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FOCUS AREAS

Corporate Governance & M+A

EDUCATION

Fordham University School of Law
J.D. 1996

University of Pennsylvania
B.A. 1992, *cum laude*

ADMISSIONS

New York

Pennsylvania

USDC, Eastern District of Pennsylvania

United States Court of Federal Claims

Lee D. Rudy, a partner of the Firm, practices in the area of corporate governance litigation, with a focus on transactional and derivative cases. Representing both institutional and individual shareholders in these actions, he has helped cause significant monetary and corporate governance improvements for those companies and their shareholders.

Many of Lee's notable successes have come after, or on the eve of, a high-profile bench or jury trial. In 2011, Lee served as co-lead trial counsel in the landmark case against Southern Peru Copper Corporation, which resulted in a $2 billion trial verdict against Southern Peru's majority stockholder, believed to be the largest trial verdict for stockholders in history. More recently, in 2023, Lee helped lead a jury trial against the Federal Housing Finance Agency (FHFA) for unfairly diverting the profits of Fannie Mae and Freddie Mac from stockholders to the U.S. Treasury Department. After a three-week trial, the jury awarded stockholders $612 million. Lee also recently served as co-lead counsel in an action challenging Shari Redstone's efforts to merge CBS and Viacom, which settled for $167.5 million shortly before trial. Lee served as co-lead trial counsel against Facebook and its founder Mark Zuckerberg challenging Facebook's plan to issue a new class of nonvoting stock to entrench Zuckerberg as the company's majority stockholder. Facebook abandoned its plan to issue the nonvoting stock just two days before trial. Lee also co-led a massive insider trading case against Pershing Square, its founder Bill Ackman, and Valeant Pharmaceuticals, relating to Pershing's buying nearly 10% of the stock of Allergan, Inc. from unsuspecting Allergan stockholders in

advance of Valeant launching a tender offer to buy Allergan. The high-profile case settled for $250 million just weeks before trial. Lee previously served as lead counsel in dozens of high profile derivative actions relating to the "backdating" of stock options.

Prior to civil practice, Mr. Rudy served for several years as an Assistant District Attorney in the Manhattan (NY) District Attorney's Office, and as an Assistant United States Attorney in the US Attorney's Office (DNJ), where he tried dozens of jury cases to verdict.

Lee serves on the boards of Legacy Youth Tennis & Education and the Becket-Chimney Corners YMCA.

Current Cases

- Activision Blizzard, Inc.

CHANCERY COURT ALLOWS PENSION FUND TO PURSUE CLAIMS THAT MICROSOFT-ACTIVISION MERGER IS INVALID UNDER DELAWARE LAW

On behalf of plaintiff Sjunde AP-Fonden ("AP-7"), Kessler Topaz recently secured a ruling largely denying defendants' motions to dismiss AP-7's claims challenging the $68.7 billion merger between Microsoft Corporation and Activision Blizzard, Inc., the company behind popular video games *Call of Duty* and *World of Warcraft*.

AP-7 originally instituted this litigation in response to allegations of sexual harassment against Activision's CEO Robert Kotick. AP-7 sought to hold Activision's board of directors ("Board") and management accountable for a widespread toxic corporate culture that negatively impacted the company and its stockholders.

As the scandal deepened, Activision's competitors perceived that Activision was wounded and its shares were trading for less than their fair value. Kotick also knew that a sale of the company would potentially insulate him from further scrutiny and legal claims. Activision's stock, which had traded over $100 per share in February 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. On January 22, 2022, Kotick and Microsoft agreed that Microsoft would buy Activision for $95 per share.

AP-7 alleges that the Merger undervalued Activision's shares and was engineered to protect Kotick and management rather than to maximize stockholder value. AP-7 also alleges that the Merger failed to comply with multiple provisions of the Delaware General Corporation Law ("DGCL").

Among other claims, Plaintiff alleged that the Activision Board did not properly approve the Merger under Section 251 of the DGCL

because material terms of the deal had not been finalized at the time the Board approved it. Plaintiff also alleged that the Board improperly delegated to a committee the decision of whether Activision stockholders would receive dividends while the Merger was pending. That committee had then agreed with Microsoft that it would only pay one $0.47/share dividend during the Merger's pendency. Plaintiff also alleged that as a result of these statutory violations, Microsoft unlawfully "converted" Activision stockholders' shares when it completed the Merger.

As expected, the Merger drew regulatory and antitrust scrutiny, and thus took a long time to complete. After AP-7 filed its complaint challenging the Board's handling of stockholders' right to dividends, on July 18, 2023, Activision and Microsoft agreed to let Activision pay a dividend of $0.99/share, a total of more than $700 million.

On June 5, 2023, the defendants moved to dismiss the Complaint's statutory and conversion claims. On October 13, 2023, the defendants consummated the Merger. On February 29, 2024, Chancellor Kathaleen St. J. McCormick issued two opinions that largely denied defendants' motions to dismiss AP-7's claims.

Chancellor McCormick ruled that AP-7 had adequately pled that (1) the Merger was invalid under Section 251 of the DGCL; (2) the Board improperly delegated to a committee the negotiation and approval of the dividend provision of the merger agreement; and (3) Microsoft had unlawfully converted Activision stockholders' shares when it closed the Merger. Chancellor McCormick determined that boards of directors "must strictly comply with statutory requirements governing mergers," and that "requiring a board to approve an essentially complete version of a merger agreement" merely reflects "the basic exercise of fiduciary duties, not to mention good corporate hygiene."

