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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.	)	

DEFENDANTS' OPENING BRIEF
IN SUPPORT OF THEIR
MOTION TO DISMISS

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June 8, 1979.

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I. NATURE AND STAGE OF THE PROCEEDINGS

The complaint in this action was filed on July 5, 1978, and alleges individual and class action claims* attacking the validity of the merger on May 26, 1978 of two Delaware corporations, UOP Inc. ("UOP") and Sigco Incorporated ("Sigco"), a wholly-owned subsidiary of The Signal Companies, Inc. ("Signal"), also a Delaware corporation.

On April 26, 1979, this Court entered its Order: (a) certifying this action as a class action pursuant to Chancery Court Rule 23(b)(3); (b) certifying the named plaintiff, William B. Weinberger, as the class representative; and (c) including as members of the class those former UOP shareholders who voted against the UOP-Signal merger and/or who have not yet turned in their UOP shares in exchange for the merger price.

On April 26, 1979, the defendants** filed a motion to dismiss the complaint on the ground that it fails to state a claim upon which relief can be granted. This is the defendants' opening brief in support of that motion.

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* The complaint, as originally filed, also contained two derivative counts. Those counts were dismissed, with prejudice, and stricken from the complaint by Order entered on April 26, 1979.

** The individual defendants named in the complaint were dismissed, without prejudice, by Stipulation and Order entered on February 1, 1979.

II. STATEMENT OF FACTS*

Signal is a publicly held Delaware corporation. Signal's stock is traded on major U. S. stock exchanges, and on about February 1, 1979, there were approximately 38.3 million shares of Signal's 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 necessary for an adjudication of defendants' motion to dismiss are set forth in the complaint, attached to which as Exhibit A is UOP's Proxy Statement relating to the subject merger. Other background facts (which are undisputed) are based on Signal's Annual Reports which have been produced in this litigation.

** 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 arrangement to acquire 50.5% of the common stock of UOP. That acquisition was made through a combination of a public 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, owning 5.8 million shares, or 50.5% of UOP's issued and outstanding common stock.

During the period from May, 1975, to about mid-February, 1978, Signal's stockholdings in UOP did not change. 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 Signal's management to pursue the possibility of a merger pursuant to 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 UOP's stockholders and the public were 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 per share.

On March 6, 1978, both Signal's Board of Directors and UOP's Board of Directors approved a plan of merger pursuant to 8 Del. C. § 251 at a cash price of $21 per share, subject to the terms of a written merger agreement. The merger agreement required, among other things, that the proposed merger be submitted to UOP's stockholders for a vote, and that the merger would not be consummated unless it was 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 transaction. The merger agreement further required 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.

In a detailed Notice of Annual Meeting of Stockholders and Proxy Statement, UOP made full disclosure of the terms 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 a copy of an opinion from the investment banking firm of Lehman Brothers Kuhn Loeb Incorporated ("Lehman Brothers") to UOP's Board of Directors stating that the proposed merger was fair and equitable to UOP's minority shareholders. The Proxy Statement also provided detailed information about the minority stockholders' right to appraisal under 8 Del. C. §262.

The annual stockholders meeting of UOP was held on May 26, 1978, at which 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 share of UOP stock was automatically converted into a right to receive the sum of $21 in cash. As of May 29, 1979, only 123,499 former shares, including those previously owned by the plaintiff,* had not been surrendered in exchange

* At the time of the merger, the plaintiff, William B. Weinberger, owned 90 shares of UOP's common stock.

for the $21 per share merger price.*

Under the terms of the merger agreement as approved by the Boards of both Signal and UOP, Signal had the option to withdraw from the transaction in the event of any challenging litigation brought before the stockholders meeting. No such legal proceeding was filed prior to May 26, 1978, and the stockholders meeting was held and the merger effected. 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 proceeding attacking the merger on any ground has been filed.

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* Affidavit of Patrick J. Link, filed on June 8, 1979.

