Doc. #127

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 BRIEF IN SUPPORT
OF HIS MOTION THAT THE CLASS BE ENLARGED

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NATURE OF THESE PROCEEDINGS

At the outset of the trial on the merits, the plaintiff served and filed a motion for the enlargement of the class to include all stockholders of UOP as of the time of the merger, May 26, 1978. This is the plaintiff's brief in support of that motion.

STATEMENT OF RELEVANT PROCEEDINGS

This action was originally filed as a class action. A motion for class certification was served and filed by the plaintiff. After briefing and argument, the Court handed down an opinion on April 5, 1980:

(a) Certifying the plaintiff, William B. Weinberger, as a class representative.

(b) Limiting the class to "those former stockholders of UOP who voted against the merger and/or have not turned in their stock certificates in exchange for $21 per share payment".

The plaintiff took an interlocutory appeal from that part of the decision limiting the class as delineated in (b) above. The request for an interlocutory appeal was refused by the Supreme Court.

An amended complaint was filed by the plaintiff after an order was entered dismissing the original complaint. An order for notice to the members of the class by the Court's order was entered on March 11, 1980. This order provided in pertinent part:

> "* Without prejudice to or waiver of plaintiff's right to appeal or move for modification or enlargement of the class, the parties agree that for purposes of the present notice, the shareholders of the class established by the Court's Order of April 26, 1979, shall consist of those shareholders as of May 26, 1978 who have not exchanged their shares for $21.00."

At the commencement of the trial, a motion for reconsideration of the certification order to include all minority shareholders as of the time of the merger of May 26,

1978, was served and filed.

This is the plaintiff's brief in support of his motion.

QUESTIONS PRESENTED

I. DOES NOT RULE 23(c)(1) SPECIFICALLY RESERVE THE POWER TO THE COURT TO ALTER OR AMEND AN ORDER ON CERTIFICATION?

II. SHOULD NOT THE COURT RECONSIDER THE MAKEUP OF THE CLASS IN TERMS OF THE ALLEGATIONS OF THE AMENDED COMPLAINT?

III. SINCE ALL OF THE MINORITY STOCKHOLDERS RECEIVED PRECISELY THE SAME INFORMATION, IS NOT THE REQUIREMENT OF COMMONALITY SATISFIED?

A R G U M E N T

I. RULE 23 GIVES THE COURT POWER TO AMEND THE MAKEUP OF A CLASS AT ANY TIME PRIOR TO A DECISION ON THE MERITS

Chancery Rule 23(c)(1) provides:

> "As soon as practicable after the commencement of an action brought as a class action, the Court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional and may be altered or amended before the decision on the merits." (Note)

In 1966, when subsections (c)(1) were added to Rule 23, the Notes of the Advisory Committee on the Rules stated (Fed. Rules Civ. Proc. Rule 23 c.2, 28 USCA pg. 300, 39 F.R.D. 69 at 105):

> "In order to give clear definition to the action, this provision requires the Court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

Note: In Walsh v. City of Detroit, 412 F.2d 226, (CA 6 1969), the Sixth Circuit said in dismissing an appeal from an order of the District Court granting class certification on reconsideration:

> "Rule 23(c)(1) provides in part:
>
> "'An order [entered] under this subdivision may be conditional, and may be altered or amended before the decision on the merits.'
>
> "Even without this Rule, the District Court had the power and authority to reconsider any of its orders entered during pendency of the case, which orders had not become final."

> "An order embodying a determination can be conditional; the Court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound."

Chancery Rule 23 is verbatim the same as Federal Rule 23. So far as the plaintiff can determine, there have been no Chancery Court cases involving the authority of the Court to alter or amend the makeup of a class pursuant to Rule 23. (Note) The Federal case law clearly establishes that the Courts have exercised the power under Rule 23(c)(1) to alter or amend the makeup of a class before a decision on the merits.