Chancellor McCormick has not yet ruled on the viability of AP-7's claims that the Board breached its fiduciary duties by agreeing to the Merger for an inadequate price. AP-7 is gratified by the Court's ruling and looks forward to pressing its claims forward.

KTMC's case team includes Lee Rudy, Eric Zagar, and Lauren Lummus.

Read February 29, 2024 Memorandum Opinion Here

Read February 29, 2024 Letter Decision Here

Read February 1, 2023 Verified Amended Class Action Complaint [Public Version] Here

- Continental Resources, Inc.

Plaintiffs challenge the take-private acquisition of Continental Resources, Inc. by Continental's controlling shareholder, Harold Hamm, which closed on November 22, 2022 (the "Take-Private"). Hamm paid approximately $4.3 billion to squeeze out minority shareholders in a deal that valued Continental overall at approximately $27 billion. On May 17, 2023, Plaintiffs filed their Verified Consolidated Class Action Petition. The Petition alleges that Hamm violated his duty of loyalty to shareholders by paying an unfair price for Continental's public shares, after an unfair negotiation process. The Petition also alleges that Continental's other board members were conflicted and failed to protect the interests of public shareholders. Plaintiffs also alleged a breach of fiduciary duty by Hamm for engaging in insider trading by buying millions of shares of Continental stock and causing Continental to buy back shares while he was secretly planning to launch the Take-Private. On October 3, 2023, the Court denied all defendants' motions to dismiss, allowing all of Plaintiffs' claims to proceed. Plaintiffs are now engaging in document discovery. Plaintiffs also filed their opening brief in support of class certification.

- Covetrus, Inc.

KTMC brought claims on behalf of the minority stockholders of Covetrus, Inc. ("Covetrus" or the "Company") to challenge the take-private acquisition of the Company by Clayton, Dubilier & Rice, LLC ("CD&R") and TPG Global, LLC ("TPG") for $21.00 per share in cash (the "Merger"). Prior to the Merger, CD&R owned approximately 24% of Covetrus, and through that investment, CD&R was represented on the Company's board of directors (the "Board") by two of its partners, Ravi Sachdev ("Sachdev") and Sandi Peterson ("Peterson"). Furthermore, CD&R's investment agreement included a broad standstill provision that prevented CD&R from even expressing an interest in a transaction with the Company without prior Board authorization. However, after certain third parties expressed an interest in a transaction with Covetrus in mid-2021, the Company's CEO tipped off Sachdev and Peterson, and soon thereafter, CD&R was provided with diligence materials. By December 2021, CD&R expressed—in violation of the standstill provision—that it valued the Company at $24.00 per share. But in March 2022, TPG offered to acquire the Company for a price between $21.00 and $22.00 per share, and immediately thereafter, Covetrus teamed up with TPG and submitted a joint bid at $21.00 per share—$4.00 per share less than what CD&R had indicated the Company was worth only months earlier. Only after the deal was nearly final, in May 2022, the Board formally granted a waiver of CD&R's standstill provision. The Company's proxy statement filed in connection with the Merger contained numerous misleading statements and omissions, including with respect to CD&R's violations of the standstill provision. Plaintiffs filed a complaint in

November 2023, and in October 2024, the Delaware Court of Chancery denied Defendants motion to dismiss against CD&R, Sachdev, and Peterson. The case is now proceeding into discovery and the parties are preparing for trial.

- Fannie Mae/Freddie Mac

On August 14, 2023, after a three-week trial in the U.S. District Court for the District of Columbia, a federal jury unanimously found in favor of plaintiff shareholders of the Federal National Mortgage Association ("Fannie Mae"), and the Federal Home Loan Mortgage Corporation ("Freddie Mac"). The jury found that in August 2012 the Federal Housing Finance Agency ("FHFA") breached the implied covenant of good faith and fair dealing inherent in the Fannie Mae and Freddie Mac shareholder contracts and awarded shareholders damages of $612.4 million. Kessler Topaz served as Co-Lead Plaintiffs' counsel for this momentous trial verdict, which was reached after a decade of litigating stockholders' claims through multiple rounds of pleadings, appeals, and after a previous jury was unable to reach a verdict after a twelve-day trial in November 2022.

On September 6, 2008, at the height of the financial crisis, FHFA placed Fannie Mae and Freddie Mac into conservatorship, giving FHFA full authority to run the companies. The law authorizing conservatorship directed FHFA as conservator to "preserve and conserve assets," and FHFA told stockholders at that time that the conservatorship would be temporary, and was designed to return Fannie Mae and Freddie Mac to safe and solvent condition, and to return the entities to their stockholders.

Also in 2008, the U.S. Treasury bought senior preferred stock in Fannie Mae and Freddie Mac, and provided a funding commitment of up to $100 billion for each of Fannie Mae and Freddie Mac in exchange for a 10% annual dividend on any amount Fannie Mae or Freddie Mac drew on the commitment. Treasury's funding commitment was later raised to $200 billion, and was later amended to be unlimited through the end of 2012. Treasury, Fannie Mae, and Freddie Mac memorialized this agreement in the Senior Preferred Stock Purchase Agreements ("PSPAs"). Treasury ultimately invested a total of $189 billion in Fannie Mae and Freddie Mac to help support each companies' critical mission of backstopping the nation's housing finance system through the financial crisis.

