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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM B. WEINBERGER, Appellant, 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, Appellees.	)	No.

NOTICE OF APPEAL OF INTERLOCUTORY ORDERS

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PLEASE TAKE NOTICE that the plaintiff, William B. Weinberger (plaintiff below, appellant) (hereafter referred to as "Mr. Weinberger" or "the plaintiff"), does hereby appeal to the Supreme Court of Delaware from the orders of the Delaware Court of Chancery in and for New Castle County

by Vice Chancellor Brown dated April 26, 1979, in Civil Action No. 5642.

1. The Nature and Stage of the Proceedings:

A. As to the Derivative Counts

On May 26, 1978, the plaintiff was a stockholder in UOP. In the merger, UOP and Sigco were merged. UOP was the surviving corporation. The plaintiff still has his UOP stock certificates. After briefing and argument, the Court below, by its order dated April 26, 1979, on its opinion of April 3, 1979, has dismissed the derivative counts. This order is in effect a final order as to the derivative counts. A copy of the opinion and order are attached, marked Exhibit "A" and "B".

B. As To the Size of the Certified Class

On July 5, 1978, the plaintiff filed a class and derivative action in the Court of Chancery in and for New Castle County in connection with the cash-out merger by The Signal Companies of the public shareholders of UOP, Inc. ("UOP") for $21.00 per share on May 26, 1978. The complaint in essence alleged that Signal, the owner of 50.5% of the common stock of UOP, without any proper business purpose but solely for its own economic advantage, entered into a conspiracy with the management and directors of UOP (some of whom were directors and officers of Signal) and Lehman Brothers Kuhn Loeb, Inc. ("Lehman Brothers"), an investment banker retained ostensibly by UOP to advise the Board and stockholders of UOP on the merger plan, to persuade the public stockholders of UOP that the merger proposed by Signal was in the best interest of the public stockholders of UOP, and that their corporate fiduciaries (i.e., the UOP

directors and management as well as Signal and Lehman Brothers) had been vigilant in protecting the rights of the UOP stockholders in negotiating the merger and particularly in obtaining a fair price for the stock of UOP held by the public stockholders.

All of the defendants, after obtaining an extension, entered a general appearance in August, 1978. After the production of documents by the defendants, depositions of the defendants were commenced in the Fall of 1978. On December 15, 1978, the plaintiff filed a motion and a brief seeking certification as class representative for all of the public stockholders of UOP who, prior to the merger, had owned a little less than one-half of the 11,488,302 common shares of UOP stock outstanding. This motion for class certification was not opposed by the defendants except on two relatively narrow grounds: first, the plaintiff was not a proper class representative and, second, that the class should not include any stockholder who voted in favor of the merger or who, since the merger, surrendered his shares. After briefing and argument, the Court below held that the plaintiff was a proper class representative, but decided that the class should "consist of only those former shareholders of UOP who are not disputed by the defendants as constituting a proper class, namely those former shareholders of UOP who voted against the merger and/or have not turned in their stock certificates in exchange for the $21. payment." (Opinion of the Court below, April 5, 1979, page 5.) The practical effect of this decision is in effect a denial of certification. A copy of the opinion and order are attached, marked Exhibit "C" and "D".

C. Denial of Certification By the Court Below

On April 27, 1979, the plaintiff applied to the Court below for certification to this Court of interlocutory appeals from its order of April 26, 1979. The application was refused. A copy of the Court below's opinion of May 7, 1979, is attached, marked Exhibit "E".

2. The Facts are:

(a) As to the dismissal of the derivative count. The relevant facts are set out above in Section 1.

(b) As to the order certifying the size of the class.

