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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 ANSWERING BRIEF
IN RESPONSE TO DEFENDANTS' BRIEF
IN SUPPORT OF THEIR MOTION TO DISMISS

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NATURE OF THE PROCEEDINGS

This action was filed July 6, 1978, as an individual, class and derivative suit by the plaintiff against The Signal Companies ("Signal"), UOP, Inc. ("UOP") and Lehman Brothers Kuhn Loeb, Inc. ("Lehman Brothers") as well as certain individual defendants. It arises out of the cash-out merger of the minority public stockholders ("minority stockholders") of UOP. The complaint, inter alia, alleges a conspiracy between the corporate defendants to effectuate a planned cash-out merger by persuading the minority stockholders to vote in favor of the plan of merger that eliminated them. The corporate defendants appeared and answered. Substantial discovery, including depositions, production and interrogatories, has been taken by both the plaintiff and the defendants. The individual defendants were dismissed without prejudice. After briefing and argument, the Court entered orders:

(a) Dismissing the derivative counts, and

(b) Certifying the action as a class action with the plaintiff as the class representative but limiting the class to those stockholders of UOP who had voted against the merger or who have not turned their shares in since the time of the merger.

An interlocutory appeal has been taken from the dismissal of the derivative counts and that part of the class

action order limiting the class: at the time of the dictation of this brief, it is not known whether the Supreme Court will accept certification of the plaintiff's interlocutory appeals.

The defendants have filed a motion which they have denominated as a motion to dismiss. Actually, the motion is a motion for summary judgment since the defendants go beyond the complaint and the proxy and notice attached to the complaint as an exhibit and the plaintiff has taken extensive discovery which he is entitled to have the Court consider in passing on defendants' motion. Specifically, the discovery taken and on file shows that there was a conspiracy between the corporate defendants to make the minority stockholders believe that their rights had been protected by the corporate (and individual) defendants who stood in a fiduciary relationship to the minority stockholders when in fact the defendants had acted in concert against the minority stockholders.

This is the plaintiff's brief in opposition to the defendants' motion. (Note)

Note: Exhibits will be referred to by the exhibit numbering system used in the case. Thus "Ex. L.B. 40" refers to document number 40 produced by Lehman Brothers; "Ex. U-7" refers to document number 7 produced by UOP; "Ex. 104" refers to document number 104 produced by Signal.

Pages of the defendants' opening brief will be referred to, thus "(DB 9)".

Pages of transcripts of depositions will be referred to by the name of the deponent, thus "(Crawford 9)".

STATEMENT OF RELEVANT FACTS

Introduction

The defendants' Statement of Facts totally overlooks the facts appearing in the record of this case through the numerous depositions taken by the plaintiff as well as the documents produced by the defendants at plaintiff's request. This voluminous discovery record confirms that the defendants did in fact act in concert under the leadership of the majority stockholder, Signal, to deprive the minority stockholders of their stock by convincing them by deceptive appearances and misrepresentations that the minority's fiduciaries had in fact taken steps necessary to protect the interests of the minority. The plaintiff will set out the facts in the record that establish that, while the defendants were careful to go through the required form and motions, in reality, they all had only one purpose -- to obtain the minority's stock for Signal at the price set by Signal.

The plaintiff will not respond in detail to the defendants' Statement of Facts: rather, the plaintiff will set out the salient facts that illustrate the basic outlines of the plan or conspiracy of the defendants. The plaintiff must, however, take specific exception to the following statement (DB 4):

> "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."

The defendants did disclose the formal terms of the merger but failed completely to disclose that back of the formal terms, the defendants conspired against the minority stockholders.

A. Signal Acquired 50.5% of the Stock of UOP Through Arm's Length Negotiations in 1975

In 1975, Signal negotiated an arm's length tender and purchase for 50.5% of the common stock of UOP (Logan 37 et seq.). Mr. James Glanville, a partner of Lehman Brothers and a director of UOP, represented UOP in these negotiations (Logan 39). Specifically, UOP started by demanding $25.00 and Signal originally offered $19.00. After bargaining, they negotiated a price of $21.00 (Logan 42-47, 53). Since UOP needed capital, the deal was structured so that $30 million of stock was purchased from UOP at $21.00 with the balance, in order to come up with 50.5%, coming from a tender to the public stockholders (Logan 49, 54).

Soon after obtaining control of UOP, Signal caused four members of its own management to be elected to the UOP Board (Messrs. Shumway, Walkup, Arledge and Chitiea) (Ex. U-7). UOP's Chief Executive Officer, Mr. Logan, was replaced by a Signal executive, Mr. Crawford; Mr. Crawford was also elected to the Signal Board (Crawford 14, 36; Logan 64). Mr. Crawford's appointment by Signal as Chief Executive Officer of UOP was a clear career and financial promotion for Mr. Crawford (Shumway 12-13).

In 1976, after Signal had acquired control of UOP, Mr. Glanville, a managing director of Lehman Brothers, had his staff prepare a Memorandum ("LB-40") specifically addressed to Mr. Forrest Shumway, President of Signal, advising that Lehman Brothers, after research and study, had concluded that it would be advantageous for Signal to take over the balance of the common stock of UOP at $21.00 per share (Seegal 19, et seq.). Actually, the Memorandum was prepared at the direction of Mr. Glanville though he denied having any recollection of it at the time of his deposition. (Seegal 20; Glanville 28) (Note)

B. Signal's Program to Acquire the Balance of UOP Stock at $21.00 Was Solely to Further Its Own Economic Advantage

From 1975 through January, 1978, Signal considered many investment and merger possibilities (Shumway 18-21). However, the serious possibility of taking over the balance or equity position in UOP first came up in January, 1978, when Forrest Shumway, President of Signal, conceived of the idea (Shumway 19-23). UOP had had severe losses in the Come-By-Chance Refinery venture back in 1976 but, in January, 1978,

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Note: The significance of the Memorandum is that as early as 1976, Mr. Glanville, a director of UOP and hence a fiduciary of the minority stockholders, was actively having research done to advance the interest of the majority holder, Signal. Significantly, the price recommended to Signal was $21.00, the 1975 price, and the price of the cash-out merger.