Newberg's Class Actions, Vol. 1, Div. 7, "Reconsideration", 2192, page 647, states:

> "Many things may lead to reconsideration of an original class ruling ... a multiplicity of actions may be developing, or a change of circumstances may have already occurred, which would suggest reconsideration of the class ruling ... The ability of a court to reconsider its initial class rulings ... is a vital ingredient in the flexibility of courts to realize the full potential benefits flowing from the judicious use of the class action device. (Citing Cases)"

In Eovaldi v. First National Bank of Chicago, 71 F.R.D. 334 (N.D. Ill. 1976), reversed on other grounds, 596 F.2d 188 (7th Cir. 1979), a case involving an alleged violation

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Note: Rule 23 has not been adopted by the Superior Court and, therefore, obviously there are no cases or precedents that might be helpful on the law side.

of the Truth in Lending Act, the Court held:

> "Rule 23(c)(1) and (2) do not require prompt notification to members of the class but merely require that the class be certified or defined as soon as practiable. This certification can be amended at any time before a decision on the merits and, under some circumstances, even thereafter."

In Weisnow v. M.C.A. Inc., 45 F.R.D. 258 (D.C. Del. 1968), Chief Judge Wright said in certifying the action:

> "In light of the circumstances shown to the Court, it is persuaded that the interests of the class will be fairly and adequately protected. It may be that new factors will come to the Court's attention in due course; if so, this Court has the power to consider them and to amend its conclusion accordingly. Rule 23(c)(1); Advisory Committee's Note, Proposed Rule of Civil Procedure 23, 39 F.R.D. 95, 104 (1966)."

In Zenith Laboratories, Inc. v. Carter-Wallace, Inc. (C.A. 3rd 1976), 530 F.2d 508, the Court said:

> "Judge Stern, who had replaced Judge Whipple by normal rotation, reconsidered the prior class certification after Zenith had amended its complaint. He determined that the asserted class was an improper mix of licensees and mere purchasers and concluded that Zenith was not an appropriate class representative of either group. Zenith Laboratories, Inc. v. Carter-Wallace, Inc., 64 F.R.D. 159 (D.N.J. 1974). Zenith was ordered to amend its pleading to eliminate class allegations, and the case continued as a private action.
>
> "Thereafter, the court entered summary judgment in favor of Carter because it could find no theory upon which Zenith was entitled to recover its excess payments to Carter. Zenith appeals from both the judgment against it and the denial of class status.
>
> "... In addition, Zenith had added four counts to its complaint, at least one of which was not even anticipated in its first complaint. Judge Stern also believed that Judge Whipple's class certification might have been based upon the

> erroneous assumption that Zenith was an express licensee of Carter. These considerations warranted the reevaluation of the original class certification."

See also Griffin v. Harris, (CA 3 1978), 571 F.2d 767.

In Bentkowski v. Marfuerza Compania Maritima, (E.D. Pa. 1976), 70 F.R.D. 401, at 406, the Court said:

> "To some extent guidance was found in the proposition that an erroneously certified class is always subject to reconsideration or modification if facts become evident which require such action: Wright & Miller, Federal Practice and Procedure: Civil §1785."

In Jimenez, et al. v. Weinberger, 523 F.2d 689 (7th Cir. 1975), the Court states:

> "The Rule unquestionably allows the District Judge to exercise this discretion in deciding upon the earliest 'practicable' time to determine whether the case is to be processed as a class action; but the text certainly implies, even if it does not state expressly, that such a decision should be made in advance of the ruling on the merits. For the explicit permission to alter or amend a certification order before decision on the merits plainly implies disapproval of such alteration or amendment thereafter. On the other hand, that degree of flexibility permitted before the merits are decided also indicates that in some cases the final certification need not be made until the moment the merits are decided."

See also Baxter v. Greater Minneapolis Area of Realtors, (D.C. Minn. 1973), 61 F.R.D. 416; U.S. v. Truckee-Carson Irrigation Distributors, 71 F.R.D. 10; Dolgow v. Anderson, (S.D.N.Y. 1968), 43 F.R.D. 472; and In Re Caesar's Palace Securities Litigation, (S.D.N.Y. 1973), 360 F.Supp. 366.

* * *

The Federal cases show that the power expressly reserved to the Courts in Rule 23(c)(1) has been extensively used to alter or amend an original order of certification.

