CCR corp
DIRECT FROM THE EXPERTS

DEAL LAWYERS

8911 N. Capital of Texas Highway, #4200-110, Austin, TX 78759

DIRECT FROM THE EXPERTS FOR 50 YEARS

VOL. 19, NO. 6 NOVEMBER-DECEMBER 2025

Activision II's New Lessons and Important Reminders for Boards When Selling the Company

By Gail Weinstein, Philip Richter, Steven Epstein, Steven Steinman, Randi Lally and Roy Tannenbaum, Fried, Frank, Harris, Shriver & Jacobson LLP

In *Sjunde AP-Fonden v. Activision Blizzard* (Oct. 2, 2025) ("*Activision II*"), the Delaware Court of Chancery, at the pleading stage, declined to dismiss claims that the directors of Activision Blizzard, Inc. breached their fiduciary duties in connection with the $69 billion sale of the company to Microsoft Corporation.

This is the court's second major decision issued in this litigation — which, notably, is still at the pleading stage although it has been pending for three years. In the first decision, "*Activision I*" (2024), Chancellor Kathaleen St. J. McCormick held that Activision's board may have violated certain provisions of the DGCL relating to approval of merger agreements. That decision led the board to have its stockholders ratify the merger agreement; and, famously, led the Delaware legislature to enact amendments to the DGCL to clarify certain of the technical requirements for approval of merger agreements.

In *Activision II*, the court has addressed the plaintiff's claims that the directors breached their fiduciary duties in the sale process. The Chancellor found it reasonably conceivable (the standard at the pleading stage) that the board permitted Activision's CEO to tilt the process to favor a quick deal with Microsoft, which was in his personal interest but not value-maximizing for the stockholders. Notably, although the court assumed that all of the directors were independent and disinterested, the court found it reasonably conceivable that all of them breached their fiduciary duties and acted in bad faith by simply supporting the conflicted-CEO's decisions. The court also held that the fiduciary breaches could not be cleansed under *Corwin* nor exculpated under *Cornerstone* — leaving the directors potentially personally liable.

Key Points

- **Directors must take an active role in a sale process.** Even when all of the directors are independent and disinterested, and management is leading the process, the board cannot simply follow management's lead nor support a conflicted CEO's acting in his own interests at the expense of value maximization for the stockholders.
- ***Corwin* cleansing is unavailable when the stockholder approval may not have strictly complied with statutory requirements.** This is an issue the court has not previously squarely addressed.

While the new DGCL amendments enacted in response to *Activision I* make noncompliance with statutory requirements for stockholder approval less likely, *Activision II* establishes that one of the consequences of a failure of strict compliance may be the unavailability of *Corwin* cleansing for any fiduciary breaches.

- **Special considerations come into play when a sale process occurs under the cloud of an unfolding or recent corporate scandal.** Activision's sale process occurred on the heels of a newspaper article reporting that the CEO had known for years about pervasive sexual misconduct at the company. The company's stock price plunged, and the CEO faces potential legal liability and loss of his job. The deal with Microsoft, the court observed, "removed [the CEO's] head from the chopping block." Yet, there was no record that the board had considered whether, in light of the scandal, this was the right time to sell the company or whether the CEO should be the person leading the process. Also, the disclosure to stockholders failed to disclose many details about the scandal and its potential impact on the sale process — which provided another reason that *Corwin* cleansing of the fiduciary breaches was unavailable.
- **Generally, a decision to extend a merger agreement should be made with the same rigor required for the initial decision to enter into the merger agreement.** The court found it reasonably conceivable that Activision's decision to extend the merger agreement was infected by the same fiduciary breaches that related to the initial decision to approve the merger agreement. The court held that *Corwin* cleansing was unavailable for any such fiduciary breaches, as the stockholders had not separately voted to approve extending the merger agreement.
- **Common sale process pitfalls heightened the court's skepticism.** Activision's board (i) set the valuation range for the price negotiations below the range implied in the company's recently board-approved strategic plan; (ii) revised downward company projections that had been prepared in the ordinary course; and (iii) did not discuss in board minutes or elsewhere the reasons for key sale process decisions. Items (i) and (ii) heightened the court's skepticism about the process from the get-go; and item (iii) led the court to infer that the board had not considered those key issues at all.
- **The court emphasized the new, higher bar to aiding and abetting liability for third-party acquirors.** The court, dismissing the plaintiff's claims against Microsoft that it aided and abetted the Activision directors' alleged fiduciary beaches, stated that the Delaware Supreme Court's message, from its recent *Mindbody* and *Columbia Pipeline* decisions, "rings loud and clear" — namely, that it is difficult to plead or prove aiding and abetting by a third-party acquiror.

