

**ORIGINAL**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

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**KING & SPALDING LLP,**

**Plaintiff**

**Index No.**

**10116232**

**v.**

**SUMMONS**

**VIVENDI S.A. and  
VIVENDI HOLDING I CORP.,**

**Defendants**

-----x

**TO: Vivendi Holding I Corp.  
800 Third Avenue  
New York, New York 10022**

**Vivendi S.A.  
800 Third Avenue  
New York, New York 10022**

**YOU ARE HEREBY SUMMONED to answer the Complaint in this action and to serve a copy of your answer on plaintiff's attorneys within twenty (20) days after service of this summons, exclusive of the date of service, or within thirty (30) days after service is complete if the summons is not personally delivered to you within the State of New York. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Complaint.**

**The basis of venue for this action is CPLR § 503 because Vivendi Holding I Corp. resides in New York County.**

**Dated: New York, New York  
December 15, 2010**

**FILED**

**DEC 15 2010  
NEW YORK  
COUNTY CLERK'S OFFICE**

**KING & SPALDING LLP**

**By:**

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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KING & SPALDING LLP,

Plaintiff

Index No.

v.

COMPLAINT

VIVENDI S.A. and  
VIVENDI HOLDING I CORP.,

Defendants

-----x

Plaintiff, King & Spalding LLP ("K&S"), by and for its complaint against defendant Vivendi S.A. and defendant Vivendi Holding I Corp. ("Vivendi Holding", together with Vivendi S.A., "Vivendi"), alleges as follows:

NATURE OF THIS ACTION

1. This is an action by K&S for breach of Vivendi's written agreements to pay the legal fees and disbursements charged by K&S in connection with its defense of Vivendi S.A.'s former CEO, Jean-Marie Messier ("Messier"), in the various legal actions formerly consolidated as In re Vivendi Securities Litigation, Civil Action No. 02 Civ. 5571 (RJH/HBP) (S.D.N.Y.) (collectively, the "Vivendi Actions"). The Vivendi Actions were initially filed in 2002. They alleged that Vivendi, Messier and the former CFO of Vivendi made fraudulent misstatements to the investing public that caused many billions of dollars of losses when Vivendi's stock price plummeted during 2002.

2. From 2002 until late 2007, K&S's fees for Messier's legal defense were paid by Vivendi's Director and Officer Liability insurers. In recent years they were paid by Vivendi pursuant to its promises undertaken in two written agreements. Specifically, on June 28, 2007

Vivendi Holding promised in writing to pay K&S's legal fees and disbursements (the "K&S Invoices") for defending Messier in the Vivendi Actions for the duration of those actions (the "2007 Agreement"). Further, on September 17, 2009, Vivendi S.A. promised K&S in writing that it would pay all future K&S Invoices to be billed throughout the trial of the Class Action and all post-trial proceedings in the Vivendi Actions (the "2009 Agreement").

3. The first of the Vivendi Actions -- that brought by a class of shareholders -- went to trial from October 2009 through January 2010. The defense of Messier at trial of that action was a total success; the jury found Messier not liable on any of plaintiffs' claims.

4. Despite his vindication by the jury's verdict, Messier's need for legal counsel in the Vivendi Actions has continued. Plaintiffs in the Class Action filed numerous post-trial motions and when the judgment is entered appeals from it are a certainty. In addition, claims of many of the plaintiffs in the Vivendi Actions have yet to go to trial.

5. Perhaps because Vivendi did not fare as well as Messier at the trial, beginning a month after the verdict, Vivendi stopped paying any further legal fees of Messier. Although it has not disputed any of the invoices submitted by K&S for its representation of Messier, Vivendi has failed to pay any of the K&S Invoices since March 2010.

6. Messier must still contend with ongoing post-trial proceedings, impending appeals and one or more upcoming trials of related claims. Vivendi's unjustified breach of its obligations to pay the K&S Invoices imperils the defense of Messier's legal rights and jeopardizes Messier's ability to continue to retain the firm that has represented him in the Vivendi Actions for the past eight years.

7. Plaintiff brings this action to recover from Vivendi the amount of all the outstanding K&S Invoices. Plaintiff also seeks declaratory relief so that Vivendi will promptly honor its obligations to pay K&S for Messier's continuing legal defense in the Vivendi Actions.

8. K&S brings this action as a party to the 2007 and 2009 Agreements and/or as a third party beneficiary of those agreements. K&S also brings this action as assignee of Messier's rights to have the K&S Invoices paid by Vivendi.