Four years later, Fannie Mae and Freddie Mac had just posted their first two quarters of profitability in four years. The housing market was recovering, and Fannie Mae and Freddie Mac management projected that the companies were on their way to sustained profitability. Stockholders reasonably believed that Fannie Mae and Freddie Mac were on a path to begin building capital and

ultimately exit conservatorship. Instead, with no notice to stockholders, on August 17, 2012, Treasury and FHFA agreed to amend the PSPAs, changing the 10% dividend into a "Net Worth Sweep." The Net Worth Sweep required Fannie Mae and Freddie Mac to pay the full amount of their net worth to Treasury every quarter. As a result, Plaintiffs alleged that Fannie Mae and Freddie Mac were unable to build capital, or ever pay dividends to private shareholders, regardless of how profitable either company was. The Net Worth Sweep has continued to sweep all of Fannie Mae's and Freddie Mac's profits to the U.S. Treasury every quarter since 2012, resulting in Treasury receiving over $150 billion in dividends in excess of what it would have received under the original PSPAs, and all at stockholders' expense. Moreover, Fannie Mae and Freddie Mac still remain in conservatorship after fifteen years.

Plaintiffs proved at trial that FHFA's agreeing to the Net Worth Sweep was an "arbitrary and unreasonable" violation of stockholders' reasonable expectations under their shareholder contracts. Plaintiffs sought $1.61 billion in damages, which was the amount that Fannie Mae's and Freddie Mac's common and preferred stock prices collectively fell on August 17, 2012 when the Net Worth Sweep was announced. At trial, Plaintiffs called twelve witnesses, including stockholder class representatives, former Fannie Mae and Freddie Mac management, and three expert witnesses. Plaintiffs also cross-examined representatives of FHFA and Defendants' expert, who opined that the Net Worth Sweep was reasonable.

After ten hours of deliberations, the jury awarded damages of $612.4 million to Fannie Mae and Freddie Mac stockholders. Appeals are anticipated.

KTMC's trial team consisted of attorneys Lee Rudy, Eric Zagar, Grant Goodhart, Lauren Lummus, plus numerous additional staff.

The case is titled *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations, No. 13-mc-1288 (RCL) (D.D.C).*

- Foundation Building Materials, Inc.

KTMC brought claims on behalf of the minority stockholders of Foundation Building Materials, Inc. ("FBM" or the "Company") to challenge the take-private acquisition of the Company by American Securities LLC ("American Securities") for $19.25 per share in cash (the "Merger"). The Merger was instigated by FBM's then-controlling shareholder, Lone Star Fund IX (U.S.), L.P. ("Lone Star") in order to trigger a contractual "change-in-control" provision that entitled Lone Star to a hefty lump-sum payment upon the sale of the Company. Lone Star orchestrated the sale process with the help of

a conflicted financial advisor, RBC Capital Markets ("RBC") and faced no resistance from a "special committee" of FBM directors—itself advised by a conflicted banker, Evercore Group LLC ("Evercore"). FBM's minority stockholders were not given the opportunity to approve the Merger, and did not receive timely notice of their appraisal rights as required under Delaware law. Among other things, Plaintiff alleged breaches of fiduciary duties in connection with the unfair Merger, aiding and abetting of those breaches by RBC and Evercore, and violation of Delaware's appraisal statute. Defendants moved to dismiss all claims, but the Delaware Court of Chancery denied, in large part, those motions. The case is now proceeding into discovery and trial preparation.

- Inovalon Holdings, Inc.

KTMC brought claims by minority stockholders of Inovalon Holdings, Inc. ("Inovalon") to challenge the take-private of Inovalon by a consortium of private equity investors led by Nordic Capital as well as Inovalon's founder, CEO, and controlling stockholder Keith Dunleavy. Inovalon provides cloud-based platforms for healthcare providers. In 2021, Inovalon was approached by Nordic who offered to take the company private and offered an attractive rollover and post-closing compensation package for Dunleavy. The Board agreed to a price of $44/share for the take private but, at the eleventh hour, Nordic informed the Board that it could not finance the merger and dropped its bid to $40.50/share. Despite acknowledging the price drop was unacceptable, not in shareholders' best interests, and that there was no need to sell, the Board ultimately agreed to $41/share. Plaintiffs alleged that the merger was unfair and deprived shareholders of Inovalon's upward trending business at a time when there was no need to sell, and gave insiders preferential treatment. Further, Plaintiffs discovered that the banker that led the sale process, JP Morgan, had significant relationships with the consortium purchasers that were not disclosed to shareholders. Defendants moved to dismiss, which was granted by the Delaware Court of Chancery. However, Plaintiffs appealed and in May 2024 the Delaware Supreme Court reversed the dismissal based primarily on to the massive undisclosed conflicts of interest between JP Morgan and the private equity consortium. The case is now proceeding into discovery and trial preparation.

- Match Group, Inc.

