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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WILLIAM B. WEINBERGER, Plaintiff, v. UOP, INC., THE SIGNAL COMPANIES, INC., SIGCO INCORPORATED, LEHMAN BROTHERS KUHN LOEB, INC. CHARLES S. ARLEDGE, BREWSTER L. ARMS, ANDREW J. CHITIEA, JAMES V. CRAWFORD, JAMES W. GLANVILLE, RICHARD A. LENON, JOHN O. LOGAN, FRANK J. PIZZITOLA, WILLIAM J. QUINN, FORREST N. SHUMWAY, ROBERT S. STEVENSON, MAYNARD P. VENEMA, WILLIAM E. WALKUP and HARRY H. WETZEL, Defendants.	Civil Action No. 5642

PLAINTIFF'S OPENING POST-TRIAL BRIEF ON LIABILITY

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NATURE OF THESE PROCEEDINGS (Note)

This is a class action case brought by the plaintiff against the corporate defendants. The case was tried to the Court commencing on May 19, 1980, and concluded on June 3, 1980. At the conclusion of the plaintiff's evidence, the defendants moved under Rule 41 for dismissal of the action. The Court reserved decision on the motion and denied the defendants' renewal of their Rule 41 motion at the conclusion of the case.

This is the plaintiff's opening post-trial brief on liability.

Note: Pages of the transcript of the trial will be referred to, thus: "(TR 1001)". Pages of depositions of deponents will be referred to by the name of the deponent, thus: "(Crawford 43)". Signal Companies will be referred to as "Signal"; Lehman Brothers Kuhn Loeb, Inc. will be referred to as "Lehman Brothers"; and UOP, Inc. will be referred to as "UOP". Exhibit numbers will be referred to by the plaintiff's numbering system previously adopted and used throughout the trial.

Matters in quotations, underlined and in parenthesis are added unless otherwise noted.

QUESTIONS PRESENTED

I. ARE NOT THE DEFENDANTS INCORRECT IN ATTEMPTING TO CLAIM THAT THE COURT'S RULINGS ON THE LEGAL SUFFICIENCY OF THE ORIGINAL COMPLAINT ARE RULINGS ON THE MERITS?

II. SHOULD NOT THE COURT FIND AGAINST THE DEFENDANTS ON LIABILITY SINCE THEIR CONDUCT WHEN MEASURED BY THE CASES THEY SELECT AS APPLICABLE FALLS FAR SHORT OF THAT WHICH IS LEGALLY PERMISSIBLE?

III. DOES NOT THE RECORD SHOW THAT THE PRESIDENT OF UOP VIOLATED HIS FIDUCIARY DUTIES TO THE MINORITY SHAREHOLDERS OF UOP?

IV. SHOULD NOT THE COURT MAKE A FINDING OF LIABILITY AGAINST THE DEFENDANTS IN VIEW OF THE FACT THAT THE DEFENDANTS REPEATEDLY MISREPRESENTED THAT THE PRICE AND TERMS OF THE MERGER HAD BEEN ARRIVED AT BY NEGOTIATIONS WHEN IN FACT THEY HAD NOT?

V. DID NOT THE DEFENDANTS MISREPRESENT TO THE MINORITY SHAREHOLDERS THAT THERE HAD BEEN AN EVALUATION OF THE FAIRNESS OF THE MERGER TERMS AND PRICE BY AN INDEPENDENT INVESTMENT BANKER?

VI. DID NOT THE BOARD OF UOP FAIL TO CARRY OUT ITS FIDUCIARY RESPONSIBILITIES TO WEIGH AND CONSIDER THE SIGNAL OFFER FROM THE POSITION OF THE MINORITY?

VII. DID NOT THE DEFENDANTS VIOLATE THEIR FIDUCIARY RESPONSIBILITIES IN RETAINING A STOCK SOLICITATION FIRM TO SOLICIT THE MINORITY STOCKHOLDERS IN FAVOR OF THE PROPOSAL OF THE MAJORITY?

VIII. THOUGH THERE WERE REPEATED MATERIAL MISREPRESENTATIONS AND OMISSIONS ON THE PART OF THE DEFENDANTS, IS IT NOT TRUE THAT ONLY SLIGHTLY MORE THAN HALF OF THE MINORITY SHAREHOLDERS VOTED IN FAVOR OF THE SIGNAL CASH-OUT MERGER PROPOSAL?

OUTLINE OF THIS BRIEF

At the outset of the trial, the plaintiff served and filed Plaintiff's Pre-Trial Memorandum on Liability.

