raping a love interest whose primary description was "the raped woman." *Id.*

¹⁶¹ 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").

¹⁶² *Id.*

R. The Merger Attracts Heavy Antitrust Scrutiny

214. Upon its announcement, the Merger immediately faced stringent scrutiny from antitrust regulators. Defendants knew 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. Microsoft insisted on Section 6.2(b) of the Merger Agreement which provides that Microsoft is not required to offer, negotiate, or commit to a “Burdensome Condition,” which includes any action expected to have (i) an adverse effect on Activision, (ii) a material impact on the benefits Microsoft expects to derive from the Merger, or (iii) more than an immaterial impact on any Microsoft business or product line. Given the high probability that one or more regulators would demand one or more such conditions, Section 6.2(b) gave Microsoft a potential out if it chose not to consummate the Merger

215. Recently, the antitrust climate has not been favorable, particularly for Big Tech. Since 2021, President Biden’s administration has signaled a clear pro-enforcement approach to crack down on mergers involving large tech companies. On March 5, 2021, President Biden appointed Timothy Wu (“Wu”) as Special Assistant to the President for Technology and Competition Policy. Wu is

known¹⁶³ for advocating reigning in dominant telecom firms and online platforms. On June 15, 2021, President Biden named Lina Kahn (“Kahn”) as FTC Chair. Kahn is known for authoring a 2017 law review article advocating a new antitrust framework to address market power in the digital age, and using antitrust law to protect social interests.¹⁶⁴ In a July 9, 2021 executive order, President Biden articulated the administration’s broad antitrust policy and instructed antitrust agencies to increase enforcement. Section 1 of the Order explained that the Order emanates from the Administration’s view that it needs to “reverse [] dangerous trends” of “economic consolidation” that have increased prices, stunted economic growth and suppressed wages. On November 16, 2021, Jonathan Kanter (“Kanter”) was confirmed as Assistant Attorney General overseeing the DOJ’s Antitrust Division. Kanter is known for being a vocal critic of Big Tech who prosecuted Google and other tech firms for antitrust violations while in private practice.¹⁶⁵

¹⁶³ See Ryan Tracy, *Tim Wu, Big Tech Critic, Named to National Economic Council*, WALL ST. J. (Mar. 5, 2021), <https://www.wsj.com/articles/tim-wu-big-tech-critic-named-to-national-economic-council-11614954821>.

¹⁶⁴ Sheelah Kolhatkar, *Lina Khan’s Battle to Rein in Big Tech*, THE NEW YORKER (Nov. 29, 2021), <https://www.newyorker.com/magazine/2021/12/06/lina-khans-battle-to-rein-in-big-tech>.

¹⁶⁵ See Cecilia Kang, *Senate Approves Jonathan Kanter, a Big Tech Critic, as the Top U.S. Antitrust Official*, N.Y. TIMES (Nov. 16, 2021), <https://www.nytimes.com/2021/11/16/technology/senate-approves-jonathan-kanter.html>.

216. Throughout 2021, Senators and Congresspersons on both sides of the aisle urged for increased scrutiny of Big Tech deals. On February 4, 2021, Senator Amy Klobuchar (D-Minnesota) and four other senators introduced the “Competition and Antitrust Law Enforcement Act of 2021,” which targets Big Tech. On April 19, 2021, Senator Josh Hawley (R-Missouri) introduced the “Trust-Busting for the Twenty-First Century Act,” proposing to prohibit mega-corporations from engaging in mergers and acquisitions. On June 11, 2021, the House of Representatives introduced five bills covering the same ground as the Klobuchar and Hawley bills. On June 14, 2021, Senators Mike Lee (R-Utah) and Chuck Grassley (R-Iowa) introduced the “Tougher Enforcement Against Monopolies Act.” Collectively, the focus of all of this antitrust activity was large tech companies. In addition, on June 30, 2021, Senator Elizabeth Warren (D-Massachusetts) sent a letter to the FTC calling for a “broad” and “meticulous” review of Amazon’s acquisition of MGM for antitrust violations. On December 6, 2021, Senator Warren and 32 members of Congress sent a letter to the DOJ urging it to investigate the \$43 billion Discovery/WarnerMedia merger for antitrust violations.

217. In addition, even putting aside the challenging antitrust environment, the Merger’s huge size of approximately \$70 billion virtually guaranteed it would be subjected to serious antitrust review. There has been a wave of consolidation in

the global videogame industry in recent years and if Microsoft acquires Activision, it will have acquired 30 game studios since 2014, including the \$7.5 billion acquisition of the popular Doom videogame franchise in 2021.¹⁶⁶ With Activision's Microsoft deal and Sony's Bungie deal, almost \$84 billion in gaming industry deals were announced in January 2022 alone, compared to less than \$25 billion in all of 2021. This reeks of the "economic consolidation" President Biden's administration wishes to "reverse."

218. The Merger will make Microsoft the third largest gaming company in the world, behind only Tencent Holdings Ltd. and Sony Group Corporation. The Merger would combine Microsoft's power in games hardware, such as Xbox consoles and PCs, with a significantly expanded library of gaming software. In addition, the FTC and DOJ are abandoning the view that most vertical mergers do not threaten competition. For example, on December 2, 2021, the FTC sued to block U.S. chip supplier Nvidia Corp.'s \$40 billion takeover of U.K. chip design provider Arm Ltd., asserting the vertical merger would allow the combined entity to unfairly undermine competitors.¹⁶⁷ With respect to the Merger, and as the CMA's September

¹⁶⁶ On January 31, 2022 Microsoft's major competitor, Sony, announced a \$3.6 billion acquisition of videogame developer Bungie, Inc. ("Bungie").

¹⁶⁷ *See In re the Matter of Nvidia Corp., et al.*, No. 9404 (F.T.C. Dec. 2, 2021).

1, 2022 Phase 1 Decision and the FTC Suit would soon make clear, antitrust issues include whether Activision's games will remain available for devices of Microsoft's competitors, such as Sony's PlayStation, or whether Microsoft will exclude its rivals from Activision's popular games.

219. Thus, upon its announcement, the Merger immediately became part of the discussions in Congress, the FTC and DOJ over the threats to competition posed by giant technology companies. The same day the Merger was announced on January 18, 2022, the FTC and DOJ held a joint press conference announcing revisions to their merger guidelines, which singled out technology companies. Also on January 18, 2022, Public Citizen, a nonprofit consumer advocacy organization, called for the FTC and DOJ to block the Merger. Numerous law firms promptly issued alerts concerning the FTC/DOJ merger revisions, warning that antitrust clearance would be more uncertain and difficult, enforcement may become more stringent and digital market mergers may be a particular focus.

220. On January 27, 2022, Open Markets Institute, an anti-monopoly advocacy group, raised concerns about Microsoft's market power in the future gaming industry.

221. On February 1, 2022, it was reported that the FTC would review the Merger for antitrust issues rather than the DOJ.

222. On March 1, 2022, fifteen labor and consumer rights groups led by Public Citizen sent a letter to the FTC urging it to scrutinize the Merger. The letter criticized the Merger as, among other things, raising serious competition issues for the video game sector that fits “an alarming pattern of concentration in the gaming industry over the past several years.”¹⁶⁸ The letter stated the Merger would undermine Activision workers’ attempts to unionize in response to the Harassment Scandal, considering that none of Microsoft’s US-based employees belong to a union.

223. 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]”¹⁶⁹ with the FTC’s Second Request. The process for becoming “substantially compliant” with a Second Request is “extremely burdensome.”¹⁷⁰ According to sophisticated counsel familiar

¹⁶⁸ March 1, 2022 Letter from Public Citizen, et al. to Lina Khan, et al. at 2 (Mar. 1, 2022), https://www.citizen.org/wp-content/uploads/FTCletter_Microsoft-Activision_v7_clean.pdf.

¹⁶⁹ Proxy at 70.

¹⁷⁰ Franco Castelli, Wachtell Lipton Rosen & Katz, & Cathleen Peterson & Kroll Ontrack, *The Nuts and Bolts of Second Request Compliance*, N.Y. STATE BAR

with the process, it “takes months, costs several million dollars and involves substantial management time and effort[.]”¹⁷¹ In addition, the HSR Act does not define “substantial compliance,” which left Defendants with little to no leverage or control over the timing of the waiting period. In sum, there was never any guarantee how long it would take Defendants to “substantially comply” with a Second Request and obtain the FTC’s approval of the Merger. Ultimately, even after the timely, costly and burdensome Second Request, the FTC challenged the Merger.

224. As pled above, Defendants foresaw heightened antitrust scrutiny of the Merger. Accordingly, as Defendants disclosed in the Proxy, they did not expect to close the Merger until “Microsoft’s fiscal year ending June 30, 2023.”¹⁷² In light of the FTC Suit and detailed review by other regulators, the Merger will not close by June 30, 2023, and there is no guarantee the Merger will close at all.

225. Instead of terminating Kotick for Cause or forcing him to resign from the Company, the Director Defendants fashioned a deal in which Kotick would remain CEO during a period of extended antitrust scrutiny that would last as long as

ASSOCIATION ANTITRUST SECTION MERGERS COMMITTEE (Dec. 1, 2016) at 6, <https://nysba.org/app/uploads/2019/02/NYSBA-Second-Request-Nuts-and-Bolts-20161128-v5-JMC.pdf>.

¹⁷¹ *Id.*

¹⁷² Proxy at 70.

18-months. Given the FTC Suit, Kotick will remain CEO until the end of 2023 at a minimum and, in all likelihood, well into 2024.

S. It Is Reasonably Conceivable That Kotick and/or Others Tipped Friends or Relatives

226. Since October 2021, there have been several instances of unusual trading in Activision stock which will result in profits if Microsoft's acquisition of Activision closes. It is reasonably conceivable that this trading was the result of leaks by Kotick or other Activision directors concerning a possible sale of Activision or other inside information.

1. Berkshire Hathaway's Purchase of Activision Stock

227. In October 2021, Berkshire Hathaway Inc. ("Berkshire") began buying a significant number of Activision shares. As of September 30, 2021, Berkshire did not own a single share of Activision. Berkshire continued to buy shares in November 2021, including after negotiations between Kotick and Microsoft had begun. Berkshire purchased 14.7 million Activision shares, about 2%, at an average price of approximately \$77 per share, an investment of over \$1.1 billion. The investment was unusual for Berkshire, which generally invests in blue chip companies in the banking, consumer and oil industries, not the stock of a beleaguered gaming

company. One report described Berkshire's perfectly timed Activision investment as "out-of-left-field."¹⁷³

228. When Berkshire's Activision position was disclosed in a February, 2022 Form 13F filing, there was speculation about whether Warren Buffett's ("Buffet") friendship with Microsoft founder Bill Gates could have resulted in Berkshire getting advance information about the Activision-Microsoft negotiations. In an unusual move, Buffett posted a letter to Berkshire's website stating that 85% of Berkshire's position was acquired in October 2021 and that it was three months after Berkshire's first purchase that "Microsoft announced its acquisition proposal of which Berkshire had no prior knowledge."¹⁷⁴ Buffett said he would be surprised if the proxy material for the Merger indicated Microsoft had "even discussed a proposal with Activision in early October[.]"¹⁷⁵

229. The speculation and denial concerning Berkshire's unusual and perfectly timed investment in Activision focused on whether Berkshire might have

¹⁷³ Paul R. LaMonica, *Warren Buffett's Berkshire Hathaway perfectly timed an out-of-left-field investment*, CNN (Feb. 15, 2022), <https://www.cnn.com/2022/02/15/investing/warren-buffett-berkshire-hathaway-activision-blizzard-microsoft/index.html>.

¹⁷⁴ Letter from Warren E. Buffet. Berkshire, to Thomas Barrabi, New York Post, et al. (Feb. 17, 2022), <https://www.berkshirehathaway.com/activisionltr.pdf>.

¹⁷⁵ *Id.*

gotten information from Microsoft about negotiations between Microsoft and Activision, negotiations that, according to the Proxy did not begin until mid-November. However, there was another potential source of information about Activision, including a possible sale or other information that could have contributed to Berkshire's decision to buy Activision shares in October and November 2021: Activision and specifically Kotick.

230. By October 2021, Activision had been buffeted by the Harassment Scandal for several months and Kotick's survival at the Company was in question. It is reasonably conceivable that, in such circumstances, Kotick would reach out to trusted mentors and mention that he might be considering pursuing a sale of Activision. Kotick considers Buffett a mentor and discusses leadership and entrepreneurship with him. He has hung a letter from Buffett on the wall of his office, and considers Buffett an inspiration. Kotick's ten-year service on the board of Coca-Cola partly resulted from his relationship with Buffett. Berkshire has been Coca-Cola's largest stockholder and Buffett and his son served on the board for many years. After Berkshire's initial investment in Activision was revealed,

Berkshire Vice Chairman Charlie Munger proclaimed “I like Bobby Kotick a lot,”¹⁷⁶ adding:

And I don’t think he personally, tolerated a lot of crazy behavior either.¹⁷⁷

231. Berkshire continued and enlarged its extraordinary investment in Activision following announcement of the planned Microsoft Merger, claiming it is a merger arbitrage play, another type of strategy that is unusual for Berkshire. According to a Form 13F, by March 31, 2022 Berkshire owned 64,315,222 shares of Activision stock, about 9.5% of Activision’s shares and a stake worth about \$6 billion. Much if not all, of this stock had been purchased prior to the March 15, 2022 record date for the vote on the Merger Agreement. It appears Mr. Buffett has come to the aid of his friend Bobby Kotick. A Form 13-F filed by Berkshire on November 14, 2022 discloses that it still owns 60,141,866 Activision common shares.

2. Diller’s “Lucky Bet”

232. On March 4, 2022, Coke announced that after 10-years Kotick was not standing for re-election as a Coca-Cola director at the company’s annual meeting.

¹⁷⁶ *Exclusive: Charlie Munger: Apple is One of The Strongest Companies In The World*, YAHOO! FINANCE (Feb. 16, 2022), <https://finance.yahoo.com/video/exclusive-charlie-munger-apple-one-173424946.html>.

¹⁷⁷ *Id.*

Kotick claimed in a Coca-Cola press release that he was stepping down “to focus my full attention on Activision Blizzard at this pivotal time as we prepare for our merger with Microsoft[.]”¹⁷⁸ Coca-Cola stockholders had demanded that Kotick not be renominated because of the Harassment Scandal. However, there may have been an even more serious reason for Kotick dropping off the Coca-Cola Board.

233. On March 8, 2022, *The Wall Street Journal* reported that the DOJ and SEC were investigating the January 14, 2022 purchase of \$108 million of options to buy 4.12 million Activision shares by Barry Diller (“Diller”), Alexander von Furstenberg (“Furstenberg”) and David Geffen (“Geffen”). January 14, 2022 was the Friday that Kotick convened the Board to discuss the Merger before they approved the deal on Monday January 17. Following the Merger’s announcement, Diller, Furstenberg and Geffen’s options for Activision shares were worth \$168 million, representing an unrealized profit of \$60 million and an even greater profit if the Merger closes.