### **THE PARTIES**

9. Plaintiff K&S is a limited liability partnership formed under the laws of Georgia, with its principal place of business at 1180 Peachtree Street, Atlanta, Georgia 30309. K&S is registered in New York as a Foreign Registered Limited Liability Partnership, and has an office at 1185 Avenue of the Americas, New York, New York 10036. The vast majority of the legal work that is the subject of this action has been performed by lawyers from that New York office.

10. Defendant Vivendi S.A. is a société anonyme organized under the laws of France, with its principal place of business at 42 avenue de Friedland 75008, Paris, France. Vivendi S.A. has offices in New York County at 800 Third Avenue, New York, New York 10022.

11. Defendant Vivendi Holding is a Delaware corporation, with its principal place of business at 800 Third Avenue, New York, New York 10022.

### **JURISDICTION AND VENUE**

12. Pursuant to CPLR § 301 and BCL § 1314, jurisdiction exists over Vivendi Holding because it is a foreign corporation registered to conduct business in New York State.

13. Pursuant to CPLR § 301 and BCL § 1314, jurisdiction exists over Vivendi S.A. because it is engaged in a systematic and continuous course of conduct of doing business in New York State both directly and indirectly through its agents, including but not limited to Vivendi Holding, such that the aggregate of its activities are not occasional or casual but have a fair measure of permanence.

14. Pursuant to CPLR § 503, venue is appropriate in this Court because Vivendi Holding resides in New York County.

## **STATEMENT OF FACTS**

### **Background**

15. K&S has represented Messier, the former Chairman and CEO of Vivendi S.A., since September 2002. Messier first retained K&S in an arbitration with Vivendi over the company's refusal to honor his severance agreement. Messier prevailed in that arbitration.

16. Also in late 2002, Messier retained K&S to defend him in a consolidated securities class action now pending before Judge Richard J. Holwell in the Southern District of New York, in which Messier, Vivendi S.A., and Guillaume Hannezo (Vivendi's former CFO) were named as defendants (the "Class Action"). That Class Action, which is now in post-trial proceedings, arose out of a dramatic drop in Vivendi's share price in 2002 during Messier's tenure as Chairman and CEO. Vivendi S.A. is a French corporation. In 2002, its common shares were traded in France but it was then listed on the NYSE, where its American Depositary Receipts ("ADRs") traded. The Class Action was brought on behalf of a purported worldwide class of Vivendi shareholders and ADR holders.

17. On March 28, 2003, Liberty Media Corporation and a number of its affiliates filed an action against Vivendi S.A. and Messier in the Southern District of New York, alleging federal securities claims based on the same core of alleged wrongdoing, as well as other common law claims (the "Liberty Action"). That case was consolidated with the Class Action on May 13, 2003.

18. On March 22, 2007, Judge Holwell issued a class certification decision ruling that the plaintiff class in the Class Action could include residents of the United States, France, England and the Netherlands, but could not include residents of other European countries (such as Germany and Austria) whose legal systems are plainly hostile to U.S.-style class actions. Beginning some months after that decision, dozens of new individual complaints, all virtually

identical to the original class complaint, were filed in the Southern District of New York against Vivendi and Messier by individual plaintiffs who had been originally included in the class and are now excluded by Judge Holwell's class certification decision (the "Individual Actions"). These plaintiffs are primarily money management funds and other financial institutions from European nations other than France, England and the Netherlands. The court ordered that all the Individual Actions be consolidated with the Class and Liberty actions.

19. The Class Action, the Liberty Action, and the Individual Actions together make up the previously-defined Vivendi Actions. K&S has represented Messier in the Vivendi Actions through many years of discovery and motion practice, and throughout the trial of the Class Action. K&S continues to represent Messier in the ongoing post trial-phase of the Class Action, as well as in the pending Liberty and Individual Actions that have not yet been tried.

**Vivendi Agrees to Pay Messier's Defense Costs**

20. The defense of the Vivendi Actions between 2002 and 2010 was funded initially by the Vivendi Director & Officer Liability insurance policies (the "D&O Policies"). Although D&O policies are designed primarily to protect directors and officers such as Messier, Vivendi was also a named insured and used the proceeds of the D&O Policies to fund its own defense.

21. By 2007, while the Vivendi Actions were still far from trial, the D&O Policies that had been used to fund the defense of Vivendi and Messier in those actions became severely depleted. The great bulk of the D&O proceeds had been used up by the defense of Vivendi; only a small fraction had been used to fund Messier's defense and the other individual defendant in some of the Vivendi Actions, Vivendi's former CFO.

22. In view of this situation, on June 28, 2007 Vivendi Holding agreed in writing to pay K&S's legal fees and disbursements for Messier's continuing defense of the Vivendi Actions for the duration of the Vivendi Actions (the "2007 Agreement").

