

## Litigators of the Week: In ‘Nuclear’ Showdown over CBS, Cleary’s Kotler and Hou on Top

By Cleary’s Kotler and Hou  
September 14, 2018

**Lit Daily:** Tell us a little about your clients and what was at stake.

Meredith Kotler: We represent the controlling stockholder of CBS and Viacom, National Amusements Inc., which is a Redstone family company. We also represent the other NAI-affiliated members on the CBS Board, Rob Klieger and David Andelman.

The stakes of this litigation were significant. Without warning, the CBS Board of Directors announced an intention to declare a dilutive stock dividend, which would have reduced NAI’s voting stake in CBS from 80 percent to 20 percent—effectively stripping NAI of its voting control without paying a dime.

This was an unprecedented move to disenfranchise a controlling stockholder for all purposes and all time.

**What were the circumstances that led up to the litigation in Delaware?**

Kotler: One of CBS’s bases for voting to issue the dilutive dividend to reduce NAI’s voting control was the allegation that Shari Redstone and NAI were attempting to force through a merger of Viacom and CBS by threatening to fire the CBS Board to accomplish this goal. This was, of course, not true.

As we stated in our filings, NAI was never going to push for a merger unless both companies and their independent directors were behind it.

**Can you walk us through how the litigation unfolded?**

Kotler: On May 14th, CBS simultaneously filed a complaint and a **motion** for temporary restraining order against NAI, seeking to tie NAI’s hands from protecting its voting control and taking action to stop the dilutive dividend from being declared. That was briefed within 48 hours. The hearing for the TRO was set for May 16th.



Just before the hearing, NAI took protective action to amend CBS’s Bylaws to require that any stock dividend require approval by 90 percent of the CBS Board. Shortly thereafter, we argued the TRO motion and the next day, the court ruled in our favor and **denied the TRO**.

Despite that ruling on May 17th, the CBS board held a meeting to vote on declaring the dividend. They did not reach the 90 percent threshold and so it was not valid as it violated the bylaw amendments. About 10 days later, NAI filed its own complaint, claiming that the actions of the CBS board were unlawful, unprecedented and in breach of their fiduciary duties. We then had dueling complaints.

Victor Hou: We knew it would be expedited litigation and we got a trial date of October 3rd for both complaints. That left us with just four months for all facets of discovery and to prepare pre-trial papers.

This was an intense and hard fought battle with talented and unrelenting lawyers on the other side. Every issue was contested from the legality of the dilutive dividend itself and the scope of the issues at trial down to every single search term that the parties would use in discovery. We

had to be prepared to fight about everything: we were and we did.

Kotler: We and our Delaware colleagues at Potter Anderson & Corroon faced off against a number of law firms on the other side. CBS and certain members of its board of directors and management were represented by Weil, Gotshal & Manges and Wachtell, Lipton, Rosen & Katz, along with Munger Tolles & Olson; Hughes Hubbard & Reed; and Ross Aronstam & Moritz.

**What were some of the key points that you stressed in your arguments?**

Kotler: There were many points that we made in our filings, but the first was that CBS's charter did not permit a dilutive dividend. We also argued that any attempt to dilute NAI's voting control would require compelling justification and a proportionate, narrowly tailored response.

In our view, the attempt to dilute the controlling shareholder was not remotely justified based on the purported threats by the controlling stockholder that CBS cited and which we argued from the beginning were not true. Separately, we also argued that CBS had wrongfully prevented NAI from protecting itself and its voting control.

Hou: This was an absolutely novel and unprecedented act taken against the controlling stockholder. This was the nuclear option that no company had ever taken before in any context and our job was to show that this decision wasn't justifiable in law or fact.

**What were some things that made this litigation unique?**

Hou: There is no question that this case presented unique issues of law and a decision in this case would have made new corporate law no matter which side prevailed.

While this case focused on actions taken by the boards of CBS and NAI, this case was also about the strong and powerful personalities associated with those actions.

On the one hand, our client, Ms. Redstone, is the most prominent woman in the media industry; on the other side is Mr. Moonves, who was one of the most powerful men in that industry.

Then you add to the mix members of the CBS Board, who each have well-established reputations in business, media, government, and academia. So while we certainly focused on preparing and making arguments based on the law and facts, you really cannot ignore the very personal

battle that was also being waged.

Kotler: This high stakes case was also singular given the media attention paid to the case and the issues presented not only from the legal press but by Wall Street analysts, Hollywood and traditional media outlets as well, which all played out against the important backdrop of the #MeToo movement and heightened awareness.