III. QUESTIONS PRESENTED
(Stated Affirmatively)

A. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE SIGNAL DID NOT USE ITS MAJORITY POSITION TO EFFECT THE MERGER AND THE MERGER WAS SUBJECT TO THE APPROVAL OF THE MINORITY SHAREHOLDERS.

B. APPRAISAL IS THE EXCLUSIVE REMEDY IN A DISPUTE OVER VALUE.

C. THERE ARE NO ALLEGATIONS OF WRONGDOING AGAINST LEHMAN BROTHERS AND THE COMPLAINT SHOULD BE DISMISSED AS TO IT.

IV. ARGUMENT

A. The Complaint Fails To State A Claim Upon Which Relief Can Be Granted Because Signal Did Not Use Its Majority Position To Effect The Merger And The Merger Was Subject To The Approval Of The Minority Stockholders.

The decision of the Delaware Supreme Court in Singer v. Magnavox Co., Del. Supr., 380 A.2d 969 (1977), together with the decisions in Tanzer v. International General Industries, Inc., Del. Supr., 379 A.2d 1121 (1977) and Sterling v. Mayflower Hotel Corp., Del. Supr., 93 A.2d 107 (1952), have apparently been interpreted by some, including this Court, to require in a merger case* that there be a "fairness hearing," when only two criteria are met: (1) compliance by the defendant with all statutory requirements (since otherwise the question of "fairness" is never reached); and (2) allegations in the complaint of some fiduciary duty owing by the defendant to the plaintiff and a violation of that duty. See, Weinberger v. UOP Inc., Del. Ch., ____ A.2d _____ (1979) (Slip Opinion dated April 5, 1979, pp. 5-6).

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* For purposes of this brief, defendants will use the term "merger case" to refer to an action brought by a minority shareholder (or, as here, a former minority shareholder) of a Delaware corporation to challenge a merger of that corporation with another Delaware corporation pursuant to 8 Del. C. §251, where after the merger the former majority shareholder owns all of the resulting merged corporation.

Defendants respectfully submit that neither the decision in Singer nor any other precedent compels the above-stated conclusion. On the contrary, defendants submit that the more reasonable conclusion which can and should be drawn from Singer and the other prior "merger case" decisions is that there are three criteria which must be met before a "fairness hearing" should be required: (1) compliance by the defendant with all statutory requirements; (2) allegations in the complaint that the consummation of the merger was accomplished by the majority stockholder's use of its position, as such, to achieve that result; and (3) allegations in the complaint of a fiduciary duty owing by the defendant to the plaintiff and a violation of that duty by reason of the defendant's use of its position as majority stockholder to accomplish the merger.

This "three criteria" approach is the only one which is consistent with long-established legal principles and still carries out the rationale of the decision in Singer. It is only in cases in which a controlling shareholder engages in "self-dealing", by exercising its power to compel a transaction, that the law requires the stockholder to bear the burden of proving the intrinsic fairness* of the transaction. The Supreme Court clearly so held in Sinclair Oil Corp. v. Levien,

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* The words "intrinsic fairness" have been held to be synonomous with the words "entire fairness" as used in Singer and Sterling. Tanzer v. International General Industries, Inc., Del. Ch., Civil Action No. 4945, May 25, 1979 (Slip Opinion at 7, copy attached).

Del. Supr., 280 A.2d 717, 720 (1971):

> "A parent does indeed owe a fiduciary duty to its subsidiaries when there are parent-subsidiary dealings. However, this alone will not evoke the intrinsic fairness standard. This standard will be applied only when the fiduciary duty is accompanied by self-dealing -- the situation when a parent is on both sides of a transaction with its subsidiary. Self-dealing occurs when the parent, by virtue of its domination of the subsidiary, causes the subsidiary to act in a way that the parent receives something from the subsidiary to the exclusion of, and detriment to, the minority stockholders of the subsidiary." (Emphasis added).

