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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. UOP, INC., THE SIGNAL COMPANIES, INC., SIGCO INCORPORATED, LEHMAN BROTHERS KUHN LOEB, INC. CHARLES S. ARLEDGE, BREWSTER L. ARMS, ANDREW J. CHITIEA, JAMES V. CRAWFORD, JAMES W. GLANVILLE, RICHARD A. LENON, JOHN O. LOGAN, FRANK J. PIZZITOLA, WILLIAM J. QUINN, FORREST N. SHUMWAY, ROBERT S. STEVENSON, MAYNARD P. VENEMA, WILLIAM E. WALKUP and HARRY H. WETZEL, Defendants.	)	Civil Action No. 5642

PLAINTIFF'S REPLY BRIEF
IN SUPPORT OF HIS MOTION FOR
CLASS DETERMINATION

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NATURE OF THE PROCEEDINGS

The plaintiff demonstrated in his opening brief that he and his counsel (Note) satisfy all the requirements of Rule 23 for class certification. Signal Oil Companies ("Signal") has conceded the correctness of plaintiff's position except on two points.

First, Signal attempts to defeat this action by claiming that, as of the time of his deposition, the plaintiff did not have the depth of knowledge and familiarity with the status and procedural niceties that Signal thinks is necessary for the proper protection of other members of the class. Signal therefore opposes class certification and obviously hopes to frustrate the rights of the entire class in this manner.

Note: The out-of-state attorney, Charles Trynin, Esquire, has been plagued with bad health from the outset of this case. In point of fact, he was intermittently sick all Fall, was not in his office except once or twice in December, 1978, and was hospitalized from early January until very recently. This accounts for his lack of appearance at Court hearings in Delaware. The defendant's attorney, probably unaware of Mr. Trynin's health problems, chides the plaintiff with lack of intimate knowledge of all developments in this rapidly moving case and seeks on this basis to claim that plaintiff is unfit to act as class representative. Of course, if Mr. Trynin had been in his usual good health, the plaintiff would have been fully and closely posted on all aspects of the case.

Second, in spite of this Court's class action decision of December 16, 1978, in Singer v. Magnavox (C.A. 4929), Signal attempts to get this Court to eliminate those public stockholders of UOP who were taken in by the conspiracy alleged in the complaint (i.e., those public stockholders who voted for the merger or who have since surrendered their shares).

The other corporate defendants, UOP and Lehman Brothers, have by letter adopted Signal's brief.

This is the plaintiff's reply brief in support of the motion for class certification.

QUESTIONS PRESENTED

(INTRODUCTION)

SHOULD NOT THE COURT DISCOUNT SIGNAL'S CLAIMS AS TO THE SUITABILITY OF THE PLAINTIFF IN VIEW OF SIGNAL'S AVID INTEREST IN PREVENTING CLASS CERTIFICATION?

ARE NOT SIGNAL'S RECITATIONS ABOUT ITS SIZE AND WEALTH IRRELEVANT ON THE QUESTION AS TO WHETHER THE PLAINTIFF SHOULD BE CERTIFIED AS CLASS REPRESENTATIVE?

ARE NOT SIGNAL'S CLAIMS THAT THE PLAINTIFF SHOULD HAVE BROUGHT OR THREATENED SUIT BEFORE THE MERGER INCORRECT?

IS NOT SIGNAL INCORRECT IN SUGGESTING THAT A CLASS ACTION PLAINTIFF IS REQUIRED TO HAVE THE QUALITIES OF AN ATTORNEY AND FINANCIAL ANALYST?

IN VIEW OF THE SINGER OPINION, IS NOT SIGNAL INCORRECT IN CLAIMING THAT THE CLASS SHOULD BE RESTRICTED TO THOSE STOCKHOLDERS NOT TAKEN IN BY THE CONSPIRACY AND DECEPTION OF THE DEFENDANTS?

A R G U M E N T

1. Introduction

The Statement of Facts in defendant's reply brief contains the very same two argumentative contentions that are repeated and elaborated on in the Argument section. The plaintiff will take up and reply to the defendant's arguments in the order they appear in the defendant's brief in the Argument section of this brief.

At the outset, it should be noted that Signal's pious doubts about the sufficiency of plaintiff's adequacy to represent the class is nothing more than a cloak for Signal's intense interest in defeating this motion for class certification since such an outcome might well result, as a practical matter, in termination of this meritorious action.

Fox v. Prudent Resources Trust, 69 F.R.D. 74, 79 (E.D. Pa. 1975):

> "[I]n class action suits it is always rather anomalous that the defendants should concern themselves with the adequacy of plaintiff's representation of the class."

See also Muth v. Dechert, Price & Rhoads, 70 F.R.D. 602, 604 (E.D. Pa. 1976).