Background

In 2018, regulators began investigating alleged pervasive sexual harassment at Activision. In mid-2021, the findings were made public. On November 16, 2021, *The Wall Street Journal* reported that Activision's CEO, Bobby Kotick, had known about the harassment for years (the "*Kotick Knew* article"). The company's stock price then plunged; employees staged a walkout seeking to force Kotick's ouster; and the company "hemorrhaged" senior leadership.

Microsoft was one of Activision's most important business partners. Kotick had a close relationship with many Microsoft executives. Two days after the *Kotick Knew* article ran, Microsoft publicly criticized Activision and announced that it was reconsidering the relationship. A few days later, Microsoft told Kotick that it was interested in acquiring Activision. Kotick immediately convened a small group of directors (the "Small Group") and a financial advisor with whom he had longstanding ties. On November 26, 2021, Kotick and the Small Group determined a price range for negotiations with Microsoft of $90 to $105 per share. Microsoft agreed the next day to negotiate within the range. The range was well below the range of values ($113 to $128 per share) implied by the company's long-term strategic plan that had been approved by the board less than a month earlier.

On December 3, 2021, Kotick informed the full board about Microsoft's interest, his consultation with the Small Group, and the discussions to date with Microsoft. On December 10, Microsoft sent a non-binding indication of interest to Activision, proposing $90 per share. By December 20, Microsoft and Kotick had agreed to $95 per share, with a 30-day exclusivity period for Microsoft. Management then lowered its projections that had been prepared in the ordinary course of business. While engaging with Microsoft, Kotick spoke with certain other potential acquirors, but the discussions did not go far and were cut off by the exclusivity agreement with Microsoft. One day before the exclusivity period expired, the board approved a draft merger agreement with Microsoft. On January 18, 2022, the merger agreement was signed.

Activision held its stockholder meeting to approve the merger on April 28, 2022 — although the parties expected that there would be a long regulatory approval process and closing would not occur until 2023 at the earliest. With 68% of the voting power casting votes, 98% voted in favor of the merger.

During the long regulatory approval process, Activision's finances improved dramatically, outperforming historical metrics, consensus estimates, and the wider industry. On July 18, 2023, the termination date stated in the merger agreement, the board approved a letter agreement that Kotick had negotiated with Microsoft, which extended the termination date to October 18, 2023. The letter agreement also restructured Activision's right to collect a termination fee, narrowed Activision's right to terminate the merger agreement, and eliminated or waived various conditions to closing. Ultimately, on October 13, 2023, after restructuring the transaction in response to regulatory concerns, the merger closed.

Discussion

The deal with Microsoft benefited Kotick. The merger agreement (i) included a key-man provision in which Microsoft and Activision agreed that Kotick would continue to serve as CEO and run the company; (ii) permitted the board to extend Kotick's employment agreement by another twelve months; (iii) provided for a restoration of Kotick's pay (that had been reduced in light of the scandal) if a board committee determined that Activision had made "appropriate progress toward" eliminating sexual harassment at the company; (iv) broadened liability protection for the company's officers and directors; (v) required

Microsoft to indemnify Kotick and the board for six years after the merger, and for a potentially broader set of conduct than was covered pre-merger (including willful misconduct and breach of the duty of loyalty or bad faith, so long as "any law" permitted it.

It was reasonably conceivable that the Small Group directors breached their fiduciary duties and acted in bad faith. It was reasonably conceivable ("at a minimum," the court wrote) that each of the Small Group directors knew about the scandal, the *Kotick Knew* article, and the employee protests; knew that the stock was depressed as a result; knew of the strategic plan's valuation range; and therefore "could easily deduce that the timing of the deal with Microsoft was bad for the Company given the effect of the [scandal] on the stock trading price, but potentially good for Kotick, whose job was at risk." The court wrote: "Yet when Kotick went to each of the Small Group members to socialize the possibility of a deal with Microsoft, they jumped right in, inferably withheld knowledge of Microsoft's outreach to Activision from the full Board …, and decided on a $90–$105 range that allegedly undervalued the Company." It was thus reasonably conceivable that "each of the Small Group members placed Kotick's interests ahead of value maximization, and thus Plaintiff has stated a non-exculpated claim against each of them."

