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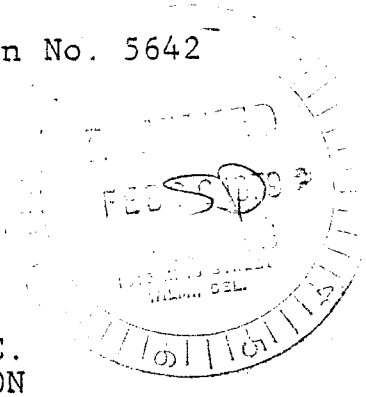
IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WILLIAM B. WEINBERGER, Plaintiff,	)	
v.	)	Civil Action No. 5642
UOP, INC., et al., Defendants.	)	



BRIEF OF THE SIGNAL COMPANIES, INC. IN OPPOSITION TO PLAINTIFF'S MOTION FOR CERTIFICATION OF THE CLASS ACTION

Robert K. Payson
POTTER ANDERSON & CORROON
350 Delaware Trust Building
P. O. Box 951
Wilmington, DE 19899
Attorneys for Defendant
The Signal Companies, Inc.

OF COUNSEL:

Alan N. Halkett
Thomas W. Dobson
LATHAM & WATKINS
Los Angeles, California

Robert K. Burgess
LATHAM, WATKINS & HILLS
Washington, D. C.

February 9, 1979.

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I. NATURE AND STAGE OF THE PROCEEDINGS

This action was filed on July 5, 1978, on behalf of the named plaintiff, William B. Weinberger. The complaint contains individual and class action claims* arising out of the merger on May 26, 1978 of two Delaware corporations, UOP Inc. ("UOP") and Sigco Incorporated, a wholly owned subsidiary of The Signal Companies, Inc. ("Signal").

On December 15, 1978, the plaintiff filed his motion for class certification in which he seeks an order certifying that all common stockholders of UOP as of May 26, 1978 (other than the defendants**) be included in the class and that the plaintiff, William B. Weinberger, be appointed as the class representative.

Signal opposes the granting of the class action order sought by plaintiff on the following grounds: (1) the plaintiff, William B. Weinberger, cannot fairly or adequately represent the interests of the purported class; and (2) the class sought to be certified is too broad and improperly seeks to include within that class persons who have no valid or enforceable claims. Each of these bases for Signal's opposition to the class action order are discussed more fully below.

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* The complaint also contains derivative claims as to which defendant Signal filed a motion to dismiss. A hearing on that motion was held on February 1, 1979, and as of the date of this brief was still under submission.

** The individual defendants named in the complaint were dismissed, without prejudice, on February 1, 1979, by stipulation and order of this Court.

II. STATEMENT OF FACTS*

A. The Signal Companies, Inc.

Signal is a publicly held Delaware corporation, the stock of which is traded on major U. S. stock exchanges and which, on about February 1, 1979, had approximately 38.3 million shares of common stock issued and outstanding.** Signal conducts all of its business through subsidiaries, the principal ones being Mack Trucks, Inc. ("Mack"), the Garrett Corporation ("Garrett"), and UOP. Mack, acquired by Signal in 1967, is engaged in the manufacture and sale of heavy duty motor trucks and related equipment. Garrett, acquired in 1964, is in the aircraft, aerospace and other transportation related equipment business. UOP is engaged in several lines of business, including petroleum and petro-chemical services, construction and fabricated metal products. Signal also owns or has substantial investments in Dunham-Bush, Inc., Signal Landmark Properties, Inc., American President Lines, Ltd., and Golden West Broadcasters. Signal's gross revenues for 1978 exceeded $3.5 billion.

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* The facts set forth in this brief are based on UOP's Proxy Statement relating to the subject merger, a copy of which is attached to the complaint as Exhibit A, and the depositions taken and documents produced in this case and the Affidavit of Merl B. Peek, the Secretary of UOP.

** In May, 1978, there were approximately 19 million shares outstanding. Since that time there has been a 2 for 1 stock split.

In early 1975, Signal entered into an agreement to acquire a 50.5% common stock interest in UOP. Such acquisition was made through a combination of a tender offer for 4.3 million shares and a purchase of 1.5 million shares directly from UOP. The tender offer was announced on April 21, 1975, at a price of $21 per share, and was met with such an enthusiastic reception by UOP's shareholders that far more than the 4.3 million shares were tendered. Because Signal's tender offer was for a maximum of 4.3 million shares, and it was therefore precluded from purchasing more, Signal purchased the tendered shares on a pro rata basis. As a result of the tender offer and the direct purchase from UOP, as of May 13, 1975, Signal was the majority stockholder of UOP with 5.8 million shares, being 50.5% of the issued and outstanding common stock.

During the period from May, 1975, to about mid-February, 1978, Signal's stockholdings in UOP remained the same. From time to time within that period, Signal's management considered a number of different business investments or acquisitions and, as a part of such considerations, thought was given to the acquisition of the balance of UOP's outstanding stock. It was not until early 1978, however, that any serious consideration was given to that possibility.

On February 28, 1978, Signal's Executive Committee authorized a possible merger under which Signal would acquire for cash the 49.5% of UOP's common stock which Signal did

not then own. Press releases were issued and the public notified of the possibility of such a merger, subject to Board approvals and other conditions, and that the merger price then under consideration was between $20-$21 per share. On February 28, 1978, the last trading day before the public announcement, the trading prices for UOP's stock were between $14.50 and $14.75.