Earlier, in Getty Oil Co. v. Skelly Oil Co., Del. Supr., 267 A.2d 883, 887 (1970), the Supreme Court had stated the same proposition as follows:

> "The test of 'intrinsic fairness' has been applied to parent-subsidiary business where the parent controls the making of the transaction and the fixing of its terms. Sterling v. Mayflower Hotel Corp., 33 Del. Ch., 293, 93 A.2d 107 (Supr. Ct. 1952); David J. Greene & Co. v. Dunhill International, Inc., 249 A.2d 427 (Del. Ch. Ct. 1968); Bastian v. Bourns, Inc., 256 A.2d 680 (Del. Ch. Ct. 1969) . . ." (emphasis added).

It was therefore no great jump to apply these same principles to a merger transaction to which a majority stockholder was a party. The first question which was, of course, essential to application of these principles in the merger situation was whether a majority stockholder was a "fiduciary" with respect to the minority shareholders. In Sterling v. Mayflower Hotel

Corp., Del. Supr., 93 A.2d 107 (1952), this question was answered in the affirmative* and subsequent decisions in merger cases obviously proceed on the basis of the existence of such a fiduciary relationship. As Justice Duffy said in Singer v. Magnavox Co., supra at 380 A.2d 976: "It is a settled rule of law in Delaware that Development, as the majority stockholder . . . owed to the minority stockholders . . . a fiduciary obligation. . ."

Having found the requisite fiduciary relationship between the majority stockholder and the minority, the common factor in all of the cases considering the need for a "fairness hearing" is that the majority stockholder used that position to accomplish the merger, and the minority stockholders had no way, under either the statute or the corporate machinery, to effectively approve or disapprove of the merger. For example, in Najjar v. Roland International Corp., Del. Ch., 387 A.2d 709 (1978), decided by this Court, the majority stockholder proceeded under 8 Del. C. §253, thereby depriving the minority stockholders of any vote on the merger. In Singer and in Sterling the minority stockholders were permitted to vote, but in each case their votes were meaningless, since the majority stockholder had, and used, its majority position to accomplish the merger. In Singer the minority stockholders were advised in

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* Although, apparently, in Sterling the parties stipulated to the existence of the fiduciary duty of the majority stockholders. 93 A.2d at 110.

advance that the requisite approval was assured. In Tanzer, the majority stockholder owned 81% of the subsidiary and it is implicit from the decisions of the Supreme Court and this Court that the majority stockholder accomplished the merger through use of its majority control.* In other words, the use of corporate power through majority ownership has been present in all of the previous Delaware cases where a "fairness hearing" has been required in connection with a merger.

Absent an allegation that a majority stockholder has used its position to effect a merger, and therefore stood on both sides of the transaction, a "fairness hearing" is not required. Otherwise, the statutory approval of and procedures for corporate mergers could easily be made practically useless. For example, in the context of a parent-subsidiary merger, even if the statutory provisions were all scrupulously followed, and the transaction made subject to the approval of minority stockholders, and even if all but one of the minority stockholders either voted in favor of the merger or otherwise expressed assent to the merger, the one non-assenting stockholder could file a

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* In Tanzer v. International General Industries, Inc., Del. Ch., Civil Action No. 4945, May 25, 1979, this Court, on remand, applied the intrinsic fairness test to assess the validity of the merger there involved between a parent and its controlled subsidiary even though the merger had, in fact, been approved by a majority of the minority shareholders of the subsidiary. Since in that case the parent had not previously relinquished to the minority alone the power to control the transaction, the holding in the recent Tanzer opinion is consistent with Sinclair Oil Corp. v. Levien, supra, and the principles discussed above.

Singer-type complaint raising some vague and general allegations of a violation of fiduciary duty. The corporation would then be put to the great financial and other burdens of being involved in a "fairness" hearing, and all the other assenting stockholders might be delayed from proceeding because of the dissent of one person. In other words, there would be only one way by which a majority stockholder could proceed with a §251 merger without the risk of protracted litigation, and that would be to obtain 100% assent of the minority stockholders, something which would be virtually impossible to achieve. Surely no such unreasonable or impractical result can have been intended by the Supreme Court when it rendered its decision in Singer.