234. The option purchases were arranged privately by JPMorgan, rather than purchased on U.S. options exchanges. Under a September 2020 criminal settlement related to market manipulation claims, JPMorgan was required to disclose to law enforcement evidence or concerns about misconduct. JPMorgan reported the trades

¹⁷⁸ Coca-Cola, Current Report (Form 8-K) (Mar. 4, 2022) at Ex. 99.1.

to law enforcement after Microsoft's planned acquisition of Activision was announced. The private nature of the option trades raises a fair inference that undermines Diller's "I wouldn't be so dumb defense"—Diller and the others may have believed the transactions would not become known and did not realize JPMorgan had reporting obligations under a criminal settlement.

235. Diller has maintained that the huge option purchases were a "lucky bet,"¹⁷⁹ but the timing of the purchases is highly suspect. Furstenberg has claimed he was buying Activision stock prior to the options trade because he thought Activision might be acquired, a claim that raises the question of whether those earlier purchases may also have been based on inside information.

236. Diller, Furstenberg and Geffen have relationships to Kotick and to each other.¹⁸⁰ Kotick is friends with Furstenberg and was widely reported to have had breakfast with him during the week of January 10, 2022, the same week Kotick was finalizing the Merger. Kotick is also close with Diller, who describes Kotick as a

¹⁷⁹ Dave Michaels & Jeffrey A. Trachtenberg, *U.S. Probes Trade by Barry Diller, Davie Geffen Before Big Merger*, WALL ST. J. (Mar. 8, 2022), <https://www.wsj.com/articles/u-s-probes-options-trade-that-gained-on-microsoft-activision-deal-11646787000>.

¹⁸⁰ Diller and Geffen are reportedly longtime friends.

“long time friend.”¹⁸¹ Kotick and Diller served on the Coca-Cola Board together during Kotick’s entire 10-year tenure as a Coca-Cola director from 2012 until 2022. They also served together on the board committee that nominated Allen & Co.’s Herb Allen as a Coca-Cola director in late 2021. Herb joined the Coca-Cola Board on December 17, 2021, indicating that Kotick and Diller were likely in contact in the midst of the Merger negotiations. Moreover, Kotick was motivated to get friends and supporters into Activision stock which could provide votes in favor of the Merger. The timing of the trades and Kotick’s relationship with Diller and Furstenberg indicate that it is reasonably conceivable that Kotick used the Company’s material non-public information to benefit himself by tipping his friends to the Merger.

237. On March 31, 2022, *The Wall Street Journal* reported that the DOJ and SEC were specifically focusing on the meeting between Kotick and Furstenberg, with the DOJ investigating potential criminal insider trading and the SEC conducting a civil insider-trading investigation. Activision has received a request for

¹⁸¹ *U.S. Probes Options Trade Gained on Microsoft-Activision Deal*, REUTERS, (Mar. 8, 2021), <https://www.reuters.com/technology/us-probes-options-trade-gained-microsoft-activision-deal-wsj-2022-03-09/>. Diller and Kotick are also both regular attendees at the Sun Valley Conference.

information from the SEC and a grand jury subpoena from DOJ and said it is cooperating with these investigations.

3. Hartong's Form 4

238. On March 23, 2022, shortly after the reports that the DOJ and SEC had launched their insider-trading investigations, 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 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.

239. The Hartong Trust sold 74 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 74 shares. However, the Hartong Trust purchased 295 shares between November 23 and December 21, 2021 and the Form 4 indicates the trust continues to own 221 shares. Thus, the Hartong Trust will profit from the sale of those shares if the Merger occurs. 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.

240. 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.

241. The timing and nature of the sale of 74 of the 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.

T. The Proxy and Special Meeting

242. Even after the Merger's announcement, Kotick has been the target of even more investigations and lawsuits. On March 3, 2022, a wrongful death lawsuit arising out of Company-wide sexual harassment was filed against Activision.¹⁸² Yet

¹⁸² See *Moynihan, et al. v. Activision Publishing, Inc.*, No. 22STCV07890 (Cal. Super. Ct., L.A. Cty.) (Mar. 3, 2021). The decedent ("Kerri") was a Company finance manager who took her life in a hotel room during a Company retreat. The complaint alleged that Kerri was the victim of "brutal workplace sexual harassment at Activision that was a substantial factor in causing her death by suicide[.]" At the time of her death, Kerri was in a sexual relationship with her supervisor ("Restituto"), who was staying in the hotel room across the hall from hers. Four months before her death, photos of Kerri's genitals were passed around an Activision holiday party. Activision and Restituto lied to the police and hid evidence about Restituto's relationship with Kerri when the police investigated Kerri's death. After Kerri's parents (the "Moynihans") filed the lawsuit, Activision told *The Washington Post* that it would "address the complaint through the legal process[.]" Gus Garcia-Roberts & Shannon Liao, *Activision Blizzard sued for wrongful death by family of*

the Board has still failed to hold him accountable and under the Merger Agreement cannot hold him accountable.

243. On March 9, 2022, Activision was disinvited from speaking at South by Southwest (“SXSW”), the annual technology, film and music festival. SXSW explained to *The Washington Post*:

Given the ongoing and unfolding nature around the sexual harassment accusations being covered up at the executive levels of Activision, we decided it was best to not have high-profile speakers from Activision present at SXSW this year[.]¹⁸³

244. On March 16, 2022, *The Washington Post* reported that Coca-Cola, Kellogg’s and State Farm were not renewing their sponsorship of Activision’s Overwatch League that would kick off in May 2022.

245. In the midst of this mess, and despite knowing the Merger would face protracted regulatory approval, Defendants rushed the Special Meeting of stockholders to approve the Merger. After limited SEC review of a preliminary

employee who killed herself, THE WASHINGTON POST (Mar. 4, 2022), <https://www.washingtonpost.com/video-games/2022/03/04/activision-blizzard-employee-suicide-lawsuit/>. The Moynihans moved the court in May 2022 to dismiss the action with prejudice, and declined to comment on their request. This suggests that Activision “addressed the complaint” by quickly and quietly settling the case.

¹⁸³ Shannon Liao, *Activision Blizzard Disinvited From Speaking At SXSW Due To Misconduct Allegations*, THE WASHINGTON POST (Mar. 9, 2022), <https://www.washingtonpost.com/video-games/2022/03/09/sxsw-activision-blizzard-gdc/>.

proxy statement filed on February 18, 2022, Activision issued the Proxy on March 21, 2022, 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 appraisal rights without any indication of the length of the antitrust review or the severity of the risk of an antitrust challenge.

247. Meanwhile, Activision made purported corporate governance and culture 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. Activision touted its addition of two female directors (*i.e.*, Meservey and Carr). However, the nomination of Meservey and Carr appears to have been motivated primarily, if not solely, by California Senate Bill 826 (SB-826), which required that by year end 2021, public companies headquartered in California with six or more directors have

at least three female directors. By April 2022, Activision had not complied with SB-826, as Activision’s nine-member Board had only two female directors, Bowers and Ostroff, who had supported Kotick amidst demands for his resignation.

248. In addition, 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.

249. On April 21, 2022, *The Wall Street Journal* published more bad reports for Kotick: in 2016 and 2019, Kotick and his then-girlfriend Sheryl Sandberg (“Sandberg”) of Meta Platforms Inc. (“Meta”) pressured *The Daily Mail*, with the assistance of Facebook and Activision employees and advisors, not to report that Kotick’s ex-girlfriend obtained a temporary restraining order against him in 2014. Activision’s Board immediately responded in a statement to *TheGamer* that they had “full confidence in Mr. Kotick’s leadership[.]”¹⁸⁴ Sandberg, in contrast, resigned as Meta’s COO after working there for 14 years.

¹⁸⁴ Rhiannon Bevan, *Activision Board Has “Full Confidence” In Bobby Kotick Following Restraining Order Allegations*, THEGAMER (Apr. 21, 2022), <https://www.thegamer.com/activision-board-full-confidence-bobby-kotick-restraining-order/>.

250. 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.

251. 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. Many of the votes for the Merger Agreement likely came from Buffett (Berkshire) and other Kotick allies. Other 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, if the Merger closes it will do so based on a stale stockholder vote that occurred more than a year and perhaps more than two years earlier.

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

252. 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.

253. The same day the 2022 Proxy was filed, the Communications Workers of America (“CWA”) filed a complaint against Activision with the National Labor Relations Board (the “NLRB”), alleging that Activision threatened workers who

discussed their concerns about sexual harassment at the Company.¹⁸⁵ On May 23, 2022, the NLRB concluded that Activision illegally threatened its staff. The NLRB's Los Angeles-based regional director said the NLRB would issue a complaint unless Activision settled with them.

254. Also on May 23, 2022, another Activision employee filed a sexual harassment lawsuit against Activision.¹⁸⁶ Doe's lawyers, who prosecuted sexual harassment claims against Bill O'Reilly and Bill Cosby and also advised Harvey Weinstein, told the press they represent eight more women, expect to file more lawsuits against Activision, and the misconduct at Activision is among the worst these attorneys have seen.¹⁸⁷ Doe's complaint seeks, among other things, an order requiring Activision to terminate Kotick's employment for cause.

255. 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

¹⁸⁵ See *Activision Blizzard, Inc.; Blizzard Entertainment, Inc.; Activision Publishing, Inc.*, 31-CA-295091 (NLRB).

¹⁸⁶ See *Doe v. Activision Blizzard, Inc., et al.*, Case No. 22STCV10065 (Cal. Super., Los Angeles Cty.). The plaintiff ("Jane Doe") alleged she was pressured to take tequila shots on her first day of work, experienced unwelcome touching and sexual comments from supervisors, and was retaliated against when she began taking steps to avoid harassment.

¹⁸⁷ See Samson Amore, *Activision Blizzard Slapped With Another Sexual Harassment Lawsuit*, DOT.LA (Mar. 24, 2022), <https://dot.la/activision-lawsuit-sexual-harassment-2657033787.html>.

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 the Board demonstrate that Kotick and the Board continue to deny, minimize and rationalize Activision's toxic culture in the hope that they can 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.

256. First, the Board opposed Proposal 5 in the 2022 Proxy, repeating bromides about Activision's supposed "commitment" to prevent harassment and discrimination and claiming the Board that tolerated such harassment and discrimination for so long knew better than anyone else how to approach the problem that arose on their watch.

257. Second, the Board took the same approach in a response by Kotick's flack Townsend to an April 13, 2022 report by Glass, Lewis & Co., LLC ("Glass, Lewis") criticizing the Company's culture and transaction-related golden parachute, lauding "Mr. Kotick's 30-year leadership of the Company" and stating that:

The Board, having reviewed Mr. Kotick's handling of workplace issues, remains confident in his conduct, leadership, commitment and ability¹⁸⁸

Once again, the Board endorsed Kotick's mishandling of workplace issues and his conduct concerning those issues.

258. Third, in response to an exempt solicitation by SOC Investment Group ("SOC"), Activision published as further proxy material a May 30, 2022 letter from Skadden accusing SOC of "blatant misrepresentations" and defending the handling of the Harassment Scandal by Kotick and the Board. The letter contained a complete whitewash absolving Kotick and the Board of any responsibility:

The Board and its external advisors have diligently reviewed the actions alleged against both Activision's senior leadership and the Board by the California Department of Fair Employment and Housing ("DFEH") and the *Wall Street Journal*. The Board and its external advisors have determined that there is no evidence to suggest that either Activision Blizzard senior executives or the Board ever intentionally ignored or attempted to downplay the instances of sexual harassment that occurred and were reported. That work also has not unearthed any evidence, directly or indirectly, suggesting any attempt by any senior executive or employee to conceal information for the Board. The review of contemporaneous documentation and statement by relevant individuals shows that media criticism of the Board and Activision Blizzard senior executives as insensitive to workplace matters is without merit. Based on that review of the underlying factual record, it is plain that prior articles

¹⁸⁸ 2022 Proxy at 2.

contain numerous statements that are materially incomplete and/or inconsistent with the full factual record. Indeed, certain of those statement are “half-truths” that in the absence of proper context are misleading and paint an inaccurate picture of Activision Blizzard. Both the Board and Activision Blizzard senior executives have responded in a timely manner and with integrity and resolve to improve the workplace at Activision. While there are some substantiated instances of gender harassment, those materials do not support the conclusion that Activision senior leadership or the Board were aware of and tolerated gender harassment. In short, the statements alleging intentional concealments of fact from the Board are simply false.

The letter also minimized even the “substantiated instances of gender harassment,” with a “boys will be boys” rationale that such “instances of employee misconduct” occur at almost any Fortune 500 company like Activision.

259. Fourth, Activision issued as additional proxy material another eight-page whitewash letter dated June 9, 2022, in response to a June 3, 2022 Glass Lewis report recommending a vote in favor of Proposal 5. The letter repeated that the Board and its external advisors had determined there was no evidence implicating the Board or any senior Activision executive, including Kotick, ignored or downplayed instances of sexual harassment, and they had responded “in a timely manner and with integrity.”

260. Fifth, because its prior efforts to exonerate Kotick and the Board by self-serving statements had failed and Proposal 5 looked like it would pass, the

Board made one last desperate attempt to absolve itself and Kotick of all blame relating to the Harassment Scandal.

261. Less than a week before the 2022 Annual Meeting, on June 16, 2022, Activision filed further proxy materials in which the Board made a statement purporting to clear Kotick and the Board of all wrongdoing in connection with the Harassment Scandal. The Board claimed that “independent” investigation and analysis conducted by Activision’s external advisors including “law firms” (*i.e.*, Skadden and WilmerHale), showed absolutely no evidence that the Board or Kotick ever did anything wrong. Reminiscent of Townsend’s “tone-deaf” July 2021 email, the Board blamed the Harassment Scandal on DFEH and media criticism. The Board’s self-serving absolution, however, flies in the face of: (i) the EEOC and DFEH’s lawsuits, 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; (v) numerous and continuing sexual harassment lawsuits and even a wrongful death suit consistently alleging systemic misconduct; (vi) Activision’s \$18 million settlement payment to the EEOC; and (vii) the NLRB’s conclusion that Activision retaliated against its employees.

262. Despite the intense lobbying by Kotick, Townsend, the Board, Skadden and the Company, Proposal 5 passed. However, having repeatedly self-exonerated themselves, Kotick and the rest of the Board will just ignore the stockholders and stick to their story that they did nothing wrong and the whole Harassment Scandal (and presumably the Merger Agreement it caused) are the fault of DFEH and the media.

263. The various denials and statements of “no evidence” were also intended to rationalize extending Kotick’s Employment Agreement and restoring his compensation. The Board was nearing July 18, 2022, the date on which Microsoft agreed the Board could extend Kotick’s Employment Agreement by 12-months. The Board’s June 16, 2022 proxy materials also listed management’s purported “reforms and improvements” at the Company, indicating the WRC rationalized the restoration of Kotick’s compensation. Activision did not and has not disclosed, however, whether Activision extended Kotick’s Employment Agreement and/or restored his compensation. Further, after issuing its 2022 Proxy on April 29, 2022 describing Kotick’s 2021 compensation, Activision has not made any disclosure concerning Kotick’s compensation for 2022 and beyond.¹⁸⁹

¹⁸⁹ Activision has historically disclosed executive compensation in its annual proxy statement, not its annual report on Form 10-K.