UOP's President reported that net income in 1977 "was at a record level" (Ex. U-49). Mr. Shumway denies having seen Lehman Brothers' Memorandum of 1976 (LB-40) advising that it would be in Signal's best interest to take over the minority stock interest at $21.00 per share (Shumway 26). There was a considerable amount of paperwork generated internally by Signal management in response to Mr. Shumway's request for an evaluation (Shumway 29, PX 68). This preparatory work culminated in a decision by Signal management to present the proposal to the Executive Committee of Signal on February 28, 1978 (Shumway 28). No outsider and specifically no investment banker had been asked at that point to evaluate the value of the minority shares either from Signal's point of view or from the point of view of UOP's minority stockholders (Shumway 24). Mr. Shumway testified as follows on the reason for the acquisition (Shumway 43):

> "Q. And the first reason you presented, therefore, was that you didn't have alternatives on the horizon, the near horizon, that would require the cash or, I suppose, the credit of Signal so that you had the resources available to make that acquisition; is that right?
>
> "A. Yes.
>
> "As an alternative we always have other places we could put funds, but they didn't think they were as attractive as this.
>
> "Q. But that's not what you said here. You said here, quote:
>
> "'... no other major cash expenditures by this Corporation are anticipated in the near future,'
>
> indicating that you had no other cash expenditures that would preclude that; is that what you meant by that?

"A. I don't know what the secretary meant.

"Q. Tell us what you meant.

"A. What I meant was that we had the financial resources to make the acquisition, and it was the most viable alternative of other potential uses of that cash, in my opinion."

C. Mr. Crawford, Signal's Designated President of UOP, Immediately Agreed to Signal's Plan, Including the Price

James Crawford, who had been made President of UOP by Signal, was summoned by Mr. Shumway, the President of Signal, from Chicago to Los Angeles for the meeting of the Executive Committee of Signal of February 28, 1978 (Crawford 36). Though Mr. Crawford had been elected a director of Signal in November, 1975, he did not ordinarily attend Executive Committee meetings (Crawford 37-38). He was not told in advance why he was being summoned but when he arrived at Signal headquarters, he met with Mr. Walkup, Chairman of the Board of Signal, and Mr. Shumway in Mr. Shumway's office (Shumway 40). Mr. Crawford was told that, at the Executive Committee meeting to be held later that same day, Signal would "acquire" the 49.5% of the publicly held stock of UOP at a "range" of $20.00 to $21.00 (Crawford 41-42). Mr. Crawford admitted that he stated at the initial meeting with Mr. Shumway and Mr. Walkup that he favored Signal's move and specifically stated that the price range of $20.00 to $21.00 was "generous" to the minority stockholders

(Crawford 44). He made this statement without consulting his own management, the Board of UOP or any independent investment adviser: this was solely based on his personal gut reaction (Crawford 44). Between the time of the original private meeting between Mr. Crawford and Messrs. Shumway and Walkup and the Executive Committee meeting, Mr. Crawford did not consult with anyone (Crawford 47). He appeared at the meeting of the Executive Committee; after Mr. Shumway had delineated Signal's program to acquire the minority's stock, including the proposed price range of $20.00 to $21.00, Mr. Crawford stated his unequivocal approval of the proposal including a price in the range of $20.00 to $21.00. Mr. Crawford admitted that he never made any attempt whatsoever to obtain anything additional by way of price for the minority shareholders nor did he see whether Signal could be persuaded to consider a tax free exchange of the UOP stock for Signal's own stock and thus give the minority the opportunity to continue their equity participation in the Signal-UOP venture (Crawford 46):

> "Q. My question to you was not that. My question was: Did you ever attempt to get a nickel more for those stockholders?
>
> "A. Your question was: Did I attempt to get more than 20 or 21?
>
> "Q. Yes.
>
> "A. And I answered that question negatively.
>
> "Q. So in this meeting with Signal, Signal's President and Chief Executive Officer, you indicated that you felt that the offer was generous?
>
> "A. Yes."

The price range of $20-21 originated entirely with Mr. Forrest Shumway, President of Signal, the majority holder of UOP stock: it was not the product of research, study or consultation, nor was it the outgrowth of negotiations. The plaintiff, a CPA by training and "an experienced private investor" (Opinion, April 5, 1974, pg. 14), calculated that the minority shares were worth $32.00 per share (Weinberger 46). The plaintiff has retained Fred Shinagel, 59 West 12th Street, New York, New York, an investment consultant (formerly with Lazard Freres), as an expert (Plaintiff's Answers to Defendant's Interrogatories, filed March 7, 1979). Based on his studies to date, he will testify at the appropriate time that the minority shares had a fair value in the context of Signal's proposal substantially in excess of $25.00 per share.

D. The Press Releases and Proxy Statement Were Issued as Part of the Plan to Give the Minority Stockholders the Impression That There Had Been Negotiations in Connection With the Price of $21.00

After the meeting of the Executive Committee of Signal on February 28, 1978, and before the meetings of the Boards of both UOP and Signal on March 6, 1978, there were two press releases published in connection with the Signal program of acquisition of the minority shares. The first was a joint release of Signal and UOP dated February 28, 1978, which reads in pertinent part (PX 146):

"SIGNAL NEGOTIATING
FOR UOP COMMON STOCK

"The Signal Companies, Inc. and UOP Inc. are conducting negotiations for the acquisition for cash by Signal of the 49.5% of UOP which it does not presently own, announced Forrest N. Shumway, president and chief executive officer of Signal, and James V. Crawford, UOP president.

"Price and other terms of the proposed transaction have not yet been finalized and would be subject to approval of the boards of directors of Signal and UOP, scheduled to meet early next week, the stockholders of UOP and certain regulatory agencies. The closing price of UOP's common stock (NYSE) on February 28, 1978, was $14.50 per share."

The public, including the public stockholders, was given to believe that (1) UOP and Signal were negotiating when in fact there never were any negotiations, and (2) the price had not been finalized when in fact Mr. Crawford, the Chief Executive Officer of UOP, had stated to the President and Chairman of Signal his agreement that the price of $20.00 to $21.00 was "generous" to the minority stockholders and had repeated his acquiesence to the acquisition program and the price to the Executive Committee of Signal.

Later in that same week, on March 2nd, a second press release was issued by Signal (PX 110):

"SIGNAL TO RECOMMEND
PRICE OF $20-21 FOR
OUTSTANDING UOP SHARES

"Forrest N. Shumway, president and chief executive officer of The Signal Companies, Inc. announced today that Signal management will recommend to its directors for their approval a price in the range of $20 to $21 a share in the proposed acquisition of the outstanding 49.5% minority interest in UOP Inc.