On April 4, 2024, the Delaware Supreme Court issued its opinion reversing the Delaware Court of Chancery's dismissal of a 2021 stockholder suit challenging the fairness of the 2020 reverse spin-off separation (the "Separation") of Match Group, Inc. ("Match" or the "Company") from its controlling stockholder, IAC/InterActiveCorp ("IAC," or the "Controller"). Media mogul Barry Diller chairs IAC and controls 43% of its voting power. The Supreme

Court's opinion is a substantial victory not just for the plaintiff in this case, but for *all* stockholders of Delaware corporations.

Plaintiff alleged that IAC used the Separation to extract $680 million from Match through a special dividend, and simultaneously to offload $1.7 billion worth of Controller-owned debt to the post-Separation company ("New Match"). The Delaware Court of Chancery had dismissed the case after determining that the Controller structured the Separation to comply with *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*").

MFW allows controlling stockholders to get deferential "business judgment" review of conflicted transactions if they condition the transaction on the approvals of both (i) an independent committee of directors, and (ii) a majority of the company's minority stockholders. The Court of Chancery had dismissed plaintiff's case despite acknowledging that plaintiff alleged that at least one of the three directors appointed to the Match special committee was not independent from IAC due to his lucrative employment history, including as the Controller's chief financial officer, and due to his prior board service with several of IAC's affiliates. On appeal, plaintiff argued that this finding was inconsistent with *MFW* and should be reversed.

The Delaware Supreme Court agreed with plaintiff, holding that to comply with *MFW*, it is not sufficient for a majority of the directors on a special committee to be independent. Rather, all directors appointed to negotiate with a controlling stockholder must be independent for a controlling stockholder-led transaction to receive business judgment review.

Defendants had also broadened the scope of the appeal by arguing that *MFW* should not have applied to the Separation in the first place. Defendants argued that *MFW* only applied to "freeze-out" mergers, i.e., mergers in which a controller buys out the minority shares it does not already own. Because the Separation was not a "freeze-out" merger, Defendants argued to the Delaware Supreme Court that *MFW* should not have applied to it, and instead, the Separation should have received lenient business judgment review, rather than the more onerous entire fairness review, which requires the controller to prove that the transaction was fair to minority stockholders, both in terms of price and process.

Whether *MFW* and entire fairness review applied to controller-led transactions other than "freeze-out" mergers had profound implications for stockholders of *all* Delaware corporations. Luckily, the Delaware Supreme Court agreed with plaintiff that decades of Delaware law supported the notion that all controller-led transactions, including the Separation, require entire fairness review. Regardless of whether the transaction was a "freeze-out" merger or a transaction like the Separation, the Supreme Court held that courts should have a "heightened concern for self-dealing when a controlling stockholder stands on both sides of a

transaction and receives a non-ratable benefit."

The Supreme Court's opinion sends the case back to the Court of Chancery for further proceedings, including discovery and trial.
Read April 4, 2024 Supreme Court of the State of Delaware Opinion Here
Read September 1, 2022 Court of Chancery of the State of Delaware Memorandum Opinion Here
Read November 2, 2021 Amended and Supplemented Verified Consolidated Stockholder Read Class Action and Derivative Complaint [Public Version] Here

- SiriusXM Holdings, Inc.

KTMC brought claims by former minority stockholders of Sirius XM Holdings Inc. ("Sirius XM") to challenge Sirius XM's transaction with its controlling stockholder, Liberty Media Corporation ("Liberty Media"). In this transaction, Liberty Media separated Liberty SiriusXM Group, comprising Liberty Media's ownership of Sirius XM, into a new company holding Liberty SiriusXM Group's assets and liabilities, which then merged with Sirius XM to form "New Sirius" (the "Transaction"). Plaintiffs allege that the Transaction was unfair to Sirius XM's minority stockholders for a variety of reasons, including that, (i) it permits Liberty Media to offload potentially massive, unrelated tax liabilities onto New Sirius, and (ii) causes New Sirius to assume almost two billion dollars of Liberty SiriusXM Group debt. Moreover, the apparent purpose of the Transaction was to close the value gap between the trading price of Liberty SiriusXM Group's tracking stock and Sirius XM's net asset value which would not benefit former Sirius XM shareholders. Plaintiffs filed their complaint on October 15, 2024, and are currently awaiting Defendants' responses.

Settled

- Allergan Inc.
  Allergan stockholders alleged that in February 2014, Valeant tipped Pershing Square founder Bill Ackman about its plan to launch a hostile bid for Allergan. Armed with this nonpublic information, Pershing then bought 29 million shares of stock from unsuspecting investors, who were unaware of the takeover bid that Valeant was preparing in concert with the hedge fund. When Valeant publicized its bid in April 2014, Allergan stock shot up by $20 per share, earning Pershing $1 billion in profits in a single day.
  Valeant's bid spawned a bidding war for Allergan. The company was eventually sold to Actavis PLC for approximately $66 billion.
  Stockholders filed suit in 2014 in federal court in the Central District of California, where Judge David O. Carter presided over the case. Judge Carter appointed the Iowa Public Employees Retirement System ("Iowa") and the State Teachers