V. The Merger Faces More Regulatory Hurdles and Kotick and the Microsoft Defendants Concede Defendants Expected the Merger Would Not Close Until 2023

264. Events since the 2022 Annual Meeting, including public statements by Kotick, his senior management team and the Microsoft Defendants, make clear that the Merger will not close until late 2023, if at all.

265. On July 13, 2022, the New Zealand Commerce Commission announced that it was scheduled to make a determination on the Merger's clearance application on August 11, 2022. The Commission keeps extending the date of its determination, which has been delayed until at least February 3, 2023.¹⁹⁰

266. After the New Zealand Commerce Commission's announcement, the CMA and E.C. launched in-depth investigations. Then, the FTC filed a lawsuit challenging the Merger.

1. The CMA Launches an "In-Depth" Investigation with a Completion Date of April 26, 2023 or Later

267. The CMA completed a Phase 1 investigation of the Merger that involved reviewing over 1,000 documents from Activision and Microsoft, and

¹⁹⁰ Decisions were initially due on August 11, September 2, September 9 and November 11, 2022. *See Case Register, Microsoft Corporation; Acquisition Blizzard Inc.*, COMMERCE COMMISSION NEW ZEALAND, <https://comcom.govt.nz/case-register/case-register-entries/microsoft-corporation-activision-blizzard-inc>.

written and oral submissions and documents from Defendants and other market participants, including Sony. On September 1, 2022, at the conclusion of its Phase 1 investigation, the CMA announced its determination that the Merger may substantially lessen competition in U.K. markets for gaming consoles, multi-game subscription services, and cloud gaming services.¹⁹¹ The CMA explained:

[I]f Microsoft buys Activision Blizzard it could harm rivals, including recent and future entrants into gaming, by refusing them access to Activision Blizzard games or providing access on much worse terms. The CMA has also received evidence about the potential impact of combining Activision Blizzard with Microsoft's broader ecosystem. Microsoft already has a leading game console (Xbox), a leading cloud platform (Azure), and the leading PC operating system (Windows), all of which could be important to its success in cloud gaming. The CMA is concerned that Microsoft could leverage Activision Blizzard's games together with Microsoft's strength across console, cloud, and PC operating systems to damage competition in the nascent market for cloud gaming services.¹⁹²

268. Kotick's response to the CMA's September 1, 2022 announcement about the conclusion of its Phase 1 investigation claimed that Defendants always

¹⁹¹ See Phase 1 Decision.

¹⁹² *Microsoft/Activision Deal Could Lead to Competition Concerns*, CMA (Sept. 1, 2022), <https://www.gov.uk/government/news/microsoft-activision-deal-could-lead-to-competition-concerns>.

expected protracted investigations and review of the Merger by antitrust regulators.

On September 1, 2022, Kotick sent a letter to Activision employees and wrote:

As we said from the outset, this is a long process. With the number of government approvals required, we still believe the deal is most likely to close in Microsoft's fiscal year ending June of next year . . . the process with all of the regulators is generally moving along as we expected.¹⁹³

269. Kotick essentially conceded that when Defendants negotiated, approved and executed the Merger Agreement, they knew the Merger would not close until 2023, if at all. Notwithstanding, on January 17, 2022, Defendants (1) made agreements that kept Kotick at the helm of the Company throughout this protracted period, and (2) agreed to sell the Company at some unknown future date for the fixed price of \$95 per share, while discontinuing dividends after the first quarter of 2022.

270. The CMA gave Defendants until September 8, 2022 to address the CMA's concerns, before referring the Merger to a Phase 2 investigation. Microsoft

¹⁹³ *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>.

informed the CMA on September 6 that it was not offering any undertaking to the CMA.¹⁹⁴

271. Accordingly, on September 15, 2022, the CMA announced that it was performing a Phase 2 investigation of the Merger, which the CMA describes as an “in-depth phase 2 investigation.” Microsoft has acknowledged that because of the pendency of the CMA investigation, the Merger cannot close until at least April 26, 2023. The CMA issued a 76-page decision explaining the bases for the CMA’s determination that the Merger raises “a realistic prospect of substantial lessening of competition (SLC) in gaming consoles, multi-game subscription services, and cloud gaming services” that can harm consumers, including by impairing Sony’s ability to compete with Microsoft.¹⁹⁵ The CMA explained that Microsoft has the ability and incentive to use the Merger to control Activision’s content to foreclose competition in gaming consoles, multi-game subscription services and cloud gaming services, particularly with respect to Activision’s *Call of Duty* franchise, which the CMA notes “is widely regarded as one of the most successful gaming franchises of all

¹⁹⁴ See *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”).

¹⁹⁵ See *id.*, generally.

time.”¹⁹⁶ The Merger will enable Microsoft to make *COD* exclusively available on Microsoft’s XBox, which according to the CMA would unfairly harm Sony, the maker of PlayStation.

272. In its submissions to the CMA, Sony stated that it would be impossible for Sony to develop a *COD* competitor if it was cut-off from *COD*, which, the CMA recognized could significantly impact Sony’s revenue and user base.¹⁹⁷ Sony also highlighted, and the CMA observed, Microsoft’s pattern of making games it acquires exclusive to XBox, including games “far less valuable” than Activision’s games and *COD*.¹⁹⁸ While Microsoft had, at the time, committed to keeping *COD* on Sony’s PlayStation for three years beyond Sony’s existing contract with Activision (i.e., until 2027), Sony stated that after having *COD* on PlayStation for 20 years, Microsoft’s proposal was inadequate.¹⁹⁹ The CMA also found Microsoft’s proposal inadequate. The CMA, referencing Section 7.15 of the CMA’s Merger Assessment Guidelines, stated that it “is not minded to place material weight” on any contractual

¹⁹⁶ *Id.* at ¶¶ 15, 152-235.

¹⁹⁷ Phase 1 Decision ¶ 28.

¹⁹⁸ Decision to Refer ¶¶ 27, 192-94.

¹⁹⁹ *Id.* at ¶¶ 156(ii), 175; *see also, e.g.*, Christopher Dring, *PlayStation: Xbox’s Call of Duty Offer was “Inadequate on Many Levels,”* GAMES INDUSTRY.BIZ (Sept. 7, 2022), <https://www.gamesindustry.biz/playstation-xboxs-call-of-duty-offer-was-inadequate-on-many-levels>.

commitments against foreclosure strategies that Microsoft is willing to make.²⁰⁰ The CMA explained: “such contractual provisions (i) may not account for all the possible foreclosure mechanisms that could be available to the Merged Entity, (ii) may be renegotiated or terminated early, or (iii) may not be enforced depending on the respective parties’ respective bargaining positions.”²⁰¹ The Merger will also allow Microsoft to control Activision’s content, and particularly *COD*, on multi-game subscription services that are becoming increasingly important to the gaming industry.²⁰² The CMA’s second theory of harm is that Microsoft could leverage its ecosystem, together with Activision’s game catalogue, to raise barriers to entry and foreclose rivals in cloud gaming services.²⁰³

273. On October 6, 2022, in the midst of this brewing regulatory battle, Meservey resigned from the Board to become Activision’s Executive Vice President, Corporate Affairs and Chief Communications Officer.

²⁰⁰ Decision to Refer ¶ 175; *see also Merger Assessment Guidelines*, CMA, at § 7.15 (March 18, 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051823/MAGs_for_publication_2021_--_.pdf.

²⁰¹ Decision to Refer ¶ 175.

²⁰² *Id.* at § TOH1b.

²⁰³ *Id.* ¶¶ 22, 33, 206-94.

274. On October 11, 2022, Microsoft submitted a 33-page paper to the CMA criticizing the CMA’s theories of harm as unsupported and insufficient to justify a Phase 2 referral and the CMA for adopting Sony’s complaints without the “appropriate level of critical review.”²⁰⁴ Microsoft argued that it is not credible that Sony is capable of being marginalized as a dominant market player, and that Sony’s submissions “vastly exaggerated the importance of [*COD*] to its continued viability” and were “self-serving.”²⁰⁵ Microsoft also reiterated to the press the same statement that Kotick made in his September 1, 2022 letter to Activision employees, conceding the Microsoft Defendants have also always known the Merger would not close until 2023. Microsoft told *Game Developer*, “We’re still on track for [the Merger] to close in fiscal year 2023 as initially anticipated[.]”²⁰⁶

275. On October 12, 2022, the CMA responded by making public on the CMA’s website its entire 76-page Phase 1 Decision. The CMA had previously only made public on its website its 8-page summary.

²⁰⁴ See *ME/6983/22 – Microsoft/Activision Blizzard, Microsoft’s Response to the CMA’s Reference Decision* (Oct. 11, 2022) (“Microsoft Submission”); see *id.* at ¶ 1.3(b).

²⁰⁵ *Id.* at ¶¶ 1.3(d), 3.16.

²⁰⁶ Chris Kerr, *UK Regulator Says Activision Blizzard Deal Could Give Microsoft “Unparalleled Advantage” In Key Markets*, *GAME DEVELOPER* (Oct. 12, 2022), <https://www.gamedeveloper.com/business/uk-regulator-says-activision-blizzard-deal-could-give-microsoft-unparalleled-advantage-in-key-markets>.

276. On October 14, 2022, the CMA published an “Issues statement” laying out the issues the CMA will investigate in Phase 2, including the areas raised in the Phase 1 Decision and any other issues that may be identified.²⁰⁷ The CMA “invite[d] the Parties and third parties to notify [the CMA] if there are any additional relevant issues which they believe [the CMA] should consider.”²⁰⁸

277. On October 20, 2022, the CMA identified on its website the individuals from the CMA who are conducting the Phase 2 inquiry and contact information for the public to submit evidence and perspectives on the Merger to the CMA.²⁰⁹ The CMA was not backing down to Microsoft’s pressure.

278. On October 28, 2022, Sony submitted a 22-page paper to the CMA touting the CMA’s Phase 1 Decision, Decision to Refer and Issues Statement and rebutting Microsoft’s October 11 paper.²¹⁰ Sony offered more criticism about

²⁰⁷ See *Anticipated Acquisition by Microsoft Corporation of Activision Blizzard, Inc., Issues Statement*, CMA, ¶¶ 3, 5 (Oct. 14, 2022) https://assets.publishing.service.gov.uk/media/63494c7de90e0731a80088e7/Issues_Statement_-_Microsoft_Activision__final.pdf (“Issues Statement”).

²⁰⁸ *Id.* ¶ 5.

²⁰⁹ See *The CMA Investigation Into the Microsoft and Activision Blizzard Merger*, CMA (Oct. 20, 2022), <https://www.gov.uk/guidance/the-cma-investigation-into-the-microsoft-and-activision-blizzard-merger>.

²¹⁰ See *Microsoft/Activision Blizzard Sony Interactive Entertainment Observations on the CMA’s Issue Statement* (Oct. 28, 2022), https://assets.publishing.service.gov.uk/media/637cecede90e076b8043d8cd/Sony_Interactive_Entertainment.pdf.

Microsoft's then-offer to make Activision's games available on PlayStation until 2027: (1) it did not give Xbox and PlayStation equal treatment, (2) it did not include making *COD* available on Sony's multi-game subscription service PlayStation Plus and (3) the duration was "badly inadequate[.]"²¹¹ Sony emphasized: "no contractual provisions can ever provide proper protections against a foreclosure strategy[.]"²¹²

279. On October 31, 2022, Microsoft submitted a 111-page paper to the CMA criticizing the Issues Statement and Sony's positions.²¹³ Microsoft reiterated its then-offer to make Activision's games available to Sony.

2. The E.C. Launches an In-Depth Investigation that Will Not be Complete Until at Least April 11, 2023

280. Microsoft had a midnight deadline on October 31, 2022 to submit commitments to the E.C. to allay the E.C.'s concerns about the Merger. Microsoft did not submit any commitments.

281. On November 6, 2022, *The New York Post* reported that a rift was developing between Activision and Microsoft about how to respond to antitrust

²¹¹ *Id.* at ¶ 16.

²¹² *Id.*

²¹³ See *Anticipated Acquisition by Microsoft Corporation of Activision Blizzard, Inc. Microsoft's Response to the CMA's Issues Statement* (Oct. 31, 2022), https://assets.publishing.service.gov.uk/media/637cec9dd3bf7f5a0b33f881/MICR_OSOF_T_S_RESPONSE.pdf.

regulators. Activision was “worried” Microsoft’s stance “could effectively blow up the deal,” and “prefer[r]ed that Microsoft take a more accommodating stance with regulators now[.]”²¹⁴ Kotick and the Director Defendants’ incentives to close the Merger, however, are not the same as Microsoft’s. While Kotick wants to use the Merger to get his payday, and Kotick and the Director Defendants want to use the Merger to insulate themselves from the fallout of the Harassment Scandal, Microsoft wants to use the Merger to become the leader in the gaming industry. Thus, Microsoft is unlikely to make the antitrust concessions that Kotick and the Director Defendants may want it to. As analysts have noted, “the option of keeping Activision on games exclusively on Xbox is a large part of the deal’s appeal for Microsoft While making public assurances is one thing, being legally bound to abandon exclusives [altogether] could be a dealbreaker[.]”²¹⁵ Wedbush Securities observed, “[i]f giving up exclusivity is one of the required concessions, Microsoft is going to have to think long and hard if this is still the right deal . . . Microsoft isn’t buying this asset so other companies can use Activision games to the same

²¹⁴ Lydia Moynihan and Theo Wayt, *Activision Insiders Fret \$69B Microsoft Merger Could Fall Apart: Sources*, N.Y. POST (Nov. 6, 2022), <https://nypost.com/2022/11/06/activision-insiders-fret-69b-microsoft-merger-could-crumble/>.

²¹⁵ *Id.*

extent[.]”²¹⁶ MoffettNathanson said, “Microsoft can’t be forced to accept draconian conditions.”²¹⁷ Indeed, as Spencer told the press on November 15, “[t]his idea that we are going to write a contract that [provides antitrust concessions] ‘forever’ doesn’t make sense . . . there’s going to be a time horizon.”²¹⁸ Thus, Microsoft’s ten year condition is as far as it will go.

282. On November 8, 2022, the E.C. announced it was opening an “in-depth” Phase 2 investigation of the Merger.²¹⁹ The E.C. expressed the same concerns about the Merger as the CMA: Microsoft has the ability and incentive to (1) foreclose access to, or degrade the terms and conditions of access to, Activision’s console and PC video games, especially *COD*; and (2) discourage users to buy non-Windows PC operating systems by combining Activision’s games with Windows’ cloud game streaming.²²⁰ The E.C. stated it had a March 23, 2023 deadline to complete its

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Nilay Patel, *Phil Spencer Really Wants You to Know that Native Call of Duty Will Stay on PlayStation*, THE VERGE (Nov. 15, 2022), <https://www.theverge.com/23459189/phil-spencer-microsoft-activision-call-of-duty-xbox-playstation-candy-crush-apple-fortnite-vr>.

²¹⁹ *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.

²²⁰ *Id.*

investigation and make a decision on the Merger, but has since extended the deadline to April 11, 2023.

