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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

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NOTICE

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PLEASE TAKE NOTICE that the attached Application for Certification will be presented to the Court on Thursday, May 3, 1979, at 10:00 A.M.

PRICKETT, WARD, BURT & SANDERS

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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

APPLICATION FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL PURSUANT TO RULE 42 OF THE SUPREME COURT RULES

The plaintiff, William B. Weinberger ("Weinberger"), moves the Court for an order certifying an interlocutory appeal from the order of this Court dated April 26, 1979, dismissing the derivative counts, and the order of April 26, 1979, insofar as that order limits the class to "those former stockholders of UOP who voted against the merger of UOP and/or have not turned in their stock certificates in exchange for the $21. per share payment".

In support of this application, the plaintiff shows:

A. As to the Derivative Counts

On May 26, 1978, the plaintiff was a stockholder in UOP. In the merger, UOP and Sigco were merged. UOP was the

surviving corporation. The plaintiff still has his UOP stock certificates.

1. This Court, by its order dated April 26, 1979, on its opinion of April 3, 1979, has dismissed the derivative counts. In doing so, it has substantially extended the doctrine found in Heit v. Teneco, 391 F.Supp. 884 (D.C. Del. 1970), Braasch v. Goldschmidt, 199 A.2d 760 (Del. Chan. 1964), and Bokat v. Getty Oil Co., 262 A.2d 246 (Del. Supreme 1970). These cases collectively hold that to maintain a derivative action, the corporation for whose benefit the suit is brought must survive the merger. In addition, these cases hold the plaintiff stockholder must be a stockholder at the time of the wrong and continue to be a stockholder. The reason for requiring that the plaintiff be a stockholder at the time of the wrong is to prevent the purchase of stock simply to bring suit: the reason for requiring continued retention of stock is so that the plaintiff retains his status and relationship with the corporation for whose benefit he brings suit. In all of these cases, the company for which the plaintiff was seeking to bring a derivative action did not survive the merger. The Court, in all three cases, held essentially that since the corporation did not survive, the plaintiff stockholder had no standing to bring a derivative action. These cases would not seem to be authority for the Court's decision in the present case.

Rather, this Court has now held that, even where the plaintiff continues to hold the stock and the corporation in which the stockholder holds stock survives the merger and is

in existence (as UOP is), the terms of the merger purporting to convert the stockholder involuntarily into a creditor in and of itself has the legal effect of precluding the plaintiff from bringing a derivative action on behalf of the surviving corporation. (Note) Such a holding unnecessarily and prematurely gives judicial recognition and force to the merger under challenge. This holding is not based on prior holdings of this Court (or the District Court of Delaware) nor the rationale of their holdings. Rather, the ruling is one of first instance in this State. If the doctrine is to be thus extended, it should be done by the Supreme Court. The ruling determines substantial issues and is determinative of the rights of the parties and therefore should be subject to review by the Supreme Court of Delaware. (Gimbel v. Signal, 316 A.2d 619 (Del. Supr. 1974)). Therefore, this Court should certify an interlocutory appeal in this case.

2. Moreover, the Court's ruling is inconsistent with both Singer v. Magnavox Co., Del. Supr., 380 A2d 969 (1977), and Bruno v. Contran, Del. Ch., C.A. No. 5428 (November, 1977), a copy of which is attached. In Singer, the Delaware Supreme Court held that a majority stockholder had a fiduciary duty of fairness to the minority when seeking to consummate a merger by which it becomes sole owner. In

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Note: This Court does seem to recognize that which corporation survives a merger is determinative since the Court in the same opinion has quashed service on Sigco Incorporated, stating: "The merger combined UOP and Sigco with UOP being the survivor."

Contran, this Court held that a derivative claim to recover the expenses of an allegedly unfair merger proposal which had been withdrawn stated a cause of action. For this Court to hold that the consummation of such a merger terminates that cause of action contravenes the fairness policy of Singer, and unjustly enriches a fiduciary who has breached its duty.

3. The ruling of the Court of April 3, 1979, as to the derivative counts is inconsistent with the Court's ruling of April 5, 1979, limiting the class. In the April 3rd ruling, the Court has held that the former stockholders were all converted to creditors: in the April 5th ruling, the Court has held that the former stockholders "who voted against the merger of UOP and/or who have not turned in their stock certificates in exchange for the $21. per share payment" are still stockholders. In the one instance, the Court has totally precluded a suit by stockholders and, in the second instance, the Court has permitted a suit by some but not all stockholders. This Court should certify an interlocutory appeal to resolve this inconsistency.

B. Order Limiting the Class Certified

The defendants conceded that this action qualified as a class action under Rule 23 in all respects except two (i.e., (1) that plaintiff was a proper representative, and (2) that the class should include all minority shareholders). This Court, by its order dated April 26, 1979, on its opinion dated April 5, 1979, has ruled that the plaintiff is a proper class representative but by its opinion has forever

eliminated from the class, without notice, all stockholders except those "who voted against the merger and/or have not turned in their stock certificates in exchange for the $21. per share payment".