Presumably, such anomaly arises because

> "It is the nature of the motion practice on class determination issues that defendants, who naturally have no interest in the successful prosecution of the class suit against them, are called upon to interpose arguments in opposition to class determination motions verbally grounded upon a concern for the 'best' representation for the class while

> the implicit, but nonetheless real, objective of their vigorous legal assault is to insure 'no' representation for the class."

Umbriac v. American Snacks, Inc., 388 F.Supp. 265, 275 (E.D. Pa. 1975).

Historically, the class action has been recognized as a beneficent tool in securities regulation to provide a remedy for injuries to large groups of people whose individual interests are so small that they have neither the means, financial strength nor incentive to assert their individual remedies and who, therefore, are in need of common representation. 3B Moore pp. 23-71, et seq.; Green v. Wolf Corp., 406 F.2d 491, cert. denied, sub nom Troster Singer & Co. v. Green, 89 S.Ct. 2131, 395 U.S. 977, 23 L.Ed.2d 766; Oppenlander v. Standard Oil Co., (D.C. Ind.), 64 F.R.D. 597.

If defendants could abort securities class action suits at the outset simply because the individual plaintiff on deposition is shown not to be the combination of sophisticated securities lawyer and financial analyst that the defendant would opt for each class action plaintiff to be, then the class action device as a remedy for securities wrongs will surely fail. It is safe to say that an intensive cross-examination of any representative plaintiff in a class action would result in a finding that the individuals involved, having neither the sophistication nor the training, would never qualify in terms of what the defendants claim to expect to lead a class action suit. The defendant's motives

are obviously to set up a standard of sophistication and expertise which no plantiff can meet. To make the rule workable, it is necessary only that the plaintiff engage attorneys who are qualified to represent the class, not that the plaintiff himself be anything more than representative of those who have been defrauded.

The Court in considering all Signal's attacks on the plaintiff should keep clearly in mind that their arguments, no matter how skillfully disguised and plausibly advanced, stem solely from Signal's interest in a total defeat of the class whom plaintiff seeks to inform and represent.

2. Response to Defendant's Section Entitled "The Signal Companies, Inc."

In this section of its brief, Signal recites in considerable detail its size and business and its original tender for 50.5% of UOP's stock. It then proceeds to recite in very general terms some, but not by any means all, of the salient facts leading up to the cash-out of the public stockholders of UOP by Signal. Signal even claims that UOP's notice and proxy statement made "full disclosure" of facts relating to the merger (DB-4). The facts that are stated are only those favorable to Signal. Signal's recitation omits altogether such pertinent things as:

(1) The fact that the press releases referred to at (DB-4) recited in effect that "negotiations" were taking place between Signal and UOP management: in fact, there never were any negotiations at all.

(2) There was no business purpose for the merger: it was simply the best investment opportunity that was presented to Signal at the time and Signal took advantage of it to the detriment of the public stockholders.

(3) There was no serious consideration of the terms of the merger by the management or the Board of UOP.

(4) The complete dominance of Signal was masked and the public stockholders were made to believe that there had been an arm's length transaction between UOP and Signal.

(5) There was no independent banking opinion obtained: instead, Mr. Glanville, a director of UOP, negotiated the price of an opinion on Lehman Brothers Kuhn Loeb stationery to convince the public stockholders that the proposal was "fair".

However, the defendant's statement of its position on the merits is not directly relevant to the narrow issue before the Court at this point: is the plaintiff qualified to act as the class representative in this litigation?

3. Response to Defendant's Section Entitled "William B. Weinberger"

The defendant attempts to slide over the fact that Mr. Weinberger, by training, financial ability, interest and total independence, is a model class representative. Indeed,

if one were to suggest the qualifications for a layman acting as a class representative, it is difficult to imagine anyone more qualified by situation, training and ability as well as interest to act as a class plaintiff.

The subsection B of Signal's brief entitled "William B. Weinberger" includes and highlights the only two favorable details that Signal's attorneys were able to dig up in the course of a day long deposition -- his age, 81 years old, and that he has "substantially retired from his long career as a CPA in New York City", etc. (DB-6). The defendant then summarizes the information that the plaintiff received from UOP and the press that raised the plaintiff's suspicions that he and his fellow shareholders were not being fairly dealt with. There follows a claim that Mr. Weinberger had a legal obligation to bring suit or "threaten" litigation to Signal and UOP when he suspected what was going to happen (DB-7). There are several answers to this argument. There is no legal requirement that Mr. Weinberger had to sue or threaten to sue based on suspicions. (Indeed, had the plaintiff brought a suit based on the information initially available to him, the very same attorneys would have moved to dismiss the complaint as premature and claimed the suit was based on an inadequate investigation by the plaintiff of the facts.) Mr. Weinberger had the duty to review the matter carefully before suing or even threatening to sue. Second, the plaintiff could not tell whether his fellow

shareholders would be taken in and would vote approval or whether they would vote it down. Third and most important, the management and Board of UOP were the plaintiff's fiduciaries: they (not he) had the obligation to protect plaintiff's rights and the rights of other public shareholders. Mr. Weinberger and his fellow shareholders had every right to rely on the elected directors and the management to carry out fully their fiduciary duties.

