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Litigators of the Week: In Delaware Chancery Trial, Latham Defends Oracle's $9.3B NetSuite Deal

By Ross Todd
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Looking for a roadmap for a corporate board considering the acquisition of a company where a fellow board member and major shareholder already holds a major stake?

You could hardly do better than the 101-page decision Delaware Vice Chancellor Sam Glasscock III handed down last week blessing Oracle Corp.'s $9.4 billion acquisition of NetSuite Inc.

Plaintiffs in shareholder derivative litigation claimed Oracle founder Larry Ellison and CEO Safra Catz breached their duties to shareholders by pushing through a deal to overpay for NetSuite. Plaintiffs claimed Ellison, who on top of owning about 28% stake in Oracle held about 40% of NetSuite's shares, put his own interests before shareholders and that Catz acted to appease him as her boss.

But after a two-week trial where Ellison and Catz were represented by a team at **Latham & Watkins** led by partners **Peter Wald** and **Blair Connelly**, Glasscock found that a "fully empowered" special committee of Oracle's board negotiated the deal at arm's length—nearly walking away from the deal before settling on a price that was a dollar per share lower than their ceiling.

"Ellison was conflicted, but recused from the acquisition process," Glasscock wrote. "He did not exercise control over the transaction, nor did he or Catz materially mislead or defraud the Special Committee so as to taint the process."

Courtesy photos

Peter Wald, left, and Blair Connelly, right, of Latham & Watkins.

Lit Daily: What was at stake for Larry Ellison and Safra Catz at trial?

Peter Wald: Mr. Ellison had famously built Oracle from the ground up, and Ms. Catz had worked with him for more than 20 years to grow Oracle into the global powerhouse that it is today. At every step along the way, they had poured their hearts and souls into Oracle—always trying to do what was best for the company and its stockholders—and were now being accused of having breached their fiduciary duties by causing Oracle to buy and overpay for NetSuite, a company that Mr. Ellison had also co-founded. Defending their reputations in the face of these meritless claims was our paramount mission.

Blair Connelly: Plaintiffs asserted that Oracle overpaid for NetSuite by several billion dollars, and that Mr. Ellison and Ms. Catz were liable to Oracle for the amount of that alleged overpayment. So there was potentially an enormous sum of money on the line for each of them. But more than that, their legacies and reputations were at stake.

How did this matter come to the firm?

Connelly: From the outset, Mr. Ellison and Ms. Catz were prepared to take this case through trial. Accordingly, they came to Peter, who had previously secured summary judgment, and affirmance by the Ninth Circuit, for Mr. Ellison and Oracle in a $3 billion securities fraud class action.

Who was on your team and how did you divide the work?

Wald: We had a deep and talented team. As we prepared for trial, we assigned each of the four critical issues to different teams. One team, led by our partner **Kevin McDonough** with support from associates **Eric Pettis** and **Emily Orman**, focused on the question of whether Oracle and NetSuite were meaningful competitors in the enterprise resource planning (ERP) industry. Another team, led by our partner **Topher Turner** with support from associates **Nate Taylor**, **Elizabeth Stasny** and **Sara-Gail Prudenti**, focused on the deal process itself and the negotiations conducted by Oracle's Special Acquisition Committee. A third team, led by Blair with support from associates **Adam Shamah**, **Jarred Muller** and **Clarissa Lu**, focused on price and valuation issues. And a fourth team, led by our fabulous co-counsel from **Young Conaway Stargatt & Taylor**, **Elena Norman**, **Rich Thomas** and **Alberto Chávez**, focused on the threshold issue of whether Mr. Ellison controlled Oracle. I sat atop all four teams and worked with each of them in developing our themes and evidentiary presentations for trial.

