

Mr. Pridett
See,

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WILLIAM B. WEINBERGER,

Plaintiff,

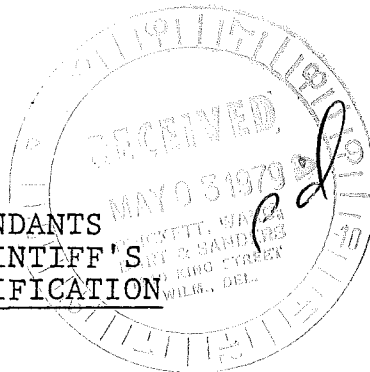
v.

UOP, INC., et al.,

Defendants.

Civil Action No. 5642

MEMORANDUM OF DEFENDANTS
IN OPPOSITION TO PLAINTIFF'S
APPLICATION FOR CERTIFICATION



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May 3, 1979

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IN AND FOR NEW CASTLE COUNTY

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Plaintiff,)	
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v.)	Civil Action No. 5642
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UOP, INC., et al.,)	
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MEMORANDUM OF DEFENDANTS IN OPPOSITION
TO PLAINTIFF'S APPLICATION FOR CERTIFICATION

INTRODUCTION

On April 23, 1979, in connection with its Opinion of April 3, 1979, the Court entered its Order (the "derivative count order"):

1. Dismissing the derivative counts of the complaint, with prejudice; and
2. Quashing the purported service of process upon Sigco, Incorporated.

On April 26, 1979, in connection with its Opinion of April 5, 1979, the Court entered its Order (the "class action order"):

1. Certifying this action as a class action and certifying plaintiff as class representative; and

2. Ordering that the class shall consist of those former shareholders of defendant UOP, Inc. ("UOP") who voted against the merger of UOP and a subsidiary of defendant The Signal Companies, Inc. ("Signal") and/or have not turned in their UOP stock certificates in exchange for the \$21.00 per share merger price.

The Court is fully familiar with the facts which gave rise to this litigation and they need not be repeated here. Plaintiff has filed an Application for Certification of an Interlocutory Appeal (the "Application") from the above-mentioned Orders. This is the Memorandum of the defendants in opposition to that Application.

ARGUMENT

Supreme Court Rule 42 provides that an appeal from an interlocutory order will be allowed only if:

(i) The order of the trial court determines a substantial issue and establishes a legal right; and

(ii) This Court determines that:

(A) Any one of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41 is applicable; or

(B) The interlocutory order has sustained the controverted jurisdiction of the trial court; or

(C) The interlocutory order has vacated or opened a judgment of the trial court; or

(D) A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.

Supreme Court Rule 41 provides that certification of an interlocutory appeal will be accepted "only where there exist important and urgent reasons for an immediate determination by ... [the Supreme Court] of the questions certified." As illustrative of the reasons for accepting certification Rule 41(b) lists:

(i) The question of law is of first instance in this State;

(ii) The reported opinions of the trial courts are conflicting upon the question of law;

(iii) The question of law relates to the constitutionality, construction or application of a statute of this State which has not been, but should be, settled by the Court.

I.

The Class Action Order Did Not Determine A Substantial Issue And Establish A Legal Right Within The Meaning Of Supreme Court Rule 42 Nor Did It Meet The Additional Requirements For Certification Under The Rule.

The class action order simply determined that plaintiff Weinberger was entitled to represent a class consisting of those former UOP shareholders who voted against the UOP-Signal merger and/or have not turned in their stock certificates in exchange for the \$21.00 per share offered in the merger. The order did

not "determine a substantial issue and establish a legal right" within the meaning of Supreme Court Rule 42(b)(i), nor does it satisfy any of the additional requirements for certification under that Rule.

Prior to certifying an interlocutory appeal pursuant to Rule 42, this Court must make two determinations: that the order for which an interlocutory appeal is sought "determines a substantial issue and establishes a legal right"; and that one of the factors listed in subsection (b)(ii) is present. Although the plaintiff omits to state what section of the Rule plaintiff believes is applicable, defendants assume that plaintiff is attempting to satisfy subsection A of section (b)(ii) by showing that two "of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41 [are] applicable." In addition to his conclusory statement that the Court's order meets the threshold Rule 42(b)(i) "substantial issue and legal right" standard, plaintiff asserts (Application, ¶5) that the ruling "is one of first instance in this State" (a reference to Rule 41(b)(i)) and that the "points decided" by the court "relate to the correct construction and application of Rule 23 which have not been but should be settled by the Delaware Supreme Court ..." (a reference to Rule 41(b)(iii)).*

* It is interesting to note that Rule 41(b)(iii) by its express terms applies only to statutes of this State. It makes no mention of Court Rules. Yet plaintiff seeks to apply it to an interpretation of Rule 23.

The criteria listed in Rule 41 are only meant to guide the court in determining whether there exist "important and urgent reasons for an immediate determination by [the Supreme] Court." Thus the purpose of Rule 41 as incorporated in Rule 42 is to insure the proper timing of appeals. Yet plaintiff's Application is almost wholly devoted to a discussion of the significance of the questions to be raised on appeal rather than the timing of the resolution of those questions.