Retirement System of Ohio ("Ohio") as lead plaintiffs, and appointed Kessler Topaz Meltzer & Check, LLP and Bernstein Litowitz Berger & Grossmann, LLP as lead counsel.
The court denied motions to dismiss the litigation in 2015 and 2016, and in 2017 certified a class of Allergan investors who sold common stock during the period when Pershing was buying.
Earlier in December, the Court held a four-day hearing on dueling motions for summary judgment, with investors arguing that the Court should enter a liability judgment against Defendants, and Defendants arguing that the Court should throw out the case. A ruling was expected on those motions within coming days.
The settlement reached resolves both the certified stockholder class action, which was set for trial on February 26, 2018, and the action brought on behalf of investors who traded in Allergan derivative instruments. Defendants are paying $250 million to resolve the certified common stock class action, and an additional $40 million to resolve the derivative case.
Lee Rudy, a partner at Kessler Topaz and co-lead counsel for the common stock class, commented: "This settlement not only forces Valeant and Pershing to pay back hundreds of millions of dollars, it strikes a blow for the little guy who often believes, with good reason, that the stock market is rigged by more sophisticated players. Although we were fully prepared to present our case to a jury at trial, a pre-trial settlement guarantees significant relief to our class of investors who played by the rules."

- Alon USA Energy, Inc.
  On October 29, 2021, Chancellor McCormick of the Delaware Court of Chancery approved a $44.75 million settlement to resolve class action litigation concerning the July 1, 2017 acquisition of Alon USA Energy by its controlling stockholder, Delek US Holdings. Representing the Arkansas Teacher Retirement System, Kessler Topaz brought this class action on behalf of former stockholders of Alon against Delek and Alon's board of directors. Through years of discovery, Kessler Topaz built a record demonstrating that Delek abused its power over Alon to secure an unfairly low price in the acquisition. The case settled just weeks before a June 2021 trial was set to commence.

- Apple REIT Ten, Inc.
  This shareholder derivative action challenged a conflicted "roll up" REIT transaction orchestrated by Glade M. Knight and his son Justin Knight. The proposed transaction paid the Knights millions of dollars while paying public stockholders less than they had invested in the company. The case was brought under Virginia law, and settled just ten days before trial, with

stockholders receiving an additional $32 million in merger consideration.

- Arthrocare Corporation
  Kessler Topaz, as co-lead counsel, challenged the take-private of Arthrocare Corporation by private equity firm Smith & Nephew.
  This class action litigation alleged, among other things, that Arthrocare's Board breached their fiduciary duties by failing to maximize stockholder value in the merger. Plaintiffs also alleged that that the merger violated Section 203 of the Delaware General Corporation Law, which prohibits mergers with "interested stockholders," because Smith & Nephew had contracted with JP Morgan to provide financial advice and financing in the merger, while a subsidiary of JP Morgan owned more than 15% of Arthrocare's stock. Plaintiffs also alleged that the agreement between Smith & Nephew and the JP Morgan subsidiary violated a "standstill" agreement between the JP Morgan subsidiary and Arthrocare. The court set these novel legal claims for an expedited trial prior to the closing of the merger. The parties agreed to settle the action when Smith & Nephew agreed to increase the merger consideration paid to Arthrocare stockholders by $12 million, less than a month before trial.

- CBS Corporation

CASE CAPTION	*In re CBS Corporation Stockholder Class Action and Derivative Litigation*
COURT	Delaware Court of Chancery
CASE NUMBER	Consolidated C.A. No. 2020-0111-JRS
JUDGE	Honorable Joseph R. Slights
PLAINTIFF	Bucks County Employees Retirement Fund

DEFENDANTS	ViacomCBS, Inc., Joseph Ianniello, Candace K. Beinecke, Barbara M. Byrne, Gary L. Countryman, Brian Goldner, Linda M. Griego, Martha L. Minow, Susan Schuman, Frederick O. Terrell, Strauss Zelnick, Thomas J. May, Judith A. McHale, Ronald Nelson, Nicole Seligman, National Amusements, Inc., NAI Entertainment Holdings LLC, Shari E. Redstone, Robert N. Klieger and the Sumner M. Redstone National Amusements Trust

In *In re CBS Corporation Stockholder Class Action and Derivative Litigation*, Consolidated C.A. No. 2020-0111-JRS, Kessler Topaz alleged that the merger of CBS and Viacom was unfair to CBS and its public shareholders because CBS was forced to overpay for Viacom's declining business. Kessler Topaz alleged that the merger was the culmination of a years-long effort by Shari Redstone, who controlled both CBS and Viacom, to combine the two companies in order to save her family's investment in the floundering Viacom as it suffered from industry headwinds due to consumers shifting away from cable television subscriptions. Ms. Redstone twice

previously attempted to merge CBS and Viacom in the years leading up to the merger, but failed due to opposition by the board. Then, in 2019 after replacing a majority of directors on the CBS board, her third attempt to merge the two companies succeeded.

After the merger was announced in August 2019, Kessler Topaz quickly initiated a books and records investigation pursuant to Delaware law in order to investigate potential merger-related claims against CBS's board of directors. After negotiations over the scope of the investigation broke down, Kessler Topaz pursued its clients' inspection rights through a successful books and records trial. After trial, the Delaware Court of Chancery ordered CBS to turn over significant additional documents, including internal communications. Kessler Topaz analyzed the documents received and used them to craft a 118- page complaint against CBS's board of directors in April 2020.

