Mr. Prickett
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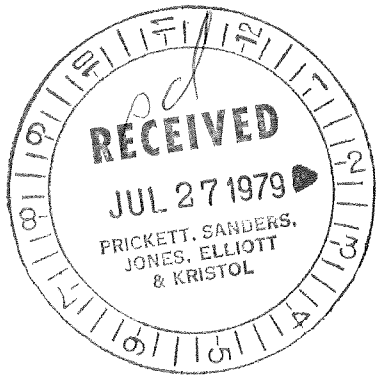
IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WILLIAM B. WEINBERGER, Plaintiff, v. UOP INC., et al., Defendants.	)	Civil Action No. 5642



DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

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I. INTRODUCTION

This is defendants' reply brief in support of their motion to dismiss for failure to state a claim upon which relief can be granted. The facts necessary for an adjudication of defendants' motion are set forth at pages 2-6 of defendants' opening brief, and are taken from the complaint, attached to which as Exhibit A is UOP's Proxy Statement relating to the subject merger. The facts upon which plaintiff purports to rely in opposition to the present motion are totally irrelevant to this Court's disposition of the motion, as will be more fully explained in Section III, infra.

II. QUESTIONS PRESENTED
(Stated Affirmatively)

A. DEFENDANTS HAVE MOVED TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED--THAT IS THE ONLY MOTION PENDING BEFORE THIS COURT.

B. 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.

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

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

III. ARGUMENT

A. Defendants Have Moved To Dismiss The Complaint For Failure To State A Claim Upon Which Relief Can Be Granted -- That Is The Only Motion Pending Before This Court.

On April 26, 1979, defendants served and filed a motion to dismiss plaintiff's complaint on the ground that it fails to state a claim upon which relief can be granted. In his answering brief (PB, p. 2), plaintiff states:

> "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...."

At page 26 of his brief, plaintiff refers to defendants' motion to dismiss as the "...defendants' motion for summary judgment."

Plaintiff's self-serving mischaracterization of defendants' motion as one for summary judgment is an obvious attempt to have this Court consider plaintiff's factual arguments which range far beyond the allegations of the complaint filed by plaintiff on July 6, 1978. Defendants' present motion to dismiss is made under Chancery Court Rule 12(b)(6) and in support of that motion they have presented no matters outside the complaint.* Therefore, defendants' motion must be decided on the basis of plaintiff's

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* Paragraph 12 of the complaint alleges that the merger was approved by more than two-thirds of a majority of the UOP shares other than those owned by Signal. In connection with their motion to dismiss, the defendants filed the affidavit of Patrick J. Link which merely reflects the precise results of the vote on the merger at the UOP Annual Stockholders Meeting held on May 26, 1978.

complaint as it now reads, not as supplemented by belatedly contrived arguments and incomplete quotations from depositions and documents. As stated in 5 Wright & Miller, Federal Practice and Procedure: Civil § 1356 at p. 592:

> "The Rule 12(b)(6) motion ... only tests whether the claim has been adequately stated in the complaint. Thus, on a motion under Rule 12(b)(6), the court's inquiry essentially is limited to the content of the complaint ..." (emphasis added).

Since defendants have not presented any matters beyond the complaint in support of their motion to dismiss, this Court should not consider the extraneous matters upon which plaintiff purports to rely in his brief. As Judge Rodney held in Park-In-Theatres, Inc. v. Paramount-Richards Theatres, Inc., 7 F.R.D. 723, 725 (D.Del. 1948):

> "... I am of the opinion that under a motion by the defendant under the present Rule 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief can be granted, no extraneous matter can be offered in the first instance by the plaintiff, but such extraneous matter, if receivable at all, is receivable only in reply to extraneous matter submitted by a defendant."

It is apparent from plaintiff's answering brief that he is unable to meet squarely the motion to dismiss and defendants' brief in support of the motion. Obviously, that is why plaintiff seeks to argue in the first instance that the motion is something other than it really is. The tendency, of course, in replying to a brief such as that filed by the plaintiff is to refute all of the points raised by plaintiff regardless of their irrelevance

to the pending motion. However, keeping in mind that defendants have filed a motion to dismiss and nothing more, we will turn to the merits of that motion.