II. IN THE LIGHT OF THE AMENDED COMPLAINT, THE COURT SHOULD RECONSIDER AND ALTER ITS ORIGINAL RULING ON THE CERTIFICATION SO FAR AS THE COMPOSITION OF THE CLASS IS CONCERNED SO THAT IT INCLUDES ALL MINORITY STOCKHOLDERS OF UOP

It is clear from the foregoing section that Rule 23(c)(1) specifically gives to the Court the power to alter or amend or revise its order on certification. This power, as was indicated, is specifically reserved to the Court in view of the earlier requirement in Rule 23(c)(1) itself that certification take place as soon as practicable. As will be shown in this section, the necessity for early certification led to the Court's decision to restrict the class to those stockholders who had in effect voted against the merger and/or who had not surrendered their UOP shares.

The reason that led this Court to restrict the class as it did is clear from the Court's opinion. The plaintiff filed this complaint on July 6, 1978, shortly after the merger of May 26, 1978. (Even though the complaint was filed promptly after the merger, the defendants still tax the plaintiff with laches.) As the Court's opinion indicates, the only information available to the plaintiff, Mr. Weinberger, at the time was the information disseminated to the public through the media and by the defendants directly to the UOP stockholders in the form of letters, financial reports, and the proxy statement. Thus, at the time the complaint was filed, Mr. Weinberger, the plaintiff, had very

limited information. He filed a complaint that the Court carefully analyzed in connection with the class action motion, saying (Opinion of April 5, 1979, page 5):

> "I have gone to this somewhat tedious length in summarizing the complaint in order to illustrate several things. First, the complaint at one place charges defendants with certain fiduciary duties, i.e., to oppose a merger which has no business purpose and which is designed to cash-out the minority at an unfair price. At another, it simply charges, at best, that the defendants have violated their duty by not opposing a merger which had no business purpose and which eliminated the minority at a grossly inadequate price. To view this as pleading conclusions is to recognize the obvious. Under the decision of Singer v. Magnavox Co., Del. Supr., 380 A.2d 969 (1977), however, this appears to be sufficient to state a cause of action and to require the Court to hold a fairness hearing. See also, Tanzer v. International General Industries, Inc., Del. Supr., 379 A.2d 1121 (1977); Najjar v. Roland Inter. Corp., Del. Ch., 387 A.2d 709 (1978). Defendants have apparently recognized this, and have made no challenge to the complaint with regard to its stating a cause of action.
>
> "This leads to the other point of illustration. Such general allegations apparently being sufficient to state a cause of action, the complaint contains no specific allegation that the proxy statement was false or misleading. At best, this has to be assumed from the allegations that the Lehman Brothers opinion accompanying the proxy statement was not truly an independent opinion, etc. The complaint contains no specific allegation that the minority shareholders were deceived in any way into voting overwhelmingly in favor of the merger. Again, to the extent that the complaint may intend to encompass this, it must be gleaned from between the lines of the actual allegations that have been made. Finally, it is difficult to nail down the type of relief that is sought on behalf of the former minority shareholders. In general terms, the complaint asks for 'judgment' for 'the losses incurred by the class' because of the 'acts of the defendants'."

The Court then went on to say (Opinion of April 5, 1979, page 8):

> "Having thus digressed, I turn to a determination of the composition of the class in this action.
>
> "Weinberger takes comfort in my memorandum opinion of December 14, 1978 in which, despite certain logical arguments by the defendants, I nonetheless held that the class to be represented in the Singer v. Magnavox Company litigation was to be comprised of all minority shareholders of Magnavox as of the effective date of the merger which eliminated their equity interests in the corporation, regardless of when or under what circumstances the members of the minority acquired their holdings. Weinberger suggests that this case presents an identical situation. However, this is not entirely so."

After pointing out that the Singer case was different in that, inter alia, the Supreme Court had in effect ruled that the class should consist of all the minority stockholders, the Court went on (Opinion of April 5, 1979, page 10):

> "Here, however, the situation differs. As the defendants point out, the merger agreement here was structured so that it could not be approved unless it received the favorable vote of a majority of the 49.5 per cent minority shares. It could not be approved solely by the majority of UOP's outstanding stock controlled by Signal as was the case in Singer. As such, under the terms of a merger agreement, Signal lacked the capacity to use its voting position as majority shareholder to bring about a cash-out merger in violation of a fiduciary duty owed to the minority. Rather, the decision was left to the minority shareholders, and they voted overwhelmingly in favor of the merger and its cash-out terms.
>
> "In his deposition, 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. Thus, it would seem obvious that Weinberger finds a basis for his suit in the same information that was sent and available to all other minority shareholders of UOP. Yet by far the majority of these other minority shareholders have voted to approve the merger, turned in their shares and received their payment. Under these circumstances, I agree with the defendants that it would be improper to include these persons in the class sought to be represented."