283. Kotick issued a November 8, 2022 statement to employees styled as an Activision press release responding to the E.C.'s announcement. Kotick reiterated that Defendants always expected protracted regulatory scrutiny. Kotick wrote: As we said when we announced our merger, this is a long process," and "the process is moving along as we expected."²²¹ Kotick also wrote:

We have been working closely with Microsoft to actively engage regulators in other key countries to answer their questions and provide them with information to assist with their [regulatory] review. People from across our business units and functions have been involved in this regulatory work, and I want to thank each of you for your tireless work and commitment to completing this merger, which we continue to expect to close in Microsoft's current fiscal year ending June 2023.²²²

Thus, Kotick led Activision management from disarray because of the Harassment Scandal into regulatory distraction. Importantly, Kotick reiterated that Defendants still expected the Merger to close by June 30, 2023.

²²¹ *A Letter from CEO Bobby Kotick Regarding Activision Blizzard's Merger With Microsoft*, ACTIVISION BLIZZARD (Nov. 8, 2022), <https://investor.activisionblizzard.com/news-releases/news-release-details/letter-ceo-bobby-kotick-regarding-activision-blizzards-merger-1>.

²²² *Id.*

284. Microsoft also responded to the E.C.’s November 8, 2022 announcement. Its unnamed spokesperson told the press: as “we’ve said[,] we are committed to making the same game available on the same day on both Xbox and PlayStation.”²²³

285. By November 23, 2022, it was widely reported the Merger was also likely to face challenges by the FTC. Making clear Activision would fight an antitrust challenge, Meservey, acting as Activision’s Chief Communications Officer, wrote on Twitter that day: “Seeing a lot of speculation about Microsoft’s acquisition of Activision Blizzard . . . We’re committed to work cooperatively with regulators around the globe to allow the transaction to proceed, but won’t hesitate to fight to defend the transaction if that’s what needed.”²²⁴

286. On December 6, 2022, Microsoft reported that it had offered more behavioral concessions in an attempt to appease Merger opposition. Spencer wrote on Twitter that: “Microsoft has entered into a 10-year commitment to bring Call of Duty to @Nintendo following the merger of Microsoft and Activision Blizzard

²²³ Foo Yun Chee, *Microsoft’s \$69 Billion Activision Bid Faces EU Antitrust Probe*, REUTERS (Nov. 8, 2022), <https://www.reuters.com/markets/deals/eu-antitrust-regulators-probe-microsofts-69-bln-activision-bid-2022-11-08/>.

²²⁴ Lulu Cheng Meservey (@lulumeservey), TWITTER (Nov. 23, 2022, 8:41 p.m.), <https://twitter.com/lulumeservey> (“@lulumeservey”).

King,” and “has committed to continue to offer Call of Duty on @Steam simultaneously to Xbox after we have closed the merger with Activision Blizzard King.”²²⁵ Microsoft’s President and Vice Chairman Smith Tweeted: “Any day @Sony wants to sit down and talk, we’ll be happy to hammer out a 10-year deal for PlayStation as well.”²²⁶ Thus, Microsoft had only expanded its *COD* offer from 3-years to 10-years, and was telling Sony to take it or leave it.

3. The FTC Files Its Suit Confirming the Severity of the Antitrust Risk, Followed by Antitrust Challenges From Gamers, Google and Nvidia and the E.C.’s Forthcoming Statement of Objections

287. Microsoft was scheduled to meet with the FTC on December 7, 2022. The FTC had already deposed Spencer and Kotick, but Microsoft wanted to make its final case before the FTC made its decision. Before the meeting, Microsoft proposed to the FTC that Microsoft sign a legally binding consent decree to make *COD* available to Microsoft’s rivals, including Sony, for 10 years.

288. On December 8, 2022, the FTC rejected Microsoft’s proposal by filing its Suit challenging the Merger. The allegations and claims in the FTC’s 124-paragraph complaint mirror the CMA and E.C.’s findings. The FTC’s complaint

²²⁵ Phil Spencer, (@XboxP3), TWITTER (Dec. 6, 2022, 11:12 p.m.), <https://twitter.com/XboxP3>.

²²⁶ Brad Smith, (@BradSmi), TWITTER (Dec. 6, 2022, 11:29 p.m.), <https://twitter.com/BradSmi> (“@BradSmi”).

alleges that Microsoft has the incentive, and post-Merger will have the ability and increased incentive, to withhold or degrade Activision’s content that is available to competitors to “substantially lessen competition” in the markets of “High-Performance Consoles, Multi-Game Content Library Subscription Services, and Cloud Gaming Subscription Services.”²²⁷ The FTC also alleged that Microsoft has a pattern of disavowing its promises not to foreclose access to the content it acquires.²²⁸

289. The detailed FTC Complaint confirms that well-known facts concerning Microsoft and Activision would raise anti-trust concerns that should have caused a properly motivated Activision CEO and Board to refrain from entering into the Merger Agreement in the first place. By allowing the Merger Agreement to remain in effect beyond the Drop-Dead Date despite the FTC Suit, the Activision Board has compounded its fiduciary breach.

²²⁷ See, e.g., FTC Complaint ¶¶ 1, 10, 13, 21, 62, 109, 116.

²²⁸ *Id.* at ¶¶ 113-15. After the FTC filed its complaint, the director of its Bureau of Competition, Holly Vedova, commented: “Microsoft has already shown that it can and will withhold content from its gaming rivals.” Karen Weise & David McCabe, *F.T.C. Sues to Block Microsoft’s \$69 Billion Acquisition of Activision*, N.Y. TIMES (Dec. 8, 2022), <https://www.nytimes.com/2022/12/08/technology/ftc-microsoft-activision.html>.

290. The FTC Suit also increases the likelihood that the CMA, E.C. and/or other regulators will also challenge the Merger.

291. On December 8, 2022, both before and after the FTC filed the FTC Suit lawsuit, Activision made clear it would fight a challenge from the FTC. Before the FTC Suit was filed, Activision published an email that Jeb Boatman (“Boatman”), Activision’s SVP of Litigation, Regulatory and Public Policy Law, sent to Activision’s employees outlining Activision’s position on the Merger. Boatman wrote: “I have [] seen speculation in the press that, in the U.S., the Federal Trade Commission is considering whether to file a lawsuit to try to block our merger . . . we’re prepared to fight to defend this merger.”²²⁹ Then, after news of the FTC Suit broke at approximately 2:00 p.m. Eastern Time, Meservey went on Twitter and wrote: “[w]e look forward to proving our case in court and closing our deal with Microsoft[.]”²³⁰ By 2:51 p.m., Kotick sent a letter to employees that Activision issued as a press release. Kotick wrote: “[t]he allegation that this deal is anti-competitive doesn’t align with the facts, *and we believe we’ll win this challenge.*”²³¹

²²⁹ Jeb Boatman, *Update on the Activision Blizzard and Microsoft Merger*, ACTIVISION BLIZZARD (Dec. 8, 2022), <https://activisionblizzard.substack.com/p/update-on-the-activision-blizzard>.

²³⁰ @lulumeservey (Dec. 8, 2022, 2:30 p.m.).

²³¹ *A Letter from CEO Bobby Kotick Regarding Activision Blizzard’s Merger with Microsoft*, ACTIVISION BLIZZARD (Dec. 8, 2022),

Thus, Kotick decided Defendants would challenge the FTC Suit and attempt to push the Merger through.

292. Microsoft also responded to the FTC Suit quickly. At 2:47 p.m. on December 8, 2022, Smith wrote on Twitter: “[w]e have been committed since Day One to addressing competition concerns, including by offering earlier this week proposed concessions to the FTC. While we believe in giving peace a chance, we have complete confidence in our case and welcome the opportunity to present it in court.”²³² While Microsoft has offered only a ten year commitment on *COD*, antitrust regulators in the U.S. and other countries see such measures as insufficient unless part of the business is spun off.²³³

293. On December 9 and December 12, 2022, seven attorneys from Wilkinson Stekloff LLP, and two attorneys from Weil Gotshal & Manges LLP, respectively entered their appearance in the FTC Suit on behalf of Microsoft.

294. On December 13, 2022, at Microsoft’s December 13, 2022 annual shareholders meeting, Smith reiterated his position that Microsoft would fight the

<https://investor.activision.com/news-releases/news-release-details/letter-ceo-bobby-kotick-regarding-activision-blizzards-merger-1>.

²³² @BradSmi (Dec. 8, 2022).

²³³ David McCabe & Karen Weise, “*Can Big Tech Get Bigger? Microsoft Presses Government to Say Yes*,” N.Y. TIMES (Nov. 21, 2022), <https://www.nytimes.com/2022/11/21/technology/microsoft-activision-deal.html>.

FTC Suit. Smith told Microsoft stockholders: “[w]e will have to present this case to a judge in court because this is a case in which I have a great confidence.”²³⁴

295. On December 14, 2022, four attorneys from Skadden, Arps, Slate, Meagher & Flom LLP entered their appearance in the FTC Suit on behalf of Activision.

296. Activision’s senior officers recognized that the FTC Suit meant the Merger would not close in June 2023. On December 13, 2022, five days after the filing of the FTC Suit, Activision’s President and COO Alegre notified the Company he plans to leave when his employment agreement expires on March 31, 2023.

297. 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 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 reflect

²³⁴ 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&yptr=yahoo> (“*Microsoft Prepares to go to Battle*”).

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. Of course, the Activision stockholders were not granted any compensation for the delay in the Merger, such as resumed dividends, interest or increased consideration.

298. By December 20, 2022, the FTC Suit had spawned a private antitrust lawsuit, and may spawn more. That day, ten video game consumers filed a lawsuit in district court in the Northern District of California challenging the Merger (the "Gamers' Federal Antitrust Suit").²³⁵ The plaintiffs seek, among other things, a declaration the Merger is unlawful, and a preliminary and permanent injunction against the Merger's consummation. The plaintiffs' complaint reiterates many of the allegations in the FTC Complaint.

299. On December 21, 2022—the same day Activision disclosed the Compensation Committee's approval of Merger-related benefits for Zerza, Bulatao and Dixon—Kotick publicly stated: "[t]here is no sensible, legitimate reason for our transaction to be prevented from closing We believe we will prevail on the merits of the case."²³⁶

²³⁵ See *Demartini et al. v. Microsoft Corp.*, No. 3:22-cv-08991 (N.D. Cal. Dec. 20, 2022).

²³⁶ Karen Weise & David McCabe, *Microsoft Gambles on 'Nice Guy' Strategy to Close Activision Megadeal*, N.Y. TIMES (Dec. 22, 2022),
175

300. On December 22, 2022, each of Activision and Microsoft filed their respective Initial Answer to the FTC Complaint.²³⁷ In its 6-page introduction, Activision chastised the FTC for its decision to file the FTC Suit, arguing the FTC (i) should have accepted Microsoft’s proposed 10-year concession, which according to Activision “provide[s] complete protection against [the FTC’s] alleged theories of harm,”²³⁸ and (ii) was re-writing antitrust law and ignoring precedent. Activision attacked the FTC in strident terms.²³⁹ In its 7-page introduction, Microsoft largely explained its rationale for the Merger. In each of their Initial Answers, Activision and Microsoft raised the identical 23 affirmative and other defenses, including that the FTC Complaint fails to state a claim for relief.²⁴⁰ Activision and Microsoft listed

<https://www.nytimes.com/2022/12/22/technology/microsoft-activision-strategy.html>.

²³⁷ Each Initial Answer was identical to the Answer, except for six affirmative defenses that the FTC proceedings are unconstitutional, which Activision and Microsoft withdrew in their respective Answers.

²³⁸ Answer and Defenses of Respondent Activision Blizzard, Inc., *In the Matter of Microsoft Corp.*, No. 9412 (F.T.C. Dec. 22, 2022) (the “Activision Initial Answer”) at 3; *see also* Activision Answer at 3.

²³⁹ *See, e.g.*, Activision Initial Answer at 1-3 (“ideologically-fueled,” “no basis in reality,” “facially absurd,” “entirely nonsensical,” “wholly implausible,” “wildest supposition”); Activision Answer at 1-3.

²⁴⁰ FTC Suit, Activision Initial Answer, Affirmative and Other Defenses ¶¶ 1-23; Microsoft Initial Answer, Affirmative and Other Defenses ¶¶ 1-23.

their defenses in the same order, nearly verbatim. Thus, Activision and Microsoft have made clear their intention to fight the FTC Suit together.

301. On January 3, 2023, the FTC, Microsoft and Activision attended the first pre-trial hearing in the FTC Suit. The FTC reported at the pre-trial hearing that there are no settlement discussions and Microsoft said possible discussions with the FTC, if any, would not commence unless and until approval by the E.C. and CMA occurs.²⁴¹

302. Also on January 4, 2023, a Scheduling Order in the FTC Suit was entered for events leading up to the August 2, 2023 trial.²⁴²

303. On January 5, 2023, the CMA extended date for completing its Phase 2 investigation and issuing a final report to April 26, 2023. The CMA cited “the scope and complexity of the investigation and the need to consider a large volume of evidence,” including main party and third-party submissions and comments in response to the CMA’s provisional findings, as reasons for the extension.²⁴³

²⁴¹ Diane Bartz, *No ‘substantive’ settlement talks between U.S. FTC, Microsoft over Activision -lawyer*, REUTERS (Jan. 3, 2023), <https://www.reuters.com/markets/deals/no-substantive-settlement-talks-between-us-ftc-microsoft-over-activision-lawyer-2023-01-03/>

²⁴² See FTC Suit, Doc. No. 606582.

²⁴³ Martin Coleman, *Anticipated Acquisition by Microsoft Corporation of Activision Blizzard, Inc., Notice of extension of inquiry period under section 39(3) of the Enterprise Act, 2002*, CMA (Jan 5, 2023),

304. By January 12, 2023, Google and Nvidia had joined Sony in objecting to the Merger. Google competes with Microsoft in cloud-computing services and its Android mobile operating system is central to how millions of people play video games. Nvidia leads the market for graphic cards prized by gamers, and operates a streaming service called GeForce Now. *Bloomberg* reported on January 12 that Google and Nvidia have provided the FTC with information supporting the claim that the Merger will give Microsoft an unfair advantage in terms of mobile gaming, subscriptions and the cloud.²⁴⁴ In its remarks to the FTC, Nvidia stressed the need for “equal and open access to game titles.”²⁴⁵

305. On January 16, 2023, *Bloomberg* reported that the E.C. is readying a charge sheet known as a “statement of objections” setting out the E.C.’s concerns about the Merger, which will be sent to Microsoft in the coming weeks.²⁴⁶

https://assets.publishing.service.gov.uk/media/63b55087d3bf7f291f280c2f/MS_Activision_-_Notice_of_extension_Jan_2023.pdf.

²⁴⁴ See Leah Nylen, Dina Bass & Ian King, *Google, Nvidia Express Concerns on Microsoft-Activision Deal*, BLOOMBERG (Jan. 12, 2023), <https://www.bloomberg.com/news/articles/2023-01-12/google-nvidia-express-concerns-to-ftc-about-microsoft-s-activision-deal?leadSource=uverify%20wall>.