It was reasonably conceivable that the other directors also breached their fiduciary duties and acted in bad faith. The court found the claims against these directors "less stark" than those against the Small Group members. However, the court stressed that "[w]hen the full Board finally convened on December 3, 2021, it did not take control of the process." Specifically: "No one confronted Kotick's conflicts, which were the elephant in the room. No one questioned the $90–$105 negotiating range, the timing of the process, or even Kotick's choice of … financial advisor. The Board never considered an independent advisor or measures to neutralize [the financial advisor]'s conflicts …. [T]he Board let Kotick control discussions with Microsoft and other bidders … [and let him] repeatedly decrease projections to justify the Merger price and instructed [the financial advisor] to rely on those pessimistic projections." The court noted the "rushed" timing of the process. "Ultimately, only twelve days after first learning of Microsoft's overture, the Board authorized Activision's sale at $95. They then rushed to approve the Draft Merger Agreement before Microsoft's exclusivity agreement expired, violating multiple basic statutory provisions along the way. Given the Board's awareness of Kotick's conflicts, these allegations make it reasonable to infer that their hasty sale of Activision was in bad faith."

***Corwin* cleansing of fiduciary breaches was unavailable because the stockholder approval of the merger agreement may not have met all statutory requirements.** Under *Corwin*, if a transaction not subject to the entire fairness standard was approved by a fully informed, uncoerced vote of the stockholders, the business judgment rule applies (thus "cleansing" any fiduciary breaches). The court here applied as the standard of review enhanced scrutiny under *Revlon*. Addressing this precise issue for the first time (as far as we are aware), the court wrote: "Because it is reasonably conceivable that the stockholder vote [approving the merger agreement] did not comply with statutory requirements [(as the court found in *Activision I*)], Defendants cannot rely on *Corwin* to lower the standard of review to business judgment at the pleading stage." The decision thus provides an additional reason (beyond those reflected in *Activision I*) that strict compliance with DGCL requirements for approval of a merger agreement is critical.

***Corwin* cleansing also was unavailable because the stockholder vote approving the merger agreement may not have been fully informed.** The proxy statement did not disclose numerous facts relating to the scandal, nor its potential impact on the sale process and the merger price. "These omissions created a misleading and incomplete narrative that the Sexual Misconduct Issues had no role in the Merger and were irrelevant to assessing the Merger's value to stockholders," the court wrote. Also of note, the court stated that the proxy statement repeatedly cited the large termination fee ($2 billion at the time the stockholders voted) as a reason the Board recommended the merger. Yet the proxy statement did not disclose that Activision had covenanted (in the Company Disclosure Letter) to purchase at least $0.7 billion worth of cloud services from Microsoft. That covenant, the court stated, "arguably offset" the benefits of the termination fee to Activision, and, "[i]n light of the … disclosure concerning the … Termination Fee, a reasonable Activision stockholder would have considered it important to know" about the covenant.

***Corwin* cleansing also was unavailable for alleged fiduciary breaches associated with extending the merger agreement.** The merger agreement stated a July 18, 2023 termination date and provided for a termination fee, ranging from $2 billion to $3 billion, payable to Activision if it terminated the merger agreement on or before that date under certain circumstances. At the termination date, Activision entered into a letter agreement, that Kotick negotiated with Microsoft, which extended the termination date to October 18, 2023; eliminated Activision's right to a then-$3 billion termination fee on the July 18 termination date; and provided instead for a $3.5 billion termination fee if Activision terminated after August 29, 2023 and $4.5 billion if after September 15, 2023. *Revlon* duties applied to the decision to enter into the letter agreement, the court stated. By extending the merger agreement, the board may have been "doubling down" on the same fiduciary breaches that related to its approval of the merger agreement — especially given that Activision's performance had improved significantly since the merger agreement was signed. "When an opportunity for renegotiation arises, directors cannot remain prisoners of their own misconceptions," the court wrote. Further, the court stated that, as "there was no separate stockholder vote concerning the Letter Agreement, there is no possibility of *Corwin* cleansing" for any fiduciary breaches in having entered into it.