On March 6, 1978, both Signal's Board of Directors and UOP's Board of Directors approved a merger at a cash price of $21 per share and subject to the terms of a written merger agreement. The merger agreement required, among other things, that it be submitted to UOP's stockholders for a vote and that the merger could not proceed unless approved by the holders of a majority of the issued and outstanding shares of UOP stock, other than those owned by Signal, present and voting at a meeting convened for the purpose of voting on the merger agreement and requiring, in any event, the approval of at least two-thirds of the UOP shares, including Signal's shares (50.5%), outstanding on the record date for the meeting.

By a lengthy Notice of Annual Meeting of Stockholders and Proxy Statement and other documents sent to its stockholders, UOP made full disclosure of the proposed merger and of the financial data and other business matters relating to UOP. This material included the recommendation of UOP's Board that the stockholders vote in favor of the merger, and

also a copy of an opinion from the investment banking firm of Lehman Brothers Kuhn Loeb Incorporated ("Lehman Brothers") to UOP's Board of Directors that the proposed merger was fair and equitable to UOP's minority shareholders.

The annual stockholders meeting of UOP was held on May 26, 1978, and at that time there were 11,488,302 shares of UOP outstanding and entitled to vote. 8,753,812 shares (76.2%) voted in favor of the merger; 254,840 shares (2.2%) voted against; and the balance of the shares were not voted. Of the 3,208,652 non-Signal shares which did vote, the vote in favor of the merger was overwhelming: 2,953,812 voted in favor, 254,840 against, or a ratio of nearly 12 to 1 in favor of the merger. On the same day, the merger became effective and, pursuant to the terms of the merger agreement, each former UOP share was converted into a right to receive in cash the sum of $21.00. As of January 31, 1979, all of the certificates representing the former UOP shares had been surrendered and the former UOP shareholders paid $21.00 per share, with the exception of certificates representing 147,593 former shares, including those previously owned by the plaintiff, William B. Weinberger.

The merger agreement gave Signal the option to withdraw from the merger in the event of any challenging litigation brought before the stockholders meeting. No legal proceedings were undertaken prior to May 26, 1978, to challenge the merger or to prevent the holding of the stockholders meeting. At no time has any UOP stockholder (including Weinberger)

filed an appraisal proceeding and, with the exception of the present lawsuit filed on July 5, 1978, some six weeks after completion of the merger, no legal proceedings of any kind directed at the merger have been brought.

B. William B. Weinberger

The named plaintiff in this action, William B. Weinberger ("Weinberger") is an 81 year old, "substantially retired" CPA who lives in New York City.

Weinberger's first contact with UOP occurred in April, 1975. On April 23, 1975, two days after Signal had announced its tender offer for UOP stock at $21 per share, in an arbitrage transaction Weinberger bought 200 shares of UOP stock at about $17.50 per share and immediately tendered it to Signal at the $21 tender price. Signal purchased 110 of the 200 shares (as a part of its pro rata purchase of all shares tendered), leaving Weinberger with the 90 shares which he continued to own until May 26, 1978.

During the week of February 27, 1978, Weinberger learned of the possible Signal-UOP merger from an article in the paper, and that the price range under consideration was $20-$21 per share. By a letter from UOP's management dated March 7, 1978, sent to all UOP stockholders, he was advised that UOP's Board had approved Signal's offer at $21 per share and that the matter would be put to the stockholders for their vote at the annual meeting in May. Weinberger subsequently received the Notice of Annual Meeting and Proxy Statement sent out by the company.

Weinberger read carefully through the Proxy Statement and, prior to the May 26 stockholders meeting, came to the conclusion that the $21 per share merger price was "very inadequate". In fact, as early as the week of February 27, when he had first heard of the possibility of a merger, he was "surprised" at the price range of only $20-$21, but did nothing at that time to pursue the matter. After having read through the materials furnished to its stockholders by UOP, and having looked at the Standard & Poor's Guide, and having concluded on the basis thereof that the price was "very inadequate", Weinberger then consulted with his attorney, Charles Trynin.

Notwithstanding the conclusion he had reached, Weinberger did not communicate that conclusion to UOP, to Signal, or to any other UOP stockholder.* He did not send in his proxy nor did he attend the stockholders' meeting or vote on the merger agreement. Neither he nor his attorney commenced or even threatened any litigation, even though, in addition to his conclusions about the inadequacy of the price, he had concluded that the Lehman Brothers opinion included in the proxy materials was not an outside independent opinion, that it was "self-serving", and that it was a negative factor which contributed to his determination not to send in his proxy

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* Weinberger testified that he was not opposed to Signal taking over UOP, "if Signal . . . would pay an adequate price . . . ." (Weinberger Dep., p. 51). In other words, it is clear that Weinberger wanted the merger to go through so he could then litigate about the price. He clearly was aware that if litigation was started before the merger was completed, Signal might withdraw.