The Court then pointed out that the original complaint did not sound in fraud or deceit, saying (Opinion, page 11):

"Despite Weinberger's assertions for the purpose of this motion as to what the complaint says, it seems clear to me from its language that it seeks the recovery of money damages against the defendants for an alleged breach of a fiduciary duty owed to minority shareholders in the context of a merger proposed by the defendants. It is a 'Singer complaint'. It does not charge fraud or deceit on the part of the defendants nor does it allege that the approval of the merger was obtained by fraud or deceit. ***

"Thus, in sum, Weinberger seeks recovery against the defendants on behalf of himself and others who opposed the merger, or have not turned in their stock, based upon the premise that the defendants, who technically could have stopped the merger and in his view had a fiduciary duty to do so, allowed the merger to go through to the detriment of those minority shareholders who opposed it and who wanted to continue as shareholders of UOP."

The Court then concluded (Opinion, page 13):

"For the foregoing reasons, I conclude that the class sought to be certified should consist only of 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 per share payment."

The defendants (taking a lead from the dictum in the Opinion of April 5, 1979) moved to dismiss the original

complaint. The Court, after briefing and argument, did dismiss the original complaint as legally insufficient. However, the plaintiff moved for leave to file an amended complaint: this motion was not opposed and an amended complaint was filed and the defendants have answered on the merits. Indeed, the case went to trial on May 18-June 3, 1980, on the basis of the complaint and the answer.

The amended complaint was based on what the plaintiff after extensive discovery had uncovered. This information was unknown to the plaintiff and the other minority UOP stockholders prior to the discovery. The plaintiff discovered that the defendants had obtained the vote in favor of the merger by misrepresenting and omitting facts relating to the merger. Thus, the deficiencies that the Court pointed out in the opinion of April 5, 1979, and in the Court's Opinion on the motion to dismiss the complaint were overcome and supplied by the discovery. No valid purpose would be served by paraphrasing the pleadings or detailing the plaintiff's proof at trial. Actually, the Court is fully familiar with the case as a result of the two-week trial that has taken place. Suffice it to say that the amended complaint clearly sets out the acts of concealment and fraud that vitiate the "majority of the minority" vote that the Court had in its opinion of April 5, 1979, found that insulated the merger from attack by those who had voted for it or who had accepted the merger by turning in their

shares. To put it another way, the complaint (and indeed the proof) shows that the defendants conditioned adoption of the merger based on the right of the majority of the minority to approve or disapprove it. However, the complaint alleges and the proof shows that this method of obtaining a requisite approval from a minority was vitiated by the fact that the defendants violated their duty of complete candor by misrepresenting some facts and omitting other facts that were critical to a proper evaluation of the merits of the merger proposal by the minority stockholders.

In the context of this motion, therefore, the Court is faced with "new factors" (Weisnow v. M.C.A. Inc., supra). Thus, the Court should now, before a decision on the merits, reconsider its order on certification so far as the makeup of the plaintiff class is concerned. The Court should take a fresh look at the situation in the light of the amended complaint and should certify the class as all the minority stockholders of UOP as of May 26, 1978.

III. THE COURT SHOULD CERTIFY ALL THE MINORITY STOCKHOLDERS OF UOP AS OF THE DATE OF THE MERGER AS THE CLASS

Having established that the Court has the authority under the Rule to alter or modify the original certification made at the outset of the case, and having pointed out the reasons why the Court originally felt constrained to limit the class, and having pointed out that the pleading restrictions that existed at the time of the original certification are overcome by the amended complaint, the Court should now take a fresh look at the question of the dimensions of the class: it should certify as the class all minority shareholders of UOP as of the time of the merger date. The reasons are obvious: the complaint pleads (and indeed the evidence proved) that the defendants made material misrepresentations and omissions in the light of their duty of complete candor vis-a-vis the minority shareholders. The result is that the "majority to minority vote" is fatally flawed or tainted by the defendants' own conduct. As originally pointed out, not only Mr. Weinberger but all of the other minority stockholders of UOP received precisely the same public information (i.e., press releases, direct letters, financial statements and the proxy statement). Hence, all minority stockholders of UOP were victims of the defendants' misrepresentations and omissions.