The aiding and abetting claim against Microsoft was dismissed. The plaintiff alleged that Microsoft had exploited Kotick's conflicts arising from the sexual misconduct scandal. Microsoft publicly condemned the situation and stated that it was reevaluating its business relationships with Activision, thus knowingly putting pressure on Kotick and Activision; Kotick contacted Microsoft shortly afterward, and Microsoft then promptly proposed an acquisition; and Microsoft knew the scandal was putting pressure on Kotick and Activision's stock price, which would make Kotick eager to sell, but it then negotiated directly with Kotick. The court wrote: "What Plaintiff fail[ed] to allege, however, is that Microsoft knew that Kotick was breaching his fiduciary duties, knew that making a bid under these circumstances was wrongful, and substantially assisted Kotick in his breach as opposed to passively creating the circumstances under which Kotick could breach his fiduciary duties."

Practice Points

- **A board must be actively engaged in a sale process.** The board can delegate to management the task of conducting a sale process, and even a *conflicted* CEO (or other person) can be selected to lead the process. However, in all cases, and especially if a conflicted person is leading the process, the board must sufficiently oversee the process. The board should ask questions of management rather than simply accepting its judgments; manage conflicts; and itself carefully consider key issues, such as who should lead the process, which advisors should be retained, what the range of prices for the negotiations should be, whether a bidder should be granted exclusivity, etc.
- **A board must manage the conflicts if a conflicted person is selected to lead the sale process.** A conflicted person sometimes may be the best choice to lead the process. For example, a CEO, although conflicted, may have the deepest knowledge about the company, the strongest connections to potential buyers, or the best skills or experience for the process. However, before selecting a conflicted person, the board should obtain all relevant information; consider how significant the conflicts are; determine whether the reasons for relying on this particular person outweigh the conflict concerns; and consider whether actions should be taken to minimize the concerns. Such actions could include, for example, designating certain director(s) to provide more intense oversight of the conflicted person; or imposing restrictions on the conflicted person's role (such as limiting it so that it does not include, for example, price negotiations; or requiring that the person engage in discussions relating to certain topics only when accompanied by a director or special committee member). Also, where a conflicted person is selected to lead the process, the board may want to ensure that a clearly *non*-conflicted financial advisor is engaged.
- **A board should formally engage its advisors.** When Microsoft informed Activision's CEO of its interest in the company, the CEO convened the Small Group of directors and a financial advisor with whom he had longstanding ties. The court noted that, when the full board finally was convened, that firm and legal counsel "just showed up as the deal advisors," and "[n]othing suggest[ed] that the Board members — who had just learned of Microsoft's overture — authorized [the CEO] to engage them." A board should consider which advisors to engage for a sale process and should make a formal decision to engage them.
- **A board should establish a record of its reasons for key or controversial decisions —** such as selecting a conflicted person to lead (or to participate substantially in) the sale process; retaining a possibly conflicted advisor; granting a bidder exclusivity; providing a bidder with a leg-up in the sale process; setting a negotiating range of prices below values indicated by the company's strategic plan; or revising company projections that had been prepared in the ordinary course.

- **A board should avoid a “rushed” sale process.** The process should be as deliberative as possible under the circumstances, with care taken to consider the key strategies and issues, to permit time for alternatives to be considered, and to ensure compliance with statutory and other requirements. Notably, *Activision II* now has established that failure to strictly comply with statutory requirements for the stockholder vote may render *Corwin* cleansing of fiduciary breaches unavailable.
- **Any decision to limit initial consideration of a sale of the company to just a small group of directors should be made with caution.** Such decision may sometimes be justified — for example, to ensure confidentiality at the earliest stage. Generally, however, the full board should be involved — before a financial advisor is selected and a price range for the negotiations is set and agreed to by the potential acquiror.
- **A sell-side board should consider disclosing in the proxy statement significant arrangements that could be viewed as “offsetting” a termination fee it might receive.** Consideration should be given to disclosing such arrangements if they are significant enough that a reasonable stockholder would view the information as relevant when considering the import of the termination fee. In *Activision II*, the court viewed Activision’s covenant to purchase at least $0.7 billion worth of services as rising to that level in the context of a $2 billion termination fee.

FOUNDING PUBLISHER - Jesse M. Brill, J.D. Yale Law School
Formerly an attorney with the Securities and Exchange Commission and a leading authority on executive compensation practices, Mr. Brill is also the Founding Publisher of *The Corporate Counsel* and *The Corporate Executive*, and Chair of the National Association of Stock Plan Professionals.

EDITOR - John Jenkins, Managing Editor of DealLawyers.com
EDITOR - Meredith Ervine, Senior Editor of DealLawyers.com

CCRcorp • 8911 N. Capital of Texas Highway, #4200-110 • Austin, TX 78759 • 1-800-737-1271 • info@ccrcorp.com