to vote on the merger.*

On July 5, 1978, six weeks after the completion of the merger, the complaint in this action was filed with Weinberger as the named plaintiff. Weinberger testified that he read the complaint before it was filed. In the complaint there is no prayer or request for rescission. Also, there is no allegation that any of the proxy materials were false or misleading, or in violation of law. The merger is denominated as "illegal" because of the alleged absence of a bona fide business purpose, and the price of $21 is alleged to be "grossly inadequate". All in all, it is clear that this is and always has been an action where the only relief being sought is money damages.**

C. Weinberger as Class Representative

In several recent federal court decisions, it is clear that certain facts about a class representative are relevant. For example, in In re Goldchip Funding, 61 F.R.D. 592, 594-595 (M.D. Pa. 1974), the court stated:

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* At his deposition, Weinberger said that prior to the May 26 meeting he, personally, had found no misstatements, omissions or errors in any of UOP's proxy materials. His attorney would not permit him to answer questions on this subject for the period after the meeting (Weinberger Dep., pp. 51-53).

** In fact, at the argument held on February 1, 1979, Weinberger's counsel advised this Court: "The class action clearly is a monetary recovery for the difference in value [of the minority shares] . . . ." (Transcript of 2/1/79 Hearing, p. 26).

> "In my view, facts regarding the personal qualities of the representatives themselves are relevant, indeed necessary, in determining whether 'the representative parties will fairly and adequately protect the interests of the class.' F.R.Civ.P. 23(a)(4). Because absent members of the class would be conclusively bound by the results obtained by these representatives and their attorneys, due process requires that they be more than pro forma representatives. Cf. Hansberry v. Lee, 311 U.S. 32, 61 S. Ct. 115, 85 L.Ed. 22 (1940). The class is entitled to more than blind reliance upon even competent counsel by uninterested and inexperienced representatives. A proper representative can offer more to the prosecution of a class action than mere fulfillment of the procedural requirements of Rule 23. He can, for example, offer his personal knowledge of the factual circumstances, and aid in rendering decisions on practical and non-legal problems which arise during the course of litigation. An attorney who prosecutes a class action with unfettered discretion becomes, in fact, the representative of the class. This is an unacceptable situation because of the possible conflicts of interest involved. See Graybeal v. American Savings and Loan Association, 59 F.R.D. 7 (D.D.C. 1973)." (Emphasis added.)

This language was cited with approval in Greenspan v. Brassler, 78 F.R.D. 130 (S.D.N.Y. 1978). More on this subject will be said, infra, and the foregoing is offered at this point as a preface to the following recital of facts concerning Weinberger.

When Weinberger's deposition was taken in New York in December, 1978, approximately five months after the action was filed, he clearly demonstrated little, if any, knowledge of the case.

1. Although the heart of the case is the proper or fair value of the UOP shares, i.e., whether the $21 per share paid was fair and adequate, Weinberger did not know what the fair value was although he said he had made some "scratch notes" and was now of the opinion that $32 per share would "not be excessive" (Weinberger Dep., pp. 46-47).

On this subject, Weinberger has no knowledge as to whether a security or financial analyst or adviser has been retained in connection with this litigation. As he said (id. at p. 99), his attorney, Charles Trynin, told him that some papers had been submitted to a financial analyst, but he, Weinberger, has "no idea who or what or when." Weinberger neither asked nor was he told what financial arrangements, if any, had been made with the financial analyst to whom the documents were sent (id. at pp. 99-100). He also said that if the financial analyst told his attorney anything, "I have no idea about whatever the analyst told him" (id. at p. 101).

For all, then, that Weinberger himself knows, some financial analyst may already have reported to Weinberger's counsel that $21 per share was a fair and adequate price. For all Weinberger himself knows (and apparently cares less) he in fact may have no lawsuit worth pursuing. This is extraordinary in view of his stated financial arrangements.

2. Weinberger has no written agreement with his counsel regarding legal representation, costs, fees and the

like (id. at pp. 89-90). He testified, however, that he, Weinberger, "supposes" that he is to be fully responsible for all costs of the litigation (id. at p. 100). But, (a) he has never received any estimate of what the costs and expenses might be (id. at pp. 58-59); and (b) as of December he had not been billed by his attorney for any costs nor did he even know what costs had been spent. All of these costs have been paid by his counsel (id. at pp. 100-101).

3. Signal in no way challenges the legal ability and experience of either Weinberger's counsel, William Prickett, or his firm, Prickett, Ward, Burt & Sanders. However, it is relevant to note that the first time Weinberger ever had any communication, written or oral, with either Mr. Prickett or any member of his firm was two days before Weinberger's deposition, nearly five months after this lawsuit, in which Mr. Prickett is the lead counsel, was filed!* (Id. at p. 103.)

4. During his deposition, Weinberger again and again indicated clearly that he has no real knowledge of this case, and that it is being conducted by his attorneys as they see fit.

(a) On December 6, 1978, he was asked if there were any motions pending in this case. Weinberger answered,

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* It is also noteworthy in this context that Mr. Prickett represented Mr. Weinberger in a derivative action before this Court, Weinberger v. Stewart, C. A. #5146. Settlement of that case was approved by Chancellor Marvel on November 16, 1977. Presumably then, Mr. Weinberger never communicated with his counsel in that case, even though the latter was awarded a fee of $75,000.

