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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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WILLIAM B. WEINBERGER,

Plaintiff,

v. Civil Action No. 5642

UOP, INC., THE SIGNAL COMPANIES, INC., SIGCO, INCORPORATED, LEHMAN BROTHERS KUHN LOEB, INC., CHARLES S. ARLEDGE, 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.

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Courtroom No. 2
Public Building
Wilmington, Delaware
Friday, September 7, 1979
11:00 a.m.

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BEFORE: HON. GROVER C. BROWN, Vice Chancellor

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APPEARANCES: WILLIAM PRICKETT, ESQUIRE
Prickett, Sanders, Jones, Elliott & Kristol
for Plaintiff

APPEARANCES: (Continued)

ROBERT K. PAYSON, ESQUIRE
Potter, Anderson & Corroon
-and-
ALAN N. HALKETT, ESQUIRE,
of the California Bar
Latham & Watkins
for Defendant The Signal Companies, Inc.

A. GILCHRIST SPARKS, III, ESQUIRE
Morris, Nichols, Arsht & Tunnell
for Defendant UOP, Inc.

R. FRANKLIN BALOTTI, ESQUIRE
Richards, Layton & Finger
for Defendant Lehman Brothers
Kuhn Loeb, Inc.

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MR. PAYSON: Good morning, Your Honor.

THE COURT: Mr. Payson.

MR. PAYSON: This is the time set for the hearing on Defendants' motion to dismiss. The argument will be presented by Mr. Alan Halkett, to whom the Court has already been introduced and who has been admitted pro hac vice. I believe I have also introduced Mr. Brewster Arms, who is vice-president and general counsel of The Signal Companies. I do not move his admission.

Your Honor, as a preliminary matter, last evening at approximately quarter of five I was served with a notice from Mr. Prickett for leave to file an amended complaint. You heard me yesterday speak to the

untimeliness of another motion, and I raise the same objection to the motion filed by Mr. Prickett yesterday. We are simply not in a position to address the merits of that motion today, and, in fact, we urge the Court to take matters one step at a time to resolve the pending motion, and thereafter our decision may well take into account what Your Honor does with the present motion to dismiss, so that we would ask that any briefing or argument be put off on the motion to amend until sometime after the Court has had an opportunity to decide the present motion.

THE COURT: All right. Mr. Prickett.

MR. PRICKETT: Your Honor, I will not respond to Mr. Payson at this point on that. I would like to have the record note, though I cannot present him formally, that Mr. Vernon Proctor, who has taken the bar and is awaiting the results, is with me at counsel table.

THE COURT: Very well. Mr. Proctor.

I think it is fair to state then that we will proceed on the basis that originally brought us here and not get into any discussion as to the motion to amend the complaint at this time.

Mr. Halkett, good to see you.

MR. HALKETT: Good morning, Your Honor. I do not propose to repeat all of the materials contained in our briefs, since I am sure that you have had an opportunity to review them. As a preliminary matter, I think that I would like to point out in case the Court has not itself obtained a notice that the Delaware Supreme Court recently notified the parties that it declined to accept the interlocutory appeals which had been filed by the plaintiff on two previous motions.

THE COURT: Yes, I have seen that.

MR. HALKETT: The motion which is today before the Court is one brought under Rule 12(b)(6), the grounds of which is that the complaint as presently filed and as presently stands in this court fails to state a claim upon which relief can be granted. The test, of course, under a motion of this kind is based upon the allegations of the complaint itself. In that connection under Rule 10 a part of the complaint is any exhibit and the contents of any exhibit attached to the complaint.

The complaint in this action has attached to it the proxy statement, which was sent out to the shareholders prior to the shareholders meeting held in May, 1978, and that proxy statement itself includes a

copy of the proposed merger agreement. Let us then turn to the complaint, to the facts which the Court has before it and which form the basis of our present motion.

There was, indeed a merger on May 26, 1978, which was consummated on that date. It is a fact from the complaint and, more specifically, from the exhibit to the complaint that as a condition precedent to that merger, as established by the parties themselves, was a vote of the majority of the minority shareholders who were present or who were voting on the merger plus in any event a requirement of a two-thirds total vote in favor of the merger.

The majority stockholder, Signal, at that time owned only 50.5 percent of the outstanding shares of UOP, so that in any event for the merger to be consummated a vote of the minority was required, and only with the requisite vote of the minority would the merger take place. As the complaint alleges, the stockholders meeting was held and the vote of the majority of the minority was obtained, and thereupon the condition was met and the merger was completed. We are dealing, then, here not with a situation in which the complaint omits certain material facts but rather a situation in

which that which is pleaded in the complaint, we submit, shows clearly on its face that the plaintiff does not have a claim upon which relief can be granted.