Since in the present case there is no contention that defendants failed to satisfy all of the required statutory procedures in order to accomplish the challenged merger, the only question now is: does the complaint allege that Signal used its majority position to accomplish the merger?

The complaint herein alleges, in substance, that the merger was unfair to the minority stockholders of UOP because it did not have a bona fide business purpose and the price of $21 per share was inadequate. Moreover, the complaint alleges that the defendants breached their fiduciary obligations by not opposing the merger. The complaint also alleges, at paragraph 12, that the merger proposal was recommended to the stockholders and that "... more than two-thirds of the majority of shares other than those owned by Signal" approved the merger. Based thereon, and upon the requirement contained in the Merger Agreement that the minority stockholders approve the merger in order for it to be consummated, defendants submit that the complaint fails to state a claim upon which relief can be granted.

In Singer v. Magnavox Co., Del. Supr., 380 A.2d 969 (1977), there was a special stockholders meeting scheduled for the purpose of voting on a plan of merger between Magnavox and T.M.C. Development Corporation. At the time of the proposed merger T.M.C. was wholly owned by North American Philips Development Corporation (Development), which also owned 84.1% of the stock of Magnavox. In the pre-meeting materials sent to the minority stockholders of Magnavox they were told that the merger was assured since Development's holdings (84.1%) alone were sufficient to provide the requisite statutory majority. The meeting was held, stockholder approval was given, and the merger was consummated.

In the litigation brought by former Magnavox shareholders, it was conceded that the defendants complied with the statutory requirements of 8 Del. C. §251. The Supreme Court, however, rejected the defendants' contention that the transaction was therefore unassailable, and held that the matter should be subjected to judicial review for "entire fairness". The following quotation from Singer indicates clearly what was behind the Court's decision:

> "It is a settled rule of law in Delaware that Development, as the majority stockholder of Magnavox, owed to the minority stockholders of that corporation, a fiduciary obligation in dealing with the latter's property. Sterling v. Mayflower Hotel Corp., Del. Supr., 33 Del. Ch. 293, 93 A.2d 107, 109-10 (1952). In that leading 'interested merger' case, this Court recognized as established law in this State that the dominant corporation, as a majority stockholder standing on both sides of a merger transaction, has 'the burden of establishing its entire fairness' to the minority stockholders, sufficiently to 'pass the test of careful scrutiny by the courts.' See 93 A.2d at 109, 110. See also Bastian v. Bourns, Inc., Del. Ch., 256 A.2d 680, 681 (1969), aff'd Del. Supr., 278 A.2d 467 (1970); and David J. Greene & Co. v. Dunhill International, Inc., Del. Ch., 249 A.2d 427, 530 (1968). The fiduciary obligation is the cornerstone of plaintiffs' rights in this controversy and the corollary, of course, is that it is likewise the measure of the duty owed by defendants." (Emphasis added).

Singer v. Magnavox Co., supra at 380 A.2d 976.

In other words, it is not merely the fact that a majority stockholder is involved in the merger, it must also stand "on both sides of the transaction" before there is the burden to go forward with a hearing on "fairness". In Singer, the majority stockholder clearly stood "on both sides of the transaction": it promoted the merger, and it controlled absolutely the outcome of the vote on the merger. The minority stockholders had no power or right whatsoever to decide whether the merger should be approved or consummated, and to the extent they voted, their vote was meaningless; in fact, they had been informed before the meeting that the outcome was assured because the majority stockholder's vote was sufficient to meet the statutory requirement.