"I don't believe so. Not yet." (Id. at p. 133.) In fact, at that time defendant Signal's motion to dismiss the derivative claims in Weinberger's complaint had been filed and only about three weeks before a lengthy brief in opposition to such motion had been filed by Weinberger's counsel.

Also, motions had previously been filed and were then pending to dismiss the individual defendants. Only two days before his deposition Weinberger's counsel had filed a discovery motion to compel certain deposition answers. In other words, on December 6 there were three motions pending in this case, and Weinberger was unaware of any!

(b) Weinberger was asked on December 6 whether there were then any depositions scheduled but yet untaken. His answer was, "Not that I know of." (Id. at p. 133.) In fact, as of that time, four depositions were then scheduled only one week later, on December 13 and 14 in Los Angeles (the costs, including travel expenses, of those depositions were, presumably, Weinberger's responsibility, but he knew nothing about them). These depositions were of four of Signal's top executives, including its President, Chairman of the Board and chief financial officer, yet he did not know of any of them.

(c) This litigation had its inception when Weinberger visited one of his attorneys, Charles Trynin, and turned over the papers dealing with the UOP merger (id. at p. 87). The complaint was drafted by his attorneys; Weinberger

did not review it before it was put in final form; and although he read it before it was filed, Weinberger recommended no changes or additions to the complaint (id. at p. 91). At least in part, the only information about certain of the complaint's allegations were obtained by Weinberger from his attorneys (id. at pp. 93-94).

(d) Weinberger himself does not know any other stockholder of UOP, and he has never at any time consulted with any other UOP stockholder relative to the UOP/Signal merger (id. at p. 129).

(e) Although he testified in response to Mr. Prickett's questions that other cases in which he had been involved had been tried to a conclusion (id. at p. 111), on re-cross-examination, it was clear that although he has been involved in many prior lawsuits, he didn't know the difference between a settlement and a trial to judgment (id. at pp. 129-130).

(f) Although he said he was of the opinion that the best way to handle this case was as a class action, and that he had authorized his counsel to proceed on that basis (dep., p. 125), on re-cross it was obvious that Weinberger has no more idea than the man in the moon what is required to maintain a class action (dep., pp. 133-135).

III. QUESTIONS PRESENTED
(Stated Affirmatively)

A. WEINBERGER WILL NOT FAIRLY AND ADEQUATELY REPRESENT THE INTERESTS OF THE "CLASS".

B. ALL UOP STOCKHOLDERS WHO VOTED IN FAVOR OF THE MERGER OR WHO SURRENDERED THEIR SHARES SHOULD BE EXCLUDED FROM ANY CLASS WHICH THE COURT MAY CERTIFY.

IV. ARGUMENT

A. Weinberger Will Not Fairly And Adequately Represent The Interests Of The "Class".

As stated earlier in this brief, Signal opposes certification of the present action as a class action on the grounds, among others, that the only named plaintiff, William B. Weinberger, cannot fairly or adequately represent the interests of the purported class.

Rule 23 of the Chancery Court Rules, entitled "Class Actions,"* contains certain conditions precedent which must be met in order to maintain a class action, including Rule 23(a)(4) which states:

> "[T]he representative parties will fairly and adequately protect the interests of the class."

Defendant Signal respectfully submits that in this case, this condition precedent has not been met.

At the outset, the burden is on the plaintiff seeking class certification to establish that he will adequately represent the interests of the proposed class. Flamm v. Eberstadt, 72 F.R.D. 187 (N.D. Ill. 1976). As stated by the court in Blumenthal v. Great American Mortgage Investors, 74 F.R.D. 508, 511 (1976):

> "At the outset, we note that the burden of demonstrating that the prerequisites of Rule 23 have been satisfied falls on

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* This rule is substantially identical to Rule 23 of the Federal Rules of Civil Procedure, which deals with class actions in the federal courts.

> those who seek to maintain the class action. [citations] Thus, the named class representative must demonstrate that all the requirements of Rule 23(a) have been satisfied . . . ." (Emphasis added.)

The adequacy of representation is a "critical" factor in determining class maintainability. Id. at p. 513.

> "Prior to certification of a class, a court must find that the named representatives of the class will fairly and adequately protect the interests of the class. 'Basic considerations of fairness require that a court undertake a stringent and continuing examination of the adequacy of representation by the named class representatives at all stages of the litigation . . . .'" (Emphasis added.)

Susman v. Lincoln American Corp., 561 F.2d 86, 89 (7th Cir. 1977).

As indicated in the immediately preceding quotation, the question of the adequacy of class representation must be focused on the named representative of the class, in this case Mr. Weinberger, and not solely on the competency of plaintiff's counsel.* See also, Levine v. Berg, 79 F.R.D. 95 (S.D.N.Y. 1978); Greenspan v. Brassler, 78 F.R.D. 130 (S.D.N.Y. 1978); Blumenthal v. Great American Mortgage Investors, supra; Tomkin v. Kaysen, 69 F.R.D. 541 (S.D.N.Y. 1976).

> "The class is entitled to more than blind reliance upon even competent counsel by uninterested and inexperienced representatives. A proper representative can offer more to the prosecution of a class action than mere fulfillment of the procedural requirements of Rule 23. He can for example, offer his personal knowledge of

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* Defendant Signal does not contest the ability or competence of either William Prickett or of his firm to prosecute a class action. Defendant's challenge is to Weinberger's competence.

