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FOCUS AREAS

Securities Fraud

Corporate Governance & M+A

EDUCATION

Washington University in St. Louis
B.A. 1992

University of Michigan School of Law
J.D. 1995

ADMISSIONS

Pennsylvania

California

New York

USDC, Eastern District of Pennsylvania

USDC, Northern District of California

USDC, Central District of California

USDC, Eastern District of California

USDC, Southern District of California

USDC, Western District of Tennessee

USDC, District of Colorado

USDC, Eastern District of Michigan

Eric L. Zagar, a partner of the Firm, co-manages the Firm's Mergers and Acquisitions and Shareholder Derivative Litigation Group, which has excelled in the highly specialized area of prosecuting cases involving claims against corporate officers and directors.

Since 2001, Eric has served as lead or co-lead counsel in numerous shareholder derivative actions nationwide and has helped recover billions of dollars in monetary value and substantial corporate governance relief for the benefit of shareholders.

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.

USDC, Western District of Michigan

USCA, Third Circuit

USCA, Fourth Circuit

USCA, Fifth Circuit

USCA, Seventh Circuit

USCA, Ninth Circuit

United States Court of Federal Claims

USDC, Northern District of Ohio

USDC, Eastern District of Wisconsin

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

- AmerisourceBergen Corporation
  On December 30, 2021, plaintiffs filed a shareholder derivative action against AmerisourceBergen Corporation (now known as Cencora, Inc.) (the "Company") and the Company's directors and officers for their role in the United States' opioid epidemic. The plaintiff shareholders' action alleged that the Company's directors and officers caused or permitted the Company to abandon its opioid anti-diversion obligations and violate laws regulating distribution of controlled substances. Plaintiffs' complaint was supported by thousands of pages of internal corporate documents that plaintiffs were awarded in 2020 after litigating an *8 Del. C.* § 220 books and records demand through trial and appeal (the "Section 220 Action").
  On December 22, 2022, the Delaware Court of Chancery granted defendants' motion to dismiss plaintiffs' complaint, despite finding that plaintiffs had pled viable claims against the Company's directors for breaching their corporate oversight duties, and observing that the Company's directors "did not just see red flags; they were wrapped in them." Notwithstanding these findings, the Chancery Court dismissed plaintiffs' claims based on a federal court decision that found that certain of the Company's actions did not rise to the level of a public nuisance in West Virginia. Plaintiffs subsequently appealed, arguing, *inter alia*, that the Chancery Court took improper judicial notice of the West Virginia decision to dismiss plaintiffs' otherwise well-pled derivative claims.
  On December 18, 2023, the Delaware Supreme Court agreed with plaintiffs and reversed the Chancery Court's dismissal of this action. In reversing, the Delaware Supreme Court found that the Chancery Court's dismissal represented a "departure from the principles" of judicial notice. The Supreme Court also

recognized that "the inference drawn by the Court of Chancery that the defendants were aware for years of the deficiencies in the Company's controls but consciously chose not to address them, was, if not the only inference, at least a reasonable one."

After being remanded, this litigation was stayed on March 4, 2024 to allow a special litigation committee ("SLC") of Company directors to investigate the plaintiff stockholders' claims. During the stay, the SLC produced to plaintiffs more than 100,000 documents and deposition transcripts—totaling more than 14 million pages—that had been provided or produced by the Company in connection with other actions and government investigations concerning the Company's opioid distribution. Plaintiffs also reviewed certain additional Company books and records that were made available for in-person inspection at the offices of the SLC's counsel. This information, on top of the more than 26,000 pages of books and records produced in the preceding Section 220 Action, enabled plaintiff stockholders to make an informed assessment of the value of their claims against the risks of continued litigation.