Every move in this case was scrutinized, praised or criticized. Under that type of microscope, it was challenging but even more important to stay focused on winning the case.

**Any high points that stand out?**

Hou: One aspect of this case that stood out and that was noted in our motion papers was uncovering the CBS senior management's use of TigerText, which is a messaging app that creates self-destructing texts.

Finding that members of the CBS management failed to disable that self-destructing function until weeks after this litigation was underway was a turning point. We immediately moved to compel the gathering of additional information about the TigerText system and poured over the TigerTexts that were saved.

Kotler: Another of the high points was to have an opportunity to work so intensely with our talented team of senior trial lawyers, including Lev Dassin, Rahul Mukhi, Rishi Zutshi, and Mark McDonald, on such a fast-moving and dynamic case. This spotlighted the strength of our bench, and it was gratifying to have this exceptional team of colleagues pull together on this.

Hou: In the hours after CBS filed suit against our clients, Meredith and I started to assemble our team and we pulled an all-nighter to prepare the opposition to the TRO together with Matt Fischer and Mike Pittenger at Potter Anderson. Meredith argued it for us the next day and did a superb job successfully arguing against the TRO and giving our clients the breathing space we needed to litigate the case.

I know that I speak for the whole team that we especially appreciated working with Ms. Redstone and the NAI directors. Ms. Redstone is incredibly astute and positive, and we are inspired by her energy and passion for CBS. Her instructions to us were clear—NAI did not start this war, but we are going to finish it. We are grateful for her trust in us.

**Do you two often work closely together? How did you divide the work and who were other key members of your team?**

Kotler: Victor and I work together on Delaware litigation matters, including prior Viacom litigation in 2016, and it was a pleasure to work with him again on this case. This case also offered the opportunity to work closely with our corporate partners who have worked with NAI over the past two years—Chris Austin, Victor Lewkow, and Paul Tiger. They have all been invaluable throughout this process and critical to our ultimate success.

Hou: We had to divide and conquer in order to match up against our adversaries who had much larger teams. We wanted to be agile and make decisions quickly and decisively, as we knew our opponents had multiple clients being represented by multiple law firms.

Meredith and Mark McDonald took responsibility for the defensive side of the case and I worked with Lev Dassin and Rahul Mukhi to run the offensive side of our case.

Lev, Meredith, Rahul and I are all former Assistant United States Attorneys, and I think that background was valuable experience in our approach to this civil litigation. We wanted to stay on the offensive as much as possible. We sifted through evidence like investigators and we treated depositions at times as if they were cross examinations at trial.

**Can you summarize the key provisions of the settlement?**

Kotler: The settlement rescinds the dilutive dividend and maintains NAI's voting control. It also brings to an end to both lawsuits.

Six new highly qualified and independent directors have been elected to the CBS Board. NAI has amended the CBS Bylaws to undo the previous defensive amendments and confirmed it has no plans to propose a merger of CBS and Viacom for at least two years.

NAI also reaffirmed that it will give good faith consid-

eration to any business combination transaction or other strategic alternative that the independent directors believe are in the best interests of the company and its stockholders.

**Were you heavily involved in the settlement negotiations? How quickly did it come together?**

Hou: While we can't discuss specifics, we were involved in the negotiation of this settlement; at the same time, we did not let up on pressing our case forward to trial.

**What are the implications of the change in the board of directors?**

Kotler: The resolution of this litigation supports two of NAI's key objectives. First, it ensures that CBS will benefit from a strong board that is truly independent from both management and the controlling stockholder, and that is solely focused on driving the best outcome for the company and its stockholders.

Second, it allows the focus to shift to what matters most to CBS employees and stockholders: stabilizing the company and ensuring CBS is well positioned over the long-term in an evolving media landscape.

**It's hard not to see a certain element of sexism in how Shari Redstone was treated. For example, your complaint mentions that fellow CBS director Charles Gifford once grabbed her face and told her to listen to him, and that he later explained "that's how he treats his daughters when he wants their attention." Do you feel there's a certain ... poetic justice in how the case has played out?**

Hou: We're not able to discuss this in detail, but I can say Ms. Redstone has always cared deeply about good governance, transparency and diversity on the CBS and Viacom boards and in the leadership of these two companies for the good of all stockholders. Although this has been a difficult and hard-fought litigation and process, I believe that those goals have been vindicated.