> the factual circumstances, and aid in rendering decisions on practical and nonlegal problems which arise during the course of litigation. An attorney who prosecutes a class action with unfettered discretion becomes, in fact, the representative of the class. This is an unacceptable situation because of the possible conflicts of interest involved." Greenspan v. Brassler, 78 F.R.D. 130, 133 (S.D.N.Y. 1978) (quoting from In re Goldchip Funding Co., 61 F.R.D. 592 (M.D. Pa. 1974)).

In denying plaintiffs' motion for class action certification, the court in Greenspan called attention to the limited personal knowledge of plaintiffs of the facts underlying the suit, "as well as their apparently superfluous role in the litigation to date." 78 F.R.D. 133-134. Among other factors, the court noted that plaintiffs had not met with their attorney until the basic groundwork of the action had been laid.

Equally illuminating are some of the considerations stated by the court in Levine v. Berg, supra, when it denied plaintiff's motion for class certification.

> "Plaintiff's unfamiliarity with matters relating to her claim permeates her testimony . . . . Plaintiff's deposition testimony reveals an alarming adversity to unearthing the facts relative to her claim, as well as a total reliance on her counsel . . . . In view of plaintiff's lack of personal knowledge of, and unwillingness to learn about, the facts upon which her complaint is based, and the undue emphasis she has placed on her attorney's ability to investigate and prosecute this suit, the mere fact that plaintiff has brought this suit and is able to bear its costs is of no consequence." 79 F.R.D. 97-98.

In the present case, the facts about the plaintiff, William Weinberger, are strikingly similar to the facts in Greenspan and Levine, and defendant Signal respectfully submits that Weinberger's motion for class certification should likewise be denied.

Based upon his deposition testimony, it seems clear that after it had occurred to Weinberger to question the adequacy of the merger price of $21 per share, he turned the matter over to his attorney, Charles Trynin, and left the decision up to Trynin as to whether an action should be filed and, if so, the type and scope of the action. As Weinberger said in his deposition: "Yes, I gave him [Trynin] the papers and asked him to study them, and if he felt, after talking to me again, there was a basis for action, he was empowered to proceed" (Weinberger Dep., p. 87). After that, Trynin did go ahead and draft a complaint, which Weinberger never reviewed until it was in final form, and then although Weinberger says that he read the complaint before it was filed, he made no changes or additions thereto. As he said, "I was satisfied with it, prior to its being drawn." (Emphasis added.) (Id. at p. 91.)

On being asked about specific facts known to him which formed the basis of the allegations contained in the complaint, Weinberger clearly possessed no such facts (id. at pp. 91-96). Weinberger's knowledge about the allegations

of the complaint are based upon his guesses, speculation, and upon information obtained by his attorneys. For example, on being asked what facts, if any, he had concerning the allegation of the complaint that there was a "plan, conspiracy or scheme with others," Weinberger answered: "It is obvious that the people who were acquiring the company had discussions amongst themselves, and whether we used the words in the complaint or other words to describe their conferences and discussions and agreements, would be immaterial in my opinion." (Id. at p. 93).

Of greater importance, and perhaps the most important indicator of Weinberger's lack of personal knowledge and involvement in the direction of this case is his total lack of familiarity with the subject of a financial analyst. His attorney, Trynin, told Weinberger that certain papers had been submitted to a financial analyst, but Weinberger himself has "no idea who or what or when" (id. at p. 99). Weinberger has never been told of the results, if any, obtained from the financial analyst and he has never asked! (Id. at pp. 95-100). Weinberger to this day has no knowledge of what, if anything, the financial analyst may have told his attorneys. As he testified, "I have no idea about whatever the analyst told him [Trynin]." (Id. at p. 101.)

What greater indication can there be of Weinberger's unwillingness to himself pursue the facts in this case than his complete detachment from the subject of a financial analyst?

The core of this action is the adequacy of the price paid by Signal to the UOP shareholders and, in substance, if it turns out that the $21 per share price paid by Signal was fair and adequate, neither Weinberger nor any member of the class whom he seeks to represent has a claim against Signal. Notwithstanding, Weinberger himself has done nothing more than make some "rough calculations" about the adequacy of the price, and has done absolutely nothing to inform himself about the subject of the adequacy or inadequacy of the $21 per share price paid. In fact, he has left it entirely to his counsel to find and retain a financial analyst, and to communicate with that financial analyst and deal with whatever findings, conclusions or result that analyst may have reached. How, then, conceivably can Weinberger make any intelligent value judgments as to the conduct of this case, since he really does not know whether he has any case at all!

Weinberger's unfamiliarity with this case is also evidenced by a number of other things contained in his deposition. For example, he was unaware at the time of his deposition of any pending motions. In fact, at that time there were three motions pending of which certainly two were quite important: one motion was that of Signal to dismiss the derivative counts of the complaint. In response to this motion, plaintiff's counsel had filed a lengthy brief several weeks before Weinberger's deposition, and indeed plaintiff's

counsel has throughout vigorously opposed the motion to dismiss the derivative counts. Weinberger was wholly unaware of the entire subject matter.

