

## INSIGHTS

## Delaware Court Holds Interested Directors Liable for "Fairer Price" In Going Private Transaction

September 8, 2015

In one of the largest ever M&A-related recoveries for shareholders, Vice Chancellor J. Travis Laster ordered Dole Food Company, Inc.'s Chairman and CEO, David Murdock, and Dole's former President, COO and General Counsel, C. Michael Carter, to pay \$148 million to class members for breaching their fiduciary duties in connection with a leveraged buyout. *In re Dole Food Co., Inc. Stockholder Litig.*, No. 8703-VCL, 2015 (Del. Ch. Aug. 27, 2015). Applying Delaware's entire fairness standard of review, the Court held Murdock and Carter personally liable despite the fact that the transaction was conditioned on the approval of an independent committee of Dole's board of directors and the affirmative vote of a majority of Dole's minority shareholders. The decision illustrates that, even in the presence of minority shareholder protections, interested executives face substantial personal liability to the extent they take steps to circumvent or undermine the ability of an independent committee and its advisors to deliver an optimal price for the benefit of the company's minority shareholders. Having concluded that the price Murdock paid may have fallen within a range of reasonableness, Vice Chancellor Laster nonetheless emphasized that Murdock and Carter took deliberate steps to undermine the independent committee's process and awarded damages based on the calculation of a "fairer" price.

### Case Background

The lawsuit arose following a 2013 single-step merger (the "Merger") in which Murdock, the *de facto* controlling stockholder of Dole Food Company, Inc. ("Dole"), through his acquisition vehicle, DFC Holdings, LLC, paid \$13.50 per share to acquire the 60% of Dole's common stock that he did not already own. Slip. Op., at 1. The plaintiff shareholder class claimed that the Merger was not entirely fair, that Murdock and two co-defendants had breached their duties of loyalty, and that the defendants should be held personally liable for damages of over \$600 million. *Id.*, at 56.

Pursuant to Delaware law, the Merger was evaluated under the entire fairness standard of review because Murdock stood on both sides of the transaction. *Id.*, at 57 (citing *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1239 (Del. 2012)). Prior to trial, the defendants moved for summary judgment pursuant to the rules set forth in then-Chancellor Strine's decision in *In re MFW S'holders Litig.*, 67 A.3d 496 (Del. Ch. 2013), *aff'd sub nom.*, *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014). The defendants argued that the more deferential business judgment standard of review applied or, alternatively, that the burden of persuasion under the entire fairness standard had shifted to the plaintiffs given Dole's adoption of minority stockholder protections. *Id.*, at 5. Specifically, the defendants emphasized that Murdock's initial proposal to Dole's Board of Directors had been appropriately conditioned on (i) approval from a committee of the Board made up of disinterested and independent directors (the "Committee") and (ii) the

affirmative vote of holders of a majority of Dole's unaffiliated shares. *Id.*, at 1. Echoing his earlier order denying the defendants' motion for summary judgment, Vice Chancellor Laster set the tone for his post-trial decision, noting that "[d]espite mimicking *MFW's form*, Murdock did not adhere to its *substance*." *Id.* (emphasis added).

### **The Court's Analysis**

Following a nine day trial, the Court held that, although the Merger superficially appeared to meet *MFW's* standards, the defendants failed to demonstrate that the Merger was entirely fair. *Id.*, at 4-5. The entire fairness standard contains two interrelated prongs, fair dealing and fair price, both of which must be objectively established "'to the court's satisfaction' . . . 'independent of the board's beliefs.'" *Id.*, at 57 (emphasis in original) (quoting *Cinerama, Inc. v. Technicolor, Inc. (Technicolor Plenary IV)*, 663 A.2d 1156, 1163 (Del. 1995) and *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1145 (Del. Ch. 2006)). While lauding the efforts of the Committee and its advisors to negotiate a fair transaction that it genuinely believed to be in the best interest of Dole's stockholders, the Court observed that "fraud vitiates everything." *Id.*, at 58, 65. The Court found that the defendants – and specifically Carter, acting on Murdock's behalf – had acted deliberately to undermine the Committee's evaluation of the Merger, thereby rendering it the "antitheses of a fair process" and rendering the Committee "ineffective as a bargaining agent for the minority stockholders." *Id.*, at 65, 72 (quoting *In re Emerging Commc'ns, Inc. Shareholders Litig.*, 2004 WL 1305745, at \*35 (Del. Ch. May 3, 2004)).