Now, let's turn then really to what I think we are talking about in this case. As we have pointed out, what has evolved over a number of years is what I think can be referred to as a Singer-type case or a fairness hearing-type case. Perhaps they are synonymous, and I may use them synonymously here today. The general gist of the Singer-type case I think comes through both from the opinions of the Supreme Court in Singer and Tanzer as well as the earlier cases.

First of all, does a majority shareholder of a corporation owe some sort of fiduciary duty to the minority, and that question has been answered in the affirmative, and it is a part of the law of Delaware, and it is a part of the law with which we have no quarrel whatsoever. In a merger situation, then, where the majority shareholder is going to merge out the minority under either a 251 or a 253 merger, the situation arises that the minority shareholders really have no control over whether such a merger will or will not take place. In the long-form merger there is, as I understand it, still the requirement for a shareholder vote, but

because it requires only a majority to vote in favor of the merger -- and the Singer-type case involves the majority owner merging out the minority -- the vote of the minority is a meaningless exercise other than for window-dressing or whatever.

Consequently, I think that what has happened is that the Court has taken the position that where the minority has no right or ability itself to participate in that merger decision, the Court should step in and at least give to the minority a forum which will look the situation over to see that they have not been unfairly treated by the majority. The language that appears in the cases that evidence this legal rationale and this legal basis is the type that talks about when a person stands on both sides of the transaction and words of similar import.

Where one is dealing with oneself and where the minority has no right or power to participate, the Court has established the so-called fairness hearing as a forum by which the minority at least can get some sort of review and perhaps protection. That, of course, is not the case here, because of the way in which the majority shareholder itself set up the transaction. Although Signal had the power under the

statutory right to have consummated this merger in such a way that the vote of the minority, whether taken or not, would be meaningless, it so structured the transaction that the minority shareholders had the power to decide whether this merger would be consummated or not.

Now, there has not been, to our knowledge, a case in which this issue has been adjudicated squarely on this point yet in Delaware or anywhere else, for that matter. However, there are, I believe, a couple of cases which have come down since we filed our motion which I believe not only are supportive of the position which we are advancing here but I think are rather clearly indicative of the thinking of the Supreme Court at least on this issue that we are talking about. And the case there that I have particularly in mind is the Najjar versus Roland case.

The Supreme Court decided certain issues in that case, and there was an opinion which just came out a couple of weeks ago. I have copies here both for the Court and for counsel --

MR. PRICKETT: We have it, thank you.

MR. PAYSON: (Continuing) -- if you don't already have one. But I would like to quote briefly from Page 5 of that opinion. The Court states, "The

unmistakable focus in Singer was on the law of fiduciary duty. See 380A 2nd at 976. Such a duty is owed by the majority shareholders (who have the power to control corporate property and, indeed, corporate destiny) to the minority stockholders of the corporation when dealing with the latter's property."

Skipping one sentence, then, to the point of this hearing, "The fiduciary duty is violated when those who control a corporation's voting machinery use that power to cash out minority shareholders; that is, to exclude them from continued participation in the corporate life for no reason other than to eliminate them."

Now, the operative thought here is the possession of the power and, secondly, the use of that power to exclude the minority. This is precisely the point that we have made on this motion and is precisely the point that has been indicated in the opinions in the previous cases, and that is that the fairness hearing comes into play when a stockholder who possesses the power uses that power to achieve the desired result; namely, to merge out the minority.

That same thought was expressed -- and I won't repeat it verbatim -- in the case decided by

Chancellor Marvel, Wayne v. Utilities and Industries Corporation. There is a letter opinion dated July 19, 1979, which we have attached as Annex or Exhibit A to our reply brief, and we have quoted that portion from that opinion which again is indicative and supportive of the position which we have taken here; namely, that the Singer-type case, the fairness hearing-type case is one which arises where the majority shareholder has used its or his power as a majority shareholder to eliminate the minority.

Now, in the Najjar opinion, from which I just quoted briefly, that, of course, is a very clear situation, as Your Honor is very well aware, in which the minority stockholders have absolutely no right or power at all even to vote for cosmetic purposes on the proposed merger. In all of the other Singer-type cases that we have found there is a clear indication from the facts in the opinions that even though votes may have been taken, they were cosmetic only, and in most cases, if not all cases, the stockholders before they voted, whether you call it ratification or voting on the merger, were advised in advance that the majority stockholder was going to vote its shares in favor of the merger; and, therefore, it was going to be consummated

regardless of the vote of the stockholders. So we do not have a case in which the minority has been given the power to control whether or not the majority would be given the right to proceed with the merger preceding this case, and we submit that the facts in this case take this out of the Singer situation. And, therefore, there is no cause of action stated for a Singer-type fairness hearing.