23. Although payments of the K&S Invoices by Vivendi Holding to K&S were often late during 2008, Vivendi Holding nevertheless did pay the K&S Invoices rendered during that year.

24. During 2009, Vivendi was even more tardy in paying the K&S Invoices. Because of this serious lateness in payment, and the impending commencement in October 2009 of the trial of the Vivendi shareholder Class Action, K&S insisted on immediate payment from Vivendi of its already-billed K&S Invoices, as well as certain other terms and reassurances from Vivendi concerning payment for Messier's defense going forward.

25. Accordingly, Vivendi S.A., on behalf of itself, its affiliates, and subsidiaries (including Vivendi Holding) entered another written agreement with K&S on September 17, 2009. In that agreement, Vivendi confirmed that it would pay not only all then-outstanding K&S Invoices, but also all future K&S Invoices to be billed throughout the upcoming trial and post-trial proceedings in the Vivendi Actions (the "2009 Agreement").

#### **The Class Action Trial and Ongoing Post-Trial Proceedings**

26. The trial of the Class Action commenced in the Southern District of New York on October 5, 2009 and continued until a jury verdict was rendered on January 29, 2010.

27. The Class Action was said by some commentators to be the largest securities class action ever tried to verdict. The verdict in the action was split. The jury found Vivendi liable under the Securities Exchange Act for 57 statements to the investing public. The jury found Vivendi liable to the shareholder class for damages that were not precisely determined for the whole class but are alleged by plaintiffs' lawyers to total several billion dollars.

28. In the same verdict form, Messier was found by the jury to have no liability, either for personal wrongdoing or for the wrongdoing of Vivendi.

29. Because of the extraordinary complexity and importance of the legal issues in the Vivendi shareholder class action trial and the enormity of the damages, the Court granted the parties' request to extend the time for briefing of all post-trial motions for many months after the trial. The Court heard an entire day of argument on those extensive motions on July 26, 2010. As of this filing, those motions remain *sub judice*. For that reason, no appeals have yet been taken from the January 29, 2010 verdict, through appeals are certainly expected as soon as the post-trial motions are decided.

30. In addition, because the post-trial motions remain *sub judice*, claims by plaintiffs in the Liberty Media Action and the Individual Action, which Judge Holwell deconsolidated from the Class Action shortly before the October 2009 trial of the Class Action, have not yet been scheduled for trial or further proceedings. Those additional claims in the Vivendi Actions -- which also total billions of dollars of claimed damages -- are certain to move forward promptly once the trial court rules on the pending post-trial motions; indeed, plaintiffs in the Liberty Media Action have asked the Court to set a date for trial of that Action.

31. During the four-month trial of the Vivendi Class Action, Vivendi honored the 2007 Agreement and the 2009 Agreement and promptly paid all the K&S Invoices.

32. Following the conclusion of the trial, however, there was a great deal of additional legal work necessary for Messier in connection with the extensive post-trial motions, preparation for appeals, and adjudication of the other claims in the Vivendi Actions.

**Vivendi Breaches its Obligation to Pay Messier's Defense Costs**

33. Vivendi continued to pay the K&S Invoices for the first month following the conclusion of the trial. In March 2010, however, Vivendi simply stopped paying the K&S Invoices. Although the K&S Invoices were timely billed for each month from March 2010 through July 2010, Vivendi did not object to the bills. It simply failed to pay them. Messier's



defense in the continuing Vivendi Actions has been and continues to be gravely jeopardized by Vivendi's refusal to honor its obligations to pay the K&S Invoices for his defense. Since the Vivendi Actions will move forward quickly upon resolution of the pending post-trial motions, Messier faces incalculable harm in the near future from Vivendi's unjustified and wrongful refusal to honor its obligations and pay the K&S Invoices.

34. Vivendi has failed to remit payment for the total amount of \$865,833.22, which is due and owing to K&S for work performed from March 2010 to July 2010 in the continued defense of Mr. Messier in the Vivendi Actions.

35. On May 9, 2010, K&S sent Vivendi an invoice dated April 4, 2010, for the billing period of March 2010, in the amount of \$250,713.22. Vivendi did not object to the invoice.

36. On June 22, 2010, K&S sent Vivendi an invoice dated June 17, 2010, for the billing period of April 2010, in the amount of \$171,919.07. Vivendi did not object to the invoice.

37. On July 16, 2010, K&S sent Vivendi an invoice dated July 7, 2010, for the billing period of May 2010, in the amount of \$128,184.06. Vivendi did not object to the invoice.

38. On July 22, 2010, K&S sent Vivendi an invoice dated July 22, 2010, for the billing period of June 2010, in the amount of \$151,581.80. Vivendi did not object to the invoice.