Turning first to the fair process prong of the analysis, the Court emphasized two instances of misconduct by Carter. First, prior to Murdock's initial offer of \$12.00 per share, the Court found that Carter intentionally drove down Dole's stock price by underestimating expected cost savings from the recent sale of Dole's Asian operations and canceling a Board-approved open market stock repurchase program. *Id.*, at 21-30. "These actions primed the market for the [Merger] by driving down Dole's stock price and undermining its validity as a measure of value." *Id.*, at 3. Second, after Murdock had submitted his proposal to the Board, the Court determined that Carter presented financial projections to the Committee that were "knowingly false" in an effort to undervalue Dole and "mislead the Committee for Murdock's benefit," only to present more positive and accurate data the next day to Murdock's advisors and financing banks. *Id.*, at 70. The Court emphasized that this conduct "deprived the committee of the ability to negotiate on a fully informed basis and potentially say no to the merger" and "likewise deprived the stockholders of their ability to consider the merger on a fully informed basis and potentially vote it down." *Id.*, at 3.

With respect to the fair price prong of the analysis, Vice Chancellor Laster noted that his task is not to identify a specific number, but to determine whether the agreed-to transaction price falls within a "range of fairness" that "a reasonable seller, under all of the circumstances, would regard as within a range of fair value . . ." *Id.*, at 73 (quoting *Cede & Co. v. Technicolor, Inc.*, 2003 WL 23700218, at \*2 (Del. Ch. Dec. 31, 2003)). Although the Committee lacked critical financial information to determine a fair price, the Court nonetheless found that the \$13.50 per share price fell within an acceptable range of fairness. *Id.*, at 81. However, had the Committee possessed accurate financial data and not been hampered by Carter's "fraud, misrepresentation, self-dealing [and] gross and palpable overreaching," the Court concluded that the \$13.50 price would have fallen toward the low end of the range of fair value or even have been below an acceptable value. *Id.*, at 81-82 (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983)). Given the defendants' actions, the Court concluded that the \$13.50 per

share price was not entirely fair to the company's minority stockholders. The Court emphasized that "[t]he stockholders are not limited to a fair price. They are entitled to a *fairer price* designed to eliminate the ability of the defendants to profit from their breaches of the duty of loyalty." *Id.*, at 3 (emphasis added).

The Court ultimately concluded that the deal had undervalued Dole by \$2.74 per share and ordered Murdock and Carter to pay the difference to the plaintiff class. *Id.*, at 4. Notably, Vice Chancellor Laster explained that the exculpation provision in Dole's articles of incorporation, as authorized by Section 102(b)(7) of Delaware's General Corporation Law, provided no defense to the defendants. *Id.*, at 84. "When a corporation has an exculpation provision and a self-dealing transaction has been determined to be unfair, 'the self-dealing director [is] subject to damages liability for the gap between fair price and the deal price without an inquiry into his subjective state of mind.'" *Id.* (quoting *Venhill Ltd. P'ship v. Hillman*, 2008 WL 2270488, at \*22 (Del. Ch. June 3, 2008)). The Court therefore found that Murdock and Carter, both Dole directors, were personally liable for breaching their duties of loyalty. *Id.*, at 85-86. Moreover, Section 102(b)(7) does not authorize exculpation for breaches of Murdock's duties as a controlling shareholder, nor does it protect Carter in his capacity as a corporate officer. *Id.*, at 85, 89. Deutsche Bank, which advised and financed Murdock during the transaction, was absolved of liability because it did not knowingly participate in the breaches that led to liability and its actions did not lead causally to damages. *Id.*, at 4.

### **Takeaways**

While this decision should not be divorced from its unique factual backdrop, it nonetheless provides guidance for controlling shareholders and C-suite executives involved in going private transactions. The decision reinforces that the *MFW* framework provides no guarantee that a transaction will escape judicial scrutiny. Even when a transaction is approved by an independent committee that carries out its duties with fidelity, corporate insiders still face a threat of substantial personal liability to the extent they engage in conduct that undermines the independent committee's authority and decision-making process. In particular, this decision highlights management's role in ensuring that an independent committee has accurate information to properly assess the offer on the table. If a corporate insider conceals material information, even an otherwise perfect independent committee process and minority shareholder approval may be insufficient to prevent substantial personal liability.