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PERSPECTIVE

Keep controlling stockholders in check

By Marc Boiron

In *In re Dole Food Co. Inc. Stockholder Litigation*, the Delaware Court of Chancery demonstrated the importance of running a real process with the goal of protecting minority stockholders from a controlling stockholder. The key issue was the controlling stockholder's manipulation of a special committee's consideration of his offer to take private Dole Food Co. Inc. by interfering with the special committee's attempt to run an informed and arm's length process. As a result of the fraudulent conduct of a top executive of Dole on the controlling stockholder's behalf, the court held the executive and the controlling stockholder personally liable for damages of approximately $148 million.

In June 2013, David H. Murdock, Dole's chairman, CEO and 40 percent stockholder, offered to purchase all of Dole's stock that he did not own for $12 per share. After Murdock revealed his desire, but before he made the offer, to take Dole private, Michael Carter, a director and the president, COO and general counsel of Dole, engaged in conduct intended to devalue Dole. Notably, without notifying the board of directors, Carter cancelled a stock repurchase program that had been approved by the board and announced publicly two weeks earlier, which caused Dole's stock price to drop 10 percent.

Murdock conditioned his offer on all of the elements required by *In re MFW Shareholders Litigation* to avoid the entire fairness standard of review. However, contrary to the requirements of MFW, the special committee's mandate was limited to approving or rejecting Murdock's offer.

In addition, the special committee's efforts were continuously undermined by the actions of both Carter and Murdock:

(i) Carter resisted the special committee's desire to retain Lazard Frères & Co. LLC as its financial advisor and instead required his approval before entering into any nondisclosure agreements with other potential bidders;

(ii) Murdock prepared to launch a hostile tender offer during the special committee's consideration of his offer;

(iii) the special committee was provided false information regarding Dole's financial projections (which failed to include an additional $30 million of annual cost savings and $15 million in annual EBITDA improvement from purchases of farms) and Carter failed to update the special committee's projections when a new internal budget was created;

(iv) Carter refused to cancel the access of Murdock's financial advisor to the data room and to refrain from sharing with Murdock and his advisors information regarding the negotiations; and

(v) Carter advised Murdock regarding an agreement with his lenders and terms of the merger agreement.

New York Times
David Murdock, chairman of Dole, in North Carolina in 2009.

To address Carter's misrepresentations, the special committee and Lazard "engaged in Herculean efforts to overcome the informational deficit, but they could not do so fully" because they never obtained accurate information about Dole's ability to improve its income by cutting costs and acquiring farms. Moreover, the special committee negotiated increases in the offer price from Murdock before obtaining a final offer of $13.50 per share, which the board of directors of Dole approved upon the special committee's recommendation.

After the transaction was announced but before the closing, Dole's stockholders commenced an action asserting breach of fiduciary duty.

The Court of Chancery's entire fairness review resulted in a finding that the going-private transaction was not the product of fair dealing and that the price paid was not a fair price. Specifically, with respect to fair dealing, the transaction was initiated after Carter intentionally depressed the market price of Dole's stock. The special committee negotiated the transaction without access to all material information, including additional cost savings and improvements to EBITDA, which significantly affected the special committee's valuation of Dole's stock. The special committee's process was further tainted by Carter's obstruction of the special committee's process. Moreover, the court noted that the go-shop provision with a low break-up fee was only "cosmetic" because Murdock made clear in his initial proposal and later in the process that he would not sell his shares of Dole stock.

With respect to fair price, the court noted that, without accounting for Carter's actions, the price of $13.50 per share was fair. However, that price was adjusted to account for the information that Carter misrepresented or withheld. Although the court said the $30 million of cost savings and $15 million in annual EBITDA improvement from purchases of farms would result in a $6.84 per share increase to Lazard's valuation, it added only $2.74 per share to the valuation. The court discounted the increased value because, at the time of the going-private transaction, uncertainty existed regarding the amount of cost savings Dole could achieve, the number of farms that Dole could purchase and the value they would generate.

The court concluded that Carter's conduct resulted in fraud and that the going-private transaction was not entirely fair. Therefore, both Murdock and Carter were found jointly and severally liable for approximately $148 million. The court explained that where fraud is involved, stockholders are entitled to a "fairer" price, which entitles the plaintiffs to damages exceeding the valuation's range of fairness.

The decision reinforces several important aspects of Delaware law and litigation in Delaware courts. First, shifting the standard of review from entire fairness to the business judgment rule under MFW is not an easy feat and requires that the controlling stockholder cede control of the process to a fully informed, disinterested and independent special committee. Second, members of a special committee may find themselves in a difficult situation when faced with a domineering, controlling stockholder but negotiating vigorously will protect them from potential liability. Lastly, all parties involved in acquisition transactions should pay attention to any written or oral communications that may be discovered at trial. The discovery conducted in fiduciary duty cases in Delaware courts generally paints a picture of the true negotiating dynamics and facts. Therefore, Delaware companies involved in acquisition transactions, whether or not with a controlling stockholder, should avoid all conduct that could bring the process of a board or committee into question to preserve the benefits of running such a process.

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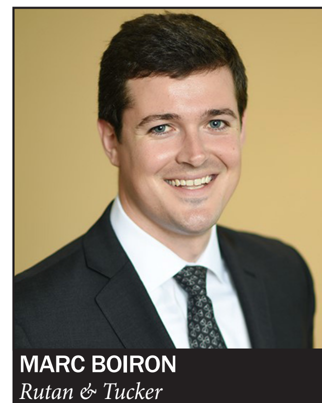

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