The facts in the present case are entirely different. Here, although Signal was the majority stockholder of UOP, it did not stand on both sides of the transaction: it could not and did not control the vote on the merger, and only because the <u>minority</u> stockholders (who stood on one side of the transaction) voted in favor of the merger was it consummated. The Merger Agreement required approval by the majority of the minority stockholders by the following provision:

> "The vote for approval of the Merger Agreement by the stockholders of UOP shall be approval 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 approving the Merger Agreement and the transactions contemplated hereby, provided that not less than two-thirds of the shares of UOP stock, including shares owned by Signal, outstanding on the record date for such meeting shall have approved this Merger Agreement." (Comp., Ex. A, App. B, p. B-3).

Thus, although Signal, as the owner of 50.5% of the outstanding shares of UOP, had the ability under §251 unilaterally to effect a merger, Signal itself chose to condition the transaction on the affirmative vote of a majority of the minority shares voting on the issue.

After receiving full and complete disclosure of all facts relevant to the proposed merger, minority stockholders owning 2,953,812 shares voted in favor of the transaction. This figure represented 92% of the minority shares actually voting, and 52% of all non-Signal shares entitled to vote. Thus, the holders of a majority of the minority shares of UOP decided that the proposed merger was in their best interests and they affirmatively approved the transaction.

In light of the fact that the Merger Agreement required this approval of the minority stockholders, the purpose for the merger is irrelevant. In Tanzer v. International General Industries, Inc., Del. Supr., 379 A.2d 1121, 1124 (1977), after reviewing several previous Delaware cases, the Supreme Court stated:

> "The rule to be derived from these cases is, we think, consistent with the general law governing the interest or bias of a stockholder in voting, as stated in Fletcher Cyclopedia, Corporations (Perm. Ed.) §2031; thus:
>
> > 'At a stockholders' meeting, each stockholder represents himself and his own interests solely and in no sense acts as a trustee or representative of others, and his right to vote upon a measure coming before the meeting is not in any way affected by the fact that he has a personal interest therein different or separate from that of the other stockholders, or by the fact that he is related to interested persons. He may vote contrary to what other stockholders deem to be the best interest of the

> corporation, or even detrimental to it. This is equally true of a stockholder who is also a director voting as a stockholder.'
>
> "In sum, for more than fifty years our Courts have held, consistent with the general law on the subject, that a stockholder in a Delaware corporation has a right to vote his shares in his own interest, including the expectation of personal profit, limited, of course by any duty he owes to other stockholders." (Emphasis added).

The key to the present case as well as to the Court's decision in *Singer* is in the last phrase of the foregoing quotation: "... limited, of course, by any duty he owes to other stockholders." When the majority stockholder uses its position as the majority stockholder to accomplish a merger, then its purpose in accomplishing the merger may well be encompassed within the duty which it owes to the minority. But if the majority stockholder does not use its position to accomplish the merger, and instead allows the minority to decide whether or not the merger should be consummated, defendants submit that the long-standing rule comes into play: the majority stockholder has the right to vote its shares and otherwise to deal with the merger in its own best interests.

The doctrine set forth in *Singer* was quite obviously designed to give minority stockholders some protection against possible exploitation by a majority stockholder using the strict letter of the statute while controlling both sides of a transaction. That doctrine has no application here. In short, because Signal did not control both sides of the transaction, plaintiff's allegation that the merger was accomplished solely to freeze-out the minority does not plead a breach of any fiduciary duty by Signal and it fails to state a claim upon which relief can be granted. As this Court held earlier in this litigation:

> "... Signal lacked the capacity to use its voting position as majority stockholder to bring about a cash-out merger in violation of a fiduciary duty owed to the minority. Rather, the decision was left to the minority shareholders, and they voted overwhelmingly in favor of the merger and its cash-out terms."

Weinberger v. UOP Inc., supra (Slip Opinion dated April 5, 1979, p. 10).

Similarly, plaintiff's allegation that the merger price of $21 per share was grossly inadequate fails to state a claim upon which relief can be granted. Signal did not stand on both sides of the transaction because the minority stockholders were given the opportunity to accept or reject the terms of the proposed merger, including the price. Because the minority stockholders of UOP were given the right to protect themselves in connection with the subject merger, plaintiff's bald allegation with respect to the adequacy of the merger price does not plead a breach of fiduciary obligation by Signal.

