KESSLERTOPAZ MELTZERCHECK LLP

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FOCUS AREAS

Corporate Governance & M+A

EDUCATION

Emory University
B.A. 2001, *magna cum laude*

Wharton School of Business at University of Pennsylvania
Certificate of Study in Business and Public Policy 2005

University of Pennsylvania Law School
J.D. 2005 (James Wilson Fellowship in Corporate Law)

ADMISSIONS

Pennsylvania

USDC, Eastern District of Pennsylvania

USDC, Eastern District of

J. Daniel Albert, a Partner of the Firm, has devoted his career to prosecuting shareholder litigation, recovering substantial damages on behalf of shareholders stemming from corporate directors' breaches of fiduciary duties, vindicating shareholders' rights, and ensuring that public companies engage in good corporate governance. Dan's practice focuses on the areas of mergers and acquisitions and shareholder derivative litigation.

Dan has served as lead or co-lead counsel in dozens of shareholder class and derivative actions nationwide, prosecuting violations of state and federal law and breach of fiduciary duty claims in connection with controlling stockholder transactions, management-led buyouts, related-party transactions, executive compensation, insider selling and stock option manipulation.

Current Cases

- 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

Michigan

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.

- 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

- 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.

- 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.

- 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.

- KCG Holdings, Inc.
  On April 2, 2020, the Delaware Chancery Court approved a $22 million settlement on behalf of former stockholders of KCG Holdings, Inc. in connection with KCG's acquisition by Virtu Financial, Inc. on July 20, 2017. As a result of the settlement, KCG stockholders received a significant improvement on the $20.00 per share transaction consideration.
  The settlement followed Kessler Topaz first securing expedited relief for KCG stockholders in the summer of 2017, before the stockholder vote on the transaction. Kessler Topaz challenged the negotiation process and asserted that KCG's largest stockholder, Jefferies LLC, had reached an agreement with Virtu to support the acquisition in violation of Delaware's anti-takeover statute. To resolve the expedited claims, the defendants agreed to modify the stockholder vote to seek approval of the transaction by a 66 2/3% supermajority vote of KCG stockholders, excluding Jefferies, and issued significant additional disclosures concerning the negotiation process.

- 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.

- 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

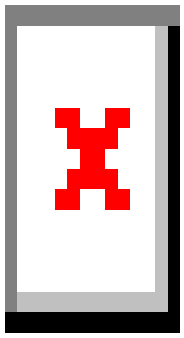
order to secure stockholders' approval of the unpopular deal.
The Delaware action was dismissed in July 2019, when then-Vice Chancellor McCormick concluded that Haley's undisclosed compensation package was immaterial to Towers' board and stockholders. In June 2020, however, the Delaware Supreme Court 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.

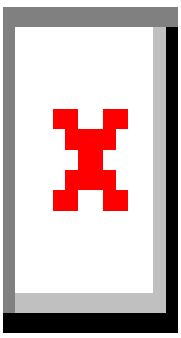
News

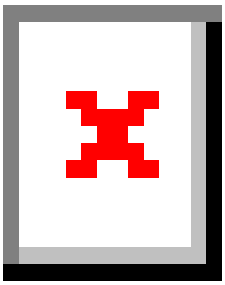
- May 27, 2021 - Delaware Court of Chancery Approves $90 Million Global Settlement of Stockholder Litigation Challenging Towers-Willis Merger
- October 1, 2020 - Kessler Topaz Meltzer & Check, LLP Once Again Included in the Benchmark Litigation Guide to America's Leading Litigation Firms and Attorneys for 2021
- June 30, 2020 - Kessler Topaz Wins Reversal From Supreme Court of Delaware
- September 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
- May 1, 2015 - Kessler Topaz Achieves Substantial Changes to Safeway Merger Terms Valued at Over $230 Million

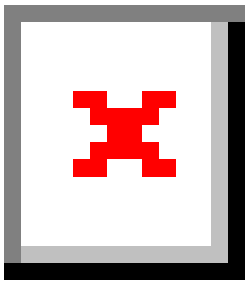
Awards/Rankings

- Benchmark National Litigation Star, 2019-2025
- The Legal 500's Leading Lawyers, 2024-2025
- Lawdragon 500 Leading Plaintiff Financial Lawyer, 2019-2025









Memberships

- American Bar Association