The cases show that the requirements of commonality and typicality under Rule 23(a) and (b) are satisfied when there

is a common course of conduct by the defendants vis-a-vis all those in the proposed plaintiff class. In Swanson v. American Consumer Industries, Inc., (CA 6 1969), 415 F.2d 1326, on remand, 328 F.Supp. 797 (S.D. Ill. 1971), the minority stockholders sought damages and an injunction against a reorganization agreement. It was alleged that the proxy statements were misleading and omitted material facts. The defendants claim that there was no causation shown between the statements and the injury claimed by the plaintiff class, citing Barnett v. Anaconda Co., (S.D.N.Y. 1965), 238 F.Supp. 766. The Sixth Circuit rejected the defendant's argument, stating:

> "We noted above that some of the minority shareholders may have accepted the offer as a result of the deception alleged, and that others may have failed to vote as a result of the notice *** the central question common to all of the minority shareholders is that of deception, and in our opinion this issue outweighs the minor variations among the shareholders based on the degree of reliance ***"

In Berland v. Mack, (S.D.N.Y. 1969), 48 F.R.D. 121, Judge Mansfield first noted the admonition of the Second Circuit that Rule 23 be liberally construed, saying (at page 125):

> "In resolving the question of whether the requirements of Rule 23 F.R.Civ.P. are satisfied, we are mindful of declarations by the Court of Appeals for this Circuit to the effect that the rule must be liberally construed with a view to enhancing the use of class actions as a means of vindicating rights of absent members who are unable, for one reason or another, personally to prosecute; and that the device is particularly suitable for use in suits charging violations of the anti-fraud provisions of the federal securities acts, which have been increasingly recognized

> as a private policing weapon supplementing governmental administrative action. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968); Green v. Wolf Corporation, 406 F.2d 291, 299 (2d Cir. 1968); see also Dolgow v. Anderson, 43 F.R.D. 472, 481 (E.D.N.Y. 1968); Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42, 43-44 (S.D.N.Y. 1966); Advisory Committee on Rule 23, Proposed Amendments to the Rules of Civil Procedure, 39 F.R.D. 69, 103 (1966); J. I. Case v. Borak, 377 U.S. 426, 433-434, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964); Escott v. Barchris Construction Corp., 340 F.2d 731, 733 (2d Cir.), cert. denied, Drexel & Co. v. Hall, 382 U.S. 816, 86 S.Ct. 37, 15 L.Ed.2d 63 (1965); Hohmann v. Packard Instrument Co., 399 F.2d 711, 715 (7th Cir. 1968); Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968), cert. denied, 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459 (1969). We are presented here with a classic type of such alleged fraud involving numerous alleged victims, no one of whom suffered substantial enough damages to shoulder individually the expense of being the 'guinea pig' in a 'test case.' The necessity for use of the class suit as a private policing weapon is less apparent here for the reason that the SEC has already taken up the cudgel and obtained injunctive relief. But these weapons are cumulative, not alternative."

In Jacobs v. Hanson, C.A. 77-500 (D.C. Del.), Judge Stapleton handed down an opinion in a securities action on July 30, 1980 (a copy of which is attached), in which he said:

> "There are clearly questions of law or fact common to the class, so Rule 23(a)(2) is also satisfied. Legal issues arising under the federal securities laws, Delaware common law, and any other theories of liability will be common to all class members, as will factual questions regarding the defendants' conduct.
>
> "The Rule 23(a)(3) test for 'typicality' is met by the lack of any apparent conflict or diversity of interest between the proposed representatives of this class and its members. See Mersay v. First Republic Corporation of America, 43 F.R.D. 465, 468 (S.D.N.Y. 1969). The representatives' claims are also 'typical' in that they arise from the same factual situation and are

based on the same legal or remedial theory. See In re Anthracite Coal Antitrust Litigation, 78 F.R.D. 709, 716 (M.D. Pa. 1978).