"Last Tuesday the company announced it was conducting negotiations for Signal's acquisition of this interest. If Signal's directors approve,

> the offer will be presented to the UOP directors for their review and approval. Both boards are scheduled to meet Monday, March 6. A further announcement will be made following the meetings."

This second release made it appear that there had been negotiations in the interim that presumably had led Mr. Shumway to announce that he would recommend a price "in the range of $20 to $21 a share" to Signal's Board. Actually, Mr. Shumway had at the outset determined the price range and had the full agreement of the Chief Executive Officer of UOP, James Crawford, to Signal's entire plan, including the price range. Though there were no negotiations whatsoever on behalf of the minority, the two press releases were designed to and did in fact make it appear to the minority shareholders that there had been negotiations on their behalf.

The Notice of Annual Meeting and Proxy Statement 1978 which was sent to stockholders of UOP in May, 1978, strenuously urging them to vote for the merger also represented falsely to the minority shareholders that there had been "negotiations" conducted on their behalf in connection with the price. The Introduction states, page 3:

> "The price was determined <u>after</u> discussions between James V. Crawford, a director of Signal and Chief Executive Officer of UOP, and officers of Signal which took place during meetings on February 28, 1978, and in the course of several subsequent telephone conversations."

(The foregoing statement is repeated verbatim at page 9 of the Proxy Statement.) The price was not determined <u>after</u> discussions: the price range was determined unilaterally by Signal, announced to Mr. Crawford who immediately agreed.

The foregoing language creates the impression that there had been negotiations (i.e., "after discussions"). However, on page 13 of the UOP Proxy, it was flatly represented that there had been negotiations (EX U-7, page 13):

> "On February 28, 1978, the last day of reported trading prior to the public announcement that UOP and Signal were conducting negotiations for the acquisition for cash by Signal of the 49.5% which it does not presently own ..."

In short, the two press releases and the later Notice of the Annual Meeting and Proxy Statement led the minority stockholders to believe that there had been negotiations on their behalf, particularly in connection with the price: in truth, no negotiations whatsoever took place. Ostensibly, the full Board of Signal considered and fixed the price of $21.00 at the March 6, 1978 meeting. Actually, Mr. Crawford told Mr. Glanville as early as March 2nd that the price would be $21.00 (and obtained an assurance that Lehman Brothers would provide a fairness letter) (Crawford 117, Ex. U-49-23).

E. The Retention of Lehman Brothers Gave the Minority Stockholders the False Impression That a Disinterested Investment Banking House Had Carefully Considered the Signal Proposal, Including the Price and Had Issued an Opinion That the Price Was Fair to the Minority

After Mr. Crawford returned to Chicago, he promptly got in touch with Mr. James Glanville (Glanville 42). As previously pointed out, Mr. Glanville was a managing director of Lehman Brothers, a New York investment house (Glanville 4-7). Mr. Glanville had been a member of the Board of UOP

for a number of years and had helped negotiate the Signal acquisition of 50.5% of the UOP stock in 1975 (Glanville 12-22). Mr. Crawford asked Mr. Glanville whether Lehman Brothers could provide a fairness opinion to the Board and minority stockholders on the Signal program for the acquisition of the minority's shares at $20.00 to $21.00 per share (Glanville 43). Mr. Glanville made no mention or reference to the fact that he had directed the preparation of a Memorandum to the President of Signal advising that it was in Signal's interest in 1976 to buy out the minority stockholders at $21.00 per share: on the contrary, Mr. Glanville affirmatively stated that Lehman Brothers had no conflict of interest. Mr. Glanville immediately replied that Lehman Brothers could give such an opinion and Mr. Crawford said that (Crawford 119-120):

> "Q. 'No problem with $21 - no negotiation.'
>
> Now, this being your note, what did that mean?
>
> "A. He said that his off-the-cuff reaction was that he would have no problem with $21 as a fair price. He didn't feel that it was necessary or proper to negotiate in order to increase that price. He was referring to the position that he might take as a member of the Board of Directors."

Mr. Glanville quoted $250,000.00 as the price of the opinion (Glanville 43). Mr. Crawford stated that he was shocked by the price. Though Mr. Glanville claimed that his loyalty was to the stockholders of UOP, the entire week before the meeting of the Board of UOP was spent in active negotiations between Mr. Crawford and Mr. Glanville on the price that

Lehman Brothers would charge for the fairness opinion (Ex. U-71).

Mr. Glanville had Mr. Schwarzman, Mr. Pearson and Mr. Seegal, subordinates at Lehman Brothers (Seegal 45), make a one-day "due diligence" visit on March 3, 1978 (Seegal 50) to UOP headquarters and reviewed some documents (Seegal 51), including the Memorandum prepared at Mr. Glanville's direction advising Signal's President that it would be in Signal's interest to purchase the minority shares in 1976 at $21.00 (Seegal 63). Mr. Glanville did not participate in this pro forma review nor did he even look at it (Seegal 79). He was in fact in Vermont on the weekend before the meeting of March 6, 1978 (Glanville 58), and only met with those who had done the work as they were flying out from New York to Chicago on the very morning of the meeting (Glanville 70-71). He may have glanced at the paperwork (Glanville 73). Actually, Mr. Glanville stated that without any work whatsoever, he could give the requisite opinion based simply on the fact that the price of the stock before the Signal announcement was in the area of $14.50 (Glanville 114) and $21.00 represented, therefore, a fifty percent premium (Glanville 117-118).

> "Q. Did you yourself make any computation as to what the proper premium was in this case?
>
> "A. In my head -- first, I don't understand the expression proper premium. The premium in this case was about 50% and that was a calculation I did in my head when I first heard what the price level was.

"Q. I see. So that when you first heard what the price was to be -- is that $21? --

"A. 20 to 21.

"Q. -- so that you did a calculation in your head that the premium was in the area of 50% and that sounded right to you based on what you knew?

"A. That sounded appropriate, correct.

"Q. And therefore, if they had said, at that time, the price is 21, you could have said, that price is fair at that time?

"A. Correct, from that point of view.

"Q. And I take it that in this situation you did not make any written calculations at all?

"MR. HAGAN: What do you mean by 'written calculations'?

"Q. You didn't write anything down on any piece of paper, you yourself?

"A. No, sir."