²⁴⁵ *Id.*

²⁴⁶ See Foo Yun Chee, *Microsoft faces EU antitrust warning over Activision deal – sources*, REUTERS (Jan. 16, 2023), <https://www.reuters.com/technology/microsoft-faces-eu-antitrust-warning-over-activision-deal-sources-2023-01-16/>.

306. On January 19, 2023, the court in the Gamers’ Federal Antitrust Suit denied Microsoft’s motion to stay that action pending the outcome of the FTC Suit.²⁴⁷ Based on Microsoft’s representation that the Merger would not close before March 31, 2023, the court rescheduled a hearing on plaintiffs’ motion to preliminarily enjoin the Merger for March 23, 2023.²⁴⁸ Thus, the January 19, 2023 order is an order issued by a court of competent jurisdiction that currently prevents the consummation of the Merger. The court’s January 19, 2023 order and the pendency of the plaintiffs’ preliminary injunction motion seeking an order enjoining the Merger means that a condition to closing the Merger under Section 7.1(d) has not been satisfied.

4. The Merger Will Not Close Until After the Termination Date, If Ever

307. The FTC has scheduled trial for its suit to begin on August 2, 2023, well after the July 18, 2023 final extended Drop-Dead Date under Section 8.01(c) of the Merger Agreement. The FTC’s initial decision will likely not be rendered for 7 to 12 months.²⁴⁹ The losing party can appeal the decision to the full commission,

²⁴⁷ *DeMartini*, No. 3:22-cv-08991-JSC, Dkt. No. 33 (N.D. Cal. Jan. 19, 2023) (Order Following January 19, 2023 Hearing).

²⁴⁸ *Id.*

²⁴⁹ See “*Microsoft Backs off June 30 as Target for Activision Deal Close*,” BLOOMBERG (Dec. 9, 2022), <https://news.bloomberglaw.com/mergers-and->

which will review the record anew and hear oral arguments. The loser on that appeal can *then* appeal the FTC’s decision to a federal appeals court.²⁵⁰ In sum, the FTC proceedings can last well over a year, if not years.

308. The FTC Suit means that all requisite antitrust clearances, consents and approvals that are conditions to the Merger under Sections 7.1(b) and (c) of the Merger Agreement will not be received prior to the July 18, 2023 Drop-Dead Date under Section 8.1(c) of that agreement. The FTC Suit is an action taken by a Governmental Authority of competent jurisdiction that seeks to prohibit, make illegal or enjoin the consummation of the Merger or impose what Microsoft considers a Burdensome Condition. Therefore, the condition to the closing of Merger under Section 7.1(d) cannot be satisfied.

309. Activision’s 10-Q for the quarter ended September 30, 2022, filed with the SEC on November 7, 2022, represented that the Merger was expected to close by June 30, 2023. In his letters to Activision employees on September 1 and November 8, 2022, Kotick stated that the regulatory processes were proceeding as expected and that the transaction was expected to close in June 2023. However,

acquisitions/microsoft-backs-off-june-30-as-target-for-activision-deal-close (“*Microsoft Backs Off*”).

²⁵⁰ See *Microsoft Prepares to Go to Battle*.

Kotick’s December 8, 2022 letter to employees, after the FTC Suit, did not say the regulatory process was proceeding as expected or that closing was expected to occur in June 2023.

310. Microsoft’s 10-Q for the quarter ended September 30, 2022 (pp. 18, 41) stated that Microsoft expected the Merger “to close in fiscal year 2023” (*i.e.*, by June 30, 2023), “subject to certain regulatory approvals and other customary closing conditions.” Following the filing of the FTC Suit, Microsoft declined to comment on the timing for closing the Merger.²⁵¹ However, at Microsoft’s December 13, 2022 annual meeting, its President and Vice Chairman Smith made it clear that Microsoft intends to go to trial in the FTC Suit, and outlined Microsoft’s arguments that the FTC is incorrect in asserting that the Merger will lessen competition. Then, Microsoft filed its Answer to the FTC Complaint, raising 23 defenses.

311. The FTC Suit also increases the likelihood that the CMA and/or E.C. do not approve the Merger. Microsoft admits the Merger cannot close without CMA and E.C. approval. While Defendants can appeal a CMA and E.C. decision opposing the Merger, an appeal will drag out long after the Drop-Dead Date. The U.K.’s Competition Appeal Tribunal (“CAT”) which would review the CMA’s decision,

²⁵¹ *See Microsoft Backs Off.*

has taken seven months to more than a year to issue a decision.²⁵² Defendants are also unlikely to be successful. To prevail, Defendants must show the CMA acted irrationally, illegally or with procedural impropriety, a high standard that has caused the CAT to sustain the CMA's decision in 67% of merger appeals since 2010. In the E.U., a General Court will review the E.C.'s decision, but in recent cases the court took over three years to issue a judgment.²⁵³ In addition, the standard of review is limited to errors of procedure and law.

312. Microsoft's Spencer has also already stated that Microsoft is not going to offer the concession that the FTC, CMA and E.C. might accept: an unrestricted

²⁵² For example, on May 21, 2021, the CAT upheld the CMA's April 9, 2020 decision blocking the proposed merger of Sabre and Farelogix. *See CMA Welcomes Tribunal Judgment in Sabre Case*, CMA (May 21, 2021), <https://www.gov.uk/government/news/cma-welcomes-tribunal-judgment-in-sabre-case>. On June 14, 2022, the CAT upheld the CMA's November 30, 2021 decision blocking the merger of Meta and Giphy. *See ANALYSIS: UK Court Agrees That CMA Can Squash Meta/Giphy Merger*, BLOOMBERG LAW (June 16, 2022), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-uk-court-agrees-that-cma-can-squash-meta-giphy-merger>.

²⁵³ For example, on May 18, 2022, the General Court issued its appellate decision on the E.C.'s February 5, 2019 order concerning the proposed merger of Werke AG and Aurubis Rolled Products. On June 22, 2022, the General Court rejected an appeal from the E.C.'s June 11, 2019 order blocking the proposed joint venture of Thyssenkrupp and Tata Steel. *See Jérémie Jourdan et al., Lessons from the EU General Court's Recent Rejections of Two Appeals of Merger Prohibitions (Wieland, Thyssenkrupp)*, WHITE & CASE (Sept. 19, 2022), <https://www.whitecase.com/insight-alert/lessons-eu-general-courts-recent-rejections-two-appeals-merger-prohibitions-wieland>.

commitment not to engage in any future foreclosure strategies. Activision and Microsoft have not identified the 9 other regulatory approvals they need (New Zealand and eight others) or revealed the status or timetables for those reviews.

IV. PLAINTIFF'S SECTION 220 INVESTIGATION

313. Plaintiff attempted to use Section 220 to investigate its claims 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 the merger: (a) the CDL and the disclosure schedules to the Merger Agreement, (b) the Parent Disclosure Letter, and (c) 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.

314. Plaintiff also demanded drafts of the Merger Agreement exchanged between Activision and Microsoft and Formal Board Materials²⁵⁴ 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.

315. Plaintiff filed a Section 220 complaint on March 24, 2022, after Activision ignored Plaintiff’s request to discuss the Refusal.²⁵⁵ Activision denied 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.

316. Between March 24 and April 6, 2022, Plaintiff negotiated the scope of a Books and Records production with Activision. Activision refused to produce the

²⁵⁴ 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).

²⁵⁵ See *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, C.A. No. 2022-0281-KSJM (Del. Ch.) (the “220 Action”).

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 60 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.²⁵⁶

317. 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 correspondence dated August 7, 2022, Activision agreed to (1) produce "any non-privileged drafts of the Merger Agreement . . . that were considered by the [Board]"; (2) 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

²⁵⁶ 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.

director or officer in connection with the Harassment Scandal; and (3) to “provide certain Indemnification Agreements[.]” However, with respect to Plaintiff’s repeated demand to inspect the CDL and disclosure schedules,²⁵⁷ 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.

318. On August 2, 2022, the Company produced additional Books and Records to Plaintiff. The production included a draft of the 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 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,

²⁵⁷ 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.

Activision did not produce any other indemnification agreements, including those referenced in Section 6.8 of the CDL.

V. CLASS ACTION ALLEGATIONS

319. Plaintiff brings this Action pursuant to Court of Chancery Rule 23, individually and on behalf of other 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 were injured as a result of Defendants’ wrongful actions.

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

321. The Class is so numerous that joinder of all members is impracticable. The Company has hundreds, if not thousands, of stockholders scattered throughout the United States. As of March 14, 2022, there were 780,922,900 shares of Activision stock outstanding.

322. 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 Sections 251(c) and (d), and whether the Merger, if it closes, will be valid;

- b. Whether the Merger is entirely fair to the Class and whether the Director Defendants breached their fiduciary duties to Plaintiff and the Class;
- c. Whether the Microsoft Defendants aided and abetted and conspired in the Director Defendants' breaches of fiduciary duties; and
- d. Whether Plaintiff and the Class are entitled to equitable relief, damages or other relief as a result of Defendants' wrongful conduct.

323. 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.

324. 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.

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

326. 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, Microsoft and the Director Defendants for Violations of Section 251 and for a Declaratory Judgment That the Requirements for a Valid Merger Under Section 251 Have Not Been Met

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

328. 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 acknowledge 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.

329. When the Director Defendants purportedly approved the Merger Agreement on January 17, 2022, they did not review or approve the entire agreement of merger, as required by Section 251(b). Instead, they approved a draft of the Merger Agreement, which did not contain terms and portions of the agreement of merger. In further violation of Section 251(b), they improperly delegated determination and approval of a critical financial term of the agreement of merger (*i.e.*, dividends) to Kotick and an *ad hoc* committee of Kotick cronies. 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 under Section 251(b). The Company did not submit for approval and the stockholders did not approve the entire agreement of merger at the Special Meeting, as required by Section 251(c). Instead, they approved the Merger Agreement, which omitted critical portions of the agreement of merger. Despite repeated requests, Defendants also failed to provide Plaintiff, as an Activision stockholder, with a copy of the full agreement of merger on request, as required by Section 251(c)(7).

Violation of Section 251(b)'s Requirement for Board Approval of the Agreement of Merger

330. 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 Board, however, only reviewed an incomplete January 17, 2022 draft merger agreement, which omitted the CDL, the disclosure schedules and Exhibit A. The Board did not otherwise review or approve the CDL or disclosure schedules.

331. The Company Disclosure Letter is referred to 45 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 Vendor"; "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.

332. 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.

333. Section 5.2 of the Merger Agreement precludes Activision from engaging in a wide range of corporate activities, including amending its Certificate or Bylaws. There are exceptions, “as set forth in Section 5.2 of the Company Disclosure Letter.” Of course, since Defendants have not provided Plaintiff or Activision’s other stockholders with the CDL or the disclosure schedules, the stockholders do not know the extent of Section 5.2’s prohibitions. Other portions of Section 5.2 are also affected by the withheld Company Disclosure Letter.²⁵⁸

334. While Section 5.2(a) of the Merger Agreement purports 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 provides that the bylaws may be altered, amended, changed, added to, repealed or rescinded, and new bylaws may be made by the stockholders. Depending on the exceptions contained in Section 5.2 of the CDL and disclosure schedules, Section 5.2(a) of the Merger Agreement may violate the stockholders’ rights to amend the Bylaws.

²⁵⁸ 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”).

335. 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.

336. The Board did not review, approve and adopt the Company Disclosure Letter, the disclosure schedules and Annex A. Therefore, the Board did not adopt the agreement of merger as 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). The Merger violates Section 251(b) and is invalid. Furthermore, the agreement of merger was not executed and acknowledged as required by Section 251(b) because the Merger Agreement was not a properly board approved agreement of merger that was executed on January 18, 2022.

Improper Delegation in Violation of Section 251(b)

337. 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]

[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.

338. On January 17, 2022, the Board purportedly delegated the negotiation, determination and approval of the dividend term to Kotick and an *ad hoc* committee of his cohorts (Kelly, Morgado and Corti). The Proxy at page 42 and the April 15, 2022 Form 8-K and Schedule 14A (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 the *ad hoc* committee, not the Board, approved the dividend term of the Merger Agreement. However, 8 *Del. C.* § 141(c)(1) controls what tasks the Board can delegate to a committee.

339. 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

²⁵⁹ Activision_0000606 at 607.

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.

340. 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 mode of carrying it into effect.” The restriction on dividends is a term of the Merger. It is a covenant of the Company, the satisfaction of which is a condition to the Merger under Section 7.2(b) of the Merger Agreement. It is 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.

341. 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 and only paid a \$0.47 dividend per share in the

first quarter of 2022, but cannot pay the annual dividend for 2023 and will not be able to pay any further dividends before the Merger closes. The value of the purported \$95 Merger is reduced by the missed dividends and what could have been earned on that money.

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

342. 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 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 Annex A which are part of the agreement of merger. Therefore, stockholders did not approve a Section 251(b) agreement of merger, as Section 251(c) requires. Therefore, there was no valid authorization of the agreement of merger by the stockholders. The Merger, if consummated, will be invalid.

Violation of Section 251(c)(7)

343. Under Section 251(c)(7) all of the terms of agreement of merger must be available to the stockholders. The Proxy repeatedly represented that the Merger would be effected through filing a certificate of merger with the Delaware Secretary of State. While that procedure may permit private corporations to avoid public disclosure of certain confidential merger terms, the stockholders are entitled to have the entire agreement of merger submitted to them and to see all terms of the agreement of merger.

344. Activision and the Director Defendants violated Section 251(c)(7). That section requires the corporation, upon request by a stockholder, to provide a complete copy of the entire agreement of merger. Plaintiff's 220 Demand requested the portions of the agreement of merger which were not provided with the Proxy, specifically, the CDL and disclosures schedules, so that Plaintiff would have the entire agreement of merger. Plaintiff repeated its request several times. The repeated requests were refused. A year after the Merger Agreement was signed, Activision and the Defendants still refuse to provide the stockholders with the complete agreement of merger. The information omitted from the Merger Agreement, including the disclosure schedules concerning regulatory review and indemnification, was material to the stockholders' decision on how to vote on the

Merger Agreement and whether to seek appraisal. It remains material to the stockholders' consideration of whether to sell their stock into the market rather than awaiting when, if ever, the Merger will close. Therefore, the Company and its Board violated Section 251(c)(7) by refusing to provide Plaintiff with a copy of the Section 251(b) agreement of merger.

Violation of Section 251(d)

345. Subsections (b)-(d) of Section 7.1 of the Merger Agreement provide that the obligations of Microsoft and Activision to consummate the Merger are subject to conditions that:

(b) . . . all requisite clearances, consents and approvals pursuant [to all applicable antitrust laws set forth in Section 7.1(b) of the Company Disclosure Letter] will have been obtained in each case, without the imposition, individually or in the aggregate, of a Burdensome Condition.

(c) . . . all requisite clearances, consents, and approvals pursuant to [Laws applicable to the Merger set forth in Section 7.1(c) of the Company Disclosure Letter] will have been obtained in each case, without the imposition, individually or in the aggregate, of a Burdensome Condition.

