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Client Alert

Shareholder and Securities Litigation Practice Group

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Delaware Chancery's *In re Dole Food Co., Inc.* Decision Provides Lessons For Corporations Considering Going Private Transactions

On Thursday, August 27, 2015, Vice Chancellor J. Travis Laster found Dole Food Co., Inc. ("Dole") Chief Executive Officer, David Murdock, and General Counsel, C. Michael Carter, liable to investors for $148 million in fraud damages resulting from Murdock's and Carter's intentional acts to drive the Dole share price down in anticipation of Murdock's 2013 go-private deal.[1]

In November 2013 Murdock, the owner of 40% of Dole's stock, paid $13.50 per share to acquire the remaining 60% of the stock. The transaction was structured as a single-step merger.[2] Shortly after the transaction was announced and before it closed, shareholders filed an action asserting breach of fiduciary duty and aiding and abetting a breach of fiduciary duty claims, alleging that they had not received a fair price due to the fraudulent conduct of Murdock and Carter, among others.[3] Vice Chancellor Laster refused to expedite the lawsuit so the shareholders could pursue injunctive relief prior to closing, instead ruling that the shareholders could pursue damages following closing. The transaction closed, and the litigation proceeded on a post-closing basis.[4]

In *In re MFW Shareholders Litigation* the Delaware Chancery Court held that, in going private mergers involving a controlling shareholder, if the transaction is approved by a special committee of independent directors and approved by a fully-informed majority of the minority shareholders, it will be subjected to the deferential business judgment rule standard of review, rather than the more exacting entire fairness standard.[5] In *Dole*, Vice Chancellor Laster found that while Murdock's process for obtaining approval from the Dole board technically followed the procedure established in *In re MFW*, and affirmed by the Delaware Supreme Court in *Kahn v. M & F Worldwide Corp.*, the misleading information that Murdock and Carter purposely provided to the board undermined the fairness of the process, and therefore the entire fairness standard of review, requiring that defendants prove the transaction was the product of fair dealing and fair price, would apply.[6]

Hoping to fit within the framework of *In re MFW*, Murdock conditioned his merger proposal on approval from a special committee composed of independent directors and a majority of the non-Murdock shareholders.[7]

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Yet even these procedural safeguards could not vitiate the effect of Murdock's and Carter's fraudulent actions over the span of an eighteen-month scheme to (1) separate and realize the value of Dole's higher-margin business, (2) make misleading press statements and deliberately erroneous business decisions in an effort to drive down Dole's share price, and (3) then engage in a freeze-out to take Dole private on the cheap.

After a nine-day bench trial, Vice Chancellor Laster concluded that the evidence showed, among other things, that Carter issued press releases falsely stating Dole's projected cost savings from selling a portion of its business and improperly suspended a share repurchase program for purely pre-textual reasons. Then, with respect to the information given to the special committee considering Murdock's proposed transaction, Carter knowingly gave management projections that contained misleadingly low estimates.[8] Vice Chancellor Laster noted that the special committee members "were too polite and professional to come right out and say it, but a court has to call things as they are. The projections Carter provided were knowingly false. Carter intentionally tried to mislead the Committee for Murdock's benefit."[9]

Carter also resisted the hiring of Lazard Frères & Co. LLC ("Lazard") as an independent financial advisor because it had no prior relationship with Murdock; sought to limit the special committee's scope of consideration; failed to inform the special committee of the projected economic benefit of the farms that Dole intended to purchase; and secretly helped Murdock prepare a hostile tender offer in case the special committee did not approve Murdock's proposal.[10] While Vice Chancellor Laster acknowledged that the agreed-upon $13.50 share price was within the range of fairness that Lazard determined at the time of the merger, he concluded that Carter's refusal to share accurate financial projections and other deliberately misleading conduct, robbed the special committee and Lazard of the ability to negotiate on a fully-informed basis and to potentially say no to the merger. Thus, Murdock and Carter could not satisfy the burden of the entire fairness standard of review, and the Chancery Court found that Murdock's purchase of the stock was not the product of fair dealing and the shareholders were entitled to a "fairer" price.[11]

Lessons and Best Practices

While the Chancery Court's ruling that Murdock's and Carter's actions were fraudulent and breached their duty of loyalty may be appealed, *Dole* provides some important – and immediate – lessons for all corporations with controlling shareholders considering go-private transactions. Specifically, *Dole* makes clear that transactions to take a corporation private may require a high level of independent diligence by a special committee and its advisors to ferret out any potential fraud or unfairness by the controller prior to approval of the proposed transaction. Among other things, special committees should hire independent financial advisors capable of and willing to test management's projections, if necessary.[12] Also, if it appears that a controlling shareholder, or an officer or other designee acting at his behest, is engaging in obstructionist or other questionable behavior, such behavior should be met head-on with firm, determined action.[13] Strong and qualified independent counsel can and should be of great assistance to the special committee in counteracting such behavior by the controller, should it occur.