The defendants thus made it appear to the minority stockholders that an independent New York banking house had carefully considered the Signal proposal and had, after due consideration, given an opinion that the price was fair. There was no careful consideration by the banking house: Mr. Glanville had made up his mind the moment he heard Signal's program. (Indeed, he had had Lehman Brothers prepare a Memorandum advising Signal that it was in Signal's best interest to do precisely that two years previously.) Mr. Glanville spent the week negotiating on the price that Lehman Brothers would charge for the fairness opinion. His subordinates at Lehman Brothers did some pro forma paperwork and a one-day "due diligence" visit to UOP headquarters but Mr. Glanville did not revise or consider this paperwork.

The written Lehman Brothers opinion was delivered to the Board of UOP on March 6, 1978. The only operative part of the letter is as follows (Ex. U-7, pg. D-2):

> "On the basis of the foregoing, our opinion is that the proposed merger is fair and equitable to the stockholders of UOP other than Signal."

F. Signal's Plan Included UOP Board Approval to Make It Appear to the Shareholders That Their Board Had Deliberated the Proposal and, After Deliberation, Could Recommend It to the Stockholders

Mr. Crawford worked assiduously with Signal's management and legal staff to accomplish Signal's take-over of the minority stock in UOP (Ex. U-49-23, U-49-24, U-49-30). It was agreed that both the Signal Board and the UOP Board would meet on March 6th, just a week after the announcement of Signal's acquisition program was disclosed to and approved by Mr. Crawford, to approve the Signal acquisition. The Boards not only met the same day but, though they met in Los Angeles and Chicago, it was a joint meeting since the Boards were connected by telephone (Ex. 36).

Of course, since Signal was the majority stockholder of UOP, it could and did determine who sat on the UOP Board. The Board consisted of four Signal employees (Mr. Shumway, Mr. Walkup, Mr. Chitiea and Mr. Arledge) and others (Mr. Pizzitola, Mr. Crawford, Mr. Clements, Mr. Lenon, Mr. Quinn, Mr. Stevenson, Mr. Venema and Mr. Wetzel). Mr. Crawford, in his message summoning UOP directors to the meeting of March 6, 1978, stated (Ex. U-49-30):

"It is particularly important that the outside directors of UOP take the lead in evaluating whatever offer is announced as a result of a Signal Board meeting which will take place March 6."

Mr. Walkup, Chairman of the Board of Signal, appeared at the UOP Board meeting in Chicago and formally presented the Signal program, including the price of $21.00 (Ex. 36). The UOP directors received their first documentary information at the meeting itself (Plaintiff's Ex. 298).

The minutes of the meeting of UOP's Board of March 6, 1978 (Plaintiff's Ex. 298) show that Mr. Crawford urged Board approval even before Mr. Walkup of Signal presented the Signal program to the Board:

"At the request of the Chairman, Mr. Crawford advised the Board that the proposed merger with Signal would appear to have minimal effect on UOP employees, their benefits and the UOP managers. He stated that some 250 employees have exercisable options to purchase UOP common stock and therefore an equitable arrangement would be needed for either an exchange of stock covered by such options or a buy-out based on the difference between the option prices and $21 per share. He was of the opinion that the proposed merger with Signal owning 100 per cent equity in UOP would have a beneficial effect on its customers. He anticipates after the proposed merger becomes effective that the Board of Directors will be changed to an all-inside Board at an appropriate time. The proposed merger-offer will give UOP stockholders an opportunity to accept or reject an approximate 45 per cent increase in the market value of UOP common stock. He expects the stockholder response to be similar to the response received in Signal's 1975 tender offer for UOP common stock, which was over-subscribed.

"Mr. Walkup then stated that Signal proposed in the cash-merger transaction to use funds on hand supplemented by short-term borrowings, which later could be changed to long-term loans. He said UOP as a wholly-owned company would make an outstanding investment for Signal in that Signal's

earnings would be increased (presently Signal can consolidate only 50.5 per cent of UOP's earnings while required to consolidate all UOP revenues and debt), Signal's ratios would improve, as well as improved return on sales and facilitate the flow of resources to UOP and from UOP to other Signal units. Signal will be able to provide financial assistance to UOP when needed as Signal has provided similar assistance to Mack Trucks, Inc. and The Garrett Corporation, both wholly-owned subsidiaries, in the past. Signal's full equity ownership of UOP will permit joint ventures with other Signal units which would not be feasible with a minority ownership interest outstanding.

"Mr. Walkup further stated that the $21 per share offering price was arrived at after comparing UOP's values in 1974 - 1975 with present values. The market value of UOP common stock at the time the 1975 tender offer was made was $13.875 and a premium of 51 per cent was offered to UOP stockholders at $21. The market value of said stock on February 28, 1978 was $14.50 - with a 45 per cent premium in the $21 cash-merger offer. At the end of 1974, UOP's earnings from operations were $24,600,000 - while in 1977, said earnings were $24,300,000. Stockholders' equity in 1974 was $193,900,000 as compared to $227,900,000 in 1977. However, the latter figure included approximately $31,000,000 provided by Signal in its purchase of 1,500,000 shares of UOP common stock in 1975. Dividends in 1974 were at the rate of 70¢ per share - dividends in 1977 were paid at the rate of 62.5¢ per share. Cost savings to both companies would be made in such activities as the elimination of some filing of reports with governmental regulatory agencies and insurance matters. The disadvantage to Signal of UOP ownership includes the Come-By-Chance litigation.

"Mr. Walkup concluded by stating that he anticipated no problems in concluding the proposed transaction and that Signal desires to keep UOP employees whole and not penalize them because of the transaction. He also stated that he would answer any questions other Directors might have and that he would leave the meeting while the other Directors participating in the meeting made their evaluation of Signal's $21 per share offer."

The Board minutes reflect that Mr. Glanville appears to have given the Board a serious disinterested evaluation of the Signal program (Plaintiff's Ex. 298, pg. 4):

"The Chairman then presented to the Board for consideration the report of Lehman Brothers Kuhn Loeb with respect to the offer of $21 by Signal to the Corporation's stockholders.

"Mr. Glanville stated that he became familiar with UOP at the time its capital stock was first offered to the public in 1959. In addition, he has served as a Director of UOP since 1972 and he has had familiarity with UOP affairs for many years. After he and his staff had reviewed what they believed to be pertinent financial and other materials, with complete cooperation of management of UOP, they concluded that the proposed merger offer is fair and equitable to the stockholders of UOP other than Signal. Copies of said report were in each Director's book. For the information of Messrs. Lenon, Pizzitola and Stevenson, who were participating in the meeting by means of conference telephone, Mr. Glanville summarized and read verbatim portions of his report to the Board of Directors.