The defendant's argument culminates in the following footnote found at DB-7:

> "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."

The defendant has here indulged in speculation and fantasy. Nothing in the record and in particular in the plaintiff's long detailed deposition can provide any basis for such an assertion.

4. Response to Defendant's Section Entitled "Weinberger as Class Representative"

Though this section is included in the "Statement of Facts", clearly it is argument. For example, the defendant cites In re Goldchip Funding, 61 F.R.D. 592, 594-595 (M.D. Pa. 1974), (DB-8). Initially, it should be noted that Judge Muir was aware of the defendants' true objective since he said:

> "The Court takes note of plaintiff's observation that defendants are probably more interested in preventing class action status than they are in assuring that the prospective class is properly represented."

Signal underlined a portion of the quote that refers to role of the attorney (DB-9): Signal misses the point. The part of the quote that is relevant is the reference to "uninterested and inexperienced representatives". Mr. Weinberger is clearly not uninterested in righting corporate abuses of stockholders of which he is a member. Nor can Signal claim that he is inexperienced. The Court in Goldchip did not deny class status. It simply said:

> "The Court lacks sufficient facts about the representatives to grant their motion that this case proceed as a class action. Their motion will be denied without prejudice to reinstitute their request and affirmatively show, by affidavit or upon evidentiary hearing, preferably the latter, that they alone or in conjunction with others will provide adequate representation.
>
> "An appropriate order will be entered."

Signal probably does not know the eventual outcome in Goldchip. As the order dated March 29, 1974 shows (a copy of which is attached marked Exhibit "A"), after a hearing, class status was granted by Judge Muir to the original plaintiffs. Thus, the original opinion simply reflects that the plaintiffs had not made the requisite showing by their affidavits. The deposition of the plaintiff negates any such claim in this case.

The balance of this section of the brief is designed to show that Mr. Weinberger was not as knowledgeable about the

case as the defendant Signal believes he should be (DB-10-14). Apart from Signal's ulterior purpose, the fact is that this case was only five months old at the time of Mr. Weinberger's deposition. It has proceeded rapidly due to the diligence of the attorneys selected by Mr. Weinberger to pursue the matter for himself and for other stockholders. Mr. Weinberger, as shown by his deposition, is experienced in this type of matter. He was worked with Mr. Trynin and other corporate and securities attorneys on a large number of important cases. The fact that defendants' counsel were able to show that he did not know (largely because of the incapacity of his New York counsel) the procedural details of the suit is not determinative.

As was stated in Greenfield v. Villager Industries, Inc., 483, F.2d 824, 832 (footnote 9) (CCA 1973):

> "Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statement to the contrary is sheer sophistry."

In Dorfman v. First Boston Corp., 62 F.R.D. 466, 473 (E.D. Pa. 1973), the Court in considering contentions that the plaintiffs were not representative of the class because one of the plaintiffs

> "unsophisticated in finance and law and unused to questioning by lawyers, was at times flustered and confused during her deposition."

and that her

> "deposition testimony raises substantial doubt as to whether she relied on or even in the ordinary sense of the word read the offering circular. Compare Korn v. Franchard Corp., 456 F.2d 1206, 1211 (CAA 2, 1972)."

and that another plaintiff relied on another person's extensive independent research and knowledge of market conditions, held plaintiffs to be proper class representatives and stated:

> "Neither the personality nor the motives of the plaintiffs is determinative of whether they will provide vigorous advocacy for the members of the class. Dorfman is obviously unschooled in the law and was flustered at her deposition but it can hardly be said that she, through her attorney, has been anything but a vigorous and tenacious plaintiff. The same may be said of Juster; principle, coupled with the hope of rectifying a claimed loss and the prospect of a substantial recovery, may be as strong a spur to vigorous prosecution as many other motivations. 62 F.R.D. at 473."

In Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966), a shareholder's derivative action, this principle was applied to sustain a complaint dismissed because the plaintiff was "uneducated generally and illiterate in economic matters" (383 U.S. at 372).

Fischer v. International Tel. & Tel. Corp., CCH Fed. Sec.L.Rep. ¶95,767 (E.D. N.Y. 1976) applied Surowitz to a class context. CCH ¶95,767 at p. 90,774-5.

The plaintiff here looked through the press releases, the notice and proxy statement and realized that the price was inadequate and that something was amiss. He retained attorneys. The law does not require any more. Furthermore, the plaintiff's knowledge and capacity as shown by his deposition far exceeds the comparable knowledge and capacity of the plaintiffs in the above cases or indeed the Goldchip case, supra.