Efforts to take a corporation private can be profitable for both the controlling and non-controlling shareholders. However, corporate boards, special committees and the parties who advise them should maintain steady vigilance in diligently assessing potential go-private transactions, because, notwithstanding the procedure set forth in *In re MFW*, such transactions may still draw close judicial scrutiny if there is any potential evidence of fraud or self-dealing by the controller or his designee, as the *Dole* decision makes clear.

[1] *In re Dole Food Co., Inc. Stockholder Litigation*, C.A. No. 8703-VCL, (Del. Ch. August 27, 2015) at 3-4.
[2] *Id.* at 1.
[3] In addition to these claims, holders of more than 17 million shares of Dole sought appraisal. The appraisal action (C.A. No. 9079-VCL) was consolidated with this action (C.A. No. 9703-VCL). The court noted that this decision likely rendered the appraisal proceeding moot, but the parties would confer on the issue. *Id.* at 4.
[4] Plaintiffs filed their motion for expedited proceedings on August 16, 2013. *In re Dole Food Co., Inc. Stockholder Litigation.*, Plaintiffs' Motion for Expedited Proceedings, 2013 WL 4456880 (Del. Ch. Aug. 16, 2013). The court denied plaintiffs' motion to expedite on August 29, 2013. *In re Dole Food Co., Inc. Stockholder Litigation.*, Oral Argument on Plaintiffs' Motion for Expedited Proceedings and Ruling of the Court, 2013 WL 5500168 (Del. Ch. Aug. 29, 2013). Dole issued a definitive proxy on October 3, 2013 and the transaction closed on November 1, 2013.
[5] *In re MFW Shareholders Litigation*, 67 A.3d 496, 502 (Del. Ch. 2013), *aff'd sub nom. Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014). After the close of the transaction to take Dole private in November 2013, the Delaware Supreme Court affirmed the holding of *In re MFW*. The Delaware Supreme Court summarized its holding by stating that: "in controller buyouts, the business judgment standard of review will be applied *if and only if*: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority." *M & F Worldwide Corp.*, 88 A.3d at 645 (emphasis added).
[6] *In re Dole* at 6, 58 (citing *Cinerama, Inc. v. Technicolor, Inc. (Technicolor Plenary IV)*, 663 A.2d 1156, 1163 (Del. 1995)). Entire fairness is often the standard of review for challenged transactions between a controlling shareholder and a corporation. *See Kahn v. Lynch Commc'n Sys.*, 638 A.2d 1110, 1115 (Del. 1994) ("A controlling or dominating shareholder standing on both sides of a transaction, as in a parent-subsidiary context, bears the burden of proving its entire fairness.").
[7] *In re Dole* at 1.
[8] *Id.* at 68.
[9] *Id.* at 70.
[10] *Id.* at 71.
[11] *Id.* at 82-83. The Court observed that Lazard had opined that the $13.50 price was within a range of fairness, but even if arguably "fair," the shareholders were entitled to a "fairer" price that would eliminate Murdock's and Carter's ability to profit from their breaches of the duty of loyalty. *Id.* at 2-3.
[12] Vice Chancellor Laster noted that there is academic research finding a correlation between management-led buyouts and measures that reduce the apparent performance of a company during periods before the announcement of a buyout. Indeed, one study found that earnings manipulation in management buyouts caused an average decrease in price of 18.6%. *Id.* at 60 n.13.
[13] In *Dole*, there were numerous incidents in which Carter improperly impeded the special committee's process, yet the special committee members chose not to challenge Carter. For example, Carter sought to limit the special committee's scope of consideration and prevent it from considering competing offers. While the committee members recognized that Carter was incorrect about the special committee's scope of consideration, they "decided not to force the issue." *Id.* at 36. Similarly, Carter challenged the special committee's ability to enter into non-disclosure agreements with other potential bidders. Again, "Carter was clearly in the wrong . . . [b]ut the Committee decided not to force this issue either." *Id.* at 37. Finally, the special committee capitulated to Carter's improper limitation on the scope of Lazard's engagement in order to allow Lazard access to the diligence materials that Carter was withholding. *Id.* In the face of such coercive tactics, a special committee should do its best to counteract such actions or, at the very least, document the coercive actions so that a complete record is preserved.