Finally, plaintiff's allegation that Signal had an affirmative duty to oppose the merger which it had earlier proposed to the minority stockholders of UOP is ludicrous. Cf., Weinberger v. UOP Inc., supra (Slip Opinion dated April 5, 1979, pp. 11-12). As the majority stockholder of UOP, Signal "... had a right to look to its own corporate concerns in determining how to conduct ... [UOP's] affairs, including a decision to cause it to merge ... (subject, of course, to the duty it owes other stockholders)." Tanzer v. International General Industries, Inc., Del. Supr., 379 A.2d 1121, 1124 (1977). Signal and the other defendants fully met whatever fiduciary obligations they may have had* by submitting the proposed merger to the UOP minority stockholders for their approval -- an approval without which the transaction could not have been accomplished.

As this Court has already observed, this is not a "fraud" case** -- it is a "fiduciary duty" case, and in substance the complaint alleges that the majority stockholder of UOP, Signal, owed to the minority a fiduciary duty which it breached.

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* Lehman Brothers owed no fiduciary obligation to UOP's minority stockholders. See Section IV C, infra.

** This Court previously held:

> "The complaint contains no specific allegation that the minority shareholders were deceived in any way into voting overwhelmingly in favor of the merger."
>
> * * *
>
> "[The complaint] does not charge fraud or deceit on the part of the defendants nor does it allege that approval of the merger was obtained by fraud or deceit."

Weinberger v. UOP Inc., supra (Slip Opinion dated April 5, 1979, pp. 6, 11).

The complaint itself alleges the very fact which makes it clear that the plaintiff is not entitled to prevail on this claim: Signal did not itself cause the merger to be consummated, the minority stockholders did. Whether or not the terms of the merger were fair or unfair, adequate or inadequate, wise or unwise in the eyes of anyone else, the great majority of the minority stockholders who chose to express their desires by voting on the question decided that they wanted and approved of the merger.* As Vice Chancellor Hartnett held in Michelson v. Duncan, Del. Ch., 386 A.2d 1144, 1155-1156 (1978):

> "If the stockholders, after receiving a disclosure of all germane facts given with complete candor, cannot ratify an act by the Board of Directors not constituting a gift or waste of corporate assets, corporate democracy is meaningless."

In short, plaintiff's complaint fails to state a claim upon which relief can be granted.

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* Not only did 92% of the minority shares actually voting approve of the merger, but significantly, a majority of all minority stockholders voted in favor of the merger.

B. Appraisal Is The Exclusive Remedy <u>In A Dispute Over Value.</u>

Stripped of its rhetoric and of its unsupported and unsupportable claims of breach of fiduciary duty (Section IV A, <u>supra</u>), plaintiff's complaint becomes nothing more than a dispute over the value of plaintiff's shares. As this Court earlier stated:

> "[T]he complaint . . . is in reality a document (perhaps artfully drafted as such) possessing certain chameleon-like characteristics which enable it to change its appearance when under scrutiny or attack."

<u>Weinberger v. UOP Inc.</u>, <u>supra</u> (Slip Opinion dated April 5, 1979, p. 7).

That the value of his shares is the only issue raised by plaintiff is conclusively shown by his prayers for relief:

> "WHEREFORE, the plaintiff prays that the Court enter an order:
>
> "1. Certifying the plaintiff as the class representative;
> "2. Rendering judgment for the plaintiff and the class for the losses incurred by the class as a result of the acts of the defendants.
>
> * * **
>
> "4. Awarding the plaintiff the costs and expenses of this litigation, including reasonable attorneys' fees.
> "5. Granting such other and further relief as may be just."

Complaint, pp. 6-7. Also, Weinberger has candidly testified

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* Paragraph 3 of the prayers was stricken by Order entered on April 26, 1979.

that he has no dispute except as to the price offered for his shares and that he had no objection to the merger "if Signal ... would pay an adequate price...." (Weinberger Dep., p. 51).