The defendant then says (DB-10):

"2. Weinberger has no written agreement with his counsel regarding legal representation, costs, fees and the like (id. at pp. 89-90)."

The defendant spent a good part of a day deposing Mr. Weinberger. No small part of the time was spent trying to find that in some way that Mr. Weinberger had in this case (or in any of the many other cases in which he has been successful in righting corporate wrongs) done something improper or has profited by his activity as a corporate watchdog. The effort was spectacularly unsuccessful. The best that the defendant can come up with is to say that Mr. Weinberger does not have a written agreement with his counsel. However, as he repeatedly testified, Mr. Weinberger has always understood his obligation to be responsible for expenses if this case is lost. There is no requirement that the plaintiff have a written agreement with his counsel regarding the client's responsibility for expenses if the suit is lost.

In short, the most Signal can say is that Mr. Weinberger was not as closely posted on detailed procedural aspects of the case as Signal would ask (DB-11). Signal piously disclaims any intention of impuning the ability of plaintiff's counsel. Yet, if there is any fault here, it lies at the feet of plaintiff's counsel who perhaps might have kept the plaintiff more closely posted. Of course, any delay in getting information to the plaintiff (since remedied) arose from the unfortunate fact that New York counsel

was sick and about to be hospitalized. Actually, the complaint was filed July 6, 1978. All the defendants requested and received an extension to answer and to answer discovery until August 25, 1978. The individual defendants' depositions were postponed into October and November. The plaintiff's own deposition was taken in December. Thus, there was a brief period when the plaintiff was not kept as closely posted as he might have been about the rapid developments in the case. However, the defendant does not and indeed can not show that there have been any critical decisions made during the period nor that any lack of detailed information by Mr. Weinberger has been significant in any way.

Signal's final shot is that Mr. Weinberger is a layman rather than a lawyer (DB-12). They now seek to rid themselves of this class action by showing that Mr. Weinberger is not an attorney and "has no more idea than the man in the moon of what is required to maintain a class action".

The defendant even goes so far as to suggest that Mr. Weinberger should not be the class representative because he does not know in detail precisely what the value of the public shares was (DB-10). Of course, the best way to have known the value would be to have had someone aggressively negotiate on behalf of the outside stockholders as the management and the directors had a fiduciary obligation to do. The true test of the value of the shares was what price could be agreed upon by forceful arm's length negotiation.

The way to do it now is to determine what the value was, based on comparable situations. To make such a determination, the services of a financial analyst is required. Again, the fact that soon after the case had been started, Mr. Weinberger did not know the name of a financial analyst who had been preliminarily interviewed by New York counsel is not significant. The defendant goes to ludicrous lengths. For example, it says (DB-10):

> "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."

As counsel for Mr. Weinberger, it can be reported at this time that an initial review of the situation by plaintiff's financial analyst shows that the foreoing is pure fantasy: a preliminary evaluation leads to the conclusion that the stock of the plaintiff and the members of the class was worth well in excess of $25.00. The defendant's attempt to dispose of this lawsuit by fantasizing that an expert has confirmed Signal's pat deal is naive, to put it charitably.

The defendant's self-serving assertions as to the plaintiff's alleged incapacity as a class representative based on defendant's claims of plaintiff's lack of legal knowledge and expertise should be quickly evaluated, discounted and discarded by the Court.

5. Response to Defendant's Argument "Weinberger Will Not Fairly and Adequately Represent the Interests of the Class"

In this, the first section under "Argument", Signal points out that Rule 23 provides (DB-15):

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

Signal, to further its own self-interest, claims that plaintiff will not, in Signal's view, fairly and adequately protect the interests of the proposed class. The plaintiff will show that each case the defendant cites really does not support the defendant's present position that the plaintiff is not fit to be certified as class representative.

(a) Flamm v. Eberstadt, 72 F.R.D. 187 (N.D. Ill. 1976), and Susman v. Lincoln American Corp., 561 F.2d 86, 89 (CCA 7, 1977), are actually the same case. The defendant cites them for the proposition that the plaintiff has the burden of proof in connection with the motion for class certification. Actually, the proponent has the burden on every motion. Neither Flamm nor Susman are factually analogous in any way to the present situation. At issue was the question as to whether there could be adequate representation when there existed a special relationship between the proposed class representative and the attorneys for the proposed class. Specifically, the proposed class representatives were either blood relatives or law partners of their attorneys. No such relationship

exists as between the plaintiff, Mr. Weinberger, and New York or Delaware counsel.

(b) Blumenthal v. Great American Mortgage Investors, 74 F.R.D. 508 (D.C. Ga. 1976), is cited by the defendant at pages 15 and 16 of its brief. Again, this case simply stands for the proposition that on the class certification motion (as indeed on every other motion), the proponent bears the burden of proof. The plaintiff has more than adequately carried the burden of proof in this situation. As in the Flamm and Susman cases, factually, Blumenthal is not on point: it involved a plaintiff whose interest was antagonistic to the other members of the class, clearly a situation that does not obtain in the present case.