Now, what we have, I believe, established as the law in this case is on the pleadings of the present complaint. The only basis, the only claim upon which the plaintiff has proceeded is the breach of fiduciary Singer-type case. Although in the plaintiff's brief the plaintiff now tries to make of his complaint something more than is in there, we respectfully submit that a reading of the complaint as well as a consideration of the determinations previously made on the other issues that have been before the Court -- namely, on the derivative count motion and on the class action motion -- have established what type of complaint and what type of case this really is. And consequently, we respectfully submit that it does not allege a claim upon which relief can be granted.

We have also raised in our motion another

ground, and that is the one of exclusivity of appraisal as the remedy where the only relief sought is monetary damages rather than for rescission. That issue was apparently a part of the appeal in Najjar. It is my understanding that counsel for Roland, et al, the appellants in that case, have filed a request or a petition for rehearing on that issue before the Supreme Court, and that is still pending. Consequently, I do not intend to address myself to that subject any further other than to say that it is still a part of our motion and a separate ground for our motion here.

Unless the Court has any questions either in terms of the materials which we have in our brief or in terms of the materials which we have just discussed, I have nothing further at this time but, of course, would hope that we have the right to some rebuttal time based upon what Mr. Prickett may have to say.

THE COURT: Thank you, Mr. Halkett. I have no questions of you at this time. I may, but none now, so I will hear Mr. Prickett, after Mr. Balotti tells me he joins in the arguments just made; right?

MR. BALOTTI: Yes, sir. I rise on behalf of Lehman Brothers to tell you that I do join in the arguments made on behalf of the other defendants by

Mr. Halkett but also to note the point which is made in the brief, Your Honor, that in addition to the arguments made by Mr. Halkett, there are no specific allegations of wrongdoing by Lehman Brothers in the present complaint. And in addition to the arguments made by Mr. Halkett, we believe that the complaint should be dismissed as to Lehman Brothers on that additional ground. Thank you.

THE COURT: All right. Thank you, Mr. Balotti.

Mr. Prickett.

MR. PRICKETT: Your Honor, I listened carefully to the argument made by Mr. Halkett to see if there was going to be anything new or startling advanced by way of oral argument supplementing what has been said in the briefs that would give some plausible basis for the Court to enter an order dismissing the complaint in this case. I don't think there is anything new that is added. In fact, there is somewhat less in the oral argument than there is in the brief. Your Honor, the motion that is before the Court is denominated as a motion to dismiss under Rule 12.

Let us first approach this in terms of Rule 12, and then I will indicate to the Court, as I

have in my brief, that it is not a Rule 12 motion; it is a summary judgment motion. But first of all, let's take it just as they would have it: a Rule 12 motion. Rule 12 says, in effect, that such a motion carries with it the burden of convincing the Court that under no circumstances will the complaint support a cause of action, and all well-pleaded allegations are taken as true and correct. And therefore, if you weigh this motion in terms of Rule 12 and you don't look to anything more, you must take all the allegations and assume that they are well-pleaded and you have got to measure all the allegations in terms of what they can carry with them. And just looking at the starkest picture that can be presented, there is an allegation that this merger was without a valid purpose and was for an inadequate price. That is pleaded. That must be accepted as true.

Now, measured by that, the stark question for the Court is, assuming those are true, does it state a cause of action. To ask the question is to receive the answer, if you measure it by Singer and its progeny. And this Court itself has indicated that in its opinion that is quoted by both briefs. So that if you look at this complaint in the strict terms of Rule 12 and you measure it by the law that is applicable, Singer and the

decisions of the Court itself, this motion to dismiss fails. Actually, however, the motion is not a motion under Rule 12. There is an affidavit that broadens the scope and takes it out of Rule 12, and I might point out in passing that Rule 12 generally looks to a motion filed at the outset. That is, you file a complaint. The defendant looks at it and says, okay, assuming everything he says is true, it doesn't state a cause of action. They didn't do that. They waited until after a year of discovery had been completed. And based on certain things that Your Honor said in the two opinions issued earlier this spring, they filed a motion to dismiss.

Now, first of all, I say that it is not a motion to dismiss because they themselves have filed an affidavit that enlarges it. And having enlarged it, it then becomes a motion for summary judgment. And the rule is perfectly clear that the Court then considers the entire record. But even beyond that, a Rule 12 can be enlarged if the Court so decides beyond the narrow scope of the pleading itself, because it says if on a motion for judgment on the pleadings matters outside of the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary

judgment, and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent by such motion by Rule 56. So that I say that they have enlarged it by filing an affidavit but in any case the Court has the power -- nay, the responsibility -- to consider it as a motion for summary judgment in such a situation. And that brings me to the question of what are we really dealing with.

