

***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**

Kevin Miller  
Alston & Bird LLP  
90 Park Avenue  
New York, New York 10016  
Tel: (212) 210-9520  
Fax: (212) 922-3840  
[kevin.miller@alston.com](mailto:kevin.miller@alston.com)

Copyright 2015©

***In re Dole Food Co. S'holder Lit.,***  
***In re PLX Technology S'holder Lit.***  
***In re Zale Corp. S'holder Lit.***  
***Corwin v. KKR Financial***

**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.  
In re Zale Corp. S'holder Lit.  
Corwin v. KKR Financial***

**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.

- 3 -

Copyright 2015©

***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."

- 4 -

Copyright 2015©

## ***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."

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: 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

Also available as part of the eCourse

[Pre and Post Closing Ethical Issues](#)

First appeared as part of the conference materials for the  
11<sup>th</sup> Annual Mergers and Acquisitions Institute session  
"Conflict Transactions: A Guide to Navigating Perilous Waters"