(d) . . . nor will any action have been taken by any Governmental Authority of competent jurisdiction . . . that . . . (i) (. . . seeks to prohibit make illegal or enjoin) the

consummation of the Merger or (ii) imposes or seeks to impose a Burdensome Condition.²⁶⁰

346. Section 8.1(c) of the Merger Agreement provides that the Merger Agreement may be validly terminated:

(c) by either Parent or the Company if the Effective Time has not occurred by 11:59 p.m., Pacific time, on January 18, 2023 (such time and date, the “**Initial Termination Date**”, and the Initial Termination Date, as it may be extended pursuant to this Section 8.1(c), the “**Termination Date**”), except that (i) if as of the Initial Termination Date all conditions to this Agreement are satisfied (other than those conditions that by their terms are to be satisfied at the Closing, each of which is capable of being satisfied at the Closing) or waived (where permissible pursuant to applicable Law), other than the conditions sets forth in Section 7.1(b), Section 7.1(c) or Section 7.1(d) (solely in connection with an Antitrust Law or Foreign Investment Law), then the Termination Date shall automatically be extended to 11:59 p.m., Pacific time, on April 18, 2023, and (ii) if as of 11:59 p.m., Pacific time, on April 18, 2023, all conditions to this Agreement are satisfied (other than those conditions that by their terms are to be satisfied at the Closing, each of which is capable of being satisfied at the Closing) or waived (where permissible pursuant to applicable Law), other than the conditions set forth in Section 7.1(b), Section 7.1(c) or Section 7.1(d) (solely in connection with an Antitrust Law or Foreign Investment Law), then the Termination Date shall automatically be extended to 11:59 p.m., Pacific time, on July 18, 2023, unless, in the case of each of clauses (i) and (ii), Parent and the Company mutually

²⁶⁰ Because Defendants have refused, and continue to refuse, to disclose the Company Disclosure Letter, the precise laws and regulators cannot be identified.

agree prior to such time in writing that the Termination Date will not be so extended. . .

347. Section 8.1(c) provides for two automatic extensions of the Termination Date until July 18, 2023 if the antitrust conditions of Sections 7.1(b), (c) or (d) have not been satisfied. It does not authorize further extensions beyond July 18, 2023. The Section permits Microsoft and Activision to agree that the Termination Date will not be automatically extended, but does not authorize them to agree that the Termination Date will be extended beyond July 18, 2023.

348. The Proxy confirms that the Merger Agreement does not authorize Microsoft and Activision to extend or waive the Drop-Dead Date. On pages 12 and 91, it describes the Termination Date as January 18, 2023 with two automatic extensions (April 18, 2023 and July 18, 2023) if antitrust clearance has not been received, without any mention of possible further extensions. At pages 40-41 it describes the “outside termination date” as 12 months from the signing of the Merger Agreement plus the two 3 month extensions. The Proxy discusses that the amount of Microsoft’s termination fee for “failure to obtain necessary antitrust approvals by the outside termination date” is tied to the extension of the outside termination date: \$2 billion if before the initial 12 month termination date (January 18, 2023); \$2.5 billion if during the first three month extension until April 18, 2023; and \$3 billion

during the second three month extension until July 18, 2023.²⁶¹ The termination fees are triggered by the failure to consummate the Merger “by the termination date.”²⁶² The Proxy does not mention any further extension or further increase in the termination fee beyond July 18, 2023.

349. Section 251(d) of the DGCL permits the board of directors to amend a merger agreement after stockholder approval only if the amendment does not alter the amount or kind of consideration or “alter or change any of the terms or conditions of the agreement if such alteration or change would adversely affect the holders of any class . . . of such constituent corporation.” Under Section 251(d) no adverse alteration or change of the terms or conditions of the Merger Agreement is permitted if it would have an adverse effect on stockholders who have already voted on the Merger Agreement. Similarly, under Section 251(d), any extension or waiver of the Drop-Dead Date condition without stockholder approval is not allowed under applicable law. The purpose of Section 251(d) is to prohibit amendment of basic terms of the merger agreement without stockholder approval because any change in a basic term should always be approved by the stockholders.

²⁶¹ Proxy at 40-41, 93.

²⁶² *Id.* at 92-93.

350. Section 8.4 of the Merger Agreement permits the parties to amend the agreement “except that in the event that the Company has received the Requisite Stockholder Approval, no amendment may be made to this Agreement that requires the approval of the Company Stockholders pursuant to the DGCL without such approval.”

351. Article VIII is a basic term of the Merger Agreement which defines the period during which the agreement remains in effect. Particularly where the agreement already remains effective for up to 18 months (to a time when the purported stockholder approval of the Merger Agreement will be nearly 15 months old), it is important to stockholders that the restrictions on the Company and their shares under the Merger Agreement not remain enforceable for a further significant period.

352. The Proxy describes Section 8.4 as follows:

Amendment

Subject to applicable law, the merger agreement may be amended in writing by the parties at any time prior to closing of the merger, whether before or after adoption of the merger agreement by stockholders. However, after adoption of the merger agreement by stockholders, no amendment that requires further approval by such stockholders pursuant to the DGCL may be made without such approval.²⁶³

Thus, the Proxy referred to Section 251(d) but failed to describe what amendments require “further approval by such stockholders pursuant to the DGCL.”

353. Article V of the Merger Agreement places numerous restrictions on the operations of Activision while the Merger Agreement remains in effect. Section 5.1 requires preserving intact Activision’s material assets and keeping available the services of its current officers, including Kotick. Section 5.2 contains 21 forbearance covenants. These covenants not only restrict Activision but impinge on fundamental stockholder rights, including the right to vote to amend the certificate or bylaws, the right to receive dividends, the right to have shares repurchased by Activision and the right to consider and vote upon mergers and sales of assets. Activision’s 2021 10-K (p. 55) acknowledges that dividends and stock repurchases

²⁶³ Proxy at 94.

enhance stockholder value. The extension of the Merger Agreement beyond the Drop-Dead Date will prevent the payment of dividends—plainly an adverse effect. Section 5.3 restricts the ability of stockholders to receive proposals to buy their shares and obligates the Activision Board to continue recommending the Merger.

354. The 2021 10-K (p. 14) identifies the Merger, the pendency of the Merger Agreement and failure to complete the Merger as the first of the principal material risks associated with an investment in the Company. It acknowledges the risks the pendency of the Merger creates, including the interim covenants of the Merger Agreement and the disruption of Activision’s business and diversion of management’s attention.²⁶⁴ Since the signing of the Merger Agreement, Activision’s 10-Qs have acknowledged that delay in completion of the Merger may adversely affect Activision’s stock price, business, business relationships and operating results.

355. Section 9.6 of the Merger Agreement provides that the stockholders have no rights or remedies under the Merger Agreement except “from and after the Effective Time, the rights of the holders of shares of Company Common Stock ... to receive the Merger Consideration set forth in Article II.” Thus, if the Drop-Dead Date is pushed back, the stockholders will be adversely affected because they will

²⁶⁴ *Id.* at 15-16.

continue to be restricted by the terms of the Merger Agreement but will have no current rights under that agreement.

356. The value of the one contingent right the Activision stockholders do have under the Merger Agreement (*i.e.*, the right to receive the Merger Consideration after the Effective Time) will be adversely diluted and impaired because the Effective Time (if it ever comes) will be substantially delayed so the Merger Consideration (if it is ever paid) will be worth significantly less. The value of the \$95 Merger price will have already been significantly reduced by the 18 month delay written into the Merger Agreement. A further delay will adversely affect the Activision stockholders by inflicting a further significant reduction in the value of the Merger consideration.

357. Activision and Microsoft have affirmed that they will continue to pursue the Merger after the Drop-Dead Date without any vote of, or compensation to, the Activision stockholders. Because Activision's 2023 annual meeting will occur in the spring of 2023, well before the Drop-Dead Date, Activision could easily submit an extension of the Merger Agreement (including any related modifications such as reinstatement of dividends and interest on the Merger consideration) to a vote of the stockholders. However, the public statements of Microsoft and

Activision demonstrate that they do not intend to comply with Section 251(d), just as they have failed to correct their noncompliance with Sections 251(b) and (c).

358. Plaintiff seeks a declaratory judgment that the approval of the Merger Agreement by the Board and the stockholders did not comply with Section 251, rendering the Merger invalid and an unlawful conversion of stockholders' shares. Plaintiff also seeks a declaratory judgment that amendment of the Merger Agreement to push back the Drop-Dead Date is not permissible under 8 *Del. C.* § 251(d) without a vote and approval by the Activision common stockholders, and that any extension or waiver of the Drop-Dead Date will render the Merger invalid and an unlawful conversion of stockholders' shares.

COUNT II

Individual and Class Claims for Breaches of Fiduciary Duty and Lack of Entire Fairness Against Kotick and the Director Defendants²⁶⁵

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

²⁶⁵ The Director Defendants against whom Count II is brought are Kotick, Kelly, Morgado, Corti, Hartong, Wasserman, Nolan, Ostroff, Meyer and Bowers.

A. The Activision Board Was Not Disinterested and Independent When It Approved an Incomplete Version of the Agreement of Merger

360. The Director Defendants, as Activision directors, and Kotick, as an Activision director and officer, owe the Company's public stockholders the 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.

361. 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 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.

362. The Merger Agreement Kotick ultimately negotiated with Microsoft was structured to further his self-interest. The Merger Agreement protects his tenuous position as CEO and allows him to remain in office. Section 5.1(iii)(B) of the Merger Agreement requires Activision to “keep available the services of its current officers and key employees” and Section 5.2(g) prohibits termination of the CEO. Section 2.2(b) provides that Activision's officers before the Merger will be the officers of Activision after the Merger. The broad indemnification, exculpation, advancement and insurance provisions of Sections 6.8(a)-(b) provide Kotick and the other Director Defendants with materially greater protections, including in connection with claims arising out of the Merger and Harassment Scandal.

363. Microsoft also agreed that the Board could extend Kotick's Employment Agreement for 12-months as of July 18, 2022, and restore his compensation pursuant to terms that violate the October Pay Cut Agreement.

364. 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, which would 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. They claim to have ignored the elephant in the room. The other Director Defendants failed to control the process, allowed Kotick to choose the Board's advisors, including Allen & Co., and let Kotick negotiate the Merger.

365. 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. The other Director Defendants also obtained for themselves through the Merger Agreement materially greater rights, indemnification, advancement, exculpation and insurance.

366. The Director Defendants, including Kotick, knew that the Merger would extinguish existing derivative claims against them, including those arising out of the Harassment Scandal. Indeed, they claim to have considered the derivative

claims as a reason for them agreeing to the \$95 per share Merger.²⁶⁶ So, by their own admission, part of the \$95 Merger consideration is payment for extinguishing derivative claims against them.

367. Because the Merger was not approved by a disinterested and independent majority of the Board, the entire fairness standard applies.

B. The Initiation, Timing, and Purpose of the Merger Were Unfair

368. 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.

369. 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

²⁶⁶ Proxy at 44.

departures due to the Harassment Scandal). Activision's stock price had been in free fall for months because of these factors.

370. 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.

C. The Negotiation of the Merger Was Not Fair Dealing

371. The negotiation of the Merger did not satisfy fair dealing. Kotick began negotiating without Board authorization, then involved Kelly and then 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.

372. 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.

D. The Director Approval Did Not Satisfy Fair Dealing

373. 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.

374. 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. The continued failure of the Activision Board to cure its failures to comply with Section 251, even after Plaintiff's Verified Class Action Complaint pointed out the defects, is a deliberate breach of their duty of loyalty, intentional misconduct and a knowing violation of law. The Board is also deliberately violating law by extending or waiving the Drop-Dead Date without complying with Section 251(d).

375. The descriptions of the various Board meetings show that the approval of the Board was also uninformed and 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 determination of a key financial term (*i.e.*, the payment of dividends) up to Kotick and an *ad hoc* committee of cronies.

E. The Stockholder Vote Was Rushed, Coerced, Uninformed and Invalid

376. 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 an incomplete agreement of merger that did not comply with Section 251. The failure to provide or describe the Company Disclosure Letter deprived the stockholders of material information. For example, the number of antitrust approvals required (apparently 16) and the identity of the countries was material to the stockholders' evaluation of the antitrust risk. As of January 2023, only four countries (Saudi Arabia, Brazil, Chile and Serbia) have given antitrust clearance. 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.

377. The stockholder vote on the Merger does not reflect an endorsement of the Merger's merits. Rather, it reflects the votes of Kotick allies such as Buffett and the preference of some stockholders when they were forced to choose between two bad options: (1) Kotick continuing to run the Company as CEO, or (2) selling their stock to Microsoft for an unfair price at some unknown date as long as 18-months after the Merger Agreement was approved. The Board forced Activision's stockholders into a hasty Hobson's choice between a no-premium sale and an unattractive status quo.

378. 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 20 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."

379. 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.

380. The prematurity of the stockholder vote has been confirmed by subsequent events. As Defendants expected, the regulatory process has been lengthy. The FTC Suit underscores the extreme antitrust risk and establishes that the Merger is unlikely to close, if at all, by the July 18, 2023 Drop-Dead Date. The E.C. and CMA reviews have proceeded to a second phase. It is reasonably conceivable that the stockholders' view of the Merger Agreement might be very different had the stockholder vote been delayed until more information concerning regulatory review was known. Activision could well have held the vote in the spring of 2023, rather than the spring of 2022.

381. 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—about a

year or more before the Merger may possibly close.²⁶⁷ A stockholder demanding appraisal would have to have held the shares on the date of demand and continue to hold those shares until the effective time of the Merger, which will be about a year or more after the vote.²⁶⁸ 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 2023 were known. Thus, in deciding before the Merger vote whether to demand appraisal, stockholders would have to speculate concerning what Activision might be worth a year or more later. The rushed vote effectively deprived the stockholders of a fair opportunity to decide whether to seek appraisal.

382. The voting results from the Special Meeting reflect 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 (presumably including Berkshire's 64 million shares) voted "For" the Merger (68.2%), while the remaining 31.2% voted against, directly or by abstaining or

²⁶⁷ Proxy at 8, 102.

²⁶⁸ *Id.*

declining to vote. Only 357,220,104 shares voted “For” the Merger-related compensation proposal (again, likely including Berkshire’s 64 million shares). The majority of Activision’s stockholders did not approve Kotick’s compensation.

F. The Proxy was Materially Misleading and Incomplete

383. The stockholder vote on the Merger does 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.

1. Misleading Partial Disclosure Concerning the Merger Negotiations and the Role of the Harassment Scandal

384. The Proxy contains a misleading and incomplete summary of the Merger negotiations and conceals the role of the Harassment Scandal in those negotiations. The November 19, 2021 call between Kotick and Microsoft occurred (1) one day after Microsoft said it was reviewing its relationship with Activision because of the Harassment Scandal, (2) three days after *Kotick Knew*’s publication, and (3) when investors and employees were calling for Kotick’s resignation and termination because of the Harassment Scandal. 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.