Now, I would suppose in my grandfather's time that pleadings were more important than facts and claims. I will not pretend to rehearse the Court on what is well-known, and that is that the present-day system is designed and supposed to provide an adjudication of claims on the merits rather than on technicalities. The Balenca case, among others, is an early indication that the form and technical aspects of the complaint were not supposed to dictate the results. What happened in this case? There was a plan by Signal to take over for its own economic reasons the balance of the stock position of the outside stockholders. They dominated UOP. They had the power, and they did elect all the directors. They put their man Crawford in as the head of it, and they decided to go through the

forms. And to get around Singer they decided, well, the way we will do this is to make it appear that this is all fair and that the price is fair and the terms are fair and that it is in the best interests of the stockholders. And we will embark upon a campaign to convince these people that we, their fiduciaries, have done everything possible to represent their interests. And they were outstandingly successful. They persuaded most of the stockholders. There were some they didn't persuade, including Mr. Weinberger. But he didn't have the inside information that we now have that delineates what I have called, and rightly so, the shabby details of how these people skirted their fiduciary responsibilities to these people. All he knew was the tip of the iceberg.

In that complaint we put in what we had at the outset, and it was sufficient at that time so that we did not get a motion to dismiss forthwith. In fact, there was a lot of discovery that took place beginning about this time last fall and continuing through January, February and March. At about that time the motion for class action was brought forward, and the briefing on the derivative count was completed. I would suppose if I had it to do over again that I

might have taken another look at the complaint and amended it to include what I had then discovered; that is, a wealth of detail. Being somewhat close to it, I didn't do it. I was not really focusing on the complaint, except insofar as it related to the derivative count and the technicalities as to whether a stockholder who ended up with the stock and whose corporation continued in existence stated a good cause of action.

The Court, quite rightly, faced with the decision, looked at the complaint and saw that it was less than ample in detail. The Court then issued an opinion indicating that the complaint had I think the Court characterized it chameleon-like characteristics, perhaps designedly so. Not correct, Your Honor. I put in every last word I knew at the time and every last word that the plaintiff knew, and all we knew was that there had been a conspiracy. We didn't know the details of it, but we knew there had not been full disclosure. We couldn't plead more. We can now. And that is in the record.

Now, at this point we think that what is before Your Honor is not a motion to dismiss, though we think we win on the motion to dismiss anyway, but a motion for summary judgment. We think that the facts

in the record detailed in the statement of facts clearly show that a motion for summary judgment will not prevail not only factually but clearly based on Singer and its progeny. And therefore, we would suggest that this motion to dismiss fails because the facts in the record indicate clearly that there is a cause of action stated and that there are factual issues that preclude a motion for summary judgment in favor of the defendants. We would suggest that if Your Honor really came to grips with the situation, the motion for summary judgment should be decided the other way; that on the factual record that exists in this court, liability should be determined against the defendants and in favor of the plaintiff.

But let me turn to the situation that underlies this case in terms of the unfolding picture in the wake of Singer. I am not going to talk about Singer. We all know it too well, and there was an offer to give us a copy of the opinion in Najjar. We, of course, were counsel in Najjar, and so we have that opinion. This case represents another facet or development in the Singer situation. Faced with the Singer decision, counsel for Signal sought to devise -- I think the phrase by Mr. Halkett was "sought to structure" a

corporate freeze-out such that they would not come within the shadow of Singer. And how did they do it? They decided that the way to do it was to get the minority to vote affirmatively for the plan. And I have got to concede that I think that that is a proper way of doing it. That is, if you are perfectly fair, you say to the minority, here is a proposition. I am not going to participate in the vote. You decide. But that has got to turn on fairness; that is, you have not only got to structure it that way but you cannot pull the strings and make it work. And furthermore, you cannot deceive the minority by making them believe that you as fiduciaries -- and I refer to all of the defendants in this situation -- have kept hands off.

What happened in this case was, they conceived this plan and then they orchestrated it in such a way that the proxy statement, which the outside stockholders have a right to rely on not only that it is accurate but that it is full disclosure, indicates that there has been that fairness, that candor that is so clearly required where a majority seeks a result in its own interest, which is conceded here. So that the place that we join issue is the question whether, having structured it this way, the record does not show that,

in fact, Signal not only structured it but orchestrated the whole thing, setting the price, preventing any negotiations on the price or the terms, carefully orchestrated a vote by the board, carefully obtained through Mr. Crawford what appeared to be the disinterested opinion on fairness by a New York banking house, carefully got the board together, ostensibly pulled themselves out of the voting but then came back in again so it could be represented it was unanimous, got the management to say in the proxy statement repeatedly we urgeyou to vote, return a proxy, attended the meeting and prevented the minority stockholders from really knowing who was behind all this.