(c) Levine v. Berg, 79 F.R.D. 95 (S.D. N.Y. 1978), is cited on pages 16 and 17 of the defendant's brief and quoted from at length on page 17. The plaintiff invites a comparison between the situation delineated in Levine and the record in the present case. The plaintiff in Levine was found to have a lack of "personal knowledge of" and, more importantly, an "unwillingness to learn" about the facts on which the complaint was based. In this case, the plaintiff, Mr. Weinberger, himself was the originator of the case. The original facts came solely from him. There is no basis for claiming that he is unwilling to learn more about the facts. Whatever lack of information he may

have had about the facts after the suit was started due to the sickness of his New York counsel has been cured. Of course, Mr. Weinberger's record of proven diligence in ferreting out and righting corporate wrongs not for private profit but for the benefit of his fellow stockholders denies any possibility of even a suggestion that he is unwilling, or unable, to learn the facts.

(d) Greenspan v. Brassler, 78 F.R.D. 130 (S.D. N.Y. 1978), involved a case where the proposed class plaintiffs had claims that were not typical of the claims of the proposed members of the class and were subject to defenses that were not applicable to other class members. In addition to the foregoing, they had very limited personal knowledge of the facts underlying the suit. Nothing could be further from the situation of Mr. Weinberger. (Actually, the defendant uses Greenspan to quote again from the Goldchip case. The plaintiff has already commented on the Goldchip case, supra.)

(e) Tomkin v. Kaysen, 69 F.R.D. 541 (S.D. N.Y. 1976). Again, the Court is invited to compare the confused and contradictory situation so far as the persons tendered as potential plaintiffs and their relationships with counsel and their unwillingness to state frankly their willingness to act especially in connection with costs as class representatives with the clarity, succinctness and directness of Mr. Weinberger's position as set out in his deposition.

In short, the cases cited by the defendant all involve situations that are clearly not in point with the present situation so far as Mr. Weinberger is concerned. The defendant Signal is clearly intent on trying to dispose of this case by preventing class certification. Signal is attempting to bring Mr. Weinberger within the ambit of the above cases but the record clearly demonstrates that Mr. Weinberger suffers from none of the legal infirmities identified in the defendant's case. Signal is grasping at legal straws.

Signal then attempts to build a factual case against Mr. Weinberger. Here, to carry the metaphor forward, Signal is trying to make legal bricks without factual straw. The first claim that Signal makes is that Mr. Weinberger has left the matter entirely to Mr. Trynin (DB-18). The fact of the matter is that Mr. Weinberger, having conceived of the fact that he and his fellow stockholders were being done an injustice by the Signal-UOP merger, went to Mr. Trynin with his papers and discussed the matter with Mr. Trynin. A complaint was drafted and Mr. Weinberger reviewed it in final form. The fact that he made no "changes or additions thereto" (DB-18) is of no significance. There is nothing that suggests that a plaintiff in a class action must (at the peril of having his action not certified as a class action) make changes in the complaint drafted by admittedly competent and experienced counsel.

Signal continues (DB-18):

> "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)."

In this connection, the Court's attention is again called to Dorfman v. First Boston Corp., 62 F.R.D. 466 (E.D. Pa. 1973), in which the Judge saw through another defendant's attempts to obtain a dismissal of a class action certification by pointing to the intricacies of questioning at a deposition.

Signal continues (DB-19):

> "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."

The answer previously given to the prior assertion along these same lines is the same. When Mr. Weinberger's deposition was taken, this case was only about sixty days old (i.e., since the defendants had filed an answer and made their initial production). Of course, in order to approach a financial analyst for detailed proof on the damage issue, it was necessary first to get at least some of the documentary material that Signal and the other defendants had in their possession all along. The early time, coupled with the fact that his New York counsel was physically incapacitated, is a complete answer to this assertion that Mr. Weinberger did not at the time have information on the financial analyst whom counsel were interviewing with a view

to retaining as an expert for the plaintiff and the proposed class. There is no showing that the plaintiff must know about the details of an initial recruitment of a requisite expert witness by his counsel as a predicate for avoiding the defendant's motion to avoid class certification. The defendant Signal hypocritically asks with rhetorical indignation (DB-19):

> "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?"

In the same vein is Signal's exclamation supposedly on behalf of the class whose interest Signal seeks by its opposition to defeat (DB-20):

> "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!"

The defendant Signal then switches back to the other facet of its flaccid two-pronged argument -- that is, Signal again attempts to claim that because Mr. Weinberger did not know the precise procedural status of various matters, such as the depositions and motions, that Signal should profit by this by not having the action certified as a class action. It does not lie in the mouth of Signal to protest against the alleged lack of knowledge of the class representative on details of the case: nor can Signal thus suddenly become for its own purposes the ostensible champion of those who would be plaintiffs against Signal. Signal's argument might have some faint air of plausibility if there were other

would-be class representatives challenging Mr. Weinberger's right to lead the attack and carry the flag. There are no other contenders and so Signal seeks to knock all claims of the proposed class out by disqualifying the only person who has stepped forward to do the task.

