



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NEW YORK CITY EMPLOYEES')
RETIREMENT SYSTEM, NEW YORK) C.A. No. 2022-0365- KSJM
CITY FIRE DEPARTMENT PENSION)
FUND, NEW YORK CITY POLICE)
PENSION FUND, NEW YORK CITY) PUBLIC VERSION
BOARD OF EDUCATION) FILED: May 2, 2022
RETIREMENT SYSTEM, and)
TEACHERS' RETIREMENT SYSTEM)
FOR THE CITY OF NEW YORK,)
)
Plaintiffs,)
)
v.)
)
ACTIVISION BLIZZARD, INC.,)
)
Defendant.)

**VERIFIED COMPLAINT PURSUANT TO 8 DEL. C. § 220
TO COMPEL INSPECTION OF BOOKS AND RECORDS**

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Plaintiffs the New York City Employees' Retirement System, the New York City Fire Department Pension Fund, the New York City Police Pension Fund, the New York City Board of Education Retirement System, and the Teachers' Retirement System for the City of New York (collectively, the "NYC Funds" or "Plaintiffs"), allege upon knowledge as to themselves and their own actions and upon information and belief as to all other matters, as follows:

NATURE OF THE ACTION

1. Plaintiffs bring this action to enforce their right to inspect certain corporate books and records of Activision Blizzard, Inc. ("Activision" or the

“Company”), a Delaware corporation, pursuant to 8 *Del. C.* § 220 (“Section 220”). Plaintiffs seek to inspect these documents to investigate possible wrongdoing and/or breaches of fiduciary duty by the Board of Directors of the Company (the “Board”), in connection with Activision’s pending acquisition by Microsoft Corporation (“Microsoft”). Plaintiffs further seek access to certain books and records to investigate the independence and disinterestedness of the Board.

2. Plaintiffs originally served a demand to inspect Activision’s books and records on October 8, 2021, in full compliance with Section 220 (the “Original 220 Demand”). Plaintiffs’ Original 220 Demand sought to inspect Activision’s books and records in connection with the Board’s failure to maintain a safe and non-discriminatory working environment for its (specifically minority and female) employees, and failure to take action in response to repeated, grave allegations of misconduct, discrimination, and harassment by Activision’s senior executives. While Activision produced some of the documents Plaintiffs sought in the Original 220 Demand, it failed to produce certain other key documents which Plaintiffs were plainly entitled to inspect. This forced Plaintiffs to file a Section 220 petition to enforce their statutory inspection rights on December 23, 2021.¹

¹ C.A. No. 2021-1112-KSJM.

3. While Plaintiffs' inspection efforts were ongoing, on January 18, 2022, Activision announced that it had reached an agreement to be acquired by Microsoft, in an all-cash transaction for \$95 per share of Activision common stock (the "Merger"). This Merger price appears to seriously undervalue Activision, as it represents a mere 1% premium over Activision's stock price before the Company was sued by the California Department of Fair Housing and Employment ("DFEH") on July 20, 2021 (an event that resulted in a cascade of damning disclosures about the Company's culture and practices).

4. Further, the Merger price undervalues Activision for the independent reason that it ascribes no value to the lucrative derivative claims that Plaintiffs were in the process of developing through their Original 220 Demand. Because Activision will become a wholly-owned subsidiary of Microsoft after the Merger, the Merger will have the effect of extinguishing these highly valuable derivative claims against Activision's Board, and specifically against Activision's Chief Executive Officer Robert Kotick. Kotick has been Activision's CEO since 1993 (prior to Activision-Blizzard merger in 2008). It is now clear that during this lengthy tenure, Kotick was aware of numerous credible allegations of misconduct by the Company's senior executives—but did nothing to address them or prevent further offenses. Kotick therefore faced a strong likelihood of liability for breaches of fiduciary duty, together with other members of the Board.

