

In re Dole Food Co. Inc.
In re PLX Technology Inc.
In re Zale Corp.
Corwin v. KKR Financial

Recent Cases with Significant Implications for Financial Advisors

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In re Dole Food Co. S'holder Lit.,
In re PLX Technology S'holder Lit.
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Potential Discussion Topics

- Are financial advisors subject to the same restrictions on relationships with counterparties as counsel?
 - Are financial advisors fiduciaries? Are they agents? Are any conflicts non-waivable?
- When is general v specific disclosure of material relationships with a potential counterparty required? When should it be updated?
 - Outset of engagement; second round; when field narrowed to less than [X] potential buyers?
- Can financial advisors provide financial advice and services to one client while contemporaneously providing financial advice and services to a prospective arms-length counterparty w/respect to other matters? Must they be unrelated and what does that mean?
- Can a financial advisor advise a controller or executives regarding a potential buyout while contemporaneously advising the company on other matters?
- How will KKR Financial impact the outcome of RBC's appeal of Rural/Metro?
- How will KKR Financial impact disclosure and litigation strategies in Delaware going forward?

***In re Dole Food Co. S'holder Lit.,
In re PLX Technology S'holder Lit.
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Caveats

- Please note that *In re Dole Food* is a judicial opinion on the merits following a trial at which many of the factual allegations were disputed.
- In contrast, *In re PLX Technology* and *In re Zale* were rulings on a motion to dismiss, for purposes of which the Court must generally accept the allegations in the complaint as true. As a consequence, the factual allegations cited in the *PLX* transcript ruling and the *Zale* opinion do not reflect the Courts' findings of fact following a trial. Many of the facts cited in the *PLX* transcript ruling and the *Zale* opinion are disputed and the Courts' ultimate findings of fact following a trial may differ materially from those alleged in the complaint.
- With the exception of page 2 (Potential Discussion Topics) and page 13 (A Few Takeaways), virtually all of the statements in these materials are quotes or excerpts from the *In re Dole Food* opinion, the *PLX Technology* hearing and ruling transcripts, the *Zale* opinion and the Delaware Supreme Court's opinion in *KKR Financial* and are provided for instructional purposes. They do not necessarily reflect the views of the author, his firm or his clients. *In re Dole Food* and *In re PLX Technology* are subject to appeal and further proceedings, respectively.
- In light of the Delaware Supreme Court's opinion in *KKR Financial*, Zale's financial advisor has filed a motion for reconsideration of its motion to dismiss with the Court of Chancery.

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In re Dole Food Co. S'holder Lit., CA No. 8703-VCL (Del. Ch. Aug. 27, 2015)

Key Claims

- Breaches of Fiduciary Duty by Directors and Controlling Stockholder
- Aiding & Abetting Breaches of Fiduciary Duty by Controlling Stockholder's Financial Advisor and Lead Financing Source

Key Quotes

- "The record at trial demonstrated that the Committee carried out its task with integrity. The Committee was assisted in this effort by legal counsel [S&C] and financial advisors [Lazard Frères] that likewise acted with integrity."
- "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."
 - "Carter [a director, President, COO and general counsel allegedly working with Murdock] provided the Committee with lowball management projections."
- "Defendant [Murdock's Financial Advisor] acted improperly by favoring Murdock and treating him as the bank's real client in transactions before the Merger, even when [Murdock's Financial Advisor] was officially representing Dole, but [Murdock's Financial Advisor] did not participate knowingly in the breaches that led to liability, and [Murdock's Financial Advisor]'s role as Murdock's advisor did not lead causally to damages."

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In re Dole Food Co. S'holder Lit. (cont'd)

Summary of Court's Findings of Fact and Conclusions of Law

Court's Findings of Fact

- On November 1, 2013, defendant David H. Murdock acquired all of the common stock of Dole Food Company, Inc. ("Dole") that he did not already own for \$13.50 per share.
- Before the transaction, Murdock owned approximately 40% of Dole's common stock, served as its Chairman and CEO, and was its de facto controller.
- The transaction was structured as a single-step merger.
- In his initial letter to Dole's board, Murdock offered to pay \$12.00 per share
- In an effort to avoid an "entire fairness" standard of review under MFW, Murdock's offer was conditioned on (i) approval by a committee of the Board made up of independent directors and (ii) the affirmative vote of holders of a majority of the unaffiliated shares.

In re Dole Food Co. S'holder Lit. (cont'd)

Court's Findings of Fact (cont'd)

- The record at trial demonstrated that the Committee carried out its task with integrity. The Committee was assisted in this effort by legal counsel (S&C) and financial advisors (Lazard Frères) that likewise acted with integrity.

"In contrast to a string of decisions that have criticized financial advisors for flawed and outcome-driven analyses, this opinion can praise and rely on Lazard's thorough and balanced work product."

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