On May 28, 1978, UOP had 11,488,302 common shares outstanding of which Signal owned 50.5%. The complaint alleges that Signal entered into a conspiracy with the other defendants to convince the public stockholders to vote for a plan of merger that would in effect, through a merger, oust the public stockholders from UOP at a price of $21.00. The complaint alleges that this plan of merger was without any proper business purpose other than to advance the economic interest of Signal in taking over the equity position of the public stockholders of UOP. The plan of conspiracy succeeded: at the annual meeting, the public stockholders voted by about 12-to-1 in favor of the plan of merger. The plan of merger was contingent on a majority of the public stockholders voting in favor of the plan and, thus, the conspiracy to persuade the public stockholders succeeded.

The plaintiff requested certification as class representative of all the public stockholders who were subject to

the conspiracy. The Court below held that the class "should consist only of those former stockholders of UOP who are not disputed by the defendants as constituting a proper class, namely those former shareholders of UOP who voted against the merger and/or have not turned in their stock certificates in exchange for the $21. per share payment."

Signal's brief in the Court below reveals that as of January 31, 1979, all but 147,593 shares of common stock have been turned in. Thus, out of a possible class of holders of about 5,700,000 shares, who were the targets of the conspiracy alleged in the complaint, the Court has excluded from the class all those who were taken in by the conspiracy (i.e., those who voted for the merger) and all those who have since turned in their shares.

3. Applicable Rules:

(a) Rule 41(b) provides:

> "(b) Requirements For Accepting A Certification. Certification will be accepted in the exercise of the discretion of the Court only where there exist important and urgent reasons for an immediate determination by this Court of the questions certified. A certification will not be accepted if facts material to the issue certified are in dispute. A certificate shall state with particularity the important and urgent reasons for an immediate determination by this Court of the question certified. Without limiting the Court's discretion to hear proceedings on certification, the following illustrate reasons for accepting certification:
>
> > "(i) The question of law is of first instance in this State;
> >
> > "(ii) The reported opinions of the trial courts are conflcting upon the question of law;
> >
> > "(iii) the question of law relates to the constitutionality, construction or application of a statute of this State which has not been, but should be, settled by the Court."

(b) Rule 42(b) provides:

> "(b) Requirements For Certification Of Interlocutory Appeals. An appeal from an interlocutory order in a civil case will be allowed only if:
>
> "(i) The order of the trial court determines a substantial issue and establishes a legal right; and
>
> "(ii) This Court determines that:
>
> "(A) Any one of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41 is applicable; or
>
> "(B) The interlocutory order has sustained the controverted jurisdiction of the trial court; or
>
> "(C) The interlocutory order has vacated or opened a judgment of the trial court; or
>
> "(D) A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice."

4. The substantial issues determined, the legal rights established and the reason for the immediate appeal from the orders of the Court below are:

(a) As to the dismissal of the derivative count.

(i) The Court below has dismissed the derivative count. This is in effect a final order so far as the derivative count is concerned.

(ii) The question of law is one of first instance in this State (Rule 41(b)(i)); and the question of law relates to the construction or application of a statute (8 Del.C. §327) of this State which has not been but which should be settled by the Court (Rule 41(b)(iii)).

This Court, by its order dated April 26, 1979, on its opinion of April 3, 1979, has dismissed the derivative counts. In doing so, it has substantially extended the doctrine found in Heit v. Teneco, 391 F.Supp. 884 (D.C. Del. 1970), Braasch v. Goldschmidt, 199 A.2d 760 (Del. Chan. 1964), and Bokat v. Getty Oil Co., 262 A.2d 246 (Del. Supreme 1970). These cases collectively hold that to maintain a derivative action, the corporation for whose benefit the suit is brought must survive the merger. In addition, these cases hold that pursuant to 8 Del.C. §327, the plaintiff stockholder must be a stockholder at the time of the wrong and continue to be a stockholder. The reason for requiring that the plaintiff be a stockholder at the time of the wrong is to prevent the purchase of stock simply to bring suit: the reason for requiring continued retention of stock is so that the plaintiff retains his status and relationship with the corporation for whose benefit he brings suit. In all of these cases, the company for which the plaintiff was seeking to bring a derivative action did not survive the merger. In all three cases, it was held essentially that since the corporation did not survive, the plaintiff stockholder had no standing to bring a derivative action. These cases would not seem to be authority for the Court below's decision in the present case.