In fact, Rule 42 itself is concerned with the timing of appeals. The test denominated by the phrase "determines a substantial issue and establishes a legal right" is one by which the court determines whether an immediate appeal is necessary in order to avoid prejudice to a party, and whether any such prejudice is outweighed by the delay in the pending action which is always caused by an interlocutory appeal:

"The purpose of the rule is to get at the dilemma [sic] posed by interlocutory appeals. On the one hand, they can serve a very salutary purpose in the administration of justice by advancing the termination of litigation and saving time below if a threshold question can be resolved. On the other hand, interlocutory appeals have caused unnecessary delay and there is substantial danger of abuse of a right to file interlocutory appeals. The existence of the right to file interlocutory appeals is consistent with ABA Standard 3.12(b) which encourages interlocutory review but only at the discretion of the reviewing court where it determines that resolution of the questions of law on which the order is based will materially advance the litigation, protect a party from irreparable injury or clarify an issue of general importance

in the administration of justice. The criteria applicable to the discretion of the trial court, and ultimately the Supreme Court, in deciding whether or not to accept an appeal of an interlocutory order are substantially in compliance with this standard."

Commentary of the Supreme Court Rules Committee to Rule 42 in the 1978 Cumulative Supplement to Volume 16 of Delaware Code Annotated (at 43).

As applied in Telvest, Inc. v. Olson, C. A. No. 5798, Letter Opinion dated March 22, 1979 (copy attached), the question which Rule 42 requires this Court to answer, as the purpose of the rule suggests, is whether the party seeking certification would be prejudiced by awaiting a final order before being allowed to appeal. As is clear from Telvest, absent such prejudice, an interlocutory appeal will not be granted.*

Certification for appeal is not warranted in the present circumstances for several reasons. Most importantly, an appeal of the order limiting the class can be made after this Court enters a final order in this litigation without adversely affecting the rights of any party to this action or of any supposed member of the class. Conversely, an appeal at this time will not

* In Telvest, the defendant had sought certification of an order granting a preliminary injunction which enjoined the defendant corporation from distributing an issue of shares created and designated as preferred stock. The Court held that because at the time the order was entered a determination of the correctness of the granting of a preliminary injunction was not "critical", Telvest, supra, at 4 (in the sense that there was no urgency in having the issue decided), certification would not be granted.

advance this litigation, but would subject all of the parties to the delay always inherent in an interlocutory appeal and possibly the Supreme Court to multiple appeals where one would suffice.*

The only portion of plaintiff's Application which in any way considers the timing of the appeal is based upon a failure to realize that the class action order may be appealed after a final order has been entered by this Court. Plaintiff states (at pp. 4-5 of his Application) that the Court's opinion "has forever eliminated from the class, without notice, all stockholders except those [designated by the Court's order]". (Emphasis added) If this contention were correct, the importance of an interlocutory appeal would be obvious. However, the contention is totally incorrect -- like any interlocutory order, this Court's class determination order will merge with and be subject to appeal with a final order in the normal course of this litigation. See 10 Del. C. §144** and United States v. MacDonald, 432 U.S. 385 (1977).

* On April 26, 1979, the defendants filed a motion to dismiss this action for failure of the remaining portions of the complaint to state a claim upon which relief may be granted. A brief schedule has not yet been agreed upon. The pendency of this motion is another common sense reason why the Application should not be granted at this time.

** "A failure to appeal from an interlocutory order, judgment or decree of the Court of Chancery or Orphans' Court shall not bar a party from making any objection to such interlocutory order, judgment or decree on appeal from the final order, judgment or decree."

Even assuming contrary to fact that the class action order is erroneous, an appeal in the normal course of the litigation (after a final order) would provide those presently excluded from the class with whatever relief those presently included in the class may be able to gain in the litigation. For example, even were plaintiff to prevail on the merits and then successfully appeal the class determination, persons not now in the class could be awarded damages on the same basis as the present class members. If plaintiff is unsuccessful on the merits, then the Supreme Court could entertain an appeal from the class action order and the final order without prejudice to the rights of those who have not been certified as members of the class. Those presently not included in the class would not bring to this action any additional issues in terms of either liability or damages. In short, an immediate appeal of the class action order can be of no material significance to the very persons whom plaintiff's attorney purports to represent.

It is also significant that the interlocutory order does not represent a "final" determination of the size of the class. Rule 23(c)(1) provides that any class action order "may be altered or amended before the decision on the merits." Thus the class action order is subject to continual modification and refinement by this Court. Presumably plaintiff will wish to subject defendants and the Supreme Court to future appeals were

any such changes not to his liking. Defendants submit that this Court should be extremely reluctant to certify an appeal from an order which by the Court Rules is subject to such change. Compare Coopers & Lybrand v. Livesay, - U.S. - 98 S.Ct. , 57 L.Ed.2d 351 (1978). Of course, plaintiff's application for certification has not been denied. In fact, plaintiff has been certified as the representative of a class. If the pending motion to dismiss is not granted (see footnote, p. 7, supra), he may try the merits of the action on behalf of that class. Whether the results of the trial apply to a broader class can be determined if plaintiff later appeals.