The plaintiff incorporates and relies on the above Pre-Trial Brief in this, his Post-Trial Brief. The defendants did not file any pre-trial briefs or memoranda. They did, however, at the conclusion of the plaintiff's proof, present a two and a half hour oral motion under Rule 41, claiming that the plaintiff had failed to prove liability. No written memorandum or brief was filed in support of the defendants' Rule 41 motion. The Court reserved decision on the defendants' Rule 41 motion and then denied the Rule 41 motion in a written opinion at the conclusion of the entire case. Thus, the only statement of the defendants' position on liability is found in their answer to the Amended Complaint and in the transcript of their argument in support of their Rule 41 motion.

This brief will track the defendants' answers to plaintiff's Amended Complaint and the defendants' argument in support of their Rule 41 motion. (Note) It commences by pointing out that the defendants are mistaken in believing that the Court's rulings directed to the sufficiency of

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Note: The defendants' answers to the Amended Complaint are identical. In addition, counsel for Lehman Brothers and UOP adopted the position and arguments advanced by Alan Halkett, Esquire on the defendants' Rule 41 motion (TR 1034, et seq.). In referring to the arguments made in connection with the Rule 41 motion, the plaintiff will therefore refer collectively to "the defendants".

paragraph 10 of the plaintiff's original complaint have any legal significance in the context of the Amended Complaint and the trial. Next, the plaintiff will then show that, when the defendants' conduct is measured by the cases cited as applicable by the defendants, the plaintiff has proved liability. In the succeeding sections, the plaintiff will first set out each allegation of paragraphs 11 to 16 of the Amended Complaint and the defendants' answer to each such allegation. The plaintiff will then respond to the defendants' arguments found in the transcript in support of defendants' Rule 41 motion.

Having responded to each of the defendants' reasons and arguments individually, the plaintiff will point out that actually the record shows that all defendants were acting together to forward the interest of Signal, the dominant stockholder. In view of the concerted action by the defendants, the Court should enter a judgment on liability against all the defendants and then determine separately the most appropriate remedy to try to make the minority stockholders whole, including the determination as to the division of responsibility as between the three corporate defendants.

ARGUMENT

I. THE DEFENDANTS MISTAKENLY ASSUME THAT THIS COURT'S RULING DIRECTED TO THE SUFFICIENCY OF THE ORIGINAL COMPLAINT CONSTITUTES A RULING ON THE MERITS

Paragraph 10 of the Amended Complaint states:

> "10. Signal management determined in January and February, 1978, that, while there was no valid or compelling business reason for doing so, the best economic opportunity for Signal at the time would be the forced acquisition of the shares of UOP held by the outside shareholders."

The defendants' answer is:

> "10. Denied."

The defendants' Rule 41 argument seems to be that because the Court held that paragraph 10 of the plaintiff's original complaint was insufficient, the Court made a decision on the merits -- namely, that this Court made a finding that there was no breach of fiduciary duty by the majority (i.e. TR 972-3): (Note)

> "This Court then, in dismissing the original complaint, found that there had been in this particular case no breach of the fiduciary duty to which I just referred. That again has to be the necessary correlative decision of the Court."

Note: William J. Carney, "<u>Fundamental Corporate Changes, Minority Stockholders and Business Purposes</u>", (A.B.A.J. Vol. 1980 No. 1, pg. 73), (hereafter cited, for example, as "<u>Carney</u>, <u>supra</u>"):

> "*** Courts often require the plaintiff to plead the unfairness with some particularity before the Court will reach the merits, which places a substantial burden of proof on the plaintiff at the onset of the case."

The defendants also said (TR 976):

> "Consequently, one basis for our motion is that under the Court's previous order of November 1979 and its opinion, the amendment complaint is itself fatally defective for the same reasons as was the original complaint. The fact here, it's quite clear, is from the outset and throughout, the plaintiff still thinks he's litigating a Singer case."

The defendants seek to avoid the requirements of (1) a proper business purpose, and (2) "so-called" (sic.) fairness issues by casually stating (TR 978):

> "Because of the prior ruling and the opinion of this Court, I don't believe it is necessary or appropriate at this time and for purposes of our motion to discuss the question of the business purpose for the transaction or the other so-called fairness issues to which I have just previously referred because of the law of this case that they are not existing issues before this Court."