The Court below has now held that, even where the plaintiff continues to hold the stock and the corporation in which the stockholder holds stock survives the merger and is in existence (as UOP is), the terms of the merger purporting to convert the stockholder involuntarily into a creditor in

and of itself has the legal effect of precluding the plaintiff from bringing a derivative action on behalf of the surviving corporation. (Note) Such a holding unnecessarily and prematurely gives judicial recognition and force to the merger under challenge. This holding is not based on prior holdings of the Courts of this State nor the rationale of their holdings. Rather, the ruling is one of first instance in this State. If the doctrine is to be thus extended, it should be done by the Supreme Court. The ruling determines substantial issues and is determinative of the rights of the parties and therefore should be subject to review by the Supreme Court of Delaware. (Gimbel v. Signal, 316 A.2d 619 (Del. Supr. 1974)). Moreover, the Court below's ruling is inconcistent with both Singer v. Maganvox Co., Del. Supr., 380 A.2d 969 (1977), and Bruno v. Contran, Del. Ch., C. A. No. 5428 (November, 1977), a copy of which is attached. In Singer, the Delaware Supreme Court held that a majority stockholder had a fiduciary duty of fairness to the minority when seeking to consummate a merger by which it becomes sole owner. In Contran, this Court held that a derivative claim to recover the expenses of an allegedly unfair merger proposal which had been withdrawn stated a cause of action. For this Court to hold that the consummation of such a merger terminates that cause of action contravenes the fairness policy of Singer, and unjustly enriches a fiduciary

Note: This Court does seem to recognize that which corporation survives a merger is determinative since the Court in the same opinion has quashed service on Sigco Incorporated, stating: "The merger combined UOP and Sigco with UOP being the survivor."

who has breached its duty.

The ruling of the Court below of April 3, 1979, as to the derivative counts is inconsistent with the Court below's ruling of April 5, 1979, limiting the class. In the April 3rd ruling, the Court below has held that the former stockholders were all converted to creditors: in the April 5th ruling, the Court below held that the former stockholders "who voted against the merger of UOP and/or who have not turned in their stock certificates in exchange for the $21. per share payment" are still stockholders. Thus, in one instance, the Court below precluded a suit by stockholders and, in the second instance, the Court below has permitted a suit by some but not all stockholders.

The defendants conceded that this action qualified as a class action under Rule 23 in all respects except two (i.e., (1) that plaintiff was a proper representative, and (2) that the class should include all minority shareholders). The Court below, by its order dated April 26, 1979, on its opinion dated April 5, 1979, has ruled that the plaintiff is a proper class representative but by its opinion has eliminated from the class, without notice, all stockholders except those "who voted against the merger and/or have not turned in their stock certificates in exchange for the $21. per share payment".

The Court below characterizes this as a Singer case: in Singer, this Court held that the minority was entitled to a hearing on fairness. The present holding of this Court circumvents the doctrine of Singer by limiting those entitled to the hearing to those "who did not vote for the

merger and/or who have not turned in their stock in exchange for the $21. per share payment". The sole basis for this decision of the Court below appears to lie in the fact that the plan for the elimination of the minority contains a "wrinkle": it was structured by the defendants to require that the majority of the minority vote for the merger. The Court construes this feature of the merger proposal to mean that approval by the majority of the minority reflects their acquiescence in the fairness of the transaction. This holding, however, ignores the fundamental fact that the stockholders of UOP who voted for the proposal relied in good faith, as they had a right to, upon their fiduciaries. The complaint alleges a conspiracy among all the defendants directed against the minority shareholders to get them to believe that the defendants, who are fiduciaries, had protected the minorities' interests. If the broad holding of Singer is to be thus narrowed, it should be by this Court.