In short, this is not a situation in which the litigation will be "materially advanced" by having the issues in question resolved immediately. Indeed, fragmenting the appeal process by certifying this order would serve no purpose whatsoever and would only result in the delay which Supreme Court Rule 42 was meant to guard against.

II.

The Derivative Counts

There is nothing novel in the Court's dismissal of the derivative counts; the legal issue is not one of first instance in Delaware; the reported opinions of the trial courts (including the U. S. District Court) are not in conflict;* and the question

* See, e.g., Heit v. Tenneco, Inc., 319 F.Supp. 884 (D.Del., 1970), and the Delaware decisions cited and discussed therein.

of law does not relate to the constitutionality, construction or application of a Delaware statute which has not been settled by the Delaware Supreme Court. In short, there is no important and urgent reason for an immediate determination by the Supreme Court of the correctness of this Court's dismissal of the derivative counts.

Plaintiff argues that this Court's ruling extended the holdings of Heit v. Tenneco, Inc., 319 F.Supp. 884 (D.Del. 1970); Braasch v. Goldschmidt, Del. Ch., 199 A.2d 246 (1964); and Bokat v. Getty Oil Co., Del. Supr., 262 A.2d 246 (1970) and is therefore one of first instance in this State. (Application, ¶1) However, this Court did not dismiss the derivative counts on the ground that they were moot. Rather the Court decided the threshold question of plaintiff's standing to maintain a derivative action. Because plaintiff was not a stockholder of UOP when the complaint was filed, the Court properly held that he had no such standing. That has long been the law of Delaware. See, e.g., Heit v. Tenneco, Inc., supra, and the Delaware decisions cited and discussed therein. Plaintiff continues to argue that the Court should not have dismissed the derivative counts because plaintiff continues to hold his UOP stock certificates. Obviously, however, plaintiff's retention of the stock certificates is meaningless, because, as the Court stated in its Opinion of April 3, 1979:

" . . . the plaintiff was, by virtue of the terms of the merger, automatically converted from a shareholder of UOP into a creditor of Signal as of the date the merger became effective." (Slip Opinion, p. 4)

Plaintiff's reliance upon Singer v. Magnavox Co., Del. Supr., 380 A.2d 969 (1977), and Bruno v. Contran, Del. Ch., C. A. 5170 (Letter Opinion dated 10/18/77, a copy of which is attached to plaintiff's Application) is entirely misplaced. Singer involved only a purported class action attacking the fairness of a merger; there were no derivative allegations. In Bruno v. Contran, Chancellor Marvel permitted plaintiff to amend his complaint so as to include a derivative count seeking damages with respect to a merger proposal which was defeated at a stockholders' meeting. Since the merger in Bruno was not consummated, obviously the plaintiff-shareholder had the requisite standing to maintain a derivative action. In the instant case, however, plaintiff's shares of UOP were automatically converted into a right to receive cash when the merger became effective. Thus, plaintiff was not a shareholder of UOP when he filed his complaint in this action and this Court properly determined that he has no standing to maintain the derivative counts.

Finally, there is nothing inconsistent between this Court's Opinions of April 3 and April 5, 1979. In the first Opinion, the Court held that plaintiff had no standing to maintain the derivative counts because he was not a stockholder of UOP when the complaint was filed. In the second Opinion the Court concluded:

"... that the class sought to be certified should consist only of those former shareholders of UOP who are not disputed by the defendants as constituting a proper class, namely, those former shareholders of UOP who voted against the merger and/or have not turned in the stock certificates in exchange for the \$21 per share payment."
(Emphasis added) (4/5/79 Slip Opinion, p. 13).

It is clear that the Court decided that all shares of UOP common stock (other than those owned by Signal) were converted into rights to receive cash as a result of the merger. Thus, Plaintiff's assertion that in the April 5 Opinion "... the Court has permitted a suit by some but not all stockholders" (Application, p. 4), is simply wrong. What the Court has done is to permit a class action to be maintained by a limited number of former stockholders of UOP.

Again plaintiff has not satisfied the requirements of Supreme Court Rule 42(b) and seeks only to burden those involved for no apparent reason. By the derivative counts, plaintiff was seeking (without the requisite standing) to enforce a supposed right belonging to UOP. Both UOP and the alleged wrongdoers will be able to have their rights determined by the Supreme Court if the plaintiff chooses to appeal after a trial of his class action count.

III.

The Form Of Order

In the unlikely event that this Court were to agree with the plaintiff that the Supreme Court should be burdened with an unnecessary appeal at this juncture, defendants request that

the form of order to be entered make clear that all portions of the class action order are to be certified. Thus defendants will be able to present to the Supreme Court their argument as to why plaintiff should not have been certified as a class representative.

CONCLUSION

For the reasons stated above, defendants respectfully request that the Court deny the Application in its entirety.

Respectfully submitted,

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