Dole Ruling Serves as Cautionary Tale for Take-Private Deals

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Earlier this year, in a consolidated breach of fiduciary duty and appraisal action, Vice Chancellor J. Travis Laster of the Delaware Court of Chancery issued a post-trial opinion that includes many important takeaways for practitioners, board members, members of management and their advisors. *In re Dole Food Co., Inc. Stockholder Litig. & In re Appraisal of Dole Food Co., Inc.*, C.A. Nos. 8703-VCL, 9079-VCL (Del. Ch. Aug. 27, 2015). The court found that this take-private transaction by its controlling stockholder was the result of unfair dealing, despite the company having implemented procedural protections recommended by the Delaware Supreme Court in *In re MFW S'holders Litig*. The court found that David Murdock (the 40 percent stockholder and de facto controller of Dole Food Company, Inc. (Dole)) and C. Michael Carter (Dole's president, chief operating officer and general counsel) were jointly and severally liable for more than $148 million in damages for breaches of fiduciary duty.

Background

The transaction was structured pursuant to the formula described in *In re MFW S'holders Litig.*, 88 A.3d 635 (Del. Ch. 2013) — namely, conditioned upon approval of a special committee of Dole directors and a majority of the minority vote of Dole stockholders — which would be expected to result in application of the business judgment rule as the standard of review applied by the court. However, the court instead applied the rigorous entire fairness standard of review to the transaction, finding that "[d]espite mimicking *MFW*'s form, Murdock did not adhere to its substance. He and his right-hand man, Carter, sought to undermine the Committee from the start, and they continued their efforts throughout the process."

The court's decision was driven by specific factual findings of improper conduct by Murdock and Carter. The court found that, prior to the process leading to the sale, Carter made false disclosures that did not identify the full extent of planned cost savings and unilaterally canceled a board-approved share repurchase program, which "primed the market for the freeze-out [transaction] by driving down Dole's stock price and undermining its validity as a measure of value." Moreover, the court found that during the process, Carter "used his control over Dole's management to provide false information to the Committee," including knowingly false "lowball" projections, while providing Murdock's bankers with more positive projections. The court also held that Carter interfered with the committee's efforts to manage the process and negotiate with Murdock by taking steps to undermine the arm's length negotiation process.

As to Murdock, the court highlighted that he had long been seeking to take Dole private and, among other things, used Dole's financial advisor at the time to investigate that plan. In addition, the court found that Murdock had a history of reprisal against board members who did not support his plans, including leaving threatening voice mails and demanding that at least one board member resign.

The court concluded that "by taking these actions, Murdock and Carter deprived the Committee of the ability to negotiate on a fully informed basis and potentially say no to the Merger." The court found that Murdock and Carter likewise deprived the stockholders of their ability to consider the merger on a fully informed basis and potentially vote it down as a result of the nondisclosure of critical information bearing on value, and that Murdock and Carter's conduct throughout the committee process, as well as their credibility problems at trial, demonstrated that their actions were not incorrect or inadvertent, but rather intentional and in bad faith. The court went so far as to find that Carter "engaged in fraud," which "rendered useless and ineffective the highly commendable efforts of the Committee and its advisors to negotiate a fair transaction that they subjectively believed was in the best interests of Dole's stockholders." Even though the court found that the special committee and its financial advisor acted "with integrity," and a majority of minority stockholders approved the merger, "what the Committee could not overcome, what the stockholder vote could not cleanse, and what even an arguably fair price does not immunize, is fraud." Thus, the court found that Murdock and Carter were liable for breaches of fiduciary duty — Murdock in his capacity as controlling stockholder and a Dole director, and Carter in his capacity as a Dole director and an officer. The court found that the exculpatory provision in Dole's charter did not apply to Murdock in his capacity as controller, and as a director, did not exculpate him because he acted in bad faith. Likewise, because Carter acted in bad faith in his capacity as a Dole director, the exculpatory provision did not apply to him. Moreover, the exculpatory provision did not apply to Carter when acting in his capacity as an officer.

The court found that stockholders were not limited to a remedy of fair price, but were rather "entitled to a fairer price designed to eliminate the ability of the defendants to profit from their breaches of the duty of loyalty." The court found that damages of $2.74 per share over the deal price were appropriate and awarded a total of $148 million in damages assessed against Murdock, his entity DCF Holdings LLC and Carter, with pre- and post-judgment interest compounded quarterly.

However, the court found that there was no evidence that the remaining directors acted disloyally or in bad faith, and they were therefore entitled to exculpation under Dole's charter.

The court also found that Murdock's financial advisor and lead financing source in connection with the take-private transaction was not liable on an aiding and abetting theory. The court noted that the financial advisor previously had served as advisor to Dole in connection with a strategic business review and "acted improperly by favoring Murdock and treating him as the bank's real client in transactions before the Merger, even when [it] was officially representing Dole." However, the court concluded that Murdock's financial advisor "did not participate knowingly in the breaches that led to liability" against Murdock and Carter in this case.

Conclusions and Takeaways

There are a number of important takeaways for practitioners from this opinion.

- One clear message the court is sending is that the substance, not just the form, of the process matters, and the court will closely scrutinize the underlying facts to determine the application of the business judgment rule to a controller take-private transaction under *MFW*.
- Moreover, committees of independent directors should have capable, experienced legal and financial advisors to guide them through a process involving a management buyout or controlling stockholder, taking appropriate steps to mitigate conflicts and to seek to obtain relevant information to inform careful action.
- *Dole* highlights the pitfalls of an important, but sometimes overlooked, corporate governance principle — namely, that officers and members of management owe fiduciary duties to the company and its stockholders generally and not to a controlling stockholder specifically or to more senior officers. If a committee asks for information, an officer has a duty to provide truthful and complete information, particularly accurate and up-to-date financial information about the company's performance.