On August 15, 2025, plaintiff stockholders and defendants jointly filed a stipulation to settle this long-running litigation. Pursuant to the terms of the stipulation, plaintiffs agreed to settle their derivative claims in exchange for a $111,250,000.00 cash payment for the benefit of the Company (the "Proposed Settlement"). The Delaware Court of Chancery will hold a hearing to determine whether to approve the Proposed Settlement on November 13, 2025 at 3:15 p.m. at the Leonard L. Williams Justice Center, 500 North King Street, Wilmington, DE 19801.

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

Read August 19, 2025 Scheduling Order [Granted with Modifications] Here

Read August 15, 2025 Stipulation and Agreement of Settlement [with Exhibits] Here

Read January 5, 2022 Verified Stockholder Derivative Complaint [Public Version] Here

Read December 18, 2023 Supreme Court of the State of Delaware Opinion Here

Read December 22, 2022 Court of Chancery of the State of Delaware Memorandum Opinion Here

- 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.

- 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

- AmerisourceBergen Corporation
  On December 30, 2021, plaintiffs filed a shareholder derivative action against AmerisourceBergen Corporation (now known as

Cencora, Inc.) (the "Company") and the Company's directors and officers for their role in the United States' opioid epidemic. The plaintiff shareholders' action alleged that the Company's directors and officers caused or permitted the Company to abandon its opioid anti-diversion obligations and violate laws regulating distribution of controlled substances. Plaintiffs' complaint was supported by thousands of pages of internal corporate documents that plaintiffs were awarded in 2020 after litigating an *8 Del. C.* § 220 books and records demand through trial and appeal (the "Section 220 Action").

On December 22, 2022, the Delaware Court of Chancery granted defendants' motion to dismiss plaintiffs' complaint, despite finding that plaintiffs had pled viable claims against the Company's directors for breaching their corporate oversight duties, and observing that the Company's directors "did not just see red flags; they were wrapped in them." Notwithstanding these findings, the Chancery Court dismissed plaintiffs' claims based on a federal court decision that found that certain of the Company's actions did not rise to the level of a public nuisance in West Virginia. Plaintiffs subsequently appealed, arguing, *inter alia*, that the Chancery Court took improper judicial notice of the West Virginia decision to dismiss plaintiffs' otherwise well-pled derivative claims.

On December 18, 2023, the Delaware Supreme Court agreed with plaintiffs and reversed the Chancery Court's dismissal of this action. In reversing, the Delaware Supreme Court found that the Chancery Court's dismissal represented a "departure from the principles" of judicial notice. The Supreme Court also recognized that "the inference drawn by the Court of Chancery that the defendants were aware for years of the deficiencies in the Company's controls but consciously chose not to address them, was, if not the only inference, at least a reasonable one."

After being remanded, this litigation was stayed on March 4, 2024 to allow a special litigation committee ("SLC") of Company directors to investigate the plaintiff stockholders' claims. During the stay, the SLC produced to plaintiffs more than 100,000 documents and deposition transcripts—totaling more than 14 million pages—that had been provided or produced by the Company in connection with other actions and government investigations concerning the Company's opioid distribution. Plaintiffs also reviewed certain additional Company books and records that were made available for in-person inspection at the offices of the SLC's counsel. This information, on top of the more than 26,000 pages of books and records produced in the preceding Section 220 Action, enabled plaintiff stockholders to make an informed assessment of the value of their claims against the risks of continued litigation.

On August 15, 2025, plaintiff stockholders and defendants jointly filed a stipulation to settle this long-running litigation.

Pursuant to the terms of the stipulation, plaintiffs agreed to settle their derivative claims in exchange for a $111,250,000.00 cash payment for the benefit of the Company (the "Proposed Settlement"). The Delaware Court of Chancery will hold a hearing to determine whether to approve the Proposed Settlement on November 13, 2025 at 3:15 p.m. at the Leonard L. Williams Justice Center, 500 North King Street, Wilmington, DE 19801.
KTMC's case team includes Eric Zagar and Lauren Lummus.