Another motion which was pending at the time of Weinberger's deposition was the motion to dismiss the individual defendants. If, in fact, Weinberger had participated in the decision making process about the nature and scope of the litigation, surely he would have known and been aware that a number of individual defendants had been named in the complaint, and why. The fact that the individual defendants had sought to dismiss themselves from this case would certainly have been a relevant matter to anyone concerned about, and paying any attention to the litigation and its conduct. In fact, Weinberger knew nothing whatsoever about this motion in early December when his deposition was taken. He also did not know that his counsel had filed a discovery motion seeking to compel additional answers from one of the principal witnesses in the case.

On the general subject of discovery, notwithstanding the fact that there were several depositions scheduled in Los Angeles the week after his own deposition in New York, Weinberger knew nothing about them. It can reasonably be concluded, therefore, that Weinberger had not been consulted either about the taking of those depositions in Los Angeles by his counsel or about the reasons therefor, or the costs that might be incurred in connection therewith.

On the subject matter of costs and expenses, "the mere fact that plaintiff has brought [a] suit and is able to bear its costs is of no consequence." Levine v. Berg, supra. On the subject of payment of costs in this case, apparently there has been no express agreement reached between Weinberger and his counsel about the payment of such costs. He stated in his deposition that he "supposes" that he is to be fully responsible for all costs of the litigation; however, he has never received any estimate of what those costs and expenses might be. Notwithstanding the fact that substantial costs have been incurred in the case, he has neither been told what those costs were nor has he been billed for any part of them; and all of the costs of conducting this litigation have been paid to date by his counsel.

Before leaving the subject of payment of the costs of this litigation, another point is relevant. In Tomkin v. Kaysen, supra, the court stated:

> "It is clear that the cost of notice of the class must be borne by plaintiff. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974). Plaintiff was unwilling to state that she was aware of the possible costs she could incur under an order properly calling for individual mailed notice to the class. Although her attorney stated for the record that he felt that she would pay for whatever notice the court ordered, she would not agree herself. On the other hand, her attorney would not allow her to adopt his statement. Plaintiff's hesitation is an element going toward the possible vigor employed in protecting the rights of the class." 69 F.R.D. 543-544.

In the present case, plaintiff's counsel has provided to the Court a proposed "Order on Certification of Class Action." There is nothing said in that proposed order about payment of costs to notify the class. Also, in his deposition, as previously indicated, Weinberger testified that he has been given no estimate of costs and has no idea whatsoever as to what the costs may be that would be incurred in this action. The unwillingness of the plaintiff (up to this point at least), to step up and recognize the potential liability for such costs is, Signal submits, another factor which points towards Weinberger's lack of suitability as a class representative.

The Tomkin opinion is also illuminating in other ways as to the requirements of a proper class representative. The court in Tomkin found that the plaintiff had not met the requirements of Rule 23(a)(4) and, among other factors to which the court pointed in reaching that conclusion, was the plaintiff's lack of knowledge of the duties of a class action representative. 69 F.R.D. at p. 54. In the present case, Weinberger was asked by his own counsel whether it would be appropriate that the action be certified as a class action. In response, Weinberger stated, "I think that is the best way to proceed." (Weinberger Dep., p. 125.) However, on redirect examination, when asked about that answer and the criteria which the court would consider in deciding whether an action was a proper class action, Weinberger stated: "I am not a lawyer. I don't know if I can answer that question." (Id.

at pp. 134-135.) In other words, Mr. Weinberger has no independent knowledge of what it is to have a class action, or what criteria go into making up a proper class action. He, as the plaintiff, has said that this should be carried on as a class action but clearly does not know what that means. As with everything else, he has just left it up to his lawyers.

Also, in Tomkin, the court pointed out that the plaintiff had not met her attorney until the first day of her deposition. In that respect, this case is very similar to Tomkin. It is true that one of plaintiff's counsel, Charles Trynin, is a longtime friend and counsel for Weinberger in various litigations; however, William Prickett, who is obviously the lead counsel in this case and whose firm would clearly be the one carrying the laboring oar if this case goes forward, had never met, spoken or in any way communicated with Weinberger until two days before Weinberger's deposition, nearly five months after the complaint in the action was filed.

Based upon the foregoing, and upon the additional factors set forth in this brief at pages 6-14, supra, Signal respectfully submits that the plaintiff has failed to carry his burden of showing that he is a proper representative of the class as required under Rule 23(a)(4), and that therefore the plaintiff's motion for class certification should be denied.

B. All UOP Stockholders Who Voted In Favor Of The Merger Or Who Surrendered Their Shares Should Be Excluded From Any Class Which The Court May Certify.

Signal respectfully submits that the class which plaintiff here seeks to have certified, namely, all minority stockholders of UOP as of May 26, 1978, embracing some 5,688,302 shares, is improper, and on that basis requires that plaintiff's present motion be denied.

Although Signal, as the owner of 50.5% of the outstanding shares of UOP, had the ability under § 251 unilaterally to effect the subject merger, Signal chose, however, to condition any merger on the affirmative vote of a majority of the minority shareholders present and voting at the annual meeting.* Thus, despite Signal's majority ownership of UOP, the voluntarily imposed "super-majority" vote provision of the merger agreement required affirmative acceptance of the proposed transaction by a majority of the minority shares present and voting at the meeting.