In fact, this Court has already held in this case that:

> "[T]he word 'rescission' nowhere appears in the complaint and there is no suggestion therein that Weinberger seeks to have the merger voided."
>
> * * *
>
> "[The complaint] seeks the recovery of money damages against the defendants...."

Weinberger v. UOP Inc., supra (Slip Opinion dated April 5, 1979, pp. 8, 11).

In Stauffer v. Standard Brands, Inc., Del. Ch., 178 A.2d 331 (1962), aff'd Del. Supr., 187 A.2d 78 (1962), plaintiffs brought an action to set aside a §253 merger, or in the alternative for damages. After reciting plaintiff's allegation that the merger price was so low as to constitute fraud, the Court of Chancery held:

> "[P]laintiffs' only challenge to the validity of the merger relates to the fairness of the price per share offered to minority shareholders as the final step to make the merger ... effective." Id. at 178 A.2d 312.

This Court then dismissed the complaint on the ground that it failed to state a claim upon which relief could be granted since plaintiffs' exclusive remedy was through an appraisal proceeding under §262. Id. at p. 316.

On appeal, the Supreme Court affirmed. Chief Justice Southerland held:

> "The complaint, of course, contains conclusory allegations of oppressive treatment of the minority by the parent corporation, and a prayer that the merger be set aside. <u>But it is plain that the relief sought is the recovery of the monetary value of plaintiff's shares -- relief for which the statutory appraisal provisions provided an adequate remedy</u>. The Vice Chancellor held that in the circumstances of this case that the remedy was exclusive. His analysis of the facts and the law was thorough and well-considered, and we agree with it. It would be superfluous for us to repeat."
>
> "[I]t is unnecessary to hold that under no conceivable circumstances could a minority stockholder obtain relief for fraud. Indeed, defendant does not press that argument. It is sufficient to say, as the Vice Chancellor held, that <u>in this case there is only a dispute as to value, and hence there is no remedy except appraisal</u>. That the remedy has been lost is the plaintiff's own fault." 187 A.2d 80 (emphasis added).

The reasoning of <u>Stauffer</u> remains sound today. In <u>Singer v. Magnavox Co.</u>, Del. Supr., 380 A.2d 969 (1977), the plaintiffs attacked a §251 merger on the ground that the sole purpose of the merger was to "freeze-out" the minority shareholders. The defendants, relying on <u>Stauffer</u>, argued that the plaintiffs' only remedy was through appraisal and that the purpose for a merger was not a proper subject for judicial review. This Court ruled:

> "But none of these decisions [including Stauffer] involved a merger in which the minority was totally expelled via a straight 'cash-for-stock' conversion in which the only purpose of the merger was, as alleged here, to eliminate the minority.
>
> "In Stauffer, a §253 case, the Court carefully examined plaintiffs' charges of majority oppression and concluded that the complaint alleged 'nothing but a difference of opinion as to [the] value' of the converted shares. 187 A.2d at 80. Viewing the case in this light, the Court ruled that a statutory appraisal was plaintiffs' exclusive medium of relief." Id. at pp. 978-979 (Emphasis added).

Thus, the Supreme Court reaffirmed that when any merger is attacked solely on the basis of the adequacy of price, appraisal under §262 provides the exclusive remedy.

All issues as to the fair value of the shares held by UOP's minority stockholders were the proper subject of an appraisal proceeding. In such a proceeding, plaintiff could have presented evidence and arguments to attempt to show that the merger price failed to reflect fairly all relevant factors. As the Court held in Tri-Continental Corp. v. Battye, Del. Supr., 74 A.2d 71, 72 (1950):

> "The basis concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern. By value of the stockholder's proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock which has been taken by the merger. In determining what figure represents this true or intrinsic

> value, the appraiser and the courts must take into consideration all factors and elements which reasonably might enter into the fixing of value. Thus, market value, asset value, dividends, earnings prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of merger and which throw any light on future prospects of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholders' interest, but must be considered by the agency fixing the value."