And therefore, we think, Your Honor, that if the Court says, well, any time that the defendant structures a deal that provides that the majority of the minority votes on it and we will not look behind it, we will not give a fairness hearing to determine whether this is really bona fide or not, then this Court is, in effect, countenancing what the Supreme Court has indicated so clearly in Singer and now in Najjar is to be done, and that is to provide, as Mr. Halkett has so wisely said, a forum where the Court will reexamine at the behest of a minority stockholder the entire fairness

of the situation, so that merely structuring the merger will not be a convenient conduit for circumventing the salutary safeguards that the Supreme Court has provided by Singer and its progeny.

Now, let me turn to two other matters, and then I will conclude. First, appraisal. So far as we are concerned, we said at the outset and we continue to say that even apart from Your Honor's decision in Najjar, now confirmed ringingly by the Supreme Court, appraisal is not the answer in this case. Appraisal, a statutory right, is far different from what the Supreme Court and, indeed, this Court is involving in terms of the remedy that is afforded to a minority stockholder who is the victim of oppression of the majority. I won't say anything more about appraisal. I think that is a dead issue, unless the Supreme Court is going to eat its opinion recently handed down.

Secondly, the amended complaint. As Mr. Halkett and Mr. Payson have indicated, the motion before the Court is a motion denominated to dismiss. There was in the brief of the defendants an invitation to the plaintiff to file a motion to amend. I don't think it is necessary. I think we state a cause of action, so that for purposes of the motion to dismiss,

Your Honor does not have to consider that. I think, however, that for purposes of housekeeping, to delineate the issues that would have to be tried, the Court might well require that what has developed in the pleadings be restated in the complaint and there be an amplification. And we have, pursuant to what is invited by the plaintiff, made such a motion. There will be a time and a place for a consideration as to whether they are going to agree to the motion or whether they are going to fight it. But we wanted to accede to their suggestion that there be such a motion for leave to amend. There is no surprise in all of this. It is all documented in the record. It all comes out of the mouths of the defendants as to what they did, and we simply restate it.

It restates in some detail but not complete detail the terms of the conspiracy by which Signal got all the players to line up and run a charade against the outside stockholders.

Finally, at the tail end, Mr. Balotti stood up and said, in effect, me, too. He joined in the arguments. But he also said Lehman Brothers should be dismissed. We named Lehman Brothers as a co-conspirator in this, and we think that they have a fiduciary

responsibility to the outside stockholders. Why? They were hired ostensibly by the management, and they knew it, to give an opinion to one set of stockholders as opposed to the other. They were not hired to advise Signal. Of course, they had prepared a memorandum for Signal previously on this. We think that having been hired to prepare an opinion that they knew was going to be disseminated to the outside stockholders and to advise them on the fairness of the proposal that related to their stock, Lehman Brothers becomes fiduciaries to those people. That is, they are not free to take $150,000 and issue a false opinion and to cooperate fully with Signal in its objective of cashing out the minority.

I pointed out in the brief the Dennison case, decided by Judge Stapleton, in which he averts to the importance of the opinion. In fact, it was the same house, Lehman Brothers, and the importance which stockholders attach to the opinion of an outside banking house and the reliance that they can justifiably put on somebody who, standing apart from the transaction, candidly advises on the fairness or unfairness of the deal. That is why they are included. They are co-conspirators in this because in dereliction of not only

their duty -- Glanville was a director -- but also their paid duty -- they got paid $150,000. And this was not to cooperate with Signal but to do a duty to the stockholders, which they did not do. And therefore, the motion to dismiss as to Lehman Brothers should fail quite apart from the overall failure of the motion to dismiss.

In short, Your Honor, we think that the motion to dismiss is based on hopes perhaps generated by some remarks that Your Honor made in the opinions of April in connection with the class action determination and the derivative action. We understand why those remarks were made, and we suggest that they have generated this belated motion to dismiss. We think the motion to dismiss fails when it is measured by the strict standards that are in force when a motion to dismiss is made. We think it is a motion for summary judgment in which the Court considers the entire record.

But even if you measure it by the standards of Rule 12 or Rule 56 in the context of the evolving fiduciary responsibilities, as enunciated by Singer and the other cases, this motion fails. The Court, therefore, should deny the motion to dismiss as to all defendants, and the matter should proceed. Thank you, Your Honor.

THE COURT: Thank you very much, Mr. Prickett.

MR. HALKETT: First of all, there are a couple of questions I just want to take a moment or two on. The rule -- namely Rule 12 -- has no restriction on it as to the timing of a Rule 12 motion, which can be made at any time up to and through trial. The question in any case, based upon the type of case and the issues involved in the case, is one of approaching it in an orderly fashion to have those issues brought before the Court and adjudicated.