The Proxy Statement and other documents which UOP provided to its shareholders contained extensive financial data about UOP as well as detailed information concerning the terms and effects of the proposed merger, the business and recent financial history of UOP, the interests of directors

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* In addition, the merger agreement required the affirmative vote of no fewer than two-thirds of all outstanding shares, including those owned by Signal, entitled to vote on the matter.

and officers in the outcome of the merger, UOP stock price market information, appraisal rights, federal income tax consequences, source of funds and pending litigation. The Proxy Statement also advised the UOP shareholders that Lehman Brothers had opined to the UOP Board of Directors that the proposed merger was fair and equitable to UOP's minority shareholders, and a copy of Lehman Brothers' opinion letter to that effect was attached as an exhibit to the Proxy Statement.

After receipt of the complete disclosure of the relevant facts as set forth in the Proxy Statement and other documents, a majority of the minority shares of UOP were voted in favor of the merger. In fact, of the 3,208,652 minority shares which were voted either by proxy or in person at the meeting, 2,953,812, or 92%, were voted in favor of the transaction. Moreover, as of January 31, 1979, out of the total of 5,688,302 former minority shares, certificates representing only 147,593, or only about 2-1/2% of all the former minority shares, had not been exchanged for the merger consideration of $21.00 per share.

It has long been the law of Delaware:

> "As a general rule equity will not hear a complainant stultify himself by complaining against acts in which he participated or of which he has demonstrated his approval by sharing in their benefits."

Trounstine v. Remington Rand, Inc., Del. Ch., 194 A. 95, 99 (1937). In Trounstine, the charter of Remington Rand was amended, upon the vote of two-thirds of each class of stock, so as to reclassify

the stock structure of the company. As a result of the reclassification plaintiff's first preferred shares were changed into shares having different rights and preferences and cumulative dividends of $26.25 per share were extinguished. Plaintiff had voted against the reclassification. In addition, prior to the vote on the plan of reclassification, plaintiff had sought in the Supreme Court of New York to enjoin the company and its directors from taking any action in furtherance of the plan. However, on advice of counsel, the motion for injunctive relief was withdrawn. Approximately 9 months after the reclassification, plaintiff surrendered his first preferred shares in exchange for the new stock which he was entitled to receive pursuant to the reclassification. Plaintiff thereafter filed an action in this Court demanding accumulated dividend arrearages on his old stock, and also requesting rescission of the reclassification on the ground that the transaction was void. The Chancellor dismissed the complaint on the ground that, although he had voted against the reclassification, the plaintiff had acquiesced in the transaction by surrendering his old stock for the new. The Court stated:

> "The new securities received in lieu of the old must in reason be regarded as acceptable to the holders of the old in liquidation of all capital and dividend rights theretofore belonging to them. No other sensible view of the matter can be entertained. He who accepts the new rights ought to be regarded as expressing an agreement to let go of the old ones."

194 A. 99. In short, even though plaintiff had voted against

the transaction and had filed an earlier action attacking it, he was estopped from challenging the reclassification in this Court because he had accepted the benefits of the plan.

In Elster v. American Airlines, Inc., Del. Ch., 100 A.2d 219 (1953), plaintiffs brought an action challenging a stock option plan for the benefit of American Airlines' executive employees. The defendants moved to dismiss as to one of the defendants on the ground that she had voted in favor of the adoption of the plan. In granting that motion, this Court held:

> "It is well established that a stockholder cannot complain of corporate action in which, with full knowledge of all the facts, he or she has concurred. Finch v. Warrior Cement Corporation, 16 Del. Ch. 44, 141 A. 54. There is no averment in the complaint of any failure on the part of defendant, or of any of those charged with its management, to make full disclosure of all the facts relating to the option plans sought to be attacked. According to the affidavit offered by defendant, which is not disputed, all facts pertinent to the option plans had been placed upon the public records of the New York Stock Exchange and had been forwarded to every stockholder of record of defendant, as requird by the regulations of the Securities and Exchange Commission. She therefore had ample notice of all pertinent facts surrounding the adoption of the option plans at the time the shares which she held were voted in favor thereof. Goldboss v. Reimann, D.C.S.D.N.Y., 55 F. Supp. 811.
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> "I therefore conclude that plaintiff Anna F. Cohen has no standing to attack the options issued according to the stock option plan and that summary judgment must be entered against her."

Id. at 100 A.2d 221. See also, Frank v. Wilson & Co., Inc., Del. Supr., 32 A.2d 277 (1943); Gottlieb v. McKee, Del. Ch., 107 A.2d 240, 244 (1954); Goodman v. Futrovsky, Del. Supr., 213 A.2d 899 (1965). See generally, 13 Fletcher, Cyclopedia Corporations § 5862 at p. 200 (1970 Rev. Vol.).