"The requirement specified in Rule 23(a)(4) that the representative parties will 'fairly and adequately protect the interests of this class' is satisfied here as well. There is every indication that the representative plaintiffs will pursue this action vigorously, and in the best interests of the entire class.

"As noted above, Rule 23(b) states three distinct rationales for granting class certification. Because I am convinced that this action fits within the rationale for class certification provided by Rule 23(b)(3), I do not need to consider plaintiffs' arguments regarding certification under Rules 23(b)(1) and (2).

"Rule 23(b)(3) provides that an action may be maintained as a class action if

> 'the court finds that the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.'

"The common questions of law and fact in this case, described above with respect to Rule 23(a)(2), clearly outweigh any issues relating to particular individuals. There is a sufficient 'common nucleus of operative facts,' Siegel v. Chicken Delight, Inc., 271 F.Supp. 722, 726 (N.D. Cal. 1967) to satisfy this aspect of Rule 23(b)(3). See Herbst v. International Telephone & Telegraph Corp., 495 F.2d 1308 (2nd Cir. 1974).

"Class certification would, I conclude, be superior to all other methods of adjudicating this case. Class certification would be advantageous in terms of the time, effort and expense necessary to litigate this action, and involves no countervailing disadvantages. Such considerations are sufficient to constitute 'superiority' within the meaning of Rule 23(b)(3). See Katz v. Carte Blanche Corp., 406 F.2d 747 (3d Cir. 1974), cert. denied 419 U.S. 885; Bryan v. Amrep Corp., 429 F.Supp. 313 (S.D.N.Y. 1977)."

In Berland v. Mack, supra, the Court then turned to the heart of the allegations of the complaint, saying (page 125):

> "From this record, it appears that although the complaints allege issuance of false or misleading statements from January 1966 to April 29, 1966, the plaintiffs' claims rest upon the alleged falsity of press releases issued by GAI's management, and statements filed by it with the SEC during the period from March 21, 1966 to April 28, 1966. ***"

The Court then stated the class (at page 126):

> "All parties were initially agreed that the members of the proposed class should be those who purchased GAI shares at any time during the period beginning March 21, 1966 (when the first objectionable press release was issued, see SEC v. Great American Industries, Inc., et al. 407 F.2d 453, 456 (2nd Cir. 1968)) and ending April 29, 1966 (the date when trading in GAI stock was suspended by the SEC for a period of almost six months). Plaintiffs have more recently argued, however, that pretrial discovery with respect to the merits and the identity of the class should be permitted to proceed before notice to the class is given, since it might lead to a more restricted delineation of the class."

The Court then said (at page 126):

> "It may eventually turn out, of course, that those who purchased GAI stock after the first SEC suspension of trading in mid-April 1966, or after GAI's issuance of certain corrective press releases and its filing of supplemental statements with the SEC, will be unable to prove reliance upon the earlier alleged misleading release and thus either have no cause of action or not be qualified for classification with those who purchased shares in late March or early April in reliance upon the first release. That possibility, however, is not adequate cause for deferring our determination. We doubt that discovery would conclusively resolve the issue, unless each and every one of the thousands of purchasers could be deposed which would be impractical. Furthermore, assuming without ruling

> that proof of reliance is essential, that issue may be deferred for separate trial, and if differences within the class later appear, we have the power to reduce the class or create subclasses. Rule 23(c)(1),(4) F.R.Civ.P.; Green v. Wolf Corp., 406 F.2d 291, 301 (2nd Cir. 1968); Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 47 (1968); Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968), cert. denied, 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459 (1969)."

In Bleznak v. C.G.S. Scientific Corp., 61 F.R.D. 493 (E.D. Penn. 1973), a securities case, the Court included within the class all those who had bought stocks after the issuance of inaccurate statements. It did not include in the class anyone who had purchased stocks before that period.