The complaint filed in this case had, of course, matters such as derivative counts, class action claims and otherwise, and obviously one makes a decision as to which issues should be brought before the Court. It seemed to us that the issue which is now before the Court is here in a logical progression and that the ruling on it should not in any way be affected simply because we chose timing now rather than at some other time. I think that what Mr. Prickett's argument does is really put into focus both the importance and relevance of the present motion in terms of going forward, if at all, with this case.

Maybe we can approach it in this fashion.

First of all, any Delaware corporation now which is a majority shareholder in another corporation and which for business reasons wishes to acquire the interests of the outstanding minority shareholders must look at the law of Delaware, which includes not only the statutory law of merger permitting it to engage in a merger and to for cash buy the minority shares but it must also look at the evolving case law, including specifically Singer, Tanzer, and say to itself that if we proceed with this merger in which we choose to exercise the power given to us by the Legislature to vote for and to consummate the merger on our own, we may very well have before us a lawsuit filed by a minority shareholder who is going to include in his complaint certain magic phrases such as there was no valid business purpose or challenge the purpose and then states that the price was inadequate. And we are going to then be involved in a fairness hearing, and we do not now know really what all is involved in a fairness hearing. It would be nice to have some standards to know really what we are going to have to do, but we doknow that the burden is going to be put upon us as the plaintiff to somehow or other go into court and prove in some intangible ways the "entire fairness" of this transaction.

One may choose to do that, and if they choose to exercise and to use the power they have to consummate the merger, that certainly is a prospect that the corporation faces. On the other hand, the corporation may say, all right. Do we have an alternative to that. And I think even Mr. Prickett has come to recognize that there can and should be an alternative to that. And that alternative is, although we may possess the power to consummate this merger on our own, should we put the matter to the minority shareholders and let them decide for themselves whether under the terms and conditions of the proposed merger they wish to vote in favor of it and to decide whether or not the merger will take place. If they vote against it, we will have no merger. If they vote for it, we will have a merger. For purposes of some degree of corporate certainty and planning, is that a viable alternative that a corporation has?

At the heart of it, that is our motion. We believe that, indeed, under the law of Delaware that is the case: that if the corporation chooses the latter alternative and puts it to the shareholders and the shareholders vote affirmatively, they do not ipso facto put themselves in a position of a Singer-type fairness

hearing on those facts alone, and if someone were to come in and file a Singer complaint after the shareholders have voted in favor of the merger and the merger has been completed, that they have failed to state a claim upon which relief can be granted, and that is our position, and that's the complaint.

Perhaps in thinking it through, Mr. Prickett has come to the same conclusion. At least he seems to have by what he said. But then he goes on to say, but even though that may be true, obviously the shareholders' vote must be a valid vote. That isn't exactly his terminology, but he talks about disclosure and so forth. And with that we have no quarrel whatsoever. It is obviously not the case, nor are we arguing that if the vote of the shareholders is procured through some sort of fraud, deception or otherwise, that the Court is not permitted to inquire into those matters, obviously not, nor are we suggesting any such thing.

The question was and is on this complaint have there been any allegations, were there any allegations and are there any allegations in this complaint that that vote of the stockholders was in any way whatsoever tainted, and the answer is no. And consequently, the complaint and the issue before the Court at this

point is where you have a merger consummated only upon the affirmative vote of the minority shareholders and that vote controlled whether the merger would or would not go forward, do we get into a Singer-type fairness hearing.

Now, let's take the other step hypothetically at this point. Let us assume that a minority shareholder then raises the question of the validity of the vote of the minority shareholders. Is that the same thing as a Singer-type fairness hearing? And we submit it is not. First of all, I think it has been clearly established that -- I say clearly. It may not be that clear, and I don't mean to make such a stipulation for the record, in case I come to rue the day that I did. But it may well be the case that in a Singer-type fairness hearing the burden is upon the majority shareholder to go forward with the burden of proof to the Court as to some intangible entire fairness aspect of the transaction.

In our opinion, if the contention is on the part of a plaintiff that thevote of the minority which approved of the transaction is in some way tainted, then it is the burden, as in any such or similar case, on the plaintiff to carry the burden of

proof that, indeed, that was the case and to show that that vote was tainted and should not be considered. That is in and of itself a material difference between the two arenas or the two types of cases we are talking about.

Second, it seems to us that if, indeed, the case is one which challenges the validity of the minority shareholders' vote and if the plaintiff in such a case is unable to carry its or his burden of showing that taint, then that disposes of the case. And we do not then end up with the type of "generalized fairness hearing" under Singer.

