

## Corporate Securities Law

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### Delaware Decision in *Dole* Highlights Importance of Robust Process in Review of Strategic Transactions

In November 2013, Dole Food Co., Inc. (“**Dole**”) was taken private by its long-time Chairman and Chief Executive Officer, David Murdock. Before the transaction, Murdock owned 40% of Dole’s outstanding common stock and was its *de facto* controller. Murdock acquired the remaining 60% for \$13.50 per share in a transaction that was approved by the independent directors of Dole and by an affirmative vote of holders of a narrow majority of the unaffiliated shares. In a recent decision, the Delaware Chancery Court held Murdock, together with Dole’s former General Counsel and COO, Michael Carter, personally liable for damages of \$148 million for breaching their fiduciary duties in connection with the transaction. The Court found that Murdock and Carter had engaged in fraud, frustrated the ability of Dole’s independent directors to negotiate the transaction on a fully informed basis, and deprived Dole’s shareholders of the opportunity to receive the best price for their shares.

The *Dole* decision focuses on Delaware concepts that do not apply to Canadian companies, including (i) an “entire fairness” standard of review of the transaction, (ii) a burden of proof that shifted to the defendants in these circumstances, and (iii) a duty of loyalty for controlling shareholders. However, it serves to remind directors of Canadian companies that in negotiating strategic transactions, particularly those involving related parties, robust procedures are imperative.

#### Procedural and Substantive Fairness

The decision in *Dole* highlights the importance of establishing a proper, independent process for the review of strategic transactions, particularly transactions involving related parties.

Upon receiving Murdock’s initial offer of \$12.00 per share, Dole’s board of directors established a special committee comprised of disinterested, independent directors to negotiate the transaction (the “**Committee**”). The Committee engaged its own independent legal and financial advisors and successfully negotiated an increase in the price from \$12.00 to \$13.50 per share. According to the Committee’s financial advisors, this increase fell within a range of fairness.

The Court praised the Committee’s work, noting that although several of its members had ties to Murdock, their performance in considering the transaction did not raise questions as to their independence. Other than Murdock, none of the Committee or board members were found to have contributed to the damages suffered by Dole’s shareholders.

However, even the robust process and laudable work of the Committee could not ensure fairness. The Court stated: “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.” The Court found that Murdock and Carter had actively sought to undermine the Committee’s review and evaluation of the transaction in bad faith, intentionally taking steps to drive down Dole’s stock price before the transaction and withholding key financial information from the Committee and its advisors. The Court determined that had the Committee had full information about Dole’s value at

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the time of the transaction, it would have concluded that the price of \$13.50 per share fell outside the range of fairness. Further, the Court determined that given Murdock's and Carter's conduct, Dole's shareholders were entitled to a "fairer" price, even if the \$13.50 price fell within a range of fairness.

The Court also commented on the sharing of confidential information by directors with their appointing shareholders. The Court stated that such sharing of information is not inherently a breach of fiduciary duty; rather, it depends whether the providers and recipients "use the information to the detriment of the corporation and its stockholders or to benefit themselves improperly." Because the Court's analysis was based on U.S. concepts, it is uncertain whether Canadian courts would come to the same conclusions on the sharing of confidential information by directors.

## **Applicability to Canadian Transactions**

In Canada, Multilateral Instrument 61-101 - *Protection of Minority Security Holders in Special Transactions* ("MI 61-101") requires certain procedural safeguards for transactions involving insiders and related parties. Although MI 61-101 only mandates an independent committee of directors in limited circumstances, the Companion Policy to MI 61-101 suggests that it is good practice for negotiations of all transactions involving an interested party to be carried out, or reviewed and reported upon, by a special committee of disinterested directors.

By following the rules and guidelines set forth in MI 61-101 and the Companion Policy, independent directors are better able to guard against the influence of controlling shareholders, management or other interested parties and protect themselves from claims that they have not discharged their fiduciary duties. For directors of Canadian companies, taking such actions may also protect against claims for oppression, a remedy that does not exist in Delaware and that therefore was not considered in *Dole*.

As the *Dole* decision shows, however, although establishing procedural safeguards such as forming an independent committee, retaining independent advisors and submitting a transaction for shareholder approval is important in facilitating a fair outcome, procedural fairness alone cannot ensure a transaction will ultimately be substantively fair.

Where a controlling shareholder or other related party stands to benefit from a transaction, independent committees and their advisors must be particularly vigilant, taking all appropriate measures to ensure that any real or perceived conflicts of interest are detected and properly addressed, and that all parties are privy to full information.

For more information on fiduciary duties and the role of the board of directors and special committees in strategic transactions, please contact any member of our Corporate Securities Group.