The defendant then turns to the question of costs and expenses (DB-22). In the lengthy deposition of Mr. Weinberger, counsel for Signal spent an inordinate amount of time trying to establish that in the present case or in some other case, Mr. Weinberger or some of the counsel that he had retained had committed some impropriety in connection with the obligation on expenses. The quest for an impropriety was spectacularly unsuccessful. The defendant Signal, though obviously eager to discredit the plaintiff, can not point a finger at him on the obligation to be responsible for expenses. The very best that Signal can do is to say that Mr. Weinberger was not very well informed at the time of his deposition as to the status of the expenses. It is clear that Mr. Weinberger understands and agrees that the costs and expenses if the suit is lost will be his.

The defendant then reverts to the Tomkin case (DB-22). In Tomkin, the Court noted that the plaintiff would not state for the record that she would pay the costs involved. The situation in the present case is that Mr. Weinberger has stated clearly and unequivocally that he understands that

whatever costs have been incurred in the event the suit is lost will be his responsibility. There is no responsibility to make any broader undertaking than that.

Signal comes once more back again to the now jaded ground that Mr. Weinberger, for all of the fact that he has been a corporate watchdog for years and years, does not have the training or knowledge of a lawyer. Mr. Weinberger, instead of trying to act as lawyer himself, stated frankly and honestly when asked what criteria the Court would consider in deciding whether an action was a proper class action stated: "I am not a lawyer. I don't know if I can answer that question." (Weinberger Dep. 134-135). The application for class action status is a technical legal subject on which lawyers and even Judges do not agree. How can Signal seriously expect to persuade this Court that Mr. Weinberger should not be certified as a class action plaintiff because he does not attempt to answer those questions that even lawyers and Judges have difficulty with.

Signal's final attack on Mr. Weinberger lies in the fact that he and Delaware counsel had not met in connection with this case until two days before Mr. Weinberger's deposition. Signal seeks to make it appear that Mr. Weinberger has but one counsel -- the firm of Prickett, Ward, Burt & Sanders. However, it has been clear from the outset that Charles Trynin, Esquire of the New York Bar is New York counsel in this case. Indeed, but for his present indisposition, he would have been much more prominent in the handling

of the case than he has been to date. He, of course, was counsel in the case and has worked closely with Mr. Weinberger in a number of cases. The defendant's attempt to prevent certification and, hence, a favorable disposition of the case based on the fact that Mr. Weinberger had not met his Delaware counsel until the deposition is clearly a vain hope.

6. Plaintiff's Response to "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"

The defendant's second argument is a patently discernible attempt to narrow down the proposed class (a) to those who have not surrendered their shares and (b) who did not vote in favor of the merger. Of course, the gist of the complaint is that all of the public stockholders were subject of a conspiracy between the defendants which, by means of deceptions, the public stockholders were led to believe that their corporate fiduciaries had protected their interests in connection with Signal's proposal to acquire their stock in UOP. To adopt the defendant's position would mean that anybody who was taken in by the conspiracy and deception by voting for the merger or surrendering their certificates would be precluded from any recovery. The defendant is attempting, in other words, to say that those stockholders whom the defendant was totally successful in defrauding are precluded from any recovery. Clearly, this is incorrect.

The defendant seems to be trying to claim that there was full disclosure in the notice to stockholders (DB-25-26; 29). The basis for this assertion is not the complaint itself but rather misplaced reliance on one small portion of the plaintiff's deposition in which he said that from the notice and proxy statement, he alone could tell the amount being offered was inadequate (Weinberger Dep. p. 36-38). Of course, one of the central issues in the case is whether there was full disclosure as claimed by the defendant Signal or was there the conspiracy and deception alleged in the complaint. These contentions involve factual issues that remain to be tried. This Court can not assume simply on the basis of assertions in a brief filed by Signal's counsel that there was full disclosure. To hold that the class is to consist of only those who did not vote in favor or who have not surrendered their shares would mean that the Court has accepted Signal's views. It would thus have decided the case without hearing any evidence. Clearly, that is not the rule.

The defendant cites Trounstine v. Remington Rand, Inc., 194 A. 95, 99 (Del.Ch. 1937). Trounstine is clearly wide of the mark: in that case, the plaintiff with full knowledge of the situation surrendered his preferred shares for new shares and thereafter sought to sue for dividend arrearages. There was no element of fraud or deception in Trounstine as there is in this case.