Now, what Mr. Prickett is now trying to do on behalf of this plaintiff is lump the two together and try to bring into his Singer-type complaint what he hopes is another type of case. If that is the case, if what we are talking about here is his wishing to pursue something other than a Singer fairness-type hearing, then, as we have pointed out in our brief, there are very good reasons why under the law that the plaintiff is required to advise the defendant of the charges which he is to defend against and particularly where those charges involve, under whatever guise or whatever label, charges of fraud, deceit, misrepresentation,

failure to disclose or whatever. What is it that we are supposed to have done? When, as and if we walk into the courtroom to try this case, what is it that we are supposed to defend against? Why is it that we are being told that the vote of these shareholders should not be considered by the Court?

Now, to that extent there is a very good reason, if someone wishes to pursue that avenue of inquiry in a case of this kind, that both the Court and the parties should be informed on what type of case is it that we are here to try, what is it that we are here to determine, what are the issues before the Court, what sort of evidence is it that we are going to have, rather than wander in and wonder just what it is that we are talking about.

To suggest that in the latter type of case -- I will put it in -- I am not quite sure what terminology to use. But the type of case in which the plaintiff is seeking to avoid the results of the vote of the minority, what I think we are looking at in that situation is very different from the Singer-Tanzer type case. I think that both the Court and the parties have got to understand that where a shareholders' vote is taken, where the shareholders are given the opportunity

to vote and who do, in fact, vote on a matter, then as long as that vote is not tainted, I do not believe it is either proper or necessary for the Court to go behind that vote to try to second-guess whether it was wise or unwise or whatever of those shareholders to have voted on whatever it is they voted on, because there then is created presumptions based upon presumptions. There may be a lot of reasons why shareholders may at a particular time want to vote for a particular measure or a particular transaction to which someone else would say, well, I wouldn't vote for that. I think that's stupid. But we don't know why they did. We don't know what their motivations were. They may have had tax reasons. They may have had all kinds of reasons why they wanted to do what they did, as long as the question is, did they have a fair opportunity to vote and did they then vote. And if the answer is to those questions yes, we don't go behind it and second-guess them and start all over again.

And I submit, Your Honor, that if we end up in this case with a situation in which the issue before the Court is was the vote of these minority shareholders in any way tainted -- and that is our issue, and we know that is the issue -- then that ought to be presented to the Court affirmatively and not in some

sort of backhanded fashion as we now have it and as I submit is not a part of the present pleading in this case.

If I may just take a moment, there were a couple of other things. First of all, this business of whether this is a Rule 12 motion or summary judgment motion, it is a Rule 12 motion. Mr. Prickett takes the fact that an affidavit was filed and from that spins off into a summary judgment. Our affidavit which we filed is an informational affidavit which has no bearing nor is it a part of the motion or the merits of the motion itself. It simply is advising the Court as of the present time as to the number of shares which have up to that time been actually turned in and relinquished by the former shareholders. That affidavit could be wholly ignored and have absolutely nothing to do with the motion before the Court. So we are not dealing with a summary judgment motion here.

Secondly, the suggestion that one should view a Rule 12 motion not only for what is in the complaint but what somebody might put in the complaint stretches it a little bit. I think that both the Court and the parties have to deal with that which is pleaded. I don't mean in the strictest sense of the word. People

have to use some sort of reason in terms of what are they really saying and what really is the theory here. But it is very clear, as we have pointed out, what the plaintiff's theory has been and is as expressed in the complaint which is under consideration, and that is a breach of fiduciary Singer-type case and no more or different from.

I find myself chewing on the inside of my lip when I hear the types of statements made by counsel factually and a wish to litigate these issues about all these claims he makes as he stands here about these nasty rotten things that people are supposed to have done. I just want to make very clear to the Court that that is the plaintiff's argumentative view of the facts as they have come forward, and as in all cases where facts are presented by advocates, they do not necessarily represent the correct state of the facts. I don't want to get into arguing, though, but I do want to make it clear that those are not the stipulated facts in this case by any means whatsoever.

And I think with that, unless there are comments from the Court, I have concluded my remarks, Your Honor.

THE COURT: All right. Thankyou very much,

Mr. Halkett. Again, I can't really think of anything to ask. You gentlemen have both been very expressive in putting forth your positions, and I am not going to tamper with it. I think I understand it and will not try to talk myself out of understanding your representative positions.

Mr. Balotti, do you have anything to say?

MR. BALOTTI: Nothing further, Your Honor.

THE COURT: All right. Gentlemen, I appreciate your argument. It seems to be my week or month for getting interesting cases. In this one you seem to continually raise points that are interesting. Unfortunately, they are also difficult. But the way you present them is certainly well received by the Court.