1. The Complaint

Now that the derivative counts have been stricken, the complaint contains sixteen numbered paragraphs plus the prayers for relief. Paragraphs 13 through 16 appear under the heading "Class Action Count", and no other "count" is stated in the complaint. Paragraphs 1 through 12 contain general allegations about the parties and about the background of the dispute. The complaint alleges the existence of a Proxy Statement (a copy of which is attached to the complaint as Exhibit A) which itself spells out the conditions of the proposed merger, including the requirement of an affirmative vote of a majority of the minority shares voting. The complaint also alleges (¶ 12) that a stockholders meeting was held, that the requisite majority of the minority shares was voted in favor of the subject merger, and that the merger was then consummated. The entire thrust of the complaint and all of the allegations therein are based upon a theory that the merger was "illegal" because of some alleged breach of fiduciary duty. (Complaint, ¶¶ 6, 13, 14).*

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* This Court has held in this case.

> "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., Del. Ch., ___ A.2d ___ (1979) (Slip Opinion dated April 5, 1979, pp. 6, 11).

Apparently aware that his complaint for breach of fiduciary duty does not state a justiciable claim, plaintiff spends the greater part of his brief trying to argue that his complaint contains some other and different claim, namely, one for "conspiracy"* ("The complaint alleged a conspiracy between the defendants.... The defendants attempt to gloss over the basic thrust of the complaint: that there was a conspiracy." PB, p. 31). However, only with a very vivid imagination could one conclude that the basic thrust of the complaint is the existence of a conspiracy. Only once in the sixteen surviving paragraphs of the complaint does the word "conspiracy" even appear (¶6), and no reference, direct or indirect, is made to any "conspiracy" in the charging allegations of the class action count (¶¶13-16). In fact, there is no allegation that there actually was a conspiracy or that these defendants were a party to any actual conspiracy: all that the complaint alleges (¶6) is that part of the fiduciary duty owed by the defendants to the plaintiff was to "[refuse] to enter into a plan, conspiracy ...," but nowhere does plaintiff actually allege that defendants violated this aspect of their supposed fiduciary duty.

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* It is of interest to note that plaintiff carefully avoids coming right out and saying that his complaint alleges fraud or deceit. Perhaps this is because plaintiff is well aware that this Court has already held that the complaint does not allege fraud or deceit (see footnote on p. 5, supra), or because plaintiff is aware that he cannot proceed in this action on any such claim were he to make it. (See pp. 11-12, infra).

On this basis alone, the complaint does not allege a "conspiracy", nevermind plaintiff's current assertion that it is the complaint's "basic thrust".

Even if the complaint is deemed to allege the existence of a conspiracy, it would still fail to state a claim upon which relief can be granted. It is well established that a conspiracy involves a combination of two or more persons to do an unlawful act. A mere allegation of conspiracy, not coupled with an allegation of an unlawful act done pursuant to the alleged conspiracy, does not state a cause of action:

> "An action on the case in the nature of a conspiracy is now the usual and proper method of suit in civil actions in most, if not all, cases where there is an agreement between two or more persons to do some unlawful act, and where such act is actually committed, and the plaintiff is damaged thereby."
>
> * * *
>
> "If, however, there be no right of action in the plaintiff against the defendants, or either of them, independent of the conspiracy, there can be no recovery though a conspiracy be alleged." (emphasis added).

Diver v. Miller, Del. Super., 34 Del. [4 W.W. Harr.] 207, 209-210, 148 A. 291, 292 (1929).* See also, 16 Am.Jur.2d, Conspiracy §§ 43, 44.

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* Citation to the official Delaware Report is made because there are typographical errors in the Atlantic Report.

The complaint here fails to allege any unlawful conduct on the part of any defendant. The only acts about which plaintiff complains are those which he alleges constitute a breach of fiduciary duty (Comp., ¶¶ 13, 14). All such acts relate to the merger itself and, as defendants pointed out in their opening brief, none of such alleged acts, even if true, constitutes a breach of fiduciary duty. See generally, Defendants' Opening Brief, pp. 8-21 and pages 13-15, infra. Thus, since the merger itself cannot be deemed unlawful, plaintiff's veiled suggestion in paragraph 6 of his complaint of a conspiracy to accomplish the merger likewise fails to state a cause of action.

In summary, plaintiff's arguments about a conspiracy are nothing more than a bootstrap attempt to cure his defective complaint. This Court has already held that the complaint does not allege fraud or misrepresentation and the complaint does not otherwise allege any unlawful conduct. Accordingly, plaintiff's conspiracy theory is but another "chameleon-like"* attempt by plaintiff to have his complaint say what he would like to have it say. Once again, he has not succeeded. The inclusion in the complaint of the word "conspiracy" in no way changes or enlarges any question now before this Court on defendants' motion to dismiss for failure to state a claim.

