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In This Issue:

- *In re Dole Food Co. Inc. Stockholder Litigation* [read more](#)
- *Court of Chancery Increases Focus on M&A-related Settlements* [read more](#)
- *Longpath Capital, LLC v. Ramtron International Corporation* [read more](#)
- *Other Notable Cases* [read more](#)
- *M&A Market* [read more](#)

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Delaware Court of Chancery Imposes \$148,190,590 in Damages on a Controlling Stockholder and Company Executive for Breach of Fiduciary Duties

In *In re Dole Food Co. Inc. Stockholder Litigation*, in connection with a take-private transaction with the controlling stockholder, the Delaware Court of Chancery held in a post-trial opinion that the President of the company and its controlling stockholder undermined the sales process by depriving: (i) the special committee of the ability to negotiate on a fully informed basis; and (ii) the stockholders of the ability to consider the merger on a fully informed basis. The court held that the President and the controlling stockholder intentionally acted in bad faith (with the President also engaging in fraud) and that they were jointly and severally liable for damages of \$148,190,590. Because fiduciary breaches of this nature are not exculpable or indemnifiable under Delaware law, the controlling stockholder and the President are personally liable for the damages imposed. For more, click [here](#).

Delaware Court of Chancery Increases Focus on M&A-related Settlements

In several decisions issued this past quarter, the Delaware Court of Chancery has indicated that it will give greater scrutiny to the breadth of releases in settlements of merger and acquisition related litigation.

- *Acevedo v. Aeroflex Holding Corporation*, discussed [here](#) – In connection with a stockholder suit that challenged the sale of a company with a controlling stockholder to a third party, Vice Chancellor Laster rejected a settlement that provided a global release of claims in exchange for a reduced termination fee and a shortening of the matching-rights period by one day, holding that these deal protections were not impediments to competing bidders and therefore were insufficient to support a global release.

Disclosure-only settlements in particular were heavily scrutinized and criticized.

- *In re Riverbed Technology Inc. Stockholders Litigation*, discussed [here](#) – Vice Chancellor Glasscock approved a disclosure-only settlement that released a broad range of claims, but in doing so, noted that, going forward, the interests of stockholder classes may merit rejecting settlements that encompass releases that extend beyond the claims asserted and the results achieved.

- *Assad v. World Energy Solutions, Inc.* – Chancellor Bouchard approved a disclosure-only settlement, but expressed concern over the breadth of the release of claims in such settlements.
 - Chancellor Bouchard stated that: “It just can’t be that there are meaningful disclosure violations in every single M&A case that’s being filed in this court. . . . [E]verybody would be well-advised to make sure you have got something real before you package one of these up and bring it in to the Court.”

In at least two instances the Court of Chancery reserved judgment on the approval of disclosure-only settlements because of the breadth of the release of claims given in exchange for the disclosures.

- *In re Intermune, Inc. Stockholder Litigation* – Vice Chancellor Noble reserved approval of a disclosure-only settlement with a broad release of claims, asking the plaintiffs why the facts justified a broad release instead of being limited to disclosure claims.
- *In re Trulia, Inc. Stockholder Litigation* – Chancellor Bouchard withheld approval of a disclosure-only settlement and asked for additional briefing regarding: (i) what standard of materiality should apply to the supplemental disclosure requested, *i.e.* “material in the traditional securities law sense” or “something different”; and (ii) why the court should endorse releases that include “unknown claims”.

Delaware Court of Chancery Relies Exclusively on Merger Price Less Net Synergies to Determine Fair Value in Appraisal Action

In *Longpath Capital, LLC v. Ramtron International Corporation*, the Delaware Court of Chancery concluded in a statutory appraisal proceeding that the company had engaged in a thorough sales process, and therefore found that it was appropriate to determine fair value of the company’s stock by relying exclusively on the merger price less net synergies. The court found that a discounted cash flow (or “DCF”) analysis was an inappropriate method to value the company’s stock in this instance, as the DCF analyses relied upon by the parties were derived from unreliable management projections. For more, click [here](#).

This opinion follows *Merlin Partners LP v. AutoInfo Inc.*, previously detailed [here](#), where the Delaware Court of Chancery held in a statutory appraisal proceeding that the merger consideration represented the best estimate of fair value of a company where the DCF relied on optimistic projections and the merger “was negotiated at arm’s length, without compulsion, and with adequate information” after “competition among many potential acquirers.”

Other Notable Cases

In *Gorman v. Salamone*, the Delaware Court of Chancery held that a bylaw which purportedly conferred upon stockholders the authority to remove officers was invalid because it impermissibly interfered with the board of directors’ ability to manage the business and affairs of the company.

In *Friedman v. Dolan*, the Delaware Court of Chancery dismissed claims of breach of fiduciary duty, holding that the business judgment standard of review, rather than entire fairness, applied to a compensation award to the patriarch of a controlling stockholder family and his son where the amount of compensation was decided by an independent

compensation committee, notwithstanding the fact that the majority of the unaffiliated stockholders had withheld support for the members of the compensation committee in previous elections.

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M&A Markets

The following issues of M&A at a Glance, our monthly newsletter on trends in the M&A marketplace and the structural and legal issues that arise in M&A transactions, were published this quarter. Each issue can be accessed by clicking on the date of each publication below.

- [July 2015](#)
- [August 2015](#)
- [September 2015](#)

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:



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