The complaint in this action does not allege that the Proxy Statement or other documents submitted by UOP to its stockholders were false or misleading. In fact, plaintiff testified that he had come to the conclusion that the $21.00 merger price was inadequate based on the information set forth in the Proxy Statement. For example, Weinberger testified:

> "Q What information contained within the UOP annual statement did you look at or review, in coming to your conclusion that the price of $21 per share was very inadequate?
>
> "A The company uses the last in, first out method of valuing their inventory and I believe that this proxy statement itself, meaning the 1978 proxy statement, indicates -- states rather plainly that there is an undervaluation of inventory of $18 million. It further states in another section that the plant and the equipment on a current basis would be worth $58 million more than it cost, less depreciation at which it is carried in the balance sheet and on the books of the company."
>
> * * *
>
> "Q Other than the material with respect to the possible understatement of inventory of $18 million and the accounting for plant and equipment; was there any other information

contained in any of the material which you had either in your file or set forth in the proxy statement which led you to conclude that the price of $21 per share was, and I believe you used the term in the previous answer, very inadequate?

"A Yes. I have in my possession Standard & Poor's Stock Guide, which will show all listed companies' earnings and also had the company's report, showing that the company had become very successful beginning at least in 1975, had earnings in '75, '76, '77 and '78 in excess of the amount that they paid as dividends[*], which is usual enough and that would be at least -- these retained earnings by UOP had increased the value of the stock and we also have the matter of inflation, the reduced value of the dollar.

"The dollar in 1978 certainly doesn't buy what it bought in 1975. In 1975 there was a $21 price. Judging just by this two things and the inventory valuation and the plant and equipment, there would be reason to believe that, again, that the price was inadequate.

"Q Have you told us now all of the information which you considered in coming up with your conclusion that the price of $21 per share was very inadequate?

"A [T]hat's all I can recollect."

Weinberger Dep., pp. 36-38. Weinberger also testified that he discounted the Lehman Brothers' fairness opinion because it was disclosed in the Proxy Statement that the managing director of Lehman Brothers who had signed the opinion letter was a director of UOP (id. at pp. 97-98). This is a further confirmation that a full disclosure of all relevant facts was made in the Proxy Statement.

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* In fact, the Proxy Statement discloses that in 1975, the year in which Signal acquired its 50.5% of UOP's stock, UOP suffered losses of $34.8 million ($3.19 per share). In 1976, the dividends were reduced from their 1975 level of 67.5¢ per share to 22.5¢ per share (Comp., Ex. A, p. 15).

It is clear that if the information provided by UOP to its stockholders was sufficient to permit Weinberger to arrive at a reasoned conclusion about the fairness and adequacy of the $21 price offered, it was adequate for that same purpose with respect to UOP's other stockholders. And, the facts show that nearly 98% of UOP's minority stockholders who either voted in favor of the merger and/or subsequently turned in their shares for cash disagree with Weinberger's conclusion.

This case therefore presents a much different situation from that faced by this Court in Singer v. Magnavox Co., Del. Ch., ___ A.2d ___ (1978) (opinion on class certification after remand). In Singer, the parent owned almost 85% of the outstanding stock of the subsidiary, and the minority shareholders were advised that the merger would be consummated regardless of their vote. Because the complaint in Singer alleged that the parent had breached its fudiciary obligation to the minority by means of its majority position, this Court concluded that the class should consist of all public minority shareholders on the day prior to the subject merger.

In the instant case, Signal did not accomplish the merger by means of its majority position. On the contrary, on its own volition Signal structured the merger proposal in such a way that its acceptance or rejection was left to the minority stockholders themselves. After their receipt and review of the Proxy Statement, the minority stockholders

themselves voted to approve the merger, and only after that vote was the merger completed. It is also significant to note that a majority of all minority shareholders voted in favor of the merger, even though only a majority of those actually voting was required.

In summary, under Delaware law, and the law generally, a stockholder is estopped to challenge a corporate transaction which he has affirmatively approved, or with respect to which he has accepted benefits, after disclosure of all material facts. As stated in 13 Fletcher, Cyclopedia Corporations § 5862 at p. 200 (1970 Rev. Vol.):

> "A stockholder who, with knowledge of the facts, himself has given consent to, or acquiesced in, acts of the directors or other corporate officers, or of majority stockholders, cannot ordinarily attack such acts afterwards. And this applies equally well to ultra vires acts. . . . So a stockholder cannot attack a wrongful or ultra vires act, where he has accepted pecuniary benefits thereunder, with knowledge of the facts. Acceptance of dividends resulting from the act or thing complained of has in several instances been held to work an estoppel."

In light of the authorities cited and discussed herein, those minority shareholders of UOP who voted in favor of the subject merger or who have since surrendered their shares in exchange for the merger price of $21.00 per share cannot properly be included in any class which the Court may certify. In other words, if any class is certified, it should

include only those former shareholders of UOP who did not vote in favor of the merger and/or have not exchanged their certificates for the $21.00 per share merger price.

V. CONCLUSION

For the reasons stated, plaintiff's motion for class certification should be denied. In the alternative, all UOP shareholders who voted in favor of the merger or who surrendered their shares in exchange for the merger price should be excluded from any class which the Court may certify.

POTTER ANDERSON & CORROON

By Robert K. Payson

Robert K. Payson
350 Delaware Trust Building
P. O. Box 951
Wilmington, DE 19899
Attorneys for Defendant
The Signal Companies, Inc.

OF COUNSEL:

Alan N. Halkett
Thomas W. Dobson
LATHAM & WATKINS
Los Angeles, California

Robert K. Burgess
LATHAM, WATKINS & HILLS
Washington, D. C.

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