39. On August 17, 2010, K&S sent Vivendi an invoice dated August 16, 2010, for the billing period of July 2010, in the amount of \$163,435.07. Vivendi did not object to the invoice.

40. Although Vivendi did not object to any of the invoices described above, it has failed and refused to pay them, despite repeated oral and written demands that it do so. The total amount of \$865,833.22 is currently due and owing by Vivendi to K&S for work performed from March 2010 to July 2010 in the continued defense of Mr. Messier in the Vivendi Actions.

41. Messier has assigned to K&S all his rights and interest in the in amounts due and owing under the K&S Invoices, whether arising from the 2007 and 2009 Agreements, under applicable statutes, corporate by-laws, or principles of law and equity.

**FIRST CAUSE OF ACTION**  
**(Breach of Contract)**

42. Plaintiff K&S repeats and realleges each and every allegation contained in paragraphs 1 through 39 above as though fully set forth herein.

43. By reason of their failure to pay invoices rendered by K&S for legal services performed for Messier during the months of March through July 2010, Defendants have breached the 2007 Agreement and the 2009 Agreement. K&S has been damaged in the amount of \$865,833.22 by Vivendi's breaches.

**SECOND CAUSE OF ACTION**  
**(Account Stated)**

44. Plaintiff K&S repeats and realleges each and every allegation contained in paragraphs 1 through 39 above as though fully set forth herein.

45. By reason of defendants' failure either to remit payment for or object to invoices rendered by K&S for work performed during the months of March through July 2010, K&S is entitled to damages of \$865,833.22 under the doctrine of account stated.

**THIRD CAUSE OF ACTION**  
**(Promissory Estoppel)**

46. Plaintiff K&S repeats and realleges each and every allegation contained in paragraphs 1 through 39 above as though fully set forth herein.

47. In the 2009 Agreement, Vivendi promised to pay all K&S's legal fees and disbursements in connection with K&S's defense of Messier in the Vivendi Actions, including those incurred in connection with the post-trial proceedings following the Class Action trial.

48. K&S justifiably relied on Vivendi's promises in defending Messier during the post-trial proceedings in the Class Action. Vivendi has broken those promises to pay the K&S Invoices.

49. K&S has suffered damages in the amount of \$865,833.22 as a result of Vivendi's failure to pay as promised.

50. By reason of defendants' breaches of its promises to pay K&S Invoices for work performed during the months of March through July 2010, K&S is entitled to damages of \$865,833.22 under the doctrine of promissory estoppel.

**FOURTH CAUSE OF ACTION**  
**(Declaratory Judgment)**

51. Plaintiff K&S repeats and realleges each and every allegation contained in paragraphs 1 through 39 above as though fully set forth herein.

52. An actual controversy has arisen and now exists between K&S and Vivendi concerning their rights and obligations under the 2007 and 2009 Agreements. K&S contends that Vivendi is obligated to continue paying legal fees and disbursements incurred in Messier's ongoing defense of the Vivendi Actions, as Vivendi agreed to do.

53. K&S seeks a judicial determination of the parties' rights and obligations under the 2007 Agreement and 2009 Agreement. K&S seeks a declaration that Vivendi is obligated to continue paying K&S's legal fees and expenses in connection with its defense of Messier in the Vivendi Actions.

**RELIEF REQUESTED**

WHEREFORE, plaintiff King & Spalding LLP demands judgment in its favor against defendants Vivendi S.A. and Vivendi Holding I Corp. as follows:

(i) On its First, Second and Third Counts, awarding damages against defendants in the amount of \$865,833.22, plus interest;

(ii) On its Fourth Count, declaring that going forward, defendants must pay all legal fees and disbursements incurred by Messier in connection with his defense of the Vivendi Actions; and

(iii) On all Counts, awarding Messier his costs and attorneys' fees incurred in connection with this action, together with such other relief as this Court may deem just and proper.

Dated: New York, New York  
December 15, 2010

KING & SPALDING LLP

By:

  
Michael J. Malone  
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New York, New York 10036  
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*Attorneys for Plaintiff King & Spalding LLP*

**SUPREME COURT OF THE STATE OF NEW YORK  
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VIVENDI S.A. AND  
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Defendants.  
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Index No.:

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**SUMMONS AND COMPLAINT**

**KING & SPALDING LLP**

*Attorney(s) for* **Plaintiff**

1185 AVENUE OF THE AMERICAS  
NEW YORK, NEW YORK 10036  
(212) 556-2100

To

Service of a copy of the within is hereby admitted.

Dated: .....20.....

Attorney(s) for

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