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Delaware Court of Chancery Imposes $148,190,590 in Damages on a Controlling Stockholder and Company Executive For Breach of Fiduciary Duties

In *In re Dole Food Co. Inc. Stockholder Litigation*, in connection with a take-private transaction with the controlling stockholder, the Delaware Court of Chancery held in a post-trial opinion that the President of the company and its controlling stockholder undermined the sales process by depriving the special committee of the ability to negotiate on a fully informed basis and the stockholders of the ability to consider the merger on a fully informed basis. The court held that the President and the controlling stockholder intentionally acted in bad faith (with the President also engaging in fraud) and that they were jointly and severally liable for damages of $148,190,590. Because fiduciary breaches of this nature are not exculpable or indemnifiable under Delaware law, the controlling stockholder and the President are personally liable for the damages imposed.

In 2011, after having been dissatisfied with Dole Food Company's public status ever since its IPO, the controlling stockholder of Dole began to lay the groundwork for Dole to separate its high-margin businesses from its lower margin businesses and then be taken private by the controlling stockholder. In 2012, the controlling stockholder sold assets to generate liquidity and reduce his debt and retained advisors to model separation scenarios and financing options. Thereafter, Dole announced a strategic review pertaining to select businesses and then sold certain high margin businesses in transactions that were largely orchestrated by the controlling stockholder. In the wake of these sales, the Dole board of directors appointed the controlling stockholder as Dole's CEO, and another Dole executive (an individual the court characterized as the controlling stockholder's "right hand man") to the Dole board and as Dole's President and COO.

The court found that after his appointment, the President purposely depressed Dole's stock price to facilitate a take-private transaction. The President issued press releases underestimating potential cost savings and undervaluing certain assets. Then, the President cancelled a board-approved share repurchase plan without informing the board, claiming that the suspension was necessary because of certain capital expenditures. The court, however, found that Dole could have proceeded with both the share repurchase and the capital expenditures and that the cancellation was pretextual. In each case, Dole's stock price fell after the President's actions.

During this same period, the controlling stockholder made his proposal to acquire the Dole shares that he did not own for a price of $12.00 per share. The controlling stockholder, following the Court of Chancery's opinion in *In re MFW S'holders Litig*. (previously discussed **here**), conditioned his proposal on (i) approval of a special committee comprising disinterested and independent directors and (ii) an affirmative vote of a majority-of-the-minority stockholders – two conditions necessary to preserve business judgment review of a take-private transaction involving a controlling stockholder under Delaware law. The controlling stockholder also stated that he was a "buyer, not a seller", thereby rendering a competing bid unlikely. A special committee of the disinterested and independent directors was formed, engaging its own legal and financial advisors and negotiating an increase in price from the controlling stockholder's initial offer to $13.50 per share (at the high end of the special committee's financial advisor's valuation range for Dole). Believing it had achieved the highest price possible, the special committee recommended the controlling stockholder's proposal to the board. The board approved a transaction which included a de minimis break fee and a 30-day go-shop. No bidder emerged doing the go-shop and 50.9% of the minority stockholders approved the transaction with the controlling stockholder.

However, the court found that the President interfered with the special committee in numerous ways, including by providing false financial information to the special committee which did not account for the full cost savings per year that Dole could realize or for cash flows from previously planned investments, lying about the availability of other relevant financial information and otherwise refusing to comply with the special committees' directives. Instead of supporting the special committee, the President promoted the controlling stockholder's acquisition of Dole by, among other things, providing more accurate financial information to the controlling stockholder and his advisors and advising them on their negotiations with the special committee.

Plaintiffs brought suit arguing that the merger was not entirely fair and that the controlling stockholder and the President breached their duty of loyalty. Although the controlling stockholder had purported to follow *In re MFW S'holders Litig.*, the court held that the defendants failed to make the showing necessary to change the standard of review from entire fairness to business judgment. Accordingly, the defendants had the burden at trial to demonstrate that the merger was entirely fair to Dole's minority stockholders.

In a post-trial opinion, the Court of Chancery held that the merger was not entirely fair, both as a result of a failure in process and an unfair price. Because the controlling stockholder and the President each breached their duty of loyalty, they are jointly and severally liable for $148,190,590 in damages. Specifically, the court held that:

- *The President engaged in fraud which rendered the special committee "useless"* - By purposefully driving down Dole's stock price in advance of the controlling stockholder's planned takeover proposal, providing false information to the special committee and interfering and obstructing the special committee's efforts to manage the sales process and negotiate with the controlling stockholder, the President ensured that the special committee could not act as an effective bargaining agent for the minority stockholders.

- *"[T]he go-shop was cosmetic"* - The controlling stockholder refused to sell his shares to a third-party, thereby rendering a competing bid unfeasible.

- *Although $13.50 may have been a "fair" price for Dole, the President's fraud entitled plaintiffs to a "fairer" price* – The President's actions "deprived the Committee of its ability to obtain a better result on behalf of the stockholders, prevented the Committee from having the knowledge it needed to potentially say 'no,' and foreclosed the ability of the stockholders to protect themselves by voting down the deal."

- *The President was liable both as a director and an officer* – The President knew of the controlling stockholder's buyout plans and consistently acted to promote the controlling stockholder's interest instead of the best interests of Dole and its stockholders.

- *The controlling stockholder was liable both as a controlling stockholder and as a director* – The controlling stockholder was liable as a director for "orchestrating an unfair, self-interested transaction" and liable as a controlling stockholder for deriving "an improper personal benefit" from the transaction.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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