5. No longer. With the announced Merger, Kotick will be able to escape liability and accountability entirely, and will instead continue to serve as an executive after the Merger closes. Worse, despite his potential liability for breaches of fiduciary duty, the Board allowed Kotick himself to negotiate the transaction with Microsoft. The Board's decision to entrust Kotick with the negotiation process is inexcusable for the additional reason that Kotick stands to personally receive substantial material benefits whose value is not directly aligned with the Merger price.

6. Given the Board's own potential liability and its decision to entrust negotiations to Kotick, it is unsurprising that Activision appears to have received no value at all for the derivative claims Activision could have asserted against its leadership. Separate and apart from the fairness of the Merger price and process, the Board's failure to realize—or even try to realize—value for these derivative claims constitutes its own breach of fiduciary duty.

7. To investigate these allegations concerning the Merger, Plaintiffs served an additional Section 220 demand to inspect Activision's books and records on April 4, 2022, in full compliance with Section 220 (attached hereto as Exhibit A) (the "Subsequent 220 Demand").² By statute, Activision was required to respond to

² Plaintiffs transmitted the Subsequent 220 Demand for service on Activision's registered agent on April 1, 2022, but service was effected on April 4, 2022.

the Subsequent 220 Demand on or before April 11, 2022. Activision instead responded to the Subsequent 220 demand on April 14, 2022, in violation of Section 220 (attached hereto as Exhibit B). Activision further breached Section 220 by refusing to produce all of the documents sought by Plaintiffs in the Section 220 demand: documents for which Plaintiffs have demonstrated a proper purpose and are entitled to inspect.

8. Activision has therefore violated its obligations under Section 220, forcing Plaintiffs to bring this action to enforce their statutory inspection rights.

JURISDICTION

9. This Court has exclusive jurisdiction to hear and determine this action pursuant to Section 220. Activision is incorporated in Delaware and maintains a registered agent and principal place of business within the State of Delaware. Venue is also appropriate pursuant to Section 220.

THE PARTIES

10. Plaintiffs are beneficial owners of Activision stock and have continuously been stockholders of the Company at all times relevant to the allegations herein.

11. Defendant Activision is a Delaware corporation headquartered in Santa Monica, California. Activision common stock is traded on the NASDAQ under the symbol "ATVI." Activision develops and publishes interactive entertainment

content and services for use of video game consoles, computers, and cellphones. Activision has created some of the most successful and lucrative video games in the world, including Call of Duty, World of Warcraft, and Candy Crush. The Company operates in three main business segments: (1) Activision Publishing, Inc. (“Activision Publishing”); (2) Blizzard Entertainment, Inc. (“Blizzard”); and (3) King Digital Entertainment (“King”).

FACTUAL BACKGROUND

Plaintiffs’ Original Investigation Into Potential Breaches of Fiduciary Duty by the Board

12. Plaintiffs began their efforts to investigate mismanagement at Activision in October 2021, following several disturbing revelations about sexual misconduct and discrimination at the Company—practices that Activision’s leadership had seemingly allowed to proliferate unchecked for years. As detailed in Plaintiffs’ prior Section 220 action and the underlying Original 220 Demand, the Board failed to take any action in response to numerous credible allegations of serious misconduct by the Company’s senior executives. Plaintiffs originally sought to investigate these allegations with a view towards bringing a derivative action on behalf of Activision, with claims likely to be asserted against several members of the Board, including CEO Kotick.

13. Plaintiffs served the Original 220 Demand on October 8, 2021. After the Company refused to fully comply with the Original 220 Demand despite weeks of negotiations, Plaintiffs filed a Section 220 petition to enforce their statutory inspection rights on December 23, 2021. In response to Plaintiffs' original demand, Activision produced a total of 107 documents, consisting of director questionnaires, Board minutes and materials, and other documents.

14. These documents suggested that the Board faced a strong likelihood of liability for breaches of fiduciary duty. For years, the Board had ignored credible and disturbing allegations of misconduct against its senior executives. As detailed in Plaintiffs' Original 220 Demand, former Chief Technology Officer ("CTO") Ben Kilgore, for example, had been accused of misconduct by the Company's employees as early as 2015. But Activision's response was to promote Kilgore to the position of CTO in 2017. Given the Board's decision to reward instead of sanction him, Kilgore unsurprisingly continued to abuse his position by acting inappropriately with Activision's female employees. Kilgore's continued misconduct eventually forced him to leave the Company in 2018. Upon his exit, his replacement as CTO offered the following advice to Activision's employees: "Don't sleep with your assistant. But if you're going to sleep with your assistant, don't stop."