"The Directors then posed questions to Messrs. Glanville and Walkup and Counsel for the Corporation with respect to various matters in connection with the proposed transaction. After receiving responses thereto, Messrs. Crawford and Walkup excused themselves from the meeting."

In spite of Mr. Crawford's suggestion that the outside directors take the lead in evaluating the Signal "offer", the proposal was not referred to the Audit Committee or a Special Committee of Directors truly independent of Signal's dominance with the responsibility of considering the matter from the point of view of the minority stockholders (Clements 58). There was no suggestion that the proposal be taken under advisement. The minutes do not reflect any questions by the directors (Clements 34-35; Pizzitola 31). Mr. Clements believed it was the responsibility of Mr. Crawford to negotiate the best price for the

minority (Clements 39). As Chief Executive Officer, Mr. Pizzitola assumed Mr. Crawford conducted negotiations because it was his responsibility to do so (Pizzitola 33). Even Mr. Glanville felt it was Mr. Crawford's responsibility to negotiate the best price and assumed, without ever asking, that Mr. Crawford had done so (Glanville 92-96). There was no suggestion that there be a negotiation effected to increase the price to the minority (Glanville 92-96).

The matter was brought on for a vote. The "Signal" directors (Messrs. Shumway, Chitiea, Walkup and Arledge) purported to abstain from voting on the advice of counsel. Furthermore, they affirmatively stated on the record that but for the conflict of interest they would have voted in favor of the proposal (Ex. U-298). This resulted in a letter to the minority stockholders that there had been "unanimous" approval by the UOP Board of Signal's program (Ex. U-199). Those persons who were jointly directors of Signal and UOP abstained with the most notable exception: James Crawford, President of UOP and director of both Signal and UOP and the man who purportedly negotiated on behalf of the minority: he did not abstain but voted for the proposal. (Note)

Note: Mr. Pizzitola, a member of the banking house of Lazard Freres which was the banking house that originally negotiated with Signal for the purchase of the 50.5%, did not abstain nor did he disclose then or in the Proxy Statement that he was on the Board as a result of his affiliation with Signal.

Thus, the minority stockholders were informed in the Notice and Proxy Statement (Ex. U-7) that the Signal proposal had been laid before the Board, that the Board had considered the proposal, that the Board had had the benefit of the opinion of Lehman Brothers, and that "Signal" directors on the UOP Board had abstained (but signified approval).

Signal, UOP and Lehman Brothers did everything possible to convince the minority stockholders to vote for the proposal (Crawford 178, et seq.). UOP's management, without even Board approval, retained Georgeson & Co., a professional stock solicitation company, to solicit proxies in favor of the management (Ex. U-7, pg. 4).

The Notice of Annual Meeting and Proxy Statement of UOP was prepared, circulated and sent out to the stockholders (Ex. U-7). The Proxy Statement strenuously urged the minority shareholders to to deliver their proxies to UOP management which would vote in favor of the proposal of Signal for a merger in which the minority stockholders would be cashed out at $21.00. It was part of the plan that it would appear that Signal would leave the matter to the majority of the minority stockholders by not voting its shares until after it was known whether a majority of the minority had approved to give the appearance of not abusing its fiduciary position vis-a-vis the minority.

All of the "paper" efforts that the defendants had gone through to make it appear that interests of the fractionated and leaderless minority shareholders had been observed culminated in the Notice and Proxy Statement (Ex. U-7) dated May 5, 1978.

It would unduly prolong this Statement of Facts to go line by line through the Notice and Proxy Statement to point out the numerous instances where statements are made that are either (a) totally untrue or (b) partially true or are superficially true in form but not in substance. For example, the representation that there had been "negotiations" found on page 13 is totally untrue. The representation that the UOP Board "considered" the fairness of the merger is a half truth: in fact, the UOP Board were all elected by Signal and they met only briefly and forthwith gave their approval without any real consideration of fairness or inquiry as to how the price was arrived at. The representation in effect that Signal had advised that it had not employed Lehman Brothers is true in substance but Lehman Brothers did have a conflict of interest in that it had taken a position adverse to that of the minority by preparing a Memorandum advising Signal to squeese out the minority for $21.00. There are numerous other representations which were designed to lead the unsuspecting minority stockholders to believe, as they had every right to, that the management and Board of the company of which they were part owners as well as the majority stockholder had affirmatively taken the steps to protect their rights.

In addition to the foregoing, in separate places, the Notice and Proxy Statement (Ex. U-7) contains strong urgings by the "management" of UOP strenuously urging in several different ways the minority stockholders to vote for the

merger by giving management their proxies (Crawford Introductory Letter, Notice, Proxy, pg. 4, pg. 9, pg. 10). As a bare minimum, the "management" should be neutral as between the majority owners and the minority owners rather than straining to make certain that the majority succeeds in cashing out the hapless minority.

In view of the foregoing, it is little wonder that the conspiracy was as successful as it was and that the minority stockholders voted overwhelmingly in favor of the merger. If the minority stockholders had been privy to the complete and true information that is in the record in this case, the result would have been far different.

QUESTIONS PRESENTED

I. DOES NOT THE PROPONENT OF A MOTION FOR SUMMARY JUDGMENT HAVE THE BURDEN OF SHOWING THAT THE PROPONENT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW AND THAT UNDER NO SET OF FACTS DOES THE PLAINTIFF RECOVER?

II. DOES NOT THE COMPLAINT WHICH ALLEGES A CONSPIRACY BY THE DEFENDANTS TO EFFECT A CASH-OUT MERGER OF THE MINORITY STATE A CAUSE OF ACTION?

III. DOES NOT A COMPLAINT ALLEGING A CONSPIRACY ENCOMPASS BOTH FRAUD AND DECEPTION?

IV. SHOULD NOT THE DEFENDANTS' CLAIM THAT APPRAISAL IN THIS SITUATION AS THE SOLE REMEDY BE SUMMARILY DISMISSED IN VIEW OF THE COURT'S DECISION IN NAJJAR?

V. SHOULD NOT LEHMAN BROTHERS' MOTION TO BE DISMISSED BE DENIED IN VIEW OF ITS ROLE AS A CONSPIRATOR TO EFFECT AN ILLEGAL CASH-OUT OF THE MINORITY SHAREHOLDERS?