Republic National Bank of Dallas v. Denton & Anderson Co., 68 F.R.D. 208 (N.D. Tex. 1975), was a class action filed on behalf of all former shareholders who sold their stock pursuant to an allegedly fraudulent tender offer. The plaintiffs and defendants disagreed as to whether reliance was an element in a cause of action for securities fraud. The Court held that the Supreme Court had ruled out reliance as an element in a non-disclosure situation. The Court ruled that the reliance question would not predominate during the course of the trial on the merits, saying (page 215):

> "I could agree with the Defendants that reliance should defeat class status if the alleged misrepresentation had varied among the purported class members. In that event innumerable fact questions would be present making treatment as a class action unwise. As stated in the Advisory Notes to Rule 23 and reiterated by the Second Circuit in Green v. Wolf, supra:

> "'... although showing some common core, a fraud case may be unsuited for treatment as a class action if there was a material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed.' 406 F.2d at 300-301
>
> "Such is not the situation here; instead, there is really only one central question and that is whether the minority shareholders of D & A were defrauded. The basic tool of the alleged fraud was the tender offer. Each of the class members received the same document. There simply were no material variations in the representations made to the potential plaintiffs."

In Elkind v. Liggett & Myers, Inc., 66 F.R.D. 36 (S.D.N.Y. 1975), a 10(b)5 case, the Court held (page 40):

> "Defendant L&M argues that there is a lack of predominance and commonality as to the nondisclosure claim pleaded in the first cause of action. It is urged that the cases of Cannon v. Texas Gulf Sulphur Co., 55 F.R.D. 306 (S.D.N.Y. 1971) and Robinson v. Penn Central Co., 58 F.R.D. 436 (S.D.N.Y. 1973) stand for the proposition that common questions of law and fact do not predominate in a 10b-5 nondisclosure case. This argument, however, is premised upon a faulty conception of the present state of the 10b-5 case law. To prevail on its nondisclosure claim, plaintiffs will have to establish that there devolved upon L&M a legal duty to disclose its April and/or May earnings, and that such information would have been material to a potential purchaser of L&M shares. There will be no need, however, for plaintiff to prove that each purchaser relied upon said omission in order to satisfy the requisite element of causation in fact. If this proposition was not clear after Mills v. Electric Auto-Lite Co., 396 U.S. 375, 385, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972) and Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 375 (2d Cir.), cert. denied, 414 U.S. 910, 94 S.Ct. 231, 38 L.Ed.2d 148 (1973), the Second Circuit's recent decisions in Herbst v. ITT, 495 F.2d 1308, 1316 (2d Cir. 1974), Shapiro v. Merrill Lynch,

> Pierce, Fenner & Smith, Inc., 495 F.2d 228, 239-40 (2d Cir. 1974) and Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374 at 381 (2d Cir. 1974), establish it beyond peradventure. See also, Note, The Reliance Requirement in Private Actions Under SEC Rule 10b-5, 88 Harv.L.Rev. 584, 590-92 (1975). To the extent that recent decisions require the rejection of the holding in Cannon v. Texas Gulf Sulphur Co., 55 F.R.D. 306 (S.D.N.Y. 1971) that a nondisclosure case is not amenable to class treatment in that individual proof of causation is necessary, this Court so holds."

In Byrnes v. IDS Realty Trust, (D.Minn. 1976), 70 F.R.D. 608, the Court held (page 613):

> "The primary issue in this action is whether the statements by the defendants caused the market price of the Trust's shares to rise so as to encourage investment. The press releases issued by the defendants overstated earnings, loan losses, and non-earnings assets. As such, they present a nucleus of facts necessarily common to all members of the class, and, because of the interrelatedness of the statements and their effect on the Trust's profits, the common questions predominate over any individual questions which may arise. Harris v. Palm Springs Alpine Estates, 329 F.2d 909 (9th Cir. 1964); Green v. Wolf, supra; Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968); Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969); Herbst v. Able, 47 F.R.D. 11 (S.D.N.Y. 1969); Doglow v. Anderson, supra; Kronenberg v. Hotel Governor Clinton, Inc., supra."

See also Cohen v. Uniroyal, Inc., (E.D. Penn. 1977), 77 F.R.D. 685, and Blackie v. Barron, (9th Cir. 1975), 524 F.2d 891.