After successfully defeating the CBS board of directors' and Ms. Redstone's motions to dismiss in January 2021, the case moved into discovery and the parties prepared for trial. Kessler Topaz developed significant facts that the merger was concocted purely by Ms. Redstone and her advisors in order for CBS to bail out her failing interest in Viacom, a company comprised of a collection of cable-TV networks that was described by many as a "melting ice cube" due to the prevalence of "cord cutting." Ms. Redstone's hand-picked directors acquiesced to her plans, while hold-over directors from the previous board's opposition to the merger were sidelined throughout the process and given no substantive role. And because the market widely viewed Viacom as a weaker company without significant upside prospects, CBS's stock price plummeted in the wake of the merger announcement, costing shareholders hundreds of millions of dollars in value.

Trial in the case was set to begin in June 2023. On April 18, 2023, after extensive mediation, and after completing virtually all of fact and expert discovery, the parties reached an agreement to settle the action in exchange for a $167.5 million cash payment by defendants and their insurance policies to CBS. The settlement was structured to reimburse CBS for its overpayment for Viacom. Unlike in a class action, the settlement fund will not be distributed to CBS's minority stockholders, because the alleged harm was to CBS, the corporation, for overpaying for Viacom.

On September 6, 2023, Vice Chancellor Sam Glasscock of the Delaware Court of Chancery approved what he called an "extraordinary" $167.5 million settlement.

Read the Stipulation and Agreement of Settlement, Compromise, and Release Here
Read Notice of Pendency and Proposed Settlement of Stockholder Derivative and Class Action, Settlement Hearing, and Right to Appear Here

- ExamWorks Group, Inc.
  On September 12, 2017, the Delaware Chancery Court approved one of the largest class action M&A settlements in the history of the Delaware Chancery Court, a $86.5 million settlement relating to the acquisition of ExamWorks Group, Inc. by private equity firm Leonard Green & Partners, LP.
  The settlement caused ExamWorks stockholders to receive a 6% improvement on the $35.05 per share merger consideration negotiated by the defendants. This amount is unusual especially for litigation challenging a third-party merger. The settlement amount is also noteworthy because it includes a $46.5 million contribution from ExamWorks' outside legal counsel, Paul Hastings LLP.

- Facebook, Inc.
  Just one day before trial was set to commence over a proposed reclassification of Facebook's stock structure that KTMC challenged as harming the company's public stockholders, Facebook abandoned the proposal.
  The trial sought a permanent injunction to prevent the reclassification, in lieu of damages. By agreement, the proposal had been on hold pending the outcome of the trial. By abandoning the reclassification, Facebook essentially granted the stockholders everything they could have accomplished by winning at trial.
  As background, in 2010 Mark Zuckerberg signed the "Giving Pledge," which committed him to give away half of his wealth during his lifetime or at his death. He was widely quoted saying that he intended to start donating his wealth immediately.
  Facebook went public in 2012 with two classes of stock: class B with 10 votes per share, and class A with 1 vote per share. Public stockholders owned class A shares, while only select insiders were permitted to own the class B shares. Zuckerberg controlled Facebook from the IPO onward by owning most of the high-vote class B shares.
  Facebook's charter made clear at the IPO that if Zuckerberg sold or gave away more than a certain percentage of his shares he would fall below 50.1% of Facebook's voting control. The Giving Pledge, when read alongside Facebook's charter, made it clear that Facebook would not be a controlled company forever.
  In 2015, Zuckerberg owned 15% of Facebook's economics, but though his class B shares controlled 53% of the vote. He wanted to expand his philanthropy. He knew that he could only give away approximately $6 billion in Facebook stock without his voting control dropping below 50.1%.
  He asked Facebook's lawyers to recommend a plan for him. They recommended that Facebook issue a third class of stock, class C shares, with no voting rights, and distribute these

shares via dividend to all class A and class B stockholders. This would allow Zuckerberg to sell all of his class C shares first without any effect on his voting control.

Facebook formed a "Special Committee" of independent directors to negotiate the terms of this "reclassification" of Facebook's stock structure with Zuckerberg. The Committee included Marc Andreeson, who was Zuckerberg's longtime friend and mentor. It also included Susan Desmond-Hellman, the CEO of the Gates Foundation, who we alleged was unlikely to stand in the way of Zuckerberg becoming one of the world's biggest philanthropists.

In the middle of his negotiations with the Special Committee, Zuckerberg made another public pledge, at the same time he and his wife Priscilla Chan announced the birth of their first child. They announced that they were forming a charitable vehicle, called the "Chan-Zuckerberg Initiative" (CZI) and that they intended to give away 99% of their wealth during their lifetime.

The Special Committee ultimately agreed to the reclassification, after negotiating certain governance restrictions on Zuckerberg's ability to leave the company while retaining voting control. We alleged that these restrictions were largely meaningless. For example, Zuckerberg was permitted to take unlimited leaves of absence to work for the government. He could also significantly reduce his role at Facebook while still controlling the company.

At the time the negotiations were complete, the reclassification allowed Zuckerberg to give away approximately $35 billion in Facebook stock without his voting power falling below 50.1%. At that point Zuckerberg would own just 4% of Facebook while being its controlling stockholder.