I must confess that I suppose I do get into trouble sometimes by putting things in opinions that probably you shouldn't and that they may come back quite often. I hear about them. I did make some reference to a chameleon, which Mr. Prickett saw fit to point out. But I will also make another one now. I can't help but still being in the position of feeling that I can't quite catch up with the complaint. I don't mean that one way or the other, but did any of you ever try to catch a wounded bird or something with a broken

wing, where you have to grab quick but be delicate when you do it, and about the time you reach for it, it hops away and you have to go again? That is how I kind of feel about the way this case has progressed through derivative and class and the various motions. And it seems that every time I am ruling on something, that about the time I get done, there is going to be a change in the complaint or at least an application for a change in the complaint or how to construe it. And I only say that because we have the application to file the amended complaint. I am wondering what bearing that has. I have to maybe take a look at it. I am wondering if I am engaging in another act of futility if I rule in some fashion on the complaint I have and then Mr. Prickett has got one that is in more detail which may wipe out what I have done.

MR. PRICKETT: Well, Your Honor --

THE COURT: Let me say this. I think I understand Mr. Halkett's position, being that I shouldn't get to that point because I ought to dismiss the one I have.

MR. PRICKETT: Well, Your Honor, I don't know whether Your Honor is inviting comment, but let me --

THE COURT: Not a whole lot, but go ahead. I have a racehorse group waiting in the other courtroom that I am ten minutes late for, but go ahead.

MR. PRICKETT: Your Honor, the bird hasn't moved.

THE COURT: Maybe not. I wanted to stress the fact that I only got that impression. I am not saying it has as a matter of law.

MR. PRICKETT: Well, let me clear up the fact. The bird hasn't moved. When we described the bird first, deliberately it had been withheld from us, the outlines of the bird. We described it as best we could at the time.

THE COURT: I understand.

MR. PRICKETT: Now, when Your Honor came to look at the bird in April, we knew a lot more then, and I say frankly we could have described the conspiracy in a lot more detail: the plumage, the tails, the feet. We did not do that. I would now, but it wasn't deliberate, and I certainly didn't change it at all. It never changed. It alleges a conspiracy, and it is still a conspiracy. It is a violation of Singer, but it is a new wrinkle on the violation of Singer. It is a conspiracy by that group to avoid Singer by putting a

vote in. It hasn't changed.

Now, Your Honor described the bird at a time when we don't think you had to do it. You were dealing with a derivative action, and you were dealing with a class action. But I didn't change it. It was the same. I have now at the suggestion of the defendants filed a motion for leave to amend, but I think the complaint as originally stated, as cut down by Your Honor in terms of the derivative action, still states a cause of action as strictly viewed. That is what is before the Court. Does it or does it not state a cause of action in terms of its original language? And if it doesn't, does the Court say I am not going to dismiss the action but I am going to strike the complaint and I am going to consider the motion for leave to amend?

THE COURT: Okay. I think I understand. And I certainly meant to cast no aspersion on either side in the drafting of your pleadings, which perhaps I did unintentionally in the earlier opinion, and your positions you are taking. I am only trying to express the difficulty as a country boy I seem to have keeping up with things. But I will get there if you give me enough time. Mr. Halkett.

MR. HALKETT: Your Honor, you asked a

question, and I think it certainly is one which hopefully a remark or two may be helpful, and that is the question of is this exercise through which you are now being put an exercise in futility or is it, in effect, moot. And we suggest it is not, because if our legal position is correct, then however this case proceeds by whatever means, I think that we will know, both sides, whether we are talking about proceeding as a Singer type case or as a some other type case and what it is. It includes, as I have suggested, a burden of proof, the type of issues that will be before the Court in the preparation for and the readiness for trial. These are matters which are not moot and which will be determined by your ruling on this motion regardless of the form that we later take.

THE COURT: All right. I understand that.

MR. HALKETT: And since we are talking about birds of a feather, I suggest the complaint started out as a Chihuahua and, having determined that there is no Chihuahua there, we are now strapping on a false beak, sticking feathers to it and otherwise and saying it was a bird all the time.

THE COURT: All right. As I started out by saying when I made the remarks, I guess I talk too

much sometimes. I didn't mean to spur you gentlemen to the heights of simile that you have risen to, but they are very good, and I think that helps me understand. All right.

Thank you for a well-presented argument, and I will do my best to do it justice in trying to give you a decision on it. Thank you very much.

(Court adjourned at 12:15 p.m.)

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CERTIFICATE

I, LORRAINE B. MARINO, Official Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 2 through 41 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above stated cause, before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this day of September, 1979.

Official Reporter for the Court of Chancery of the State of Delaware

Transcribed by: Patricia Ann Bilson