There are numerous answers to the foregoing assertion. First, Singer v. Magnavox Co., Del. Supr., 380 A.2d 969 (1977), is far more than a mere holding restricted to one particular factual situation: Singer reannounces in clarion terms basic principles that measure and govern the situation where a dominant stockholder merges a company thereby eliminating the minority shareholders. Second, since at trial the plaintiff proved that the "majority of the minority" vote was accomplished by fraud or misrepresentation on the part of the defendants, the defendants are back at Singer and the requirement of establishing "a proper business purpose for the transaction" and "so-called" fairness. See Harriman v. E. I. DuPont de Nemours, D. Del., 411 F.Supp. 133, 152-3 (1975). Third, this Court held the original complaint legally insufficient because (unlike Singer, Najjar and Tanzer) the minority in this case had ostensibly been given the power to prevent the merger. However, this Court recognized that the mere fact that the merger had been structured to give the majority of the minority the vote on the merger did not make the merger immune from attack (TR 979):

> "'In so ruling, however, I hasten to add that by no means do I intend to insinuate that a merger can be rendered immune from attack by the simple device of structuring the merger agreement so as to require that it be approved by a majority of the minority shareholders. I do think, however, that where the terms of the merger are ratified and approved by a majority of those shareholders who otherwise would have been powerless to stop it, and when approval is made to depend on the minority vote, then the Singer rationale is inapplicable, and the burden should shift to the complaining member of the minority to show fraud, misrepresentation or other conduct attributable to the majority shareholder which would warrant setting aside the affirmative vote of the minority for their own benefit.'"

Actually, the defendants concealed what actually took place from the outside stockholders. Thus, at the time of filing of the original complaint, the plaintiff obviously did not have access to the information to allege in detail "fraud, misrepresentation or other conduct attributable to the majority which would warrant setting aside the affirmative vote of the minority for their own benefit".

Fourth, the plaintiff filed an Amended Complaint without objection from the defendants. The defendants answered the Amended Complaint. The defendants did not challenge the sufficiency of the complaint by bringing on pre-trial motions directed to the complaint: rather, the case proceeded to trial on the basis of the Amended Complaint and the defendants' answers. The Amended Complaint alleged and the evidence at trial established just such reprehensible conduct on the part of the defendants that this Court held would warrant setting aside the vote of the minority. The defendants are now trying to escalate the Court's decision on the original complaint to encompass not only the plaintiff's Amended Complaint but the plaintiff's proof at trial. However, the Court's opinion was carefully confined to the original complaint.

Finally, the defendants' farfetched attempt by technical and procedural arguments to avoid Singer's requirements of (1) a proper business purpose and (2) intrinsic fairness is in fact a tacit admission by the defendants that they recognize that they must avoid at all cost allowing a situation to arise where this Court will rule on the question as to whether Signal had a proper business purpose in effecting the merger and whether the merger was intrinsically fair. The plain fact (as was shown in Plaintiff's Pre-Trial Memorandum on Liability) is that Signal had no proper business purpose: Signal effected the merger, as Mr. Shumway candidly admitted (Shumway 43), because it was the only available economic opportunity for Signal to utilize its available cash (Shumway 43). Mr. Walkup confirmed at trial that the reason for the merger was because it was "the only game in town" (TR 1668-1672).

Since February 28, 1978, when Mr. Crawford was told by Mr. Shumway and Mr. Walkup that Signal was going to cash-out the minority because it was the only available alternative for Signal's available cash, there have been many new reasons cobbled up to satisfy the proper business purpose required (e.g., UOP Proxy Statement, U-7, pg. 4):

> "UOP believes that the Merger will be beneficial because it should provide UOP with greater access to the financial resources of Signal and to the management and technical expertise which Signal and its wholly-owned subsidiaries have to offer than UOP has had as a partially-owned Signal subsidiary, should provide a greater possibility of joint cooperation between UOP on the one hand and Signal and its other subsidiaries on the other, and should provide a modest reduction in certain stockholder relations, insurance and other costs. Because of the fiduciary responsibilities which both Signal and UOP have had to their respective stockholders and to the public stockholders of UOP, great care has been required in determining areas of possible joint cooperation and the availability of proprietary and confidential, including technical, information and in considering and implementing transactions between UOP and Signal or other Signal subsidiaries. Additionally, Signal has been required to consider how its stockholders might view commitments of additional Signal funds to UOP or the backing by Signal of UOP commitments or obligations where the results of UOP operations inured only partially to benefit of Signal stockholders. If UOP were a wholly-owned subsidiary of Signal, less time and expense would be necessary in evaluating the fairness of proposed intercompany transactions, corporate opportunities and other such problems and would reduce the accountability to Signal stockholders Signal currently feels while evaluating UOP business proposals. For the purposes of Signal in effecting the Merger see 'Signal and Sigco -- Signal's Purposes'."