We alleged that the reclassification would have caused an economic harm to Facebook's public stockholders. Unlike a typical dividend, which has no economic effect on the overall value of the company, the nonvoting C shares were expected to trade at a 2-5% discount to the voting class A shares. A dividend of class C shares would thus leave A stockholders with a "bundle" of one class A share, plus 2 class C shares, and that bundle would be worth less than the original class A share. Recent similar transactions also make clear that companies lose value when a controlling stockholder increases the "wedge" between his economic ownership and voting control. Overall, we predicted that the reclassification would cause an overall harm of more than $10 billion to the class A stockholders.

The reclassification was also terrible from a corporate governance perspective. We never argued that Zuckerberg wasn't doing a good job as Facebook's CEO right now. But public stockholders never signed on to have Zuckerberg control the company for life. Indeed at the time of the IPO that was

nobody's expectation. Moreover, as Zuckerberg donates more of his money to CZI, one would assume his attention would drift to CZI as well. Nobody wants a controlling stockholder whose attention is elsewhere. And with Zuckerberg firmly in control of the company, stockholders would have no recourse against him if he started to shirk his responsibilities or make bad decisions.
We sought an injunction in this case to stop the reclassification from going forward. Facebook already put it up to a vote last year, where it was approved, but only because Zuckerberg voted his shares in favor of it. The public stockholders who voted cast 80% of their votes against the reclassification.
By abandoning the reclassification, Zuckerberg can still give away as much stock as he wants. But if he gives away more than a certain amount, now he stands to lose control. Facebook's stock price has gone up a lot since 2015, so Zuckerberg can now give away approximately $10 billion before losing control (up from $6 billion). But then he either has to stop (unlikely, in light of his public pledges), or voluntarily give up control. There is evidence that non-controlled companies typically outperform controlled companies.
KTMC believes that this litigation created an enormous benefit for Facebook's public class A stockholders. By forcing Zuckerberg to abandon the reclassification, KTMC avoided a multi-billion dollar harm. We also preserved investors' expectations about how Facebook would be governed and when it would eventually cease to be a controlled company.
KTMC represented Sjunde AP-Fonden ("AP7"), a Swedish national pension fund which held more than 2 million shares of Facebook class A stock, in the litigation. AP7 was certified as a class representative, and KTMC was certified as co-lead counsel in the case.

- Harleysville Mutual Insurance Co.
  Kessler Topaz served as co-lead counsel in expedited merger litigation challenging Harleysville’s agreement to sell the company to Nationwide Insurance Company. Plaintiffs alleged that policyholders were entitled to receive cash in exchange for their ownership interests in the company, not just new Nationwide policies.
  Plaintiffs also alleged that the merger was “fundamentally unfair” under Pennsylvania law. The defendants contested the allegations and contended that the claims could not be prosecuted directly by policyholders (as opposed to derivatively on the company’s behalf). Following a two-day preliminary injunction hearing, we settled the case in exchange for a $26 million cash payment to policyholders.

- Safeway, Inc.
  Kessler Topaz represented the Oklahoma Firefighters Pension

and Retirement System in class action litigation challenging the acquisition of Safeway, Inc. by Albertson's grocery chain for $32.50 per share in cash and contingent value rights. Kessler Topaz argued that the value of CVRs was illusory, and Safeway's shareholder rights plan had a prohibitive effect on potential bidders making superior offers to acquire Safeway, which undermined the effectiveness of the post-signing "go shop." Plaintiffs sought to enjoin the transaction, but before the scheduled preliminary injunction hearing took place, Kessler Topaz negotiated (i) modifications to the terms of the CVRs and (ii) defendants' withdrawal of the shareholder rights plan. In approving the settlement, Vice Chancellor Laster of the Delaware Chancery Court stated that "the plaintiffs obtained significant changes to the transaction . . . that may well result in material increases in the compensation received by the class," including substantial benefits potentially in excess of $230 million.

- Southern Peru Copper Corp.

KTMC brought derivative claims on behalf of stockholders of Southern Peru, alleging that Southern Peru's majority stockholder Grupo Mexico had caused Southern Peru to purchase mining assets from Grupo Mexico for an inflated price. Grupo Mexico sold these mining assets to Southern Peru in exchange for $3 billion in Southern Peru stock. We alleged that Grupo Mexico had caused Southern Peru to grossly overpay for the private company in deference to its majority shareholder's interests. Discovery in the case spanned years and continents, with depositions in Peru and Mexico. The trial court agreed and ordered Grupo Mexico to pay more than $2 billion in damages and interest. Grupo was forced to pay this amount back to Southern Peru to remedy the overpayment. The Delaware Supreme Court affirmed on appeal. The judgment is believed to be the largest trial verdict in Delaware corporate law history.