A R G U M E N T

I. THE DEFENDANTS' MOTION MUST BE DENIED NOT ONLY BECAUSE QUESTIONS OF FACT ARE INVOLVED BUT ALSO BECAUSE THE DEFENDANTS ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW

A. The Defendants Actually Are Seeking Reargument on the Court's Interpretation of the Singer Doctrine

The plaintiff is genuinely baffled by defendants' motion to dismiss for several reasons. First, the defendants are forced to concede that their interpretation that for Singer to apply, three criteria must be met rather than two. Thus, what the defendants chose to denominate as a "motion to dismiss" is, as it turns out, in reality a motion for reargument on the Court's interpretation of Singer. Actually, the plaintiff believes that the defendants have filed this motion in the hope that (based on dicta in this Court's opinions on the class certification and motion to dismiss the derivative counts) the Court can be persuaded to dismiss the entire action. However, the majority stockholder, Signal, not only completely violated all its fiduciary responsibilities to the minority but enlisted its corporate co-defendants (who were likewise fiduciaries of the minority stockholders) in a conspiracy to contravene the rights of the minority. Signal not only actively preferred its own interest at the expense of the minority but thought up a plan to make it appear that the rights of the minority

had been observed and then persuaded the unwitting minority to vote for Signal's merger proposal. Thus, when this Court, pursuant to the dictates of the Singer doctrine, holds a fairness hearing, the plaintiff will prove that Signal, through its complete control of UOP, stood on both sides of the acquisition proposal. The plaintiff believes that the defendants are proceeding on the basis that they have nothing to lose at this point in trying to persuade the Court to dismiss the complaint.

B. The Motion of the Defendants Is Denominated a Motion to Dismiss

The plaintiff, in opposing such a motion, is entitled to point out evidence in the record which precludes the defendants' motion. The defendants' motion is actually a motion for summary judgment. As Vice Chancellor Hartnett said recently in Tanzer v. Internatinal General Industries, Inc., C.A. 4945 (1975), decided May 10, 1979, revised May 25, 1979:

> "There is a heavy burden upon the movant in a motion for summary judgment. As stated in Judah v. Delaware Trust Co., Del.Supr., 378 A.2d 624, 632 (1977):
>
> > '... The facts must be viewed in the manner most favorable to the nonmoving party (cites) with all factual inferences taken against the moving party and in favor of the nonmoving party (cite) and the moving party has the burden of demonstrating that there is no material question of fact (cite).'"

The defendants' motion for summary judgment must be resolved adversely to the defendants since, as the Statement

of Facts shows, there are myriads of fact questions. In addition, if the facts are viewed in the light most favorable to the plaintiff (with all factual inferences), the plaintiff is entitled to have the defendants' motion for summary judgment denied.

II. WHEN MEASURED BY SINGER, PLAINTIFF'S COMPLAINT STATES A CAUSE OF ACTION

A. Since the Complaint Alleges That the Merger Was For the Purpose of Freezing Out the Minority, It States a Cause of Action Under Singer

As the Statement of Facts shows, the record clearly establishes that Signal did use its dominant position to accomplish the merger. However, quite apart from the facts, contrary to defendants' basic contention (DB 8-15), the plaintiff need not allege, to come within the ambit of Singer, that the consummation of the merger was accomplished by the majority shareholder's use of its position. In Singer v. Magnavox, supra, the Delaware Supreme Court held

> "That a §251 merger, made for the sole purpose of freezing out minority shareholders, is an abuse of the corporate process; and the complaint, which so alleges in this suit, states a cause of action for violation of the fiduciary duty for which the Court may grant such relief as it deems appropriate under the circumstances." 380 A.2d at 980.

If the complaint alleges that much, a fairness hearing will be held in order to determine the "entire fairness" of the transaction. Sterling v. Mayflower Hotel, Del.Supr., 33 Del.Ch. 293, 93 A.2d 107 (1952). This Court, in Najjar v. Roland International Corp., 387 A.2d 709 (1978), concurred in the above formulation, saying:

> "From this I cannot help but get the impression that when a complaint attacking a merger 'alleges' that its sole purpose is to eliminate minority interests, such a complaint is now virtually immune from a motion to dismiss for failure to state a cause of action, especially when the basis

> for such a motion would be, as here, that the plaintiff is only complaining about the amount paid for the minority shares." 387 A.2d at 713.

Plaintiff's complaint states that the proposed merger in this case was intended to freeze out the minority shareholders.

B. The Approval of the Merger by the Majority of the Minority Does Not Preclude a Fairness Hearing Since the Approval Was In Itself Obtained by Overreaching on the Part of the Defendants and the Merger Was Without a Proper Purpose

Defendants also argue that the approval of the merger by a majority of the minority shareholders insulates the transaction from judicial scrutiny. The defendants are again in error. The Statement of Facts shows that the defendants made it appear that they had vigilantly protected the rights of the minority while in reality they worked in concert to achieve the merger, the sole reason for which was the economic advantage of Signal at the expense of the minority stockholders. In Tanzer v. International General Industries, Inc., 379 A.2d 1121 (1978), the Supreme Court held that a parent corporation could effect a merger with a subsidiary in order to advance a business purpose of its own, provided that the alleged purpose was valid. Of course, a parent can "vote its shares and otherwise to deal with the merger in its own best interests"(DB 18), but the Delaware Supreme Court emphasized the fact that the parent had to have a genuine business purpose.

> "Although we have stated that IGI is entitled as a majority stockholder to vote its own corporate concerns, it should be clearly noted that IGI's purpose in causing the Kliklok merger must be bona fide. As a stockholder, IGI need not sacrifice its own interest in dealing with a subsidiary; but that interest must not be suspect as a subterfuge, the real purpose of which is to rid itself of unwanted minority shareholders in the subsidiary. That would be a violation of Singer and any subterfuge or effort to escape its mandate must be scrutinized with care and dealt with by the trial court. And, of course, in any event, a bona fide purpose notwithstanding, IGI must be prepared to show that it has met its duty, imposed by Singer and Sterling v. Mayflower Hotel Corp., of 'entire fairness' to the minority." (Citations omitted; emphasis added.)

Thus, at the fairness hearing, Signal must prove "entire fairness" as well as a valid business purpose.

III. THE COMPLAINT ALLEGES A CONSPIRACY DIRECTED AGAINST THE MINORITY STOCKHOLDERS BY THE DEFENDANTS

A. A Civil Conspiracy is Defined as Combination to Defraud

The plaintiff believes that the Court can and should deny the defendants' motion summarily based on the familiar and usual standards applied to such motions as well as the clear dictates of Singer. However, the plaintiff will go forward and point out some of the affirmative reasons why the plaintiff's complaint states a cause of action.