Thus, the remedy of appraisal is the exclusive remedy available to plaintiff in this case and such remedy is entirely fair and adequate. Plaintiff testified that he was aware of the appraisal procedure, but that he made no effort to seek appraisal because he regarded it as "costly, time-consuming and very seldom effective" (Weinberger Dep., p. 50). Whether plaintiff's quarrel is with the Legislature or the judicial construction given to §262 is unclear. In any event, despite plaintiff's personal opinion of appraisal, this Court and the Supreme Court have held the appraisal remedy to be adequate and exclusive. Stauffer v. Standard Brands, Inc., supra.

In summary, plaintiff is seeking money damages only, not equitable relief. Since it is "plain that the real relief sought is the recovery of the monetary value of plaintiff's shares ... the statutory appraisal provisions provided an adequate [and exclusive] remedy." Stauffer v. Standard Brands, Inc., Del. Supr., 187 A.2d 78, 80 (1962).* Accordingly, plaintiff's complaint fails to state a claim upon which relief can be granted and should be dismissed.

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* We recognize that a similar argument was rejected by this Court in Najjar v. Roland International Corp., Del. Ch., 387 A.2d 709 (1978). That decision was appealed and the Supreme Court, which heard argument on the appeal on December 19, 1978, has yet to rule on the point.

C. There Are No Allegations Of Wrongdoing Against Lehman Brothers And The Complaint Should Be Dismissed As To It.

Since the Court's Order of April 26, 1979, only paragraphs 1 through 16 remain as the complaint. Not one of those paragraphs alleges any specific wrongdoing by Lehman Brothers. In fact, the only count of the complaint (paragraphs 13-16) does not contain any allegation of supposed wrongdoing other than the alleged lack of a "bona fide business purpose for the merger" and an unsupported allegation that the $21 per share price paid to the stockholders of UOP was "grossly inadequate". Neither of these allegations is directed toward Lehman Brothers.

The only paragraph which could arguably be construed even to indicate a cause of action against Lehman Brothers is paragraph 6. That paragraph alleges, in essence, that Lehman Brothers and certain other defendants had a "fiduciary relationship" to the plaintiff and other minority stockholders. This duty supposedly included an obligation affirmatively to oppose the merger.*

There is no indication in the complaint of how Lehman Brothers came to owe a fiduciary duty to the minority stockholders of UOP. There is no indication in the complaint of what steps Lehman Brothers could have or should have taken to prevent or

* There is another supposed duty set forth in paragraph 6, but it relates solely to the derivative counts which are no longer a part of this action.

oppose the merger. Lehman Brothers, of course, was not involved in any of the corporate steps by which the stockholders of UOP overwhelmingly approved the merger at a price which they obviously believed to be very favorable. Lehman Brothers was acting as "UOP's investment banking firm" (complaint ¶9). As has been noted, there are no facts alleged which would support the existence of a fiduciary duty between Lehman Brothers and the plaintiff and other minority stockholders of UOP.

In the complete absence of any allegations of fact supporting a claim against Lehman Brothers by the former minority stockholders of UOP, the complaint should be dismissed as to Lehman Brothers. In addition, the complaint should be dismissed as to all of the defendants, including Lehman Brothers, for the reasons set forth in the preceding sections of this brief.

V. CONCLUSION

Signal did not exercise its position as majority stockholder of UOP to effect the merger which is the subject of this litigation. Rather, Signal proposed a transaction to the minority shareholders of UOP for their vote and they overwhelmingly accepted the transaction and all of its terms. Because Signal did not stand on both sides of the transaction, and in view of the affirmative vote of a majority of the minority shares, plaintiff's complaint fails to state a claim upon which relief can be granted. In the alternative, because plaintiff seeks only money damages, appraisal was his exclusive remedy and his complaint also fails to state a claim for that reason. The complaint should be dismissed.

Respectfully submitted,

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