ALERT MEMORANDUM

Activision Blizzard II: Chancery Court Allows *Revlon* Claims Against Full Board to Move Forward

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Last year, the Delaware Court of Chancery surprised many M&A practitioners by holding in *Sjunde AP-Fonden v. Activision Blizzard* that the Board of Directors of Activision Blizzard, in approving the sale of the company to Microsoft, did not comply with technical requirements of the Delaware General Corporation Law (DGCL) concerning the manner in which it approved the merger agreement and disclosed the merger to stockholders. That decision led to several amendments to the DGCL that became effective on August 1, 2024. It also prompted Activision Blizzard to seek ratification of the Microsoft merger pursuant to DGCL 205, which the Court granted. Following these developments, the stockholder plaintiffs amended their complaint. In a decision issued on October 2, 2025, the Delaware Court of Chancery declined to dismiss certain fiduciary duty claims at the pleading stage in a decision that offers important lessons for boards considering a sale of the company.

Background

As the Court noted in its October 2 decision, even though the *Activision Blizzard* case had been pending for three years, it was still at the pleading stage, reflecting its complicated history.

Facts

In 2018, Activision Blizzard Inc. ("Activision Blizzard") faced allegations from regulators that pervasive sexual harassment had taken place within the company.[1] In mid-2021, regulators concluded their investigation and released their findings, including that the CEO Bobby Kotick had been aware of the sexual harassment allegations. The share price dropped after the news became public, and employees staged a walkout in protest.[2] Some speculated that Kotick's job as CEO could be in danger.

Shortly afterward, Microsoft Corporation ("Microsoft"), one of Activision Blizzard's closest business partners, made a cash offer to acquire Activision.[3] The initial overture was made to CEO Kotick, after which Kotick convened a small group of directors. Despite the Activision board having adopted a long-range plan reflecting a price range of $113 to $128 per share only a month earlier, the small group ultimately decided on (and informed Microsoft of) a negotiation price range of $90 to $105 per share before informing the rest of the board of directors of the overture.[4] The subsequent negotiations were handled largely by Kotick, and Activision Blizzard ultimately executed a merger agreement with Microsoft at $95 per share.[5]

Stockholders in Activision Blizzard then brought suit, alleging breaches of fiduciary duties and statutory violations with respect to the merger agreement negotiations and approval.[6] Plaintiffs claimed that the deal with Microsoft benefited CEO Kotick by allowing him to keep his job and avoid a forfeiture of hundreds of millions of dollars of unvested options and potential clawbacks of equity grants, but resulted in a lower share price for stockholders.[7]

Procedural History

The parties agreed to bifurcate consideration of the statutory claims and the breach of fiduciary claims, and on February 29, 2024, the Court issued a decision denying in part defendants' motion to dismiss the statutory claims ("Activision I").[8] This decision prompted certain amendments to the DGCL that became effective later in 2024.[9] Meanwhile, Activision Blizzard and Microsoft sought judicial validation of some of the alleged defects in the sale process, which was granted by the Court, mooting other claims.[10]

Plaintiffs filed an amended complaint on April 22, 2024, and defendants again filed a motion to dismiss both the statutory claims and the breach of fiduciary duty claims.[11] The October 2 decision ("Activision II") addresses this second motion to dismiss, and despite granting dismissal with respect to several more claims, the Court largely denied the motion with respect to the breach of fiduciary duty claims.

The *Activision II* Decision

In the second motion to dismiss, the applicable standard of review was a highly contested issue, as was whether plaintiffs had adequately pled breach of fiduciary duty claims.

[1] *AP-Fonden v. Activision Blizzard, et al*, No. 2022-1001-KSJM, 2025 WL 2803254, at *1 (Del. Ch. Oct. 2, 2025). ("Opinion").
[2] *Id.*
[3] *Id.*
[4] *Id.* The board subsequently lowered its own long-range plan "for purposes of considering Microsoft's offer," citing the "passage of time" since the prior long-range plan. *Id*. at 21.
[5] *Id.* at 1-4.
[6] *Id.* at 4.
[7] *Id.*
[8] *Id.* at 4-5; *AP-Fonden v. Activision Blizzard, et al*, 2024 WL 863290 (Del. Ch. Feb. 29, 2024, corrected Mar. 19 2024).
[9] DGCL §§ 147, 232(g), and 268.
[10] Opinion at 5.
[11] *Id.*