Connelly: Then during trial, we collaborated closely with counsel for Renee James at **Sidley Austin**—**Sara Brody**, **Jaime Bartlett**, **Matthew Dolan** and Stephen Chang—as well as their Delaware counsel **John DiTomo** and **Thomas Will** of **Morris, Nichols, Arsht & Tunnell**. Sara conducted strong examinations of the Special Committee members, Ms. James and George Conrades. Peter and I handled the remaining fact witness examinations, with strong support from our issues teams (see above) to ensure continuity across witnesses. Elena, Topher, and Kevin examined our expert witnesses, and Peter and I handled the cross-examinations of plaintiffs' experts. It was a very collaborative effort throughout.

What were your key trial themes and how did you try to drive them home with the court?

Wald: It was very important that the court understand the Software-as-a-Service (SaaS) ERP industry and business model, because when you understand that industry's evolution and the different market segments served by Oracle and NetSuite, it is easy to see that the NetSuite acquisition made incredibly good sense for Oracle. We relied on testimony from former NetSuite and Oracle executives, as well as industry and competition experts, to describe the different ERP products made by each company, the different segments of the market that each of them addressed, the evolution of their SaaS ERP offerings and businesses, and the evolution of the SaaS industry more generally. Vice Chancellor Glasscock's opinion makes clear that he understood and accepted the witnesses' testimony concerning these critical issues, and the strong strategic rationale for the acquisition.

Connelly: We also stressed that Oracle had followed its normal process for acquisitions, and that the Special Committee had conducted hard-nosed and effective bargaining. Ms. Catz aided the Special Committee in this effort and at all times worked in the best interests of Oracle and its stockholders. We emphasized that the Special Committee bargained hard to acquire NetSuite at the lowest price possible, demonstrated that it was willing to walk away if necessary, and stood its ground on price even when it appeared that the NetSuite shareholders might reject Oracle's offer as being too low. The testimony of the Special Committee members, its advisors, and Oracle's executives drove these points home.

You had to abruptly pivot from an in-person trial during the first week to remote proceedings the second week after multiple members of your team contracted COVID. How did you keep things rolling? And how did everyone cope?

Connelly: As a practical matter, we needed to establish an arrangement that would keep safe those who had not been exposed. Latham's tech team, led by **Tim McGowan**, set up a virtual courtroom on the second floor of the Georgetown Microtel. We rearranged our examiners and support into COVID-negative and COVID-positive teams, in order to limit the spread. And our team members who had COVID, including all of our team's partners except me (I had thoughtfully contracted COVID two months earlier), and our intrepid "hot seat" tech, **Scott Johnson**, powered through the second week after a rough weekend. As a result, when trial reconvened remotely, our team did not miss a beat. And fortunately, everyone recovered without issue.

Wald: Well, if our team was going to contract COVID, we were at least fortunate that it struck late on Friday night following the first week of trial—giving us, opposing counsel, the court, and our amazing tech team the weekend to absorb the shock and determine how to proceed going forward. And I should note that everyone involved—including, of course the court and opposing counsel—was exceptionally gracious in dealing with this emergency, and worked cooperatively to assure that the proceedings could continue remotely and safely. All in, this was a wonderful reflection of the civility and courteousness that is a hallmark of Delaware Court of Chancery proceedings.

There's a certain set of concerns a lawyer might have when putting a corporate titan such as Larry Ellison or a CEO such as Safra Catz on the stand in front of a lay jury. Is the calculus any different when preparing clients such as yours for their time on the stand in the Court of Chancery, where everything is tried to a board-savvy bench?

Wald: To be sure, both Mr. Ellison and Ms. Catz are corporate titans in their own right. And in addition to being enormously successful executives, they are true experts in their respective fields. No one knows the cloud computing business better than Larry Ellison. He is widely regarded as its creator, and while the term "genius" is frequently overused in today's public discourse, it unquestionably applies to Larry when it comes to technology. Safra Catz is an iconic Silicon Valley dealmaker, whose acumen in identifying and acquiring complementary businesses that have enabled Oracle to become an industry powerhouse is the stuff of legend. The class she teaches at Stanford Graduate School of Business on mergers and acquisitions is one of the school's signature course offerings. Having a very sophisticated jurist like Vice Chancellor Glasscock as the audience positioned Mr. Ellison to testify in depth about the relevant industry, the two companies' products, their complementary nature, and the evolution of the SaaS business model generally, and positioned Ms. Catz to testify in depth about Oracle's acquisition process—both generally and with respect to the NetSuite deal itself. In particular, her testimony underscored and illuminated the very hard bargaining in which the Special Acquisition Committee consistently engaged on behalf of Oracle stockholders.