The Court below should not preclude without notice potential class plaintiffs, some of whom, on the one hand, are aware of their legal rights and, some of whom, on the other hand, are known to be relying on this very lawsuit for vindication of their rights. Lutz v. Garber, 357 A.2d 746, 751-2 (Chan. 1976). Rule 23 should be liberally interpreted. Parker v. University of Delaware, 75 A.2d 225 (Chan. 1950). Class certification and notice to the class is simply notice and an opportunity to the members of the class to join or decline to join in the action. The right to become members of the class or decline to become members of the class should not be summarily adjudicated without

notice to those involved. Accord Turoff v. Union Oil Co., 61 F.R.D. 51, 57-58 (1973).

Rule 23 is purely procedural. Wilmington Trust Co. v. Schnieder, 320 A.2d 709, 710 (Del. Supr. 1974). The decision as to whether certain members of the class are precluded by an affirmative vote for the merger should not be summarily adjudicated in a Rule 23 motion: it should be done only on a motion for summary judgment or (where there are factual questions) after trial. Dolese Bros. Co. v. Brown, 157 A.2d 784, 789 (Del. Supr. 1960). If a Rule 23 motion is to be used in this fashion, this Court should be afforded the opportunity to rule at this point.

The complaint was filed based on the public information that was available to the plaintiff and his attorneys at the time. Additional information has become available through the plaintiff's discovery. The Court below chose to disregard the additional information that was in the record. Instead, the Court has strictly construed the original complaint in such a way as to preclude the vast majority of stockholders against whom the dominant majority and the other defendants conspired. In doing so, the Court below eliminated the rights of the minority shareholders without considering the discovery to date or postponing a decision on class action certification pending an amendment to the complaint in the light of discovery. Koffler v. McBride, 283 A.2d 855, 858 (Chan. 1971). The purpose of a complaint is to give the defendants notice: it should not be construed narrowly and strictly in the context of a Rule 23 motion for the purpose of narrowing the class. Klein v. Sunbeam Corp., 94 A.2d

385, 391 (Del. Supr. 1952); Harf v. Korkorian, 347 A.2d 133, 134 (Del. Supr. 1975); Herrmann, The New Rule of Procedure in Delaware, 18 F.R.D. 327 (pgs. 338 and 342).

The Court below limited the class to those UOP stockholders "who voted against the merger of UOP and/or have not turned in their stock certificates in exchange for the $21. per share payment". This limitation appears to come directly from the last line of the last page of defendant's brief (page 33, Brief of Signal Companies, Inc. in Opposition to Plaintiff's Motion for Certification of the Class Action"). This Court's second limitation allows stockholders who voted for the merger but who for any number of reasons do not happen to have turned their certificates in to participate in the class while excluding all other stockholders who voted in favor of the merger. (Note) The plaintiff does not believe there is any basis in fact or in law for the line the Court below has drawn. Furthermore, the Court's decision specifically eliminates stockholders from the class who indicated non-approval of the merger by not voting at all but have since turned their certificates in. On the other hand, as pointed out, the Court's decision permits stockholders to join the class who affirmatively signified approval by voting for the merger but who have not turned their certificates in.

Note: The Court below did not give any date when turning certificates in will vitiate the right to be a member of the class. The plaintiff notes that the anniversary of the merger is in May. Thus, many stockholders, unaware of the rights that the Court below's ruling has given them, may forfeit that right by now turning their certificates in.

For the foregoing reasons, the plaintiff respectfully requests this Court to accept this interlocutory appeal.

Respectfully submitted,

PRICKETT, WARD, BURT & SANDERS

By _____
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Attorney for Appellant

May 25, 1979

The undersigned, attorneys of record for the appellees above named, hereby signify their acceptance and acknowledgment of service of the foregoing Notice of Appeal of Interlocutory Orders, in duplicate, on this ____ day of May, 1979.

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