

## Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION—Del. Ch.: Discovery motion granted in Dole stock appraisal case, (Dec. 10, 2014)

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By R. Jason Howard, J.D.

A motion to compel production of valuation-related materials and for supplemental depositions of Rule 30(b)(6) witnesses in the Dole Food Company, Inc. (Dole), stock appraisal case has been granted by the Delaware Chancery Court (*In re Appraisal of Dole Food Company, Inc.*, December 9, 2014, Laster, T.).

**Background.** On June 11, 2013, Dole announced that its board of directors had received an unsolicited proposal from David H. Murdock, Dole's CEO, chairman, and controlling stockholder, to acquire all of the shares of Dole common stock that he did not already own for \$12.00 per share in cash. On August 12, 2013, Dole and Murdock announced their agreement on a take-private merger at \$13.50 per share in cash. After a special meeting, Dole's stockholders approved the deal.

After the deal closed, petitioners Hudson Bay Master Fund Ltd. and Hudson Bay Merger Arbitrage Opportunities Master Fund Ltd. (together, Hudson Bay), filed a petition seeking appraisal for more than 3.6 million shares of Dole common stock. Similarly, petitioner Ripe Holdings LLC (Ripe), a special-purpose investment vehicle jointly owned by different funds managed by affiliates of Fortress Investment Group (Fortress), pursued its statutory right to an appraisal of its approximately 2.8 million shares of Dole common stock.

**Issues.** During discovery, interrogatories and document requests were served by Dole that sought information about any valuations or similar analyses of Dole that Hudson Bay or Ripe prepared, reviewed, or considered when buying or selling Dole stock or when seeking appraisal. Dole only sought pre-litigation materials, but Hudson Bay and Ripe objected to the document requests on the grounds that the information was "irrelevant and that it was premature to provide discovery on valuation before the expert discovery phase." Hudson Bay and Ripe objected to the interrogatories as "seek[ing] an opinion on areas where an expert will be opining, not the Petitioners."

Dole also served notices of deposition for Hudson Bay and Ripe pursuant to Court of Chancery Rule 30(b)(6) on topics that included any valuations of Dole that were performed, reviewed, or considered by both Hudson Bay and Ripe when purchasing Dole stock or seeking appraisal. Hudson and Ripe objected on relevance and attorney-client privilege grounds. Thereafter, Dole sent a deficiency notice and insisted on the production of witnesses to testify about the valuation.

**Witnesses.** Hudson Bay designated Henry Choi, a portfolio manager, as its Rule 30(b)(6) witness but at the deposition, Choi stated that he was not prepared to testify about the topics to which Hudson Bay objected. Ripe designated John Neumark as its Rule 30(b)(6) witness and made the same objections as Hudson Bay to topics in the deposition. At his deposition, Neumark stated that he was not prepared to testify about the topics to which Ripe objected.

**Motion to compel.** Dole motioned to compel production of information regarding valuations or analyses of Dole's value that Hudson Bay and Ripe prepared, reviewed, or considered in connection with their decision to purchase Dole stock or seek appraisal. Dole also sought supplemental Rule 30(b)(6) depositions to address the topics that were not covered during the original depositions.

**Admissibility.** Hudson Bay and Ripe opposed the motion to compel on the basis of potential admissibility, suggesting that an inquiry into pre-litigation valuations was not reasonably calculated to lead to the discovery of admissible evidence. They argued that their valuations were opinions, not facts, and that the question of

valuation in an appraisal is purely a matter for the experts and, thus, does not satisfy the narrow exceptions for lay opinions as established in the rules of evidence.

After some analysis, the court reasoned that if no experts are retained in connection with a valuation, it is the court's statutory obligation to determine fair value of the shares in question. In making that determination, the court can consider a wide range of factual evidence, including, but not limited to, "the market price, the merger price, other offers for the company or its assets, prices at which knowledgeable insiders sold their shares, internal corporate documents from the respondent, and valuation work prepared for non-litigation purposes."

Vice Chancellor Laster said, "In my view, the valuation-related information that Dole seeks easily satisfies the potential admissibility requirement."

**Privilege and work product.** Ripe claimed separately that its valuation information was not discoverable because it was privileged or constituted work product. Specifically, Ripe focused on a Fortress memorandum that Neumark prepared after consultation with outside counsel. Except for the memorandum, which the court acknowledged could contain legal analysis or work product, the court said that Ripe had failed to demonstrate that its valuation materials warranted protection. The court ordered that the memorandum be provided for *in camera* review.

**Conclusion.** The court's extensive and precedent laden analysis reached the ultimate conclusion that the precedents presented by Dole for production of the materials in its favor were persuasive and that the Hudson Bay and Ripe objections to producing the valuation-related materials on the basis of relevance were not well-founded. Subsequently, the court stated "Dole should not have been forced to file a motion to compel to induce the petitioners to abandon it."

Further, the court stated that Hudson Bay and Ripe were not substantially justified in the failure to provide the discovery and, thus, Dole was awarded reasonable costs, including attorneys' fees, that it incurred in taking the Rule 30(b)(6) depositions of Choi and Neumark and in bringing the motion to compel.

The case is No. 9079-VCL.

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Companies: Hudson Bay Master Fund Ltd.; Hudson Bay Merger Arbitrage Opportunities Master Fund Ltd.; Ripe Holdings LLC; Dole Food Company, Inc.

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