***Standard of Review – Enhanced Scrutiny Under* Revlon**

The Court began its analysis by determining the applicable standard of review. While the plaintiffs argued that the Court should apply entire fairness *ab initio* because a majority of the directors were alleged to be interested in the merger, the Court sidestepped that issue and instead assumed the directors were disinterested and therefore enhanced scrutiny would apply under *Revlon*.[12] The Court therefore considered defendants' argument that under *Corwin*, the approval of the merger by a fully informed, uncoerced vote of disinterested stockholders was sufficient to invoke the business judgment rule ("BJR"), which would result in dismissal of the case.[13]

However, in a novel ruling on an issue that has not been squarely addressed before, the Court reasoned that because it was "reasonably conceivable" that the stockholder vote had not complied with certain statutory requirements in the DGCL relating to seeking stockholder approval per *Activision I*, defendants were unable to rely on the *Corwin* defense.[14] The alleged defects included that the board did not approve an "essentially complete" version of the merger agreement, failed to attach a summary of the merger agreement to the notice and instead attached it to the proxy statement, and improperly delegated authority to negotiate one of the merger agreement provisions to an ad hoc committee.

In any event, the Court also denied the *Corwin* defense on the basis that it was reasonably conceivable that the proxy statement was materially misleading and incomplete, since it did not disclose the alleged impact of the sexual misconduct issues on the merger agreement or the merger's value to stockholders.[15] On the basis of those claims, the Court found it reasonably conceivable that the stockholder vote approving the transaction was not fully informed, thus failing to meet the necessary requirements for *Corwin* cleansing.

Ultimately, having rejected defendants' defense under *Corwin*, the Court concluded that plaintiffs had stated a claim under *Revlon*, and adequately pled that the process leading to the merger, particularly the actions of CEO Kotick, fell outside the range of reasonableness. Specifically, the Court reasoned that it was reasonably conceivable that Kotick was incentivized to sell the company to Microsoft to protect his job, and that he "tainted the sale process by undercutting Activision's negotiating efforts, stiff-arming alternative bidders, delaying and limiting disclosures to the Board, and reducing management projections to justify Microsoft's price."[16]

Plaintiffs also claimed a separate breach of the board's fiduciary duties from the board's failure to terminate the letter agreement with Microsoft and demand payment of the $3 billion termination fee once the termination date had passed. Instead, the board entered into an amended letter agreement with Microsoft, which extended the termination date. The Court reasoned that since there was no separate stockholder vote to approve the letter agreement, there could not be *Corwin* cleansing, and that, applying enhanced scrutiny under Revlon, it was reasonably conceivable that the same conflicts that affected the board's approval of the merger agreement likewise infected the approval of the letter agreement.

***Claims Against Disinterested Directors Analyzed under* Cornerstone**

The Court characterized the allegations against CEO Kotick as tracking the "paradigmatic Revlon theory," though the Court's analysis of the claims against the other directors was more unusual.

Under the Delaware Supreme Court's *Cornerstone* decision, claims against each director must be assessed individually to determine whether they adequately allege a non-exculpated claim, which requires that the

[12] Opinion at 39.
[13] *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304 (Del. 2015); Opinion at 40.
[14] Opinion at 40.
[15] Opinion at 41.
[16] *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173 (Del. 1986); Opinion at 49.

director act disloyally or in bad faith.[17] In this case, the Court reasoned that the plaintiffs had pled non-exculpated claims against the entire board, even though the Court assumed the remaining directors were not personally interested in the merger.[18] Instead, plaintiffs alleged that the board was acting in Kotick's interests when they acted in bad faith to approve the merger.

The Court conducted a separate analysis of the actions of the "Small Group" of directors that knew of the initial Microsoft outreach and decided on a valuation range of $90 to $105. The Court reasoned that each Small Group member knew about the negative press and protests surrounding Kotick's conduct, knew that the board had approved a strategic plan contemplating a value of $113 to $128 per share, and could easily deduce that the timing of the sale to Microsoft was bad for the company given the depressed stock price. However, the Court held that it was adequately pled that the Small Group members supported Kotick in the sale, withheld information from other board members, and decided on a valuation range of $90 to $105.