The plaintiff cites and quotes from Elster v. American Airlines, Inc., 100 A.2d 219 (Del.Ch. 1953). As the quotation from the opinion makes clear, the sole reason why the stockholder in question was precluded was because there was "full disclosure of all the facts relating to the option plans sought to be attacked". In this case, there was a conspiracy against and deception of the public stockholders.

All of the other cases cited by Signal denying the stockholder the right to protest after signifying approval were based on the fact that there was full disclosure.

(a) Frank v. Wilson, 32 A.2d 277 (Del.Supr. 1943):

> "With full knowledge of the facts, he chose to accept the dividends without objection...".

(b) Gottlieb v. McKee, 107 A.2d 240 (Del.Ch. 1954):

> "It is apparently not disputed that plaintiff either knew or had a full opportunity of knowing all the facts surrounding this transaction."

(c) Goodman v. Futrovsky, 213 A.2d 899 (Del.Supr. 1965):

> "It is quite plain therefore that the purchasers of Grant stock knew at the time they were buying into Grant and that Grant for the future would continue to buy its produce from the independent wholesaler Shapiro. In the light of this knowledge, the purchasers will not be heard to now claim that they are entitled to something for which they have not paid."

Finally, the defendant cites 13 Fletcher, Cyclopedia Corporations, §5862 (1970 Rev. Vol.) at p.200. The first line of the citation makes it clear that the disability of

the stockholder turns on the fact that the stockholders had full knowledge:

> "A stockholder who with full knowledge of the facts..."

The defendant argues that because the plaintiff, Mr. Weinberger, concluded from the proxy statement itself that the price was inadequate demonstrates that there was full disclosure (DB-31). That is absurd: all that Mr. Weinberger fortunately saw was the tip of the iceberg. Most of the other stockholders were either not so discerning or relied as they had a right to on the fiduciaries whose duty it was to protect their rights. Apparently, some of those who voted against the merger have now become discouraged and have capitulated by turning their stock in, not knowing that help was on the way.

Finally, the defendant seeks to avoid the effect of the recent holding of this Court on class certification in Singer v. Magnavox (Memo Op. Nov. 16, 1974). This Court said:

> "If the surviving cause of action here had been based upon a fraudulent merger contention, then perhaps the timing of stock acquisitions might have some bearing on whether or not the claims of certain shareholders would be typical of the claim asserted by the plaintiffs. But the Supreme Court has agreed with this Court, as I see it, that to the extent that the complaint sought relief on the basis of a fraudulent merger, it failed to state a cause of action under Delaware law. It did, however, state a cause of action to the extent that it alleged a violation of a fiduciary duty owed to all minority shareholders. This is a fine distinction, perhaps, but a distinction nonetheless.

> "Given the fact that no cause of action for fraud in the accomplishment of the merger has been stated when coupled with that fact that Development, with its 84.1 per cent holdings, assured approval of the merger in advance, it would seem that to the extent that the plaintiffs allege and rely upon supposed misrepresentations and omissions in the proxy statement, they do so in furtherance of their contention that the defendants failed to satisfy their fiduciary responsibilities and not as an independent basis for relief. In other words, in the context of matters, reliance by minority shareholders on proxy shortcomings is no more material to the question of a proper exercise of fiduciary duty by the defendants than is the failure of a minority shareholder to oppose the merger, or the reason or timing for the acquisition of his stock.
>
> "Analyzed in this fashion, with emphasis on the Supreme Court decision which has established the guidelines for further proceedings in this Court, I am forced to conclude that the plaintiffs have satisfied the requirements of Rule 23(a) as well as that of Rule 23(b)(3) and that the scope of the class which they seek to represent should include all public minority shareholders of Magnavox as of July 23, 1975."

The above language is just as applicable to this case as it is to Singer. The Supreme Court opinion reaffirmed and restated the basic principle that under Delaware law, the majority stands in a fiduciary relationship to the minority. This Court's recent opinion makes it clear that where there is an allegation of a Singer situation, the class is the entire minority.

CONCLUSION

As pointed out at the outset, Signal has totally conceded except on two narrow points. Mr. Weinberger, contrary to the slurs and innuendos aimed at him, is well qualified by training, finances, interest, integrity and ability to be a class representative in this case. He has no interest antagonistic to the other members of the class: on the contrary, as his deposition shows, he is acting for the best interests of his fellow public shareholders. He does not claim to be an attorney or a financial analyst but there is nothing in the cases that require a proposed class representative to be all things to all men. He does not have as detailed knowledge of the status of the case as the defendant Signal pretends is necessary to avoid Signal's covert aim of defeating class certification. Even the defendant Signal, seeking for its own interest to disqualify him, can not pretend that there has been any prejudice to the interests of the proposed class as a result of any alleged lack of knowledge of Mr. Weinberger of procedural details. In addition, it should be recognized the fatal defect in Signal's argument: it is not an argument made by a rival seeking to displace or accompany Mr. Weinberger in order to represent the class. It is an argument being made by the defendants who stand to lose if Mr. Weinberger is certified as class representative. It will mean that notice will go to all of those who to this day do not know they have been

defrauded and give them an opportunity to participate in the class action which Mr. Weinberger has initiated. If the defendant's self-serving argument prevails, presumably Mr. Weinberger's case would be defeated simply because of his own small personal interest. Signal and the other defendants will go on their way rejoicing, knowing that they have defeated what might well have been at trial a meritorious class action simply because it has been able to impune the integrity and knowledgeability of Mr. Weinberger. Surely, this would be an incongruous result in a class action which is designed to preclude a defendant from doing exactly that.