1. The Court characterizes this as a Singer case: in Singer, the Supreme Court held that the minority was entitled to a hearing on fairness. The present holding of this Court circumvents the doctrine of Singer by limiting those entitled to the hearing to those "who did not vote for the merger and/or who have not turned in their stock in exchange for the $21. per share payment". The sole basis for this decision of this Court appears to lie in the fact that the plan for the elimination of the minority contains a "wrinkle": it was structured by the defendants to require that the majority of the minority vote for the merger. The Court construes this feature of the merger proposal to mean that approval by the majority of the minority reflects their acquiescence in the fairness of the transaction. This holding, however, ignores the fundamental fact that the stockholders of UOP who voted for the proposal relied in good faith, as they had a right to, upon their fiduciaries. The original complaint, among other things, alleged a conspiracy among all the defendants directed against the minority shareholders to get them to believe that the defendants, who are fiduciaries, had protected the minorities' interests. If the broad holding of Singer is to be thus narrowed, it should be by the Supreme Court ruling on an interlocutory appeal and, hence, the case should be certified.

2. This Court should not preclude without notice potential class plaintiffs, some of whom, on the one hand, are aware of their legal rights and, some of whom, on the other hand, are known to be relying on this very lawsuit for vindication of their rights. Lutz v. Garber, 357 A.2d 746, 751-2 (Chan. 1976). Rule 23 should be liberally interpreted. Parker v. University of Delaware, 75 A.2d 225 (Chan. 1950). Class certification and notice to the class is simply notice and an opportunity to the members of the class to join or decline to join in the action. The right to become members of the class or decline to become members of the class should not be summarily adjudicated without notice to those involved. Accord Turoff v. Union Oil Co., 61 F.R.D. 51, 57-58 (1973). For this reason, this Court should certify an interlocutory appeal to the Supreme Court.

3. Rule 23 is purely procedural. Wilmington Trust Co. v. Schnieder, 320 A.2d 709, 710 (Del. Supr. 1974). The decision as to whether certain members of the class are precluded by an affirmative vote for the merger should not be summarily adjudicated in a Rule 23 motion: it should be done only on a motion for summary judgment or (where there are factual questions) after trial. Dolese Bros. Co. v. Brown, 157 A.2d 784, 789 (Del. Supr. 1960). If a Rule 23 motion is to be used in this fashion, the Supreme Court should be afforded the opportunity to rule at this point.

4. The complaint was filed based on the public information that was available to the plaintiff and his attorneys at the time. Additional information has become available through the plaintiff's discovery. The Court has chosen to disregard the additional information that was in

the record. Instead, the Court has strictly construed the original complaint in such a way as to preclude the vast majority of stockholders against whom the dominant majority and the other defendants conspired. In doing so, this Court has eliminated the rights of the minority shareholders without considering the discovery to date or postponing a decision on class action certification pending an amendment to the complaint in the light of discovery. Koffler v. McBride, 283 A.2d 855, 858 (Chan. 1971). The purpose of a complaint is to give the defendants notice: it should not be construed narrowly and strictly in the context of a Rule 23 motion for the purpose of narrowing the class. Klein v. Sunbeam Corp., 94 A.2d 385, 391 (Del. Supr. 1952); Harf v. Korkorian, 347 A.2d 133, 134 (Del. Supr. 1975); Herrmann, The New Rule of Procedure in Delaware, 18 F.R.D. 327 (pgs. 338 and 342). If Rule 23 motions for class certification are to be narrowly measured by the precise letter of the original complaint, the Supreme Court should so rule. Hence, this Court should certify an interlocutory appeal at this point.

5. The Court has limited the class to those UOP stockholders "who voted against the merger of UOP and/or have not turned in their stock certificates in exchange for the $21. per share payment". This limitation appears to come directly from the last line of the last page of defendant's brief (page 33, Brief of Signal Companies, Inc. in Opposition to Plaintiff's Motion for Certification of the Class Action"). This Court's second limitation allows stockholders who voted

for the merger but who for any number of reasons do not happen to have turned their certificates in to participate in the class while excluding all other stockholders who voted in favor of the merger. (Note) The plaintiff does not believe there is any basis in fact or in law for the line the Court has drawn. Furthermore, the Court's decision specifically eliminates stockholders from the class who indicated non-approval of the merger by not voting at all but have since turned their certificates in. On the other hand, as pointed out, the Court's decision permits stockholders to join the class who affirmatively signified approval by voting for the merger but who have not turned their certificates in. The ruling is one of first instance in this State and determines substantial issues and establishes legal rights among the parties. Gimbel v. Signal, supra. Additionally, the points decided by the Court's memorandum opinion of April 5, 1979, and its order relate to the correct construction and application of Rule 23 which have not been but should be settled by the Delaware Supreme

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Note: The Court does not give any date when turning certificates in will vitiate the right to be a member of the class. The plaintiff notes that the anniversary of the merger is about a month away. Thus, many stockholders, unaware of the rights that the Court's present ruling has given them, may forfeit that right by now turning their certificates in.

Court before the rights of the large number of potential class action plaintiffs are decided without notice to them.

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