In Muth v. Dechert, Price & Rhoads, (E.D. Pa. 1976), 70 F.R.D. 602), the Court said (pages 607-8):

> "The core allegation of plaintiffs' complaint is that these defendants, individually and as co-conspirators, aided and abetted the various defendants in the Oberholtzer action and engaged in a common course of conduct which lead to the fraud allegedly perpetrated on this class of securities investors. All members of the class share a

> common interest in proving this central claim and in establishing that the alleged statements and omissions by the defendants were materially false and/or misleading. Dorfman v. First Boston Corporation, 62 F.R.D. 466, 474 (E.D. Pa. 1974). In this, at least, plaintiffs are clearly adequate representatives of the class. Furthermore, it is this crucial core allegation of a common course of conduct that yields predominant common questions in this case sufficient to allow the maintenance of a class action. See, In re Penn Central Securities Litigation, 347 F.Supp. 1327 (E.D. Pa. 1972), aff'd 494 F.2d 528 (3d Cir. 1974); Dorfman v. First Boston Corporation, supra; Entin v. Barg, 60 F.R.D. 108 (E.D. Pa. 1973); Siegel v. Realty Equities Corp. of New York, 54 F.R.D. 420 (S.D.N.Y. 1972); Fisher v. Kletz, 41 F.R.D. 377 (S.D.N.Y. 1966). Questions of reliance are simply irrelevant to the class action determination. Dorfman v. First Boston Corporation, supra, 62 F.R.D. at 474; B & B Investment Club v. Kleinert's, Inc. supra, 62 F.R.D. at 145; see, also, Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972); Rochez Bros., Inc. v. Rhoades, 491 F.2d 402 (3d Cir. 1974); Landy v. Federal Deposit Insurance Corp., 486 F.2d 139 (3d Cir. 1973), cert. denied 416 U.S. 960, 94 S.Ct. 1979, 40 L.Ed.2d 312 (1974); Kohn v. American Metal Climax, Inc., 458 F.2d 255 (3d Cir. 1972), cert. denied 409 U.S. 874, 93 S.Ct. 120, 34 L.Ed.2d 126 (1972); Kahan v. Rosenstiel, supra; Dorfman v. First Boston Corporation, supra."

The minority shareholders all were sent or had available to them precisely the same information that the class representative, Mr. Weinberger had. It was established at trial that there was non-disclosure of material facts and that there were misrepresentations. (No individual proof of reliance is required.) Therefore, the basic requirements of Rule 23 of commonality and typicality as to all the minority stockholders of UOP as of May 26, 1978, have been satisfied.

CONCLUSION

Rule 23(c)(1) required that the Court at the earliest practicable time make a preliminary determination of certification. The Rule clearly recognizes the realities by specifically reserving to the Court the power to amend or modify the original certification at any time before a decision on the merits. The Federal cases and authorities show that the Courts have regularly utilized the power given to them to alter and amend certification orders.

The original complaint in this case contained allegations based on the very limited public information that was available to Mr. Weinberger and the other outside shareholders of UOP. This Court held, in its opinion on certification and indeed in its opinion on the motion to dismiss, that the complaint did not allege, at least with sufficient clarity, fraud and concealment. Thus, this Court felt obliged to limit the class only to those stockholders who, like Mr. Weinberger, had opposed the merger, claiming that it was unfair. This Court held in effect that stockholders (not having been deceived) were precluded from being class members because they had either voted in favor of the merger or had accepted the terms of the merger. However, the amended complaint, based on the discovery that had taken place since the time of the initial complaint, flushed out fraud and concealment: specifically, it pleads (and the plaintiff has proved at trial) that there were omissions and

misrepresentations made to the minority stockholders. These omissions and misrepresentations vitiate the ostensible approval of the "majority of the minority" of the proposed merger.

Based on Rule 23(c)(1), the Court should reconsider and alter its order on certification. It should review its order in the light of the amended complaint which, as shown above, does plead, and the plaintiff has proved, omissions and misrepresentations made to the minority shareholders. The cases show that these Federal Courts include in the class all those persons who were the victims of misrepresentations and omissions in connection with securities transactions.

In short, the Court should redefine the class in the light of the amended complaint and the proof at trial to include in the class all those persons who were minority shareholders of UOP at the time of the merger.

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By _____

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August 18, 1980