The only other aspect of the plaintiff's motion for class certification as to which the defendant has not conceded is found in defendant's effort to cut the class down to those few against whom their deceit, fraud and conspiracy did not work. The defendant transparently seeks to eliminate all those who were defrauded. To do so, they have to claim by counsel's assertion that there was a complete disclosure to all the stockholders of everything that was pertinent. That, of course, is circuitous: that is what this case is about.

It should be noted that those stockholders who believe that they were not defrauded or those who have no desire to pursue the case further or those not convinced that Mr. Weinberger and the attorneys he has selected to prosecute the case are not going to do it diligently will have the right to either appear in the action or bring their own

action or to let case drop so far as they are concerned.

Signal's attempt for its own interest and the interest of its co-defendants to prevent certification should be recognized for what it is and an order should be entered certifying Mr. Weinberger as class representative.

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February 21, 1979

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN THE MATTER OF GOLDCHIP FUNDING COMPANY AND COSMOPOLITAN INVESTORS FUNDING COMPANY

RUTH C. LEIB AND FRANK D. LEIB, et al.,

Plaintiffs

vs.

20TH CENTURY CORPORATION, et al.,

Defendants

CIVIL ACTION NO. 73-551
CIVIL ACTION NO. 73-557

ORDER
March 29, 1974

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On January 15, 1974, this Court denied without prejudice Plaintiffs' motion that this action be maintained as a class action. The basis for the Court's decision was the lack of facts upon which could be made a determination as to the adequacy of the representation. Since the denial of that motion, two additional Plaintiffs and proposed representatives have been joined. Hearings on Plaintiffs' renewed motion for class action determination were held on February 19 and 28, 1974.

At the hearing, each of the proposed representatives was called as a witness. Ruth Leib, a shareholder of Goldchip Funding Company (Goldchip), demonstrated a keen interest, both past and present, in the affairs of Goldchip. She joined an independent shareholders committee in 1971, and she contributed to a fund for committee legal expenses. In addition, Mrs. Leib's extensive work in various mental health projects is demonstrative of her organizational and leadership abilities.

Frank Leib, a shareholder of Cosmopolitan Investors Funding Company (Cosmopolitan Funding) is an English graduate student and instructor at Temple University. Although not as closely involved in company policies as is his mother, Ruth Leib, Mr. Leib is a young man of obvious intelligence with a good grasp of the claims being asserted against the Defendants. Mr. and Mrs. Andrew Yenchko, joint shareholders of Cosmopolitan Funding, also seek representative status. Mr. Yenchko has run his own business in Hazleton, Pennsylvania since 1934 and therefore possesses the practical experience necessary in cases such as this.

While it is true that some of the representatives revealed, at best, an elementary understanding of this litigation, their other qualities as outlined above outweigh this limitation. The Court is satisfied that each of the named parties would provide adequate representation to other members of the classes.

In the January 15, 1974 Opinion denying class action status, the Court expressed concern about whether the numerosity requirement of F.R.Civ.P. 23(a)(1) could be satisfied as to Goldchip. No one contends that the Cosmopolitan Funding shareholders cannot meet the numerosity requirement. Goldchip has about 50 shareholders. Under normal circumstances, the Court might be inclined to find that joinder of these shareholders is not impracticable. However, in this case, the Cosmopolitan Funding shareholders present a proper class, and the claims of Goldchip are closely aligned to those of Cosmopolitan Funding. Indeed, Goldchip's sole assets consist of Cosmopolitan Funding stock. Under these circumstances, the claims of the shareholders of both companies should be tried in one suit. Judicial economy dictates that the suit proceed within the framework of the class action provisions of the Federal Rules.

Although the claims of Goldchip and Cosmopolitan Funding are similar, the companies are separate entities. Therefore, rather

than creating one class as suggested by Plaintiffs, the Court is of the opinion that two separate classes would be more appropriate.

The Court concludes that this case should proceed as a class action with two classes, the Goldchip shareholders represented by Ruth Leib, and the Cosmopolitan Funding shareholders represented by Frank Leib and the Yenchkos.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Plaintiffs' motion that this action be maintained as a class action is granted.

2. Within 15 days of the date of this order, Plaintiffs shall submit a form of an appropriate order implementing this decision.

MUIR, United States District Judge