The defendants' brief purports to discuss, analyze and evaluate the complaint. The complaint was filed on July 6, 1978, at a time when the plaintiff did not have the wealth of information that he now has as a result of discovery. The plaintiff alleged all he could based on the limited information that was available to the plaintiff and other public or minority stockholders. The complaint alleged a conspiracy between the defendants to freeze out the minority stockholders in clear violation of fiduciary obligations of the defendants. The complaint standing alone states a cause of action and is sufficient to withstand a motion to dismiss. However, the defendants claim the plaintiff's case does not involve fraud (DB 20-21). The defendants attempt to gloss over the basic thrust of the complaint: that there was a conspiracy. Indeed, the defendants have written a thirty (30) page brief supposedly about the complaint without mentioning once that the complaint alleges a conspiracy. The defendants go further and state that there is

no suggestion in the complaint that the complaint alleges a conspiracy involving fraud or deception.

Conner v. Bryce, 170 NYS 94, 95, defines conspiracy as follows:

> "The essence of a civil conspiracy is a consent or combination to defraud or cause others injury to the person or property which results in damage to the person or property of the plaintiff."

Bergos v. Price, 250 NY 457, 460, 140 Misc. 287:

> "As respects an action for damages, the essence of conspiracy is a combination to defraud or cause injury actually resulting in damage."

Burns v. Hayes, 94 NYS 262, 193 Misc. 491:

> "A conspiracy is generally the results of a secret agreement between two or more to do an unlawful act."

B. The Conspiracy Involved a Large Number of Different Violations by Defendants of Obligations to the Minority Stockholders

In the present situation, Signal, the majority owner of the stock of UOP, conspired with the other corporate defendants, UOP and Lehman Brothers, to defraud the minority stockholders through a plan by which the minority stockholders would be led to believe that Signal, a majority holder, and thus their fiduciary, and UOP, the management and Board of which were likewise fiduciaries, and Lehman Brothers, an investment banker hired by UOP to advise on the fairness of the offer, had in fact carried out their fiduciary responsibilities. In fact, as the record shows, Signal, acting without any proper business purpose but seeking for its own economic advantage to deprive the

stockholders of their equity participation in Signal, set a price of $21.00 on the shares. (Singer v. Magnavox, 380 A.2d 869 (Del. Supr. 1977); Tanzer v. International General Industries, 379 A.2d 1121 (Del. Supr. 1977) UOP had as its President and Chief Executive Officer James Crawford. As such, he had the highest responsibility to safeguard the rights of his minority stockholders against the designs of the majority, Signal. Mr. Crawford, however, had been a long time Signal employee before he was placed by Signal as the head of UOP. In fact, he was thereafter elected to Signal's Board. Instead of divorcing himself from the transaction, in view of his hopeless conflict of interest, he claims to have fulfilled his fiduciary responsibilities towards the minority stockholders. The record, however, flatly negates his claims: he in fact accepted the proposed Signal price of $21.00 without consultation with his own management, without reference to outside expert opinion and without reference to independent members of his Board. Mr. Crawford had an obligation to negotiate the best terms possible (Gimbel v. Signal, 316 A.2d 599 (Chan. 1974), aff'd. 316 A.2d 619 (Del. Supr. 1974); Bastian v. Bourns, 256 A.2d 680 (Chan. 1969), aff'd. 278 A.2d 467 (Del. Supr. 1970); Abelon v. Symonds, 184 A.2d 173 (Chan. 1962), aff'd. 189 A.2d 675 (Del. Supr. 1963). He never even attempted to negotiate a better price or better terms let alone opposing the proposed merger entirely since it carried no benefit for UOP or the minority stockholders. He concealed the lack of

negotiation by issuing false press releases that affirmatively represented that negotiations were going on. SEC v. Texas Gulf Sulphur, 401 F.2d 833 (2nd Cir. 1968) (en banc) cert. denied sub nom Coates v. SEC, 394 U.S. 976 (1969); 312 F.Supp. 77 (SD NY 1970).

The plan included giving the minority stockholders the impression that there had been an expert evaluation of the fairness of the offer of the majority stockholder for the minority shareholders. Specifically, the minority were given the impression that Lehman Brothers, a prestigious investment banker, had been consulted and had maturely and independently considered the situation and had opined that the price of $21.00 was "fair". There is an obligation not to mislead stockholders by parading the opinion of an investment banker which in reality has not reviewed the matter. Denison v. Fibreboard, 388 F.Supp. 812 (D.C. Del. 1974). However, as the discovery indicates, Lehman Brothers was not independent: James Glanville, a director of UOP and a managing partner of Lehman Brothers, had in fact had a Memorandum prepared by Lehman Brothers advising Signal in 1976 that it would be in Signal's best interest to appropriate the minority stock interest at $21.00 per share. In addition, as Mr. Glanville frankly testified, Lehman Brother's opinion, which he delivered to the UOP Board, was not based on research or consideration: it was simply his own personal opinion instantaneously formed. There was no revelation to the minority stockholders that the only

negotiation that had taken place in the period between the time of the announcement of the Signal offer and the time of its acceptance by UOP was a lively negotiation on the size of the fee to be paid to Lehman Brothers so that UOP could recite to the minority stockholders that it was the opinion of Lehman Brothers was that the offer was fair.

The plan contemplated assuring the minority stockholders that the Board of UOP, again fiduciaries for the minority, had maturely considered, as they had an obligation to do (Bastian, supra; Gimbel, supra; Kaplan v. Centrex, 284 A.2d 119 (1971), the Signal offer in the light of the fairness to the minority. Actually, there was no consideration by independent directors. The offer at $21.00 was simply presented to the UOP directors as a whole. Some of the directors assumed that there had been negotiations on behalf of the minority by UOP management. The Board voted unanimously in favor of the offer, recommending it to the stockholders. The "Signal" directors of UOP (with the notable exception of Mr. Crawford) ostensibly abstained from voting on the Signal proposal on the advice of counsel. However, as part of the plan to convince the minority stockholders that their interests had been safeguarded affirmatively stated on the record that, but for the conflict, they would have voted for the proposal, and this was reflected in a letter to the stockholders, saying the Board had voted unanimously in favor of the merger.