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* Weinberger v. UOP Inc., supra (Slip Opinion dated April 5, 1979, p. 7).

2. Amendment To The Complaint

At the tail end of his answering brief, the plaintiff, obviously recognizing the deficiencies of his complaint in the face of defendants' present motion, states:

> "An amended complaint fleshing out the details of the conspiracy originally alleged could be filed but to what purpose?"

Obviously, the purpose would be to inform the Court of the nature of the case before it and to advise defendants of the charges against which they are to defend. It is hornbook law that a complaint should contain a direct averment of all ultimate facts necessary to state a cause of action. As stated in 71 C.J.S., Pleading §1:

> "The purpose of pleadings is to present, define, and narrow the issue, and to form the foundation of, and to limit, the proof to be submitted on the trial. They are designed to advise the court and the adverse party of the issues and what is relied on as a cause of action or defense, in order that the court may declare the law and that the adverse party may be prepared on the trial to meet the issues raised."

See also, 61 Am.Jur.2d, Pleading §§68-73.

In the present case, particularly in light of plaintiff's answering brief, it is evident that if plaintiff wishes or intends to proceed with this case on some theory other than that which is now contained in his complaint, both the Court

and the defendants require and deserve a lot more by way of pleadings than they have seen to date. As discussed above (pp. 6-8, supra), plaintiff seems to believe that he has some kind of an action here for "conspiracy"* -- but a conspiracy to do what? If plaintiff wants to pursue some theory other than the one he has sought to allege, namely, breach of fiduciary duty, certainly both defendants and the Court must know what that theory is, and whether the plaintiff can, indeed, state facts in his complaint to support any such theory. As stated in 71 C.J.S., Pleading at §21:

> "It is the almost universal rule that fraud, conspiracy, or collusion must be charged by allegations of fact. It has accordingly been held that a general averment of fraud or false representations ... as well as a general averment of conspiracy or collusion, without alleging the facts which constitute such fraud, conspiracy, or collusion, is a conclusion of law and is insufficient."

As Chancellor Seitz held in Dann v. Chrysler Corp., Del. Ch., 174 A.2d 696, 700 (1961):

> "Where fraud is the basis of the claim, the claims must have particularity sufficient to advise the charged defendant of the basis of the claim. Using the word 'fraud' or its equivalent in any form is just not a substitute for the statement of sufficient facts to make the basis of the charge reasonably apparent."

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* It is the conspiracy which plaintiff says he could "flesh out" in an amended complaint.

See also, Chancery Court Rule 9(b) which specifically requires that "... the circumstances constituting fraud ... shall be stated with particularity."

This case has now been in existence for over a year, during which time discovery has been conducted, numerous pleadings have been filed, motions have been made and ruled upon, etc. At no time have defendants conducted their preparation of this case as some kind of "conspiracy" case or as any kind of case other than the kind sought to be alleged in plaintiff's complaint--one for alleged breach of fiduciary duty, including primarily one dealing with a claimed inadequacy of the price.*

Plaintiff suggests throughout his answering brief that what he really may want to attempt to prove is some kind of fraud and deceit. In addition to this Court's clear holding that the present complaint does not allege fraud or deceit, it seems clear

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* Particularly so when the plaintiff himself testified at his deposition:

> "Q. Prior to the stockholders' meeting on May 26, 1978, other than having concluded that the price was inadequate, had you concluded that there was any defect in the proposed merger transaction?
>
> "A. If your question means, was I in any way opposed to Signal taking over UOP, no. If Signal wants UOP and would pay an adequate price, as far as I'm concerned, they're welcome to it."

Weinberger Dep., p. 51.

that plaintiff has not sought to amend his complaint under Chancery Court Rule 15 to allege fraud and deceit because of his own sworn testimony. Thus, this Court has already held in this case:

> "... Weinberger has conceded that he brought this suit based upon his knowledge of the 1975 tender offer price paid by Signal, the information contained in the proxy statement and accompanying documents, including the Lehman Brothers fairness opinion and his consideration of a Standard & Poor's Guide."

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

Given this record, it is abundantly clear that if plaintiff has any thought of proceeding with this case on some theory other than as set forth now in his complaint, that theory and the facts upon which plaintiff relies to support that theory must be set forth in a pleading which can be properly examined and against which plaintiff's standing to proceed could be tested. In this latter respect, defendants do not in any way mean to suggest that they would stipulate to the filing of an amended complaint or its equivalent. Whether defendants would or would not oppose the filing of some amended complaint will, of course, depend on what is proposed and other relevant factors at the time such a question is actually raised.