385. The eleven page “Background of the Merger” section of the Proxy does not mention the Harassment Scandal.²⁶⁹ Indeed, it misleadingly suggests that the Microsoft merger discussions resulted from regular review of strategic options and routine discussions with Microsoft about the gaming industry.²⁷⁰ The Proxy states 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.”²⁷¹ 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 disclosed to the Activision stockholders.²⁷² The Proxy references that Activision and Microsoft have certain licensing arrangements and a business relationship of Activision games being carried on Microsoft’s XBox platform. However, it does

²⁶⁹ *Id.* at 32-42.

²⁷⁰ *Id.* at 32.

²⁷¹ *Id.*

²⁷² 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.

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.

386. The remainder of the Proxy also avoids 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.²⁷³ The Proxy creates the misleading impression that the merger discussions were completely divorced from the Harassment Scandal.

387. The Proxy lists 24 reasons for the Board's approval and recommendation of the Merger Agreement and 13 potential negative factors without mentioning the Harassment Scandal.²⁷⁴

²⁷³ 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 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”).

²⁷⁴ *Id.* at 43-48.

388. The Proxy also does not disclose that key Activision officers had resigned or been terminated because of their misconduct in connection with the Harassment Scandal or whether they were given indemnification agreements. In fact, the Merger Agreement, which is attached to the Proxy as Annex A appears to indicate (misleadingly) that there is no sexual harassment problem at Activision, representing in Section 3.19(f):

(f) No Allegations of Sexual Harassment, Sexual Misconduct or Retaliation. To the knowledge of the Company, the Company and each of its Subsidiaries have not been party to a material settlement agreement entered into since January 1, 2018 with a current or former officer or employee resolving material allegations of sexual harassment, sexual misconduct or retaliation for making a claim of sexual harassment or sexual misconduct, in each case, that was alleged to have occurred on or after January 1, 2018 in the United States, by either a current (i) officer of the Company or any of its Subsidiaries; or (ii) employee of the Company or any of its Subsidiaries holding a position at or above the level of Senior Vice President. There are no, and since January 1, 2018, there have not been any, material allegations of sexual harassment, sexual misconduct or retaliation for making a claim of sexual harassment or sexual misconduct, in each case, that was alleged to have occurred on or after January 1, 2018 in the United States, by or against any current director, officer or employee holding a position at or above the level of Senior Vice President, in each case, of the Company or any of its Subsidiaries.

The Merger Agreement does not define “material settlement agreement” or “material allegations.” More importantly, the Merger Agreement provides that the

representation in Section 3.19(f) is qualified “as set forth in the Company Disclosure Letter.” The Proxy’s disclosure concerning the Harassment Scandal is materially incomplete because there is no description of the contents of the section of the CDL relating to Section 3.19(f) and the related disclosure schedules.

389. 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]

390. As described above, the Proxy’s description of the Merger negotiations differs in a number of important respects from what is (or is 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 are misleading and incomplete.

391. The Proxy also fails 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

[REDACTED]

[REDACTED]

[REDACTED] This information is not disclosed even though (i) the first reason the Proxy gives for the Board’s recommendation of the Merger is the purported premium over market, and (ii) Allen & Co.’s analysis of Activision’s historical trading prices was referenced in the Proxy.

392. The Proxy repeatedly stated that the \$95 Merger price represents “(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.”²⁷⁵ These mathematically correct calculations are misleading partial disclosure without the further disclosure that the “premium” is based on stock prices following a substantial decline after the Harassment Scandal hit. Indeed, the 30-trading day period commenced in the aftermath of (1) Activision’s announcement that it was delaying the release of Overwatch 2 and Diablo 4, which was the result of leadership departures because of the Harassment Scandal, and (2) the series of disclosures culminating in *Kotick Knew*’s November 19, 2021 publication and Activision’s inadequate response.

393. 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

²⁷⁵ *Id.*, Letter to stockholders from Kotick and Kelly; *see also id.* at 16.

was aware of and considered these interests in evaluating the negotiation of, approving and recommending the Merger Agreement.²⁷⁶ However, the Proxy only describes the accelerated vesting of equity compensation, the value of equity awards, potential termination payments and golden parachute compensation.²⁷⁷ This was misleading partial disclosure because it does not include other interests that Kotick and the other Director Defendants had, including Kotick eliminating his risk of being terminated for Cause and forfeiting his then-outstanding equity awards and 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.

394. 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, 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

²⁷⁶ *Id.* at 8, 59.

²⁷⁷ *Id.* at 59-67.

employment and compensation for Kotick. Instead of complete and accurate information, the Director Defendants deliberately chose to make misleading partial disclosure that omitted mention of the Harassment Scandal.

395. 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 would be important in evaluating the Merger and deciding how to vote.

2. Misleading Partial Disclosure of Allen & Co.'s Conflicts, Engagement and Analysis

396. 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 Coca-Cola Board with Herbert and Herb Allen, and that Kotick nominated Herb to the Coca-Cola Board during the Merger negotiations. Instead, the Proxy merely states as to Allen & Co.'s 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

to Microsoft for which Allen & Company has received compensation[.]”²⁷⁸

397. The Proxy states that Kotick promptly involved Allen & Co., “which had provided strategic financial advice to Activision Blizzard on other occasions.”²⁷⁹ It claims 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.”²⁸⁰ The Proxy’s discussion of Allen & Co. states it was selected as financial advisor based on its “experience and familiarity with Activision Blizzard.”²⁸¹

398. The repeated statements about Allen & Co.’s previous advice, work, experience and familiarity is 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 past two years is misleading partial disclosure without a summary of the prior contacts, which were substantial.

²⁷⁸ *Id.* at Annex C.

²⁷⁹ *Id.* at 32.

²⁸⁰ *Id.* at 33.

²⁸¹ *Id.* at 57.

399. 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 is particularly so because the Board recommended that stockholders approve the Merger based on Allen & Co.'s fairness opinion.

400. 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 contradict 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." 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 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" to engage Allen & Co.

401. These misleading, partial disclosures were material. They obscure 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.

402. 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.

403. 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 \$90.00 per share)."²⁸² 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 reveals that all the price targets were published on or

²⁸² *Id.* at 57.

after November 2, 2021, after the Harassment Scandal had had a significant negative impact on analysts' price targets. Analysts 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.

3. Misleading Partial Disclosure of Kotick's Employment Agreements with Microsoft

404. 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 and other commitments described in such announcement.²⁸³

405. This disclosure is 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”

²⁸³ *Id.* at 61 (emphasis added).

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.

406. The Proxy also disclosed:

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. Kotick under the existing terms of his employment agreement (as may be extended)²⁸⁴

407. This disclosure, when coupled with the false disclosure about the October Press Release, is 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

²⁸⁴ *Id.* (emphasis added).

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.

408. 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.

409. While the 8-K addresses discussions concerning Kotick’s “post-closing employment,” neither the 8-K nor the Proxy disclose when Activision and Microsoft agreed (1) to the terms of Kotick’s compensation while the Merger is pending, (2) that the WRC could extend Kotick’s Employment Agreement for six months or (3) that, under Section 2.6(a) of the Merger Agreement, the initial officers of Activision after the Merger will be officers of Activision immediately before the Merger. A reasonable stockholder would consider the timing and circumstances of these negotiations important, considering these terms benefit Kotick, who was the primary negotiator of the Merger. Further, the disclosure that no discussions about “post-

closing employment” occurred are simply not credible when Defendants discussed Kotick’s pending-closing employment. Having traveled the road of disclosure concerning the discussions of Kotick’s employment and compensation, the Defendants were required to provide a full and fair summary.

G. The \$95 Merger Price Is Unfair and Activision Is More Valuable as an Independent Company

410. The Merger consideration is not a fair price for Activision’s stock.

411. The \$95 Merger price was approved on January 17, 2022 and does not take into account that the Merger is unlikely to close, if at all, before June 2023 because of antitrust risks. The stock has generally traded at or under \$80 per share since the Merger’s announcement, indicating the market is heavily discounting the Merger price because of the substantial antitrust delays and the risks the Merger may not receive regulatory approval at all. Trading in the middle of the \$95/\$65 range suggests the market views the likelihood that the Merger will close at about 50%. During October, 2022, Activision consistently traded below \$75 per share, closing at \$72.86 on October 28, 2022.

412. 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.”²⁸⁵ More than 7 months after the Merger Agreement was signed, Kotick told Company employees in his September 1, 2022 letter, “the process with all of the regulators is generally moving along as we expected.” Kotick reiterated this statement on November 8.

413. The Merger Agreement also reflects that Defendants knew antitrust review could tie up Activision for as long as 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 establishes a January 18, 2023 “Initial Termination Date” for the Merger Agreement. Section 8.1(c) provides that if antitrust clearance has not been received by the Initial Termination Date, the Termination Date automatically extends until April 18, 2023 and then until July 18, 2023, unless the parties mutually agree not to extend. Extended “drop-dead”²⁸⁶ dates reflect the risk of prolonged antitrust review and the

²⁸⁵ 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/>.

²⁸⁶ *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>.

potential that antitrust agencies will seek to block a transaction or require a remedy as a condition of clearance. The lengthy and automatically extended Termination Date reinforces that Defendants knew antitrust reviews would be lengthy. In addition, the Proxy disclosed the target closing date would be sometime during Microsoft's fiscal 2023 (*i.e.*, between July 1, 2022 and June 30, 2023).

414. The value of the Merger has also been diminished because the Activision stockholders have been forced to give up dividends after the \$0.47 annual dividend paid in early 2022. The annual dividend of \$0.47 per share for 2023 will be missed before the Merger closes—if it closes. Even putting aside the unfairness of the Merger price in light of the antitrust delay and missed dividends, the \$95 deal is also unfair because it values Activision only slightly 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 represents 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.²⁸⁷ 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.

415. The unfairness of the Merger price is 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 [REDACTED]

[REDACTED] In addition, the LRP's sensitivity analysis for 2024 indicated an implied per share valuation range for Activision stock of [REDACTED]

[REDACTED] Management subsequently depressed the LRPs after Microsoft's approach for the purpose of negotiating the Merger. The Merger price also falls below the midpoint [REDACTED] of the DCF range of Allen & Co.'s final fairness opinion [REDACTED] which was based on the *depressed* LRPs.

²⁸⁷ 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.

²⁸⁸ Activision_0000645 at 791.

416. The extension of the Merger Agreement beyond the Drop-Dead Date invalidates Allen & Co.’s fairness opinion. The opinion is based on the assumption that the Merger will 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.²⁸⁹

417. The unfairness of the Merger price is 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.

418. The unfairness of the Merger price is also reflected by Activision’s recent performance, which indicates that Activision is more valuable as a standalone, independent company. On October 4, 2022, Activision finally released its successful new AAA title, *Overwatch 2*. On Friday, October 28, Activision released *COD: Modern Warfare II*. Within the first three days, it generated \$800 million in sell-through, the highest-earning weekend of a *COD* game ever.²⁹⁰ Within ten days, it

²⁸⁹ Proxy at C-3.

²⁹⁰ *Modern Warfare II Tops \$800 Million Sell-Through in Three Days, Delivers Largest Opening Weekend in Franchise History*, BUSINESSWIRE (Nov. 1, 2022), <https://www.businesswire.com/news/home/20221101005809/en/Modern-Warfare->

generated \$1 billion in sales, the biggest opening of a *COD* game ever, and the highest grossing entertainment opening of the year, surpassing worldwide 2022 box office openings.²⁹¹ Indeed, according to an Activision strategy document, *COD* has a massive following amongst millions of monthly active users.²⁹² From 2003 through 2020, *COD* produced \$27 billion in revenues.²⁹³ From 2010-2019, *COD* accounted for 10 of the top 15 console games and has continued to top the charts in 2020 and 2021.²⁹⁴ *Modern Warfare*, according to the FTC Complaint, is on pace to outsell all other games for 2022, despite being released on October 28, 2022.²⁹⁵

419. Activision has also announced that highly anticipated *Diablo IV* will be released in June 2023.²⁹⁶

420. On November 7, 2022, Activision announced third quarter financial results that beat analysts' estimates. Activision also announced two upcoming releases: *Warfare 2.0* (released on November 16) and a full release of *COD*:

II-Tops-800-Million-Sell-Through-in-Three-Days-Delivers-Largest-Opening-Weekend-in-Franchise-History.

²⁹¹ *Id.*; Activision Answer at ¶ 7.

²⁹² FTC Complaint ¶ 7.

²⁹³ *Id.*; Activision Answer at ¶ 7.

²⁹⁴ FTC Complaint ¶ 7.

²⁹⁵ *Id.*

²⁹⁶ *See also* Activision Answer at ¶ 5; Microsoft Answer at ¶ 5.

Warzone Mobile in 2023 for which over 20 million people had, as of November 7, already pre-registered on Google Play. Activision stated in a press release that the launch of *Modern Warfare II*, *Warzone 2.0* and *Warzone Mobile* “mark the start of a new era intended to take the franchise to new heights.”²⁹⁷

421. Numerous analysts recognized Activision’s strong performance, but viewed the FTC’s potential challenge of the Merger as a downside risk. Before the FTC Suit was filed, J.P. Morgan concluded that because of increased regulatory risk, it was more reasonable to value Activision on a fundamental basis, as compared to J.P. Morgan’s prior base case view that assumed the Merger would close.²⁹⁸ J.P. Morgan noted that “Activision’s fundamental performance across games has been strong recently,” and that “the long-run risk/reward skews positively for the stock.”²⁹⁹ In contrast, J.P. Morgan reasoned, “the prospect of a deal break or extended regulatory process presents downside risk over the near-term.”³⁰⁰ J.P.

²⁹⁷ *Activision Blizzard Announces Third Quarter 2022 Financial Results*, ACTIVISION BLIZZARD (Nov. 7, 2022), <https://investor.activisionblizzard.com/news-releases/news-release-details/activision-blizzard-announces-third-quarter-2022-financial> (emphasis in original).

²⁹⁸ David Karnovsky, *Activision Blizzard*, J.P. MORGAN (Nov. 28, 2022) at 1.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

Morgan set its price target at \$86 on a fundamental basis.³⁰¹ This exceeds the market price of Activision stock, which reflects a significant discount from the Merger price because of the substantial delay and uncertainty in closing.

422. 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 as long as 18-months, if at all, 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, while other Companies distance themselves from Kotick and Activision and the Harassment Scandal continues.

423. The Merger is unfair because it allows Kotick to remain in charge of the Company for at least 18 months while the Merger is subject to regulatory review. As noted above, Defendants knew the Merger would be subject to heightened scrutiny, and therefore extend Kotick's employment, leaving stockholders and

³⁰¹ *Id.* Wells Fargo was also “optimistic about ATVI’s stand alone prospects.” See Brian Fitzgerald & Robert Coolbrith, *Activision Blizzard Inc (ATVI)*, WELLS FARGO (Nov. 28, 2022) at 3. See also Eric Handler, *Activision Blizzard, Inc. (ATVI, Buy, \$95.00)*, MKM PARTNERS (Nov. 15, 2022) at 1 (“fundamental improvements being seen with its business and strong growth potential in 2023,” but calculating “\$85 fundamental value”).

employees stuck with an incompetent CEO who grossly mismanaged the Harassment Scandal.