Having observed the formalities but having grossly transgressed their fiduciary responsibilities by not actively taking any steps to protect the minority and having used the corporate machinery to effect their purpose (Schnell v. Chris-Craft Industries, 285 A.2d 437 (Del. Supr. 1971); Bennett v. Breill, 99 A.2d 236 (Chan. 1953); Cordec Corp. v. Lunkenheimer, 230 A.2d 769)), the corporate defendants brazenly recited all the steps taken in the Notice and Proxy Statement to the Minority. They hired, without any corporate authority, a professional proxy solicitor, Georgeson & Co., to obtain the requisite majority of the minority (Ex. U-7). The results were eminently successful from the defendants' point of view. The vast bulk of the minority stockholders, convinced as they had every right to be and relying on assurances made, voted 12-to-1 in favor of the plan of merger.

C. Since the Defendants Concealed Pertinent Facts Relating to the Proposed Merger From the Minority, the Vote By the Minority Does Not Insulate the Transaction From Judicial Review

The defendants claim that the vote of the majority of the minority not only shows the defendants did not stand "on both sides" and use their dominant position to dictate the outcome but further that the minority has itself ratified the merger. The defendants go so far as to say (DB 17):

word was dropped — It should say:

"Ratification, however, can never constitute the only requisite to validity, at least [absent] unanimity."

> "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 proposed merger."

As the Statement of Facts shows, the defendants did not make the required complete disclosure to the minority stockholders: on the contrary, they carefully and deliberately concealed the essential facts from the minority.

Folk, Delaware Corporation Law, page 83-84, summarizes the law applicable to the effect of stockholder ratification:

> "Under prior law, stockholder ratification was often effective to validate a transaction otherwise open to challenge, for 'the entire atmosphere is freshened and a new set of rules invoked where formal approval has been given by a majority of independent, fully informed stockholders.' Ratification, however, 'can never constitute the only requisite to validity,' at least unanimity. To be effective the ratifying stockholders must have knowledge of what they are asked to approve, and 'the burden is on him who relies on a ratification to show that it was made with a full knowledge of all material facts.' Mere availability of knowledge from books present at the meeting is not the equivalent of actual knowledge, nor does approval of the minutes of a preceding meeting of itself constitute ratification which validates everything which the minutes disclose to have been done. Although one who knowingly votes to ratify a voidable transaction may not thereafter challenge the ratification, voting a general proxy which failed to disclose that a ratification resolution would be introduced at an annual meeting does not bar the stockholder from thereafter attacking it. Finally, the Delaware courts have held that fraud could not be effectively ratified by stockholders, nor waste of corporate assets, except by a unanimous vote."

Clearly, the vote of the minority stockholders does not preclude the present suit in view of the fact that the minority stockholders were not "fully informed". The

defendants' quotation (DB 21) from Vice Chancellor Hartnett's opinion in Michalson v. Duncan, 386 A.2d 1144 (Chan. 1978), is not apt since the minority stockholders in this case did not receive "disclosure of all germane facts given with complete candor".

IV. THE DEFENDANTS' CONTENTION THAT APPRAISAL IS THE PLAINTIF'S ONLY REMEDY HAS ALREADY BEEN RULED UPON ADVERSELY TO THE DEFENDANTS BY THIS COURT

The plaintiff could answer the defendants' contention that appraisal is the sole remedy available to the plaintiff by simply pointing out that (as defendants admit, DB 27) this precise argument was rejected by this Court in Najjar v. Roland International Corp., 387 A.2d 709 (Chan. 1978). The Supreme Court has heard argument but has yet to rule.

Nevertheless, the defendants' claim that the Stauffer v. Standard Brands, Inc., 178 A.2d 331 (Chan. 1962), aff'd. 187 A.2d 78 (1962), is applicable. Stauffer is not applicable for several reasons. First, as the discovery has established, the conspiracy alleged in the complaint was accomplished by means of fraud and deceptions. Second, the plaintiff's prayers for relief include prayer number 5:

> "5. Granting such other and further relief as may be just."

When this case is tried, the plaintiff will urge this Court under prayer number 5 to use its full equitable powers to do justice to the minority shareholders, including rescinding the merger which defendants have procured by the frauds and deceptions set out in the Statement of Facts. The plaintiff, however, recognizes the practical difficulty of "unscrambling the eggs" after the merger and especially when the rights of innocent third parties would perhaps be adversely affected. It may be that monetary recompense

is all that can be done. Third, the measure of recompense in an appraisal proceeding as worked out in case law is far different from the monetary damages the minority stockholders are entitled to under the Singer doctrine for the wrongful freeze-out by the majority.

V. THE COMPLAINT ALLEGES AND THE DISCOVERY ESTABLISHES THAT LEHMAN BROTHERS PARTICIPATED IN THE CONSPIRACY AGAINST THE MINORITY

The complaint in this case was filed shortly after the merger (July 6, 1978). At the time, neither the plaintiff nor other minority shareholders knew the shabby details of the conspiracy which have been brought to light by the discovery. Specific acts of fraud as well as gross deceptions have now been exposed. (Note) The complaint names Lehman Brothers as one of the conspirators who acted with and for Signal to accomplish its illegal objective -- that is, without any proper business purpose but solely for its own economic advantage, it used its dominant position and together with the active help of the management and the Board of UOP and Lehman Brothers to carry out a deliberate plan to effect its objective. Lehman Brothers' role in the conspiracy was to make it appear that a prestigious investment banking house, having no conflict of interest, had carefully studied the Signal proposal and had issued a formal opinion concluding that the proposal was fair to the minority. Nothing could be farther from the truth.

The motion to dismiss as to Lehman Brothers should be denied.

Note: An amended complaint fleshing out the details of the conspiracy originally alleged could be filed but to what purpose? The defendants have notice of plaintiff's complaint and the record through discovery already contains the specifics.

CONCLUSION

The defendants have filed a motion to dismiss the complaint based apparently on hopes springing from certain dicta in the Court's prior opinions. However, the record as established through the discovery clearly establishes not only that there are factual questions that would prevent the granting of such a motion but, in addition, the law is clear that the complaint as amplified by the discovery states a cause of action.

The claim that appraisal is the plaintiff's sole remedy has been ruled adversely to the defendants in Najjar. Finally, Lehman Brothers clearly is one of the active conspirators and as such is not entitled to be dismissed.

The Court should deny the defendants' motion.

Respectfully submitted,

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