15. Kilgore is far from the only example. Activision's former Senior Manager of Global Business Strategy and Operations and Esports Lead, Tyler

Rosen, was forced to leave the Company in October 2018 after years of ignored accusations. Most damningly, a senior executive named Alex Afrasiabi left Activision in June 2020, following years of reports that he serially exploited his power with the Company's female employees. Afrasiabi was the primary benefactor of the now-infamous "Cosby Suite": a hotel suite at the Company's annual convention, where Activision's executives emulated Bill Cosby by attempting to drug and abuse guests at the convention.

16. Activision's repeated failure to ensure the safety of its employees (and its customers) resulted in the California DFEH commencing legal action against the Company on July 20, 2021. The DFEH's complaint detailed egregious examples of the rampant and toxic culture that the Board allowed to proliferate at Activision, following an exhaustive three-year investigation. As detailed in Plaintiffs' prior Section 220 petition, rather than view the DFEH litigation as a wake-up call to reform the Company, Activision's Board and management downplayed the DFEH's allegations, and steadfastly denied any wrongdoing.

17. Meanwhile, damning disclosures about Activision's culture continued to emerge. Reports of misconduct by several more executives forced these executives to leave the Company, and a disturbing report by news organization Axios on August 3, 2021 detailed the myriad ways in which Activision's human resources department was deeply broken. Worse, in August 2021, the DFEH

amended its complaint against the Company to accuse Activision of destroying evidence and interfering with its investigation.

18. Perhaps unsurprisingly in light of his decades-long tenure at the Company, it also emerged that Activision CEO Kotick had been aware of these accusations of executives' misconduct for several years—but, like the Board as a whole, took no action in response. On November 16, 2021, the Wall Street Journal reported that Kotick had been fully aware of the repeated misconduct by senior executives described above, but had nonetheless lied to the public by professing his ignorance and innocence. Fortunately for Kotick, according to the proxy statement filed in connection with the Merger on March 21, 2022 (the "Proxy"), Kotick's negotiations with Microsoft began only three days the Wall Street Journal's revelatory disclosure.

Microsoft's Acquisition of Activision

19. Given Kotick's personal responsibility and liability for Activision's broken workplace, it should have been clear to the Board that he was unfit to negotiate a sale of the Company. But it wasn't. According to the Proxy, the Board chose Kotick to lead negotiations on behalf of Activision, while the Board itself seemingly took a hands-off approach. Microsoft opened acquisition discussions on November 19, 2021, but the Board did not hold a meeting to discuss Microsoft's outreach until two weeks later, on December 1, 2021.

20. In that window, without Board authorization or an actual offer from Microsoft, Kotick blithely informed Microsoft that he would be willing to accept an offer in the range of \$90-\$105 per share. Microsoft then duly made an offer at the bottom of Kotick's arbitrary range, \$90, on December 10, 2021. By December 16, 2021, despite multiple other interested parties not identified by name in the Proxy, Activision and Microsoft had already executed a 30-day confidentiality agreement.

21. The speed with which Kotick moved to not just set an offer ceiling, but to execute an agreement, was to be expected. Not only did the Merger offer Kotick and his fellow directors a means to escape liability for their egregious breaches of fiduciary duty, but it also offered Kotick the chance to realize substantial nonratable benefits. As detailed in the Subsequent 220 Demand, these included significant bonuses that Kotick could receive for simply ensuring that Activision complied with the law.