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Read December 22, 2022 Court of Chancery of the State of Delaware Memorandum Opinion Here

- CBS Corporation
  Case Caption: *In re CBS Corporation Stockholder Class Action and Derivative Litigation*
  Case Number: Consol. C.A. No. 2020-0111-SG
  Court: Delaware Court of Chancery
  Judge: Honorable Sam Glasscock III
  Plaintiffs: Cleveland Bakers and Teamsters Pension Fund, International Union of Operating Engineers of Eastern Pennsylvania and Delaware
  Defendants: National Amusements, Inc., the Sumner M. Redstone National Amusements Trust, Shari E. Redstone, Candace K. Beinecke, Barbara M. Byrne, Gary L. Countryman, Linda M. Griego, Robert N. Klieger, Martha L. Minow, Susan Schuman, Frederick O. Terrell, Strauss Zelnick, and Joseph Ianniello, Paramount Global f/k/a ViacomCBS Inc.

Overview: 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.

- Comverse Technology, Inc.
  In re Comverse Technology, Inc. Derivative Litigation, Index No. 601272/06 (N.Y. Sup. Ct.)
  KTMC served as Co-Lead Counsel in a stockholder derivative action brought for the benefit of Comverse Technology, Inc. ("Comverse") to remedy a years-long stock option "backdating" scheme that unfairly enriched Comverse executives, including founder/Chairman/CEO Jacob "Kobi" Alexander, who

notoriously fled to Namibia to escape prosecution. After significant investigation and litigation, we negotiated a settlement that required Alexander and certain other executives to disgorge more than $62 million in ill-gotten assets and overhauled the company's corporate governance and internal controls. Among other things, the new measures replaced a number of directors and corporate executives, split the Chairman and CEO positions, and instituted majority voting for directors.

- EchoStar Corporation
  On December 9, 2021, Judge Susan Johnson of the Clark County, Nevada District Court approved a $21 million settlement to resolve class action litigation concerning the August 19, 2019 sale of the majority of EchoStar Corporation's broadcast satellite services business to DISH Network Corp. in exchange for DISH Class A Common stock.
  Representing the City of Hallandale Beach Police Officers' and Firefighters' Personnel Retirement Trust, Kessler Topaz brought a class action on behalf of the public shareholders of EchoStar alleging Charles Ergen, the controlling shareholder of EchoStar and DISH, orchestrated the transaction through an unfair process and for unfair consideration in order to benefit DISH at EchoStar's expense, thereby breaching his fiduciary duties to EchoStar's minority shareholders and that Ergen was aided and abetted by the EchoStar and DISH defendants.

- Erickson Incorporated
  Kessler Topaz represented an individual stockholder who asserted in the Delaware Court of Chancery class action and derivative claims challenging merger and recapitalization transactions that benefitted the company's controlling stockholders at the expense of the company and its minority stockholders.
  Plaintiff alleged that the controlling stockholders of Erickson orchestrated a series of transactions with the intent and effect of using Erickson's money to bail themselves out of a failing investment. Defendants filed a motion to dismiss the complaint, which Kessler Topaz defeated, and the case proceeded through more than a year of fact discovery. Following an initially unsuccessful mediation and further litigation, Kessler Topaz ultimately achieved an $18.5 million cash settlement, 80% of which was distributed to members of the stockholder class to resolve their direct claims and 20% of which was paid to the company to resolve the derivative claims. The settlement also instituted changes to the company's governing documents to prevent future self-dealing transactions like those that gave rise to the case.

- 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.

- Fannie Mae / Freddie Mac
  Case Caption: *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations*
  Case Number: 1:13-mc-1288 (RCL)
  Court: U.S. District Court for the District of Columbia
  Judge: Honorable Royce C. Lamberth
  Plaintiffs: Joseph Cacciapalle, Michelle M. Miller, Timothy J. Cassell, Barry P. Borodkin
  Defendants: Federal Housing Finance Agency, Federal National Mortgage Association, Federal Home Loan Mortgage Corporation

Overview: 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. Thereafter, on March 20, 2024, Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia entered a final judgment in the amount of $812 million, which included $199.65 million in pre-judgment interest for the Fannie Mae preferred stockholders. Defendants responded by filing a motion for judgment as a matter of law, seeking to overturn the jury verdict and final judgment. On March 14, 2025, Judge Lamberth denied Defendants' motion for judgment as a matter of law, ruling that "Plaintiffs provided ample evidence for the jury to conclude that the Net Worth Sweep is causing harm to shareholders today" and that "a reasonable jury could come to the verdict that was rendered here.