B. 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.

Plaintiff's contention that defendants' present motion is merely an attempt, in disguise, to reargue this Court's interpretation of Singer v. Magnavox Co., Del. Supr., 380 A.2d 969 (1977), is ridiculous. Defendants have no interest whatsoever in rearguing Singer since the facts in the present case are so significantly different from the facts in Singer. In fact, defendants' motion to dismiss is in part based on the opinion in that case. In Singer, Justice Duffy stated:

> "We turn, first, to what we regard as the principal consideration in this appeal; namely, the obligation owed by majority shareholders in control of the corporate process to minority shareholders in the context of a merger under 8 Del. C. § 251 ..."
>
> * * *
>
> "[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.'" (emphasis added).

Id. at pp. 972, 976. Although Signal, as the owner of 50.5% of the outstanding shares of UOP, could have effected the subject merger unilaterally, it voluntarily chose to let the minority shareholders decide whether the merger should be consummated. Thus, because of the manner in which the merger

was structured, Signal was not in control of the corporate process, nor did it stand on both sides of the transaction. Accordingly, plaintiff's allegations that the merger was accomplished solely to freeze-out the minority, that the merger price was grossly inadequate, and that Signal had an obligation to oppose the merger do not plead breaches of fiduciary duty by Signal or any other defendant. See generally, Defendants' Opening Brief, pp. 8-21. As Chancellor Marvel held in the very recent decision in Wayne v. Utilities and Industries Corp., Del. Ch., Civil Action No. 5333 (Letter Opinion dated July 19, 1979, a copy of which is attached hereto as Annex A):

> "[T]he proposal that stockholder approval of the merger in issue be made to depend on a majority of the votes cast at a special meeting of stockholders by the minority stockholders alone would appear to negative any contention that the majority stockholders are exercising their coercive power to effect a merger for their exclusive benefit and that such majority's business purpose in going private for its own best interests is not to be forced on the minority public stockholders."

Nowhere in his answering brief does the plaintiff meet head on the issue raised by defendants under the facts in this case: must a Delaware court conduct a "fairness hearing" where there is a charge that a majority shareholder, in a merger, breached its fidudiary duty to the minority shareholders, but where the complaint, on its face, shows that the minority shareholders had control over the consummation of the

merger and that the majority of the minority voted in favor of that merger? Implicit, however, from the structure and tenor of plaintiff's answering brief is that plaintiff recognizes the merit of defendants' position, and it is for this reason that he throws up a cloud of dust in the way of his "conspiracy" theory and a plethora of "facts" and arguments which are nowhere contained in his complaint and have nothing to do with a determination of a motion to dismiss under Chancery Court Rule 12(b)(6). In short, the complaint filed by plaintiff on July 6, 1978 fails to state any claim upon which relief can be granted.

C. Appraisal Is The Exclusive Remedy In A Dispute Over Value.

On this issue raised by defendants' present motion, after repeating what defendants themselves acknowledged in their opening brief, the only thing plaintiff does is argue that since this is an action for rescission, appraisal is not the sole remedy.

Defendants submit that it is absolutely clear, and in fact the law of the case, that the plaintiff is seeking money damages only, and not rescission. See Defendants' Opening Brief, pp. 22-23. As this Court earlier held:

> "[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).*

Since the complaint seeks only money damages, there is nothing more than a dispute as to value, Therefore, appraisal was plaintiff's exclusive remedy in this matter, and his complaint must be dismissed. See Stauffer v. Standard Brands, Inc., Del.Supr., 187 A.2d 78 (1962).

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* At the oral argument on February 1, 1979, plaintiff's counsel advised the Court that the "...class action [count] clearly is a monetary recovery for the difference in value ...." Transcript of 2/1/79 Hearing, p. 26.

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

As was initially noted, the complaint fails to allege any wrongdoing on the part of Lehman Brothers. Plaintiff's only responses were that Lehman Brothers was a party to the "conspiracy" upon which plaintiff purports to rely in his answering brief and a reassertion (without factual or legal support) that Lehman Brothers owed a fiduciary duty to the minority shareholders. However, as we have shown above (pp. 6-8, supra), plaintiff's bald allegations of conspiracy fail to state a cause of action as a matter of law. In light of the complete absence of any allegations of fact supporting a claim against Lehman Brothers (see Defendants' Opening Brief, pp. 28-29), the complaint should be dismissed as to it.

IV. CONCLUSION

For the reasons stated in this brief and in Defendants' Opening Brief, the complaint should be dismissed for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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