# Client Update
# *In re Dole Food Co.*: When Stockholders Deserve a Fairer Price

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The Delaware Court of Chancery, in a decision issued yesterday by Vice Chancellor Travis Laster,[1] held David Murdock, the CEO and de facto controlling stockholder of Dole Food Company, Inc., and his principal lieutenant, Dole's Chief Operating Officer and General Counsel, jointly and severally liable for over $148 million in damages in connection with Murdock's November 2013 take-private acquisition of Dole. The damage award represented $2.74 per share, or a 20.4% increase in the original transaction price of $13.50, and is the second largest award to stockholders by a Delaware court in connection with an M&A transaction.

The Court ruled for the stockholders challenging the transaction notwithstanding the fact that Murdock, who owned 40% of Dole's common stock prior to the transaction, followed the *MFW* playbook[2] by conditioning his proposal from the outset on both the approval by a committee of disinterested directors and the affirmative vote of a majority of shares held by the Company's unaffiliated stockholders. Those steps have previously been held by the Delaware courts to subject a take-private transaction by a controlling stockholder to the business judgment rule rather than the stringent test of entire fairness. In this case, the Court found that the committee was indeed independent, that it "carried out its task with integrity" and that the work of its financial and legal advisors was exemplary. Moreover, the committee succeeded in negotiating an increase in the per-share price initially proposed by Murdoch from $12.00 to $13.50, which the Court found was arguably within the range of fairness.

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1 *In re Dole Food Co., Inc. Stockholder Litigation* (Del. Ch. August 27, 2015).

2 *In re MFW Stockholders Litigation*, 67 A.3d 496 (Del. Ch. 2013), *aff'd sub nom., Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

However, the Court found that the procedural safeguards adopted by the parties and the laudable performance of the committee were undermined by the disloyal actions of the Company's COO and General Counsel. According to the Court, "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." Even if the price was fair, the Court ruled, the stockholders were, in the circumstances, entitled to a "fairer price." Those circumstances included, among other things, efforts by Murdock and his lieutenant to limit the committee's authority and exert influence over the hiring of its financial advisor, as well as their making public announcements and taking other steps to drive down the trading price of Dole's stock in the months before Murdock's offer was announced and, most egregiously, providing false projections to the committee.

It is worth noting that the only persons that the Court held liable were Murdock and his lieutenant—despite allegations that the other non-independent director knew that the projections relied upon by the committee were inaccurate and the fact that the Court had previously found that the relationships between certain committee members and Murdock, and actions taken by Murdock for the alleged purpose of asserting dominance over the independent directors, created a triable issue of fact as to the independence of members of the committee. But the actual conduct of the committee members, the estimable work of their advisors, and the credibility of their testimony served to protect them from liability.

Judicial decisions premised on fraudulent conduct rarely provide useful lessons for future transactions. However, Vice Chancellor Laster's *Dole Food Co.* decision again demonstrates that a properly functioning committee of independent directors, assisted by high-quality advisors, can protect participants in a conflicted transaction even where the committee is deprived of accurate information and other parties to the transaction act improperly.

The decision of the Delaware Court of Chancery can be found here:
http://courts.delaware.gov/Opinions/Download.aspx?ID=228790

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