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).*

- GCI Liberty Inc.
  Case Caption: *In re Hollywood Firefighters' Pension Fund, et al. v. John C. Malone, et al.*
  Case Number: C.A. No. 2020-0880-SG
  Court: Delaware Court of Chancery
  Judge: Honorable Sam Glasscock
  Plaintiffs: Hollywood Firefighters' Pension Fund; Sheet Metal Workers' Local Union No. 80 Pension Trust Fund
  Defendants: John C. Malone, Gregory B. Maffei, Gregg L. Engles, Ronald A. Duncan, Donne F. Fisher, Richard R. Green

Overview: On October 5, 2021, Vice Chancellor Glasscock of the Delaware Court of Chancery approved a $110 million settlement against John Malone and other former members of GCI Liberty Inc.'s board of directors in a case involving a challenge to the telecom holding company's merger with its affiliate, Liberty Broadband Corp. The outstanding result was in addition to substantial equitable relief obtained via the parties' November 21, 2020 settlement of plaintiffs' suit to preliminarily enjoin the merger.
On behalf of plaintiff Sheet Metal Workers' Local Union No. 80 Pension Trust Fund, KTMC had brought a class action alleging that Malone and CEO Greg Maffei used their super-voting shares to opportunistically merge the companies in an all-stock deal at a time when the exchange ratio was tilted in their favor due to market volatility created during the Covid-19 pandemic. After weeks of expedited discovery, the defendants issued new disclosures and drastically altered the previously announced terms of the deal by agreeing to convert the super-voting shares into

shares of one-vote common stock, so that Malone and Maffei would no longer obtain special treatment resulting in outsized control of the post-merger company. Subsequently, plaintiffs amended their complaint and successfully pursued monetary relief to correct for the unfair merger price that resulted from Malone's previously undisclosed, improper leveraging of his control position.

- 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.

- Viacom, Inc.
  Served as lead counsel on behalf of the Mississippi Public Employees' Retirement System in an action alleging that the Board of Directors of Viacom, Inc. (Viacom) breached its fiduciary duties by paying excessive and unwarranted compensation to Executive Chairman and CEO, Sumner M. Redstone, and co-COOs Thomas E. Freston and Leslie Moonves, at a time when the company was suffering record losses. Specifically, in 2004, when Viacom reported a net loss of $17.46 billion, the Board improperly approved compensation payments to Redstone, Freston, and Moonves of approximately $56 million, $52 million, and $52 million, respectively. Under a settlement reached in 2007, Executive Chairman and controlling shareholder Redstone agreed to a new compensation package that substantially reduced his annual salary and cash bonus, and tied the majority of his incentive compensation directly to shareholder returns.

News

- January 16, 2024 - Delaware Supreme Court Revives Derivative Claims Against the Directors and Officers of AmerisourceBergen Corporation n/k/a Cencora, Inc.
- August 15, 2023 - KTMC Wins Historic $612 Million Jury Verdict For Fannie Mae and Freddie Mac Stockholders
- 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

Speaking Engagements

Eric has been a featured speaker on shareholder derivative litigation at national and international conferences, including the Rights & Responsibilities of Institutional Investors in Amsterdam, Netherlands, the Practicing Law Institute's Annual Securities Regulation Institute in San Francisco, California, and the American College of Business Court Judges Annual Meeting in Chicago, Illinois.

Publications

A Review of Options Backdating Settlements and Corporate Governance, 2 *Journal of Securities Law, Regulation & Compliance* 236

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