The claims against the remaining directors were "less stark," but the Court nonetheless found that the allegations against those other directors were adequately pled. The Court reasoned that under *Revlon*, the board was required to maintain an active role in the merger process, and despite knowing of Kotick's potential conflict of interest, they did not play a sufficiently active role in taking control of the process, confronting Kotick's potential conflicts, or questioning the valuation range agreed to by Kotick.[19]

Finally, the Court found it significant that the board authorized the merger only twelve days after learning of the initial overture to Kotick, which the Court considered "rushed."[20] Together, the Court reasoned that the plaintiffs sufficiently pled bad faith, which is not exculpated under *Cornerstone*.[21]

Aiding and Abetting Claim Against Microsoft Analyzed Under Mindbody *and* Columbia Pipeline

The Court, however, dismissed plaintiffs' claims against Microsoft for aiding and abetting the breach of fiduciary duties.[22] Plaintiffs alleged that Microsoft aided and abetted the board's breach of fiduciary duties by putting pressure on Kotick to sell at a low price and leveraging its existing business relationship with Activision Blizzard to achieve a favorable deal.

The Court reasoned that this is not enough to state a claim for aiding and abetting liability against an acquiring entity.[23] Applying the recent Delaware Supreme Court decisions in *Mindbody*[24] and *Columbia Pipeline*,[25] the Court reasoned that plaintiffs must allege that the defendant had knowledge that the primary party's conduct constituted a breach of fiduciary duty, and actual knowledge that their own conduct was legally improper.[26] Plaintiffs also must demonstrate that the defendant provided "substantial assistance" to the primary party.[27] Here, Plaintiffs failed to allege that Microsoft knew Kotick was breaching his fiduciary duties, that making a bid was wrongful, or that Microsoft provided substantial assistance to Kotick in breaching his fiduciary duties.[28] Therefore, the claims against Microsoft were dismissed.

Key Takeaways

The decision is hardly the first finding that a target company CEO violated *Revlon* duties by allegedly putting his own interests in finding a favorable buyer over the stockholders' interest in maximizing the deal value. But the decision provides important reminders to boards embarking on a sale process:

[17] In re Cornerstone Therapeutics Inc, S'holder Litig., 115 A.3d 1173, 1179-87 (Del. 2015)
[18] Opinion at 55-59.
[19] *Id.* at 57.
[20] *Id.*
[21] *Id.* at 59.
[22] *Id.* at 67.
[23] *Id.*at 66.
[24] *In re Mindbody, Inc., S'holder Litig.*, 332 A.3d 349 (Del. 2024).
[25] *In re Columbia Pipeline Grp., Inc. Merger Litig.*, No. 281, 2024, 2025 WL 1693491 (Del. June 17, 2025).
[26] Opinion at 60.
[27] *Id.*
[28] *Id.* at 66.

First, most importantly, the board should play an active role in the merger process and related negotiations and decision-making, particularly when the CEO is arguably interested in preferring certain buyers over others.

Second, boards of directors considering a merger should be actively involved in making the decision to retain independent and disinterested advisors to analyze company valuation, rather than reflexively relying on advisors chosen by management. The board should consider conflicts that advisors may have with respect to senior management, and not just the merging parties.

Third, though approving a merger agreement in near-final form no longer violates the DGCL, boards of directors should consult legal counsel to ensure compliance with applicable Delaware statutes, since statutory violations could lead them to forfeit a *Corwin* defense.

Fourth, given the availability of *Corwin* cleansing only to decisions ratified by a stockholder vote, boards of directors should take into account the potential advantages of a cleansing vote alongside considering whether amendments or waivers of an agreement are significantly material that they would require a further stockholder vote from a strict corporate law perspective.

Fifth, boards of directors should always be conscious of the interplay between long-range plans developed in the ordinary course of business and projections prepared in connection with a sale process. Deviations between the two—particularly in situations where the transaction-related projections are lower than an ordinary-course plan—will frequently face scrutiny and should necessitate both full disclosure and credible explanation.

Sixth, the decision in this case shows the importance of documenting, both in board minutes and in the proxy statement, deliberations by the board on key issues such as the decision to hire advisors, enter into exclusivity, price negotiations, and the like. The Court in this case inferred at the pleading stage that the board had not considered such issues because there was no reference to them in the board materials, which led the Court to make the plaintiff-friendly inference that the board permitted the allegedly conflicted CEO to make such decisions on his own.

Finally, the *Activision Blizzard* decision continues to clarify the application of *Mindbody* and *Columbia* to aiding and abetting claims asserted against acquiring companies, and makes clear that such claims will be dismissed unless plaintiffs can allege the buyer's actual knowledge that the target's fiduciaries were breaching their fiduciary duties and the buyer's substantial assistance. Short of this exacting standard, companies engaging in negotiations to acquire another company have strong defenses against claims for aiding and abetting.

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