CORPORATE FINANCE/M&A - USA

Bad-faith conduct prevented "fairer price" in take-private transaction

January 20 2016 | Contributed by Ropes & Gray LLP

In a recent post-trial opinion(1) Vice Chancellor Laster of the Delaware Court of Chancery held David Murdock, chief executive officer and 40% stockholder of Dole Food Company, Inc, and Michael Carter, a Dole director who also served as Dole's president, chief operating officer and general counsel, liable for $148 million in damages for their conduct relating to the November 2013 transaction in which Murdock took Dole private for $13.50 per share.

Decision

The court found that Carter, in concert with Murdock, acted to depress Dole's value artificially and undermine the transaction process to ensure that Murdock could acquire Dole at an artificially low price. Notably, the transaction was approved by an independent special committee of Dole's board of directors and a majority of stockholders unaffiliated with Murdock, as provided by the framework for controlling stockholder deals established by *In re MFW Shareholders Litigation*. Nevertheless, Laster held that entire fairness review, rather than the business judgement rule review provided for in *MFW*, applied, based on his finding that Carter and Murdock had undermined the special committee's process and effectiveness. He also held that even though the $13.50 deal price was within a range of fairness as determined by the special committee's independent financial adviser, the Dole stockholders were entitled to a "fairer price" for which an effective special committee could have potentially negotiated. Laster awarded $2.74 per share in damages, far less than the $11.77 per share that the plaintiffs had sought.

Murdock had an extensive history with Dole, having acquired control over Dole in 1985 and having previously taken Dole private in 2003. Murdock initiated an initial public offering in 2009, which reduced his ownership stake to 40%. The court concluded that even though Dole had become a public company, Murdock remained "an old-school, my-way-or-the-highway controller who dominated the company's operations". The court also found that Murdock, together with his "right-hand man" Carter, opportunistically conspired to commence another take-private transaction. In order to facilitate the transaction at a favourable price, the court found that Murdock and Carter worked to depress Dole's stock price, both by suppressing the release of favourable information and by cancelling a potential share repurchase programme that the board believed would increase Dole's stock price. The court noted that Murdock and Carter were able to effect these changes by alternately bullying and misleading directors, all with the goal of setting conditions favourable to their planned go-private transaction.

The court found that while Carter was taking efforts to suppress Dole's share price, which had traded down to $10.20, Murdock proposed to acquire Dole's remaining shares that he did not already own for $12 per share. Structured to comply with *MFW*, Murdock's acquisition proposal was conditioned on approval from:

- an independent special committee of Dole's board; and
- a majority of Dole's unaffiliated stockholders, which *MFW* sets as prerequisites to obtain business judgement review of a squeeze-out transaction involving a controlling stockholder.

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In making his proposal, consistent with *MFW*, Murdock informed the board that he was not interested in selling his stake in Dole, effectively precluding any transaction not approved by him. The court found that the special committee, as well as its advisers, performed laudably in connection with the transaction, but that their efforts were undermined by Murdock and Carter. As an initial matter, the court found that Carter attempted to limit the committee's authority only to negotiating with Murdock, rather than a broader mandate permitting the committee to negotiate for the best transaction available to stockholders. The court also found that Carter had then inserted himself into the negotiations of non-disclosure agreements with potential bidders, thus giving him (and presumably Murdock) insight into the identity of potential competitors. The court further found that the special committee also had to overcome resistance from Carter and Murdock with regard to selecting independently both its chair and its financial adviser, as Carter initially insisted that the committee use an adviser that had a long-term relationship with Murdock and Dole.

However, the court was most troubled by its finding that Carter provided the committee with artificially low management projections while withholding the "real" projections that were provided to Dole's lenders, and which were the basis for Dole's 2015 budget. The court found that Carter's conduct severely handicapped the committee, which was forced to create its own projections in an effort to determine Dole's actual value, but which never had access to management's best estimates of Dole's expected future performance. The court concluded that Carter's efforts to mislead the special committee about Dole's projected performance were "fatal" to the committee's otherwise good-faith process and prevented the committee from negotiating the transaction on a fully informed basis. The court found that despite Carter's efforts, the special committee was ultimately able to obtain price concessions from Murdock, who increased his offer from $12 to $13.50, a price that the committee's financial adviser found to be within its range of fairness. The committee also obtained a relatively low termination fee and a go-shop provision, although the court stated that the go-shop's efficacy was undermined by Murdock's unwillingness to sell his 40% equity stake to any other bidder. The transaction ultimately closed, with a slender majority (50.9% of the unaffiliated shares) approving the transaction, and holders of 17,287,284 shares seeking appraisal. In arguing that their conduct was proper and entitled to judicial deference, Murdock and Carter relied heavily on their adoption of the *MFW* process and pointed to the special committee's effectiveness in negotiating an increased premium offer. However, the court held that the transaction process did not adhere to the substance of the *MFW* process and that the special committee's "heroic" efforts were effectively undermined. The court's review looked beyond the form of the technical adherence to the *MFW* mechanics and concluded that here the structure had failed in practice to protect minority stockholders.

With respect to damages, the opinion acknowledged that an entire fairness "fair price" analysis should involve an assessment of whether the transaction fell within a "range of fairness". However, because the court had also concluded that the negotiation was effectively undermined by Murdock and Carter, it found that the negotiated transaction price was insufficient, holding that it was not "sufficient to obtain a fair price if that price is not the best alternative available for the corporation and its stockholders".

Comment

While the facts of *Dole* found by Laster were relatively extreme, the *Dole* opinion can be read as a warning to corporate officers – including senior in-house attorneys – that they retain a paramount fiduciary duty to stockholders and cannot act solely for the benefit of a controller, and may be held personally liable for bad-faith conduct detrimental to the stockholders. Here, Laster expressly held that Carter had committed fraud, which prevents exculpation under Dole's 102(b)(7) provision and could make it difficult for him to obtain indemnification or insurance coverage for the court's judgment.

In contrast, Laster found that Murdock's financial adviser and lead financing bank were not liable to Dole's shareholders for aiding and abetting the breaches of duty found by the court. In an important victory for investment banks, Laster found that Deutsche Bank "did not know about or participate in th[e] acts" which gave rise to liability, and that it "was not directly involved, nor even secondarily involved in the critical breaches of duty". Cabining the nature of claims against banks acting as financial advisers, Laster held that actions purportedly giving rise to aiding and abetting liability must "resul[t] in harm" to shareholders as "casually related damages".

On December 7 2015 both parties agreed to drop any potential appeal of the Delaware Court of Chancery's decision, and Murdock and Carter agreed to pay stockholders $101 million in damages and $12.5 million in interest to settle the litigation.

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Endnotes

(1) *In re Dole Food Co, Inc S'holder Litig*, CA No 8703-VCL, 2015 Del Ch LEXIS 223 (Del Ch Auguest 27 2015).