This derivative suit notably did make it to trial. Is there anything you can glean from Vice Chancellor Glasscock's decision here post-trial that the special committee or Oracle management could have done differently that could have led to an earlier dismissal? Or does this deal scenario just beg for a trial?

Connelly: I think this case was destined for trial from the outset. As the Vice Chancellor held, Mr. Ellison fully recused himself from the acquisition process, the Special Committee's process, as strongly informed by its own advisors, was independent and robust, and the tender offer itself passed by the slimmest of margins. Plaintiffs were able to craft a story that survived motions to dismiss, given the plaintiff-friendly inferences available at various pretrial stages—but Mr. Ellison and Ms. Catz had lived this acquisition experience from the outset, knew the truth behind its proper and successful completion, and were not going to settle claims that they knew to

be without merit. Plaintiffs' narrative simply could not withstand the development of evidence in discovery, and its presentation at trial.

What's important in the vice chancellor's decision for special committees or management of other companies faced with a similar scenario?

Wald: This case illustrates the critical role of a Special Committee in conflicted transactions. It is important to select committee members who are independent, disinterested, savvy, skilled in the industry and in the tactics of negotiation, consistently diligent in their work on behalf of stockholders, and deeply committed to achieving the best price possible. And as this case demonstrates, the best way to show independence and loyalty to the company is to negotiate hard for the best deal you can secure. The committee needs to play hardball, and in our case, the fact that the Special Committee showed throughout the negotiations that it was willing to walk away if the other side refused to come down in price—thereby actually forcing NetSuite to bid against itself—was a very significant factor that suffused the entire evidentiary record.

Connelly: Agreed—and though not all companies have the history of acquisitions that Oracle does, to the extent management has standard practices that it has followed in doing prior deals or valuing companies, they should do their best to follow those practices. That was an essential theme for us throughout the litigation. We showed that Oracle has well-established systems and practices to make sure that it only enters into acquisitions that make sense for the company, and that it does so on the most favorable terms it can achieve. There was no evidence that Oracle management had deviated from its normal process and practices in preparing the analyses requested by the Special Committee.

What will you remember most about this matter?

Wald: In many respects, it was the case of a lifetime. The jurisprudential and factual issues were fascinating, the story of the SaaS industry's evolution is compelling, Mr. Ellison and Ms. Catz are iconic figures in American commerce, and opposing counsel was exceptionally skilled and committed. It could not have been more challenging—or fun—to ride this roller coaster for six years. That said, I suppose my most vivid recollection was waking up very early on Saturday morning following the first week of trial, feeling unwell, taking a COVID rapid test—and seeing for the first time in the pandemic's 2.5-year existence two little pink lines staring back at me. Our ability to cope with this development—which affected eight team members—without missing a beat was gratifying beyond words.

Connelly: It was indeed the case of a lifetime, and I was honored to be part of such a fantastic team. As a general matter, what I'll remember most is that at every step along the way we were dealing with the most sophisticated and experienced people in the industry, and working with (and against) some of the very best lawyers in this practice area. That forces you to be at the top of your game.

One particular moment that sticks out for me was an example of how a little anecdote can really drive a point home at trial. During the negotiations, NetSuite made an aggressive demand and the Special Committee actually declined to make a counteroffer. There was about a two-week period of radio silence. When I asked the lead banker what he did at that point, he testified that he went on vacation with his family to Israel—and they lived in Los Angeles. The significance of that was obvious to everyone in the courtroom: there's no way the lead banker would go on vacation halfway around the world if he thought the deal was still alive. It underscored that the Special Committee wasn't just posturing—they were genuinely willing to let the deal die if it wasn't on Oracle's terms.