- Stock Option Backdating Litigation
  In 2006, the Wall Street Journal reported that three companies appeared to have "backdated" stock option grants to their senior executives, pretending that the options had been awarded when the stock price was at its lowest price of the quarter, or even year. An executive who exercised the option thus paid the company an artificially low price, which stole money from the corporate coffers. While stock options are designed to incentivize recipients to drive the company's stock price up, backdating options to artificially low prices undercut

those incentives, overpaid executives, violated tax rules, and decreased shareholder value.
Kessler Topaz worked with a financial analyst to identify dozens of other companies that had engaged in similar practices, and filed more than 50 derivative suits challenging the practice. These suits sought to force the executives to disgorge their improper compensation and to revamp the companies' executive compensation policies. Ultimately, as lead counsel in these derivative actions, Kessler Topaz achieved significant monetary and non-monetary benefits at dozens of companies, including:
Comverse Technology, Inc.: Settlement required Comverse's founder and CEO Kobi Alexander, who fled to Namibia after the backdating was revealed, to disgorge more than $62 million in excessive backdated option compensation. The settlement also overhauled the company's corporate governance and internal controls, replacing a number of directors and corporate executives, splitting the Chairman and CEO positions, and instituting majority voting for directors.
Monster Worldwide, Inc.: Settlement required recipients of backdated stock options to disgorge more than $32 million in unlawful gains back to the company, plus agreeing to significant corporate governance measures. These measures included (a) requiring Monster's founder Andrew McKelvey to reduce his voting control over Monster from 31% to 7%, by exchanging super-voting stock for common stock; and (b) implementing new equity granting practices that require greater accountability and transparency in the granting of stock options moving forward. In approving the settlement, the court noted "the good results, mainly the amount of money for the shareholders and also the change in governance of the company itself, and really the hard work that had to go into that to achieve the results…."
Affiliated Computer Services, Inc.: Settlement required executives, including founder Darwin Deason, to give up $20 million in improper backdated options. The litigation was also a catalyst for the company to replace its CEO and CFO and revamp its executive compensation policies.

- Towers Watson & Co.
  On May 25, 2021, Chancellor McCormick of the Delaware Court of Chancery approved the $15 million portion of a $90 million global settlement of Delaware and federal litigation challenging the January 4, 2016 merger of Towers Watson & Co. and Willis Group Holdings plc. Both actions challenged the fairness of the merger based, in large part, on a nine-figure compensation package that Towers' chief negotiator, defendant John Haley, stood to earn at the post-merger entity, and hid from Towers' board and stockholders. The global resolution provides a $1.52 per share payment to the vast majority of former Towers

stockholders who are members of the overlapping classes in the Delaware and federal actions. The settlement consideration largely closes the gap on the high end of the price range that Haley unsuccessfully bid when he re-negotiated the merger's original terms in order to secure stockholders' approval of the unpopular deal.
The Delaware action was dismissed in July 2019, when then-Vice Chancellor McCormick concluded that Haley's undisclosed compensation package was immaterial to Towers' board and stockholders. In June 2020, however, the Delaware Supreme Court reversed and remanded the action back to the trial court, holding that the Delaware plaintiffs had sufficiently plead that Haley breached his duty of loyalty by failing to disclose the compensation proposal and selling out Towers stockholders in the merger renegotiations.

News

- August 15, 2023 - KTMC Wins Historic $612 Million Jury Verdict For Fannie Mae and Freddie Mac Stockholders
- May 27, 2021 - Delaware Court of Chancery Approves $90 Million Global Settlement of Stockholder Litigation Challenging Towers-Willis Merger
- October 1, 2020 - Kessler Topaz Meltzer & Check, LLP Once Again Included in the Benchmark Litigation Guide to America's Leading Litigation Firms and Attorneys for 2021
- June 30, 2020 - Kessler Topaz Wins Reversal From Supreme Court of Delaware
- September 24, 2019 - Kessler Topaz Meltzer & Check, LLP Once Again Included in the Benchmark Litigation Guide to America's Leading Litigation Firms and Attorneys for 2020
- December 29, 2017 - Kessler Topaz Represents Investors in $290 Million Total Settlement Recovery Reached with Valeant Pharmaceuticals and Bill Ackman's Pershing Square Over Insider Trading Claims
- September 22, 2017 - Facebook and Founder Mark Zuckerberg Capitulate To KTMC On Eve Of Trial
- May 8, 2017 - Kessler Topaz Again Named Class Action Litigation Department of the Year by The Legal Intelligencer
- January 3, 2017 - Kessler Topaz Again Named One of America's Leading Litigation Firms by Benchmark Litigation
- May 5, 2016 - Kenneth Cole Productions: Kessler Topaz argued before New York's highest court
- March 14, 2016 - Kessler Topaz Meltzer & Check earns a spot

on The National Law Journal's "2016 Plaintiffs' Hot List"

- November 24, 2015 - Kessler Topaz Again Named One of America's Leading Litigation Firms by Benchmark Litigation
- May 1, 2015 - Investors Opposing Fee-Shifting Bylaws
- April 1, 2015 - Delaware Legislature Weighs Fee Shifting Legislation — Legislation Bans Fee Shifting While Authorizing Other Litigation-Restricting Bylaws
- September 1, 2014 - KTMC Still Slugging at Billionaire Harold Hamm Despite Legislative "Home-Towning"
- September 1, 2014 - Bylaw Madness: Boards Writing Their Own Rules for Litigation

Awards/Rankings

- Benchmark National Litigation Star, 2019-2025
- Legal 500's Leading Lawyers, 2019-2024
- Lawdragon 500 Leading Plaintiff Financial Lawyer, 2019-2024
- Lawdragon 500 Leading Global Plaintiff Lawyers, 2024
- Philadelphia Business Journal's Best of the Bar 2023
- National Law Journal Trailblazers Plaintiffs' Lawyers, 2022