22. For example, Kotick stood to receive a bonus of up to \$22 million if he only made "appropriate progress" towards certain targets related to gender discrimination. These targets include launching a zero-tolerance sexual harassment policy (which Activision clearly did not previously have), and increasing the proportion of female and non-binary employees in Activision's workforce. Fortunately for Kotick, these targets almost identically track the provisions of a consent decree Activision had entered into with the Equal Employment and

Opportunity Commission on January 1, 2022. In other words, the Merger will allow Kotick to receive a windfall worth up to \$22 million if he simply makes “appropriate progress” towards Activision complying with its legal obligations.

The Merger Undervalues Activision and Ascribes No Value to Plaintiffs’ Putative Derivative Claims

23. Given Kotick’s and the Board’s perverse incentives and conflicts of interest, it is no surprise that the final \$95 per share Merger price undervalues the Company. As detailed in the Subsequent 220 Demand, this deal price represents a paltry 1.16% premium to Activision’s 30-day average stock price prior to the date the DFEH commenced its litigation against the Company. In announcing the Merger, Activision proudly touted that it had obtained a far higher premium of 45.3%. This premium, however, is entirely illusory: it only exists in relation to the substantially lower stock price that the Board’s own misconduct brought about.

24. The Merger price that the Board agreed to is also undervalued for another distinct reason: it ascribes no value to the meritorious derivative claims that Plaintiffs had been pursuing before the Merger was announced. As outlined above and in the attached Section 220 demands, Plaintiffs’ investigation revealed that the Board and Kotick had breached their fiduciary duties to the Company, and that these breaches of fiduciary duty had inflicted enormous financial harm to Activision.

Despite this, the Proxy provides no indication that the Board sought to realize any value for these lucrative derivative claims.

25. Instead, as detailed in the Subsequent 220 Demand, the Proxy states that the Board “assum[ed]” that even if “such litigation claims had material value,” the “merger consideration of \$95.00 per share provided more than adequate value for such claims.” The Proxy provides no detail or explanation as to how the Board reached this conclusion, or what efforts the Board’s financial and legal advisors made—if any—to actually calculate the value of these claims. Further, given that the Board entrusted Kotick with the negotiation process, it is unsurprising that Kotick and his fellow directors were disinterested in seriously evaluating the serious claims that could have been brought against them.

26. Kotick’s misconduct did not end with his decision to sell Activision for less than it is worth. On March 31, 2022, the Wall Street Journal reported that the SEC had launched an investigation to determine whether Kotick had divulged non-public information to Alexander von Furstenburg, the stepson of media mogul Barry Diller, prior to the Merger. A few days after they met with Kotick (and before the Merger was announced), von Furstenburg, Diller, and David Geffen (another longtime friend of Kotick’s) together spent around \$108 million to acquire the options to acquire 4.12 million Activision shares. These highly suspicious trades stand to deliver the three Kotick affiliates a windfall of more than \$100 million.

Kotick's continued suspected misconduct even after the Merger was agreed to further underscores the fact that Kotick was unfit to negotiate the Merger on behalf of the Company.

PLAINTIFFS' SECTION 220 DEMAND

27. These troubling facts related to the pending Merger prompted Plaintiffs to serve yet another Section 220 demand on the Company, on April 4, 2022. This Subsequent 220 Demand requested the following categories of documents:³

Request 1: All Board Material⁴ involving or relating to:

- (a) The Merger;
- (b) Any potential alternative transactions, including with any potential transactions with Company A, Individual B, Company C, Company D, or Company E;
- (c) The Merger Agreements and any voting, support, or governance agreements, and any drafts of the foregoing;

³ Unless otherwise specified, the time period relating to Plaintiffs' requests is November 1, 2021 to the present.

⁴ "Board Materials" is defined herein as is defined herein as all minutes of and documents provided at, considered at, discussed at, or prepared or disseminated, in draft or final form, in connection with, in anticipation of, or as a result of any meeting, whether formal or informal, of the members of the Board, or any regular or specially created committee thereof, including, without limitation, all presentations, Board packages, recordings, agendas, preparation materials, summaries, memoranda, charts, transcripts, notes, minutes of meetings, drafts of minutes of meetings, exhibits distributed at meetings, summaries of meetings, and resolutions. This request includes Board Materials hosted on electronic portals or platforms, including, without limitation, any edits, notes, comments, or communications, hosted on such portal or platform.