424. The Merger price is also unfair because of the risk that Microsoft may use antitrust issues to walk away from the Merger. According to the Proxy, Microsoft proposed that there be no obligation for Microsoft to agree to divestures or limitations that would reduce the benefits Microsoft hoped to achieve from acquiring Activision.

425. Section 7.1(b) of the Merger Agreement makes antitrust clearance without a “Burdensome Condition” a prerequisite to the closing of the Merger. Under Section 6.2(b) of the Merger Agreement, it would be a Burdensome Condition to require Microsoft:

to offer, negotiate, commit to, effect or otherwise take any action [that] would reasonably be expected to (i) have a material adverse impact on the Company and its subsidiaries, taken as a whole, (ii) have a material impact on the benefits expected to be derived from the Merger by Parent or (iii) have a more than immaterial impact on any business or product line of Parent[.]

426. This provision gives Microsoft an option to withdraw from the Merger by claiming that any antitrust conditions sought by the regulators would “have a material impact on the benefits expected to be derived from the Merger by Parent.” The Merger Agreement does not define or quantify the “expected benefits” to

Microsoft from the Merger. This vague formulation gives Microsoft broad ability to claim that regulators' proposed antitrust conditions would decrease a particular "expected" benefit, entitling Microsoft to walk away from the Merger. For example, even if antitrust regulators only require behavioral promises that Activision's games will continue to be released on Sony's PlayStation for a specified period longer than ten years, Microsoft could claim that condition would reasonably be expected to have a material impact on an expected Merger benefit to Microsoft. The CMA, E.C. and FTC have already rejected Microsoft's offer to make Activision's games available to Microsoft's competitors for 10 years, and Spencer has already stated Microsoft will not agree to give its rivals access to Activision's games indefinitely. The pendency of the CMA and E.C. proceedings means there are regulatory restraints that prevent the consummation of the Merger and actions by a Governmental Authority that seeks to prohibit the consummation of the Merger. Therefore, the conditions of Section 7.1(d) of the Merger Agreement for closing the Merger have not been met and Microsoft can refuse to close the Merger.

427. Section 7.1(d) of the Merger Agreement also gives Microsoft the option to withdraw from the Merger based on the preliminary injunction proceedings in the Gamers' Federal Antitrust Suit. Section 7.1(d) conditions the Merger on the absence of any order that prevents the consummation of the Merger. The January 19, 2023

order in the Gamers' Federal Antitrust Suit is such an order. Section 7.1(d) also gives Microsoft the ability to claim that the preliminary injunction motion, scheduled hearing and potential preliminary injunction prevents satisfaction of a condition to the Merger because the action seeks to enjoin the Merger.

428. 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 III

Individual and Class Claims for Breaches of Continuing Fiduciary Duty and Lack of Entire Fairness Against Kotick and the Director Defendants for Extending the Merger Agreement³⁰²

429. 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 Determined to Extend or Waive the Drop-Dead Date in the Merger Agreement

430. In connection with the Merger Agreement, the Director Defendants, as Activision directors, and Kotick, as an Activision director and officer, owe the Company's public stockholders continuing fiduciary duties of loyalty and care. In

³⁰² The Director Defendants against whom Count III is brought are Kotick, Kelly, Morgado, Corti, Nolan, Ostroff, Meyer, Bowers and Carr.

determining whether to extend the Merger Agreement beyond the Drop-Dead Date, the Director Defendants had a duty not to benefit themselves at the expense of Activision's public stockholders. The Director Defendants were not disinterested and independent with respect to their decision.

431. Kotick was conflicted because the Merger Agreement, so long as it is in effect, continues his compensation and protects his job, reputation, millions of dollars of unvested options and other benefits and provides him with materially greater indemnification, exculpation, advancement and insurance from lawsuits against him arising out of the Harassment Scandal and the Merger. Kotick was also conflicted because the Merger, so long as it closes at any future time, entitles him to cash-out his change in control benefits, as opposed to forfeiting those benefits if fired for Cause.

432. Seven of the eight other Director Defendants (excluding Kotick) that decided to extend or waive the Drop-Dead Date were also conflicted. They faced potential liability arising from, and were named defendants in lawsuits concerning, their involvement in the Harassment Scandal and approval of the Merger Agreement. As with Kotick, the Merger Agreement provides the Director Defendants materially greater rights to indemnification, advancement, exculpation and insurance (including with respect to the Merger and Merger Agreement and their decision to

extend or waive the Drop-Dead Date). In addition, the Director Defendants have longstanding, lucrative ties and personal relationships with Kotick, which they prioritized and protected when deciding to continue to pursue the Merger.

433. Because the decision to extend the Merger Agreement beyond the Drop-Dead Date was not approved by a disinterested and independent majority of the Board, the entire fairness standard applies.

B. The Activision Board's Decision to Extend or Waive the Drop-Dead Date in the Merger Agreement Was a Breach of the Duty of Loyalty and Duty of Care

434. The Activision directors, including Kotick, owe continuing fiduciary duties to evaluate the Merger. 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 and make an informed judgment.

435. The same day the FTC filed suit, Kotick announced that Activision would proceed with the Merger though it cannot be accomplished by the Drop-Dead Date. Therefore, any decision of the Board to continue with the Merger was hasty and uninformed. Activision's filing of its bellicose Answers to the FTC Suit on December 22, 2022 and January 4, 2023, and the FTC's representation that the parties are not in substantive settlement discussions, confirmed that the Activision Board has determined to, or at least acquiesced to, extension or waiver of the Drop-

Dead Date without stockholder approval. The Board's extension or waiver of the Drop-Dead Date without stockholder approval is a breach of fiduciary duty, intentional misconduct and a knowing violation of law. Similarly, the elimination or waiver of the regulatory approval condition is a breach of fiduciary duty, intentional misconduct and a knowing violation of law.

436. The Director Defendants' decision to extend or waive the Drop-Dead Date will result in further reduction of the value of the already unfair Merger consideration. The value of the \$95 per share Merger consideration is worth less today than it was on January 18, 2022, and will continue to fall as the Merger is delayed. Activision's business will continue to be disrupted and undermined by the pendency of the Merger and any earnings will accrue to the benefit of Microsoft, not the Activision stockholders.

437. The Director Defendants' decision to extend or waive the Drop-Dead Date also subjects Activision and its stockholders to the stringent restrictions of the Merger Agreement beyond July 18, 2023, including missed dividends in 2023 and possibly 2024. Activision has paid an annual dividend for years, including a \$0.47 dividend in 2021 and 2022 based on a record date of April 15 and payment date of May 6.³⁰³ However, Section 5.2(c) of the Merger Agreement only permits one \$0.47

³⁰³ Activision, Annual Report (Form 10-K) (Feb. 22, 2022) (the "2021 10-K") at 35.

cash dividend, which was declared on February 3, 2022 and paid on May 6, 2022, without obtaining Microsoft's approval, which may not be unreasonably withheld, conditioned, or delayed.³⁰⁴ Activision committed to fighting the FTC Suit and extending the Merger Agreement indefinitely without obtaining Microsoft's approval for payment of annual dividends in 2023 and subsequent years. Because the Merger Agreement will extend far beyond the July 18, 2023 Drop-Dead Date, it is unreasonable for Microsoft not to approve payment of Activision's annual dividend in 2023 and subsequent years when the Merger Agreement remains in effect. It was a breach of fiduciary duty for the Activision Board to commit to fighting the FTC Suit and extending the Merger Agreement without seeking or obtaining such approval. Moreover, because of Activision's performance in 2022, which was much stronger than its impaired results in 2021 because of the Harassment Scandal, the dividend for 2023 should be greater than \$0.47 per share.

438. Yet, in extending or waiving the Drop-Dead Date, the Director Defendants did not seek (i) interest on the Merger consideration, (ii) the reinstatement of dividends or (iii) Activision stockholder approval. Further, Activision stockholders have no enforceable rights under the Merger Agreement until the Effective Time.

³⁰⁴ *Id.*

439. On January 27, 2021, the Activision Board authorized a stock repurchase program for the Company to repurchase up to \$4 billion of its common stock during the two year period from February 14, 2021 until the earlier of February 13, 2023 or a Board determination to discontinue the program. The Company did not repurchase any shares to support Activision's stock price during the decline caused by the Harassment Scandal. Under Section 5.2(d) of the Merger Agreement, Activision is forbidden from any repurchase during the pendency of the Merger without obtaining Microsoft's approval, which may not be unreasonably withheld, conditioned, or delayed. Because the Merger Agreement will extend beyond February 13, 2023, it was a breach of fiduciary duty for the Activision Board to commit to fighting the FTC Suit and extending the Merger Agreement without seeking or obtaining Microsoft's approval to an extension of the repurchase program and to the repurchase of shares. It is unreasonable for Microsoft to refuse to agree to such extension and repurchases.

440. Activision stockholders have been harmed by, and have gotten nothing for, the extension or waiver of the Drop-Dead Date. Kotick, on the other hand, extends his job and compensation and protects his reputation and financial benefits. The Director Defendants (including Kotick) continue to be entitled to the materially greater rights to indemnification, exculpation, advancement and insurance under the

Merger Agreement. The directors other than Kotick will continue to grant themselves RSUs. In addition, Microsoft effectively now holds an extended option on the stock of Activision stockholders. Microsoft retains the right to consummate the Merger, but has the option to terminate the Merger Agreement by concluding that antitrust regulators are conditioning their approval of the Merger on what Microsoft deems is a “Burdensome Condition.” Microsoft has already stated that making Activision’s games available to rivals for 10-years is as far as Microsoft will go. Regulators have already rejected Microsoft’s proposed concessions. The CMA and E.C. proceedings currently restrain and seek to prohibit the consummation of the Merger, enabling Microsoft to refuse to close the Merger under Section 7.1(d) of the Merger Agreement.

441. Microsoft also has the option to terminate the Merger Agreement because the January 19, 2023 order in the Gamers’ Federal Antitrust Suit is seeking a preliminary injunction enjoining the consummation of the Merger.

442. As discussed above, the Board’s decision to extend or waive the Drop-Dead Date without a stockholder vote or stockholder approval also violated Section 251(d). This was, in turn, a breach of fiduciary duty.

443. 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 Aiding and Abetting and Conspiracy Against the Microsoft Defendants

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

445. The Director Defendants breached their fiduciary duties of care and loyalty owed to Activision stockholders by self-interestedly negotiating and approving the Merger for an unfair price, and determining to extend or waive the Drop-Dead Date in the Merger Agreement. The Microsoft Defendants aided and abetted and conspired with the Director Defendants in those breaches.

446. The Microsoft Defendants were aware of Kotick's conflict arising from his desire to remain CEO in the face of the Harassment Scandal and demands by employees and stockholders for his ouster. Activision's stock price was depressed by the Harassment Scandal. The Microsoft Defendants leveraged Kotick's conflicts and Activision's impaired stock price for their benefit. They made public 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 call from Kotick to 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 stockholders. Microsoft dictated a rapid pace for negotiations in order to exploit the vulnerability of Kotick and the Board caused by the Harassment Scandal.

447. In exchange for Kotick's agreement to sell the Company at a bargain price, Microsoft provided Kotick the ability to stay on as CEO during the lengthy pendency of the Merger and as an initial officer in the post-Merger entity, agreed to Kotick's change in control financial benefits that eliminated the financial risks he faced if fired for Cause, and agreed to Kotick's improved compensation terms.

448. Microsoft was also aware that Kotick and the Director Defendants faced conflicts because of the Harassment Scandal, including the many pending lawsuits and investigations against Kotick and the Director Defendants. This gave the Microsoft Defendants an unfair bargaining advantage with respect to the Merger. Microsoft conducted due diligence on the Harassment Scandal and discussed it with Activision management. Microsoft took advantage of the Director Defendants'

potential liability. Microsoft granted very broad and supplemental indemnification, exculpation, advancement and insurance rights for the Director Defendants. The Microsoft Defendants conspired with Kotick and the other Defendants Directors to help them evade the personal and professional consequences of the Harassment Scandal through their negotiation and approval of an ill-timed, unfair and highly risky Merger. The Merger Agreement requires Microsoft's approval for settlement of any pending or threatened Legal Proceeding.

449. The Microsoft Defendants also knowingly exploited and conspired in the Director Defendants' breaches. The Microsoft Defendants conspired with Kotick and the Board to rush Activision's stockholders into a quick vote on the Merger before more was known about the antitrust risks and the timing of receipt of the Merger consideration. Microsoft collaborated with Kotick and the other Director Defendants to provide Activision's 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. Microsoft knew the "premium" disclosures were misleading without disclosure of the effects of the Harassment Scandal on the market price of Activision's stock. It also knew that the Proxy's description of Microsoft's agreement on Kotick's

compensation was misleading and incomplete. Microsoft had and exercised its right under Section 6.3 of the Merger Agreement to review and comment on the preliminary proxy statement, the Proxy and subsequent 8-K containing further information. However, it did not correct disclosures that it knew were misleading or incomplete.

450. Microsoft extracted an unfair Merger price, as the Merger was unlikely to close for as long as 18-months, if at all, because of delays in pursuing antitrust clearance. The Microsoft Defendants knew Activision would be worth far more than \$95 per share in 2023 when the Merger is likely to close.

451. When the FTC filed its lawsuit, the Microsoft Defendants knew the Director Defendants were conflicted. Kotick was still using the Merger to save his job. Eight of the nine Director Defendants faced liability arising from the Harassment Scandal and the Merger, but were protected by greater rights to exculpation, indemnification, advancement and insurance that the Merger Agreement provides. The Microsoft Defendants knowingly exploited the Director Defendants' conflicts by extracting an extension or waiver of the Drop-Dead Date without providing any benefits to Activision stockholders, such as the reinstatement of dividends or interest on or an increase in the Merger consideration.

452. The Microsoft Defendants also knowingly participated and conspired in the Director Defendants' breaches by agreeing to extend or waive the Drop-Dead Date without a vote or approval of the Activision stockholders.

453. As a result of the Microsoft Defendants' aiding and abetting of and conspiring in 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.

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, including the approval of the agreement of merger by the Director Defendants and Activision stockholders and the extension of the Merger Agreement beyond the Drop-Dead Date without Activision stockholder approval, did not comply with Section 251 in several respects, rendering the Merger invalid and an unlawful conversion of stockholders' shares;

- c. 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;
- d. Declaring that the Microsoft Defendants aided and abetted and conspired in the breaches of fiduciary duty by Kotick and the Director Defendants;
- e. Awarding appropriate injunctive and equitable relief to remedy the violations of Section 251 and the breaches of fiduciary duty by Kotick and the other Director Defendants;
- f. Awarding the Class damages, including pre-judgment and post-judgment interest;
- g. Awarding Plaintiff the costs and disbursements of this action, including reasonable attorneys' and experts' fees; and
- h. Granting such other and further equitable relief as the Court may deem just, proper and equitable.

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Dated: January 25, 2023

CERTIFICATE OF SERVICE

I, Stacey A. Greenspan, do hereby certify on this 1st day of February, 2023,
that I caused a copy of the *Public Version of the Verified Amended Class Action
Complaint* to be served by File&ServeXpress upon the following counsel of record:

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