- (d) Any agreements or memoranda of understanding between any members of the Board on one hand, and Microsoft or its subsidiaries, on the other;
- (e) Employment or compensation agreements, and amendments to them, for CEO Robert Kotick, and any other senior officers of Activision;
- (f) Any valuations performed concerning the value of Activision or its stock, or of Microsoft or its stock;
- (g) Any presentations or analyses received from any financial or legal advisor or Activision management in connection with the Merger, financial and/or legal due diligence, or the projected financial performance of Activision;
- (h) Any conflicts of interest considered by the Board with respect to any of the financial or legal advisors, including but not limited to Skadden, WilmerHale, and Dorr LLP, and Allen & Co., who provided any advice or consulting services to the Board or any committee thereof in connection with the Merger or any other possible strategic transaction;
- (i) Any discussion of any agreement by Microsoft to release any claims against any Activision director or officer relating to the misconduct described herein and in the Prior Demand Letter;
- (j) Any discussion of any agreement by Microsoft to indemnify or hold harmless any Activision director or officer in connection with any claims against such director or officer relating to the misconduct described herein and in the Prior Demand Letter;
- (k) All Documents reflecting discussion of potential derivative claims relating to the matters set forth in NYC Funds' Prior Demand, including, but not limited to, the Pending Derivative Actions;
- (l) All Documents referencing any attempt to determine the value of any potential derivative claims relating to the matters set forth in NYC Funds' Prior Demand, including, but not limited to, the Pending Derivative Actions;
- (m) All Documents relating to any attempt to value potential derivative claims relating to the matters set forth in NYC Funds' Prior Demand, including, but not limited to, any attempt to value the Pending Derivative Actions;
- (n) All Documents relating to any discussion or consideration of any potential derivative claims relating to the matters set forth in

NYC Funds' Prior Demand, including, but not limited to, the Pending Derivative Actions in connection with the Merger negotiations;

- (o) All Documents reflecting the anticipated or actual impact of the Merger on the Board and/or officer's potential liability in any pending Section 220 action or derivative action; and
- (p) All Documents concerning any discussions between Kotick and the Activision Traders.

Request 2: Any and all communications accessible by or under the control of the Company between Kotick and the Activision Traders from July 20, 2021, to the date of production of documents in response to this Section 220 demand.

Request 3: All documents reviewed, considered, or produced by the Board or by officers of the Company in connection with any meeting during which any of the items enumerated above in requests 1(a)-(p) were discussed.

Request 4: All communications between or among the Board and/or directors or officers of Activision and/or the Board in connection with any of the items enumerated above in requests 1(a)-(p).

Request 5: Documents sufficient to demonstrate how each of the directors serving on the Board was nominated for appointment and/or election to the Board or to any committee of the Board, and all documents considered by the Board in connection with such appointment or nomination, including all nominating and governance files, reports and questionnaire responses.

Request 6: Documents reflecting any and all personal, familial, financial or business relationships, other than their service as directors of Activision or its subsidiaries, between or among any members of the Board.

Request 7: Any documents that have already been produced or that the Company is planning or intending to produce to any other stockholders making demands for inspection of books and records under Section 220 or any analogous statute concerning any of the misconduct described herein or in the Prior Demand.

28. Plaintiffs' purposes for seeking the inspection of books and records sought in their Subsequent 220 Demand are proper. Plaintiffs seek to inspect these books and records:

(a) To investigate potential wrongdoing, mismanagement, and breaches of fiduciary duties by the Board in connection with the above-described efforts—or lack thereof—made by the Board to obtain fair value of Activision's corporate assets, including potential and actual derivative claims, in connection with the Merger;

(b) To investigate potential wrongdoing, mismanagement, and breaches of fiduciary duties by CEO Robert Kotick and the Board in negotiating Kotick's compensation package and potential continued employment at Activision in connection with the Merger;

(c) To investigate potential wrongdoing, mismanagement, and breaches of fiduciary duties by CEO Robert Kotick and the Board in negotiating the Merger;

(d) To investigate potential wrongdoing and breaches of fiduciary duties by CEO Robert Kotick in connection with sharing material non-public information with the Activision Traders;

(e) To take appropriate action in the event the members of the Board did not properly discharge their fiduciary duties; and

(f) To determine whether the members of the Board are disinterested and independent and capable of exercising their business judgment in determining whether to institute a derivative action or respond to a litigation demand.

29. The Subsequent 220 Demand was accompanied by a declaration and documents demonstrating Plaintiffs' beneficial ownership of Activision and a Power of Attorney authorizing the undersigned counsel to act on the NYC Funds' behalf.

30. Accordingly, Plaintiffs have met the required burden, and the Court should find that Plaintiffs are entitled to inspect Activision's books and records, as set forth in the Subsequent 220 Demand and under well-settled Delaware law.

ACTIVISION'S RESPONSE TO THE DEMAND

31. Plaintiffs properly served the Subsequent 220 Demand upon Activision's registered agent in Delaware on April 4, 2022, which meant that Activision was statutorily required to respond by no later than April 11, 2022. Activision instead responded to the Subsequent 220 Demand on April 14, 2022.

32. Activision's response is deficient under Delaware law. Activision wrongly asserts that Plaintiffs' demand fails to satisfy the statutory requirements, including that Plaintiffs have failed to assert a proper purpose.

33. Further, Activision's stockholders are scheduled to vote on the Merger at a shareholder meeting on April 28, 2022. If approved, the Merger is expected to close on April 28, 2022 or shortly thereafter. Apart from Activision's violations of Section 220, Plaintiffs also bring this action to preserve standing and, therefore, their ability to enforce their statutory inspection rights.

COUNTS

COUNT I

Demand for Inspection Pursuant to 8 Del. C. § 220

34. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

35. Plaintiffs' Subsequent 220 Demand satisfies the form and manner requirements of Section 220.

36. Plaintiffs' Demand for inspection is made for purposes of investigating: (a) potential wrongdoing, mismanagement, and breaches of fiduciary duties by the Board in connection with the above-described efforts—or lack thereof—made by the Board to obtain fair value of Activision's corporate assets, including potential and actual derivative claims, in connection with the Merger; (b) potential wrongdoing, mismanagement, and breaches of fiduciary duties by CEO Robert Kotick and the Board in negotiating Kotick's compensation package and potential continued employment at Activision in connection with the Merger; (c) potential wrongdoing, mismanagement, and breaches of fiduciary duties by CEO Robert Kotick and the Board in negotiating the Merger; (d) potential wrongdoing and breaches of fiduciary duties by CEO Robert Kotick in connection with sharing material non-public information concerning the Merger; (e) appropriate action in the event the members of the Board did not properly discharge their fiduciary duties;

and (f) whether the members of the Board are disinterested and independent and capable of exercising their business judgment in determining whether to institute a derivative action or respond to a litigation demand.

37. These stated purposes are proper under Delaware law and are directly related to Plaintiffs' interests as Activision stockholders. The requests for information and books and records are narrowly tailored to serve these stated purposes, and are necessary and essential to fulfill these purposes.

38. By failing to produce documents that are plainly responsive, within the scope of Plaintiffs' Subsequent 220 Demand, and reasonable, Activision has wrongly refused Plaintiffs' Demand.

39. For the foregoing reasons, Plaintiffs are entitled to a judgment directing Activision to produce to Plaintiffs, or otherwise permit Plaintiffs to inspect and receive copies of, the books and records requested in the Demand.

40. Plaintiffs have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray this Court summarily enter judgment in favor of Plaintiffs and against the Company:

i. Ordering Activision to produce to Plaintiffs the books and records identified herein and in Plaintiffs' Subsequent 220 Demand;

ii. Awarding to Plaintiffs the costs and expenses incurred in this action, including without limitation reasonable attorneys' fees; and

iii. Granting such other and further relief as the Court deems just and proper.

Dated: April 26, 2022

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