Actually, as Mr. Walkup admitted, all of these alleged "problems" were clearly visible in 1975 when Signal acquired control (TR 1662, et seq.).

Carney, supra, makes it clear that an elimination of conflicts of interest is not really a proper business purpose, saying (pg. 108):

> "The great difficulty with this justification is that the conflict of interest was often created by the parent corporation when it began the take-over. Surely this conflict, and the costs that might be incurred because of it, must have been obvious to the parent when it weighed the costs and benefits of the take-over. The only way to resolve this conflict is to eliminate the minority shareholders in the target, which involves the ultimate conflict of interests with which we are here concerned. If the parent discounts the costs of operational conflicts in its take-over decision, it does so in recognition of the 'taking power' that will exist after control is obtained. The circularity of the process of allowing elimination of conflicts of interest to serve as the justification for a squeeze-out should at least cause courts to pause in their relatively unquestioning approval of this purpose."

The proof at trial also showed that the transaction did not meet the measure provided by the intrinsic fairness test.

* * *

The defendants' attempt to maintain their position on the merits based on the Court's prior ruling directed only to the legal sufficiency of the original complaint is misdirected.

II. BY THE STANDARDS WHICH THE DEFENDANTS HAVE SELECTED, THEY ARE LIABLE FOR THEIR MATERIAL MISREPRESENTATIONS

A. The Defendants Were Guilty of Misrepresentations

The defendants then cite Judge Rodney's opinion in Nye Odorless Incinerator Corp. v. Felton, Del. Super., 162 A. 504 (1931) (TR 980-981):

> "'In order to support an action of this kind, i.e., an action for damages based on allegedly fraudulent misrepresentation, it is necessary for the plaintiff to satisfy the jury by a preponderance of the evidence, one, that the defendant made a substantial material misrepresentation respecting the transaction; two, that he knew it was false; three, that when he made it he knew it was false; four, that he made it with the intention of inducing the plaintiff to act upon it, and five, that the plaintiff was misled thereby, and in reliance thereon did act upon it, and thereupon suffered damages.'"

The plaintiff's uncontradicted evidence establishes the defendants are liable when measured by the standards set out in Nye. (Note 1) Actually, Lynch v. Vickers, Del. Supr., 383 A.2d 278 (1978), and Kaplan v. Goldsamt, Del. Ch., 380 A.2d 556 (1977), embodying a far less rigorous standard, state the applicable law but plaintiff will show that even when measured by the standard they themselves chose, they are liable.

(1) The defendants made substantial material misrepresentations respecting the transaction. (Note 2)

Note 1: See also Victor Brudney and Marvin A. Chirelstein, "Fair Shares in Corporate Mergers and Takeovers", 88 Harv. L. Rev. 297 (1974), and A. A. Sommer, Jr., "'Going Private': A lesson in Corporate Responsibiliyt", reprinted in [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶80,010, at 84,695.

Note 2: The plaintiff will show that the misrepresentations were "material" in Section "B" which follows.

The defendants made numerous substantial misrepresentations representing the merger transaction. First, the defendants misrepresented repeatedly to the outside stockholders, directly and through the press, that there were "negotiations" between Signal and UOP in arriving at the terms of the merger and the merger price. (Press Release of February 28, 1978 -PX 146; Press Release of March 2, 1978 - PX 110; Press Release of March 6, 1978 - PX 24; Letter to Stockholders of March 7, 1978 - U-49-075; Proxy Statement - Exhibit U-7, page 13.) There were no "negotiations".

Second, the defendants represented to the outside stockholders that there had been an independent evaluation of the fairness of the terms of the merger, including the price (Ex. U-7-D-2). In fact, Mr. Glanville made no evaluation of the value of the minority shares (Glanville 117-118). The other Lehman Brothers employees, Messrs. Schwarzman, Pearson and Seegal, made a one-day due diligence visit to UOP but their one-page report and their perfunctory assembly of statistics do not even purport to value the minority shares (LB-5). None of the three who prepared the report participated in the Lehman Brothers presentation to the Board of UOP (Schwarzman 52).

In addition, there was deliberate omission of the fact that Lehman Brothers was not an independent investment banker. Mr. Schwarzman, the senior executive at Lehman Brothers who was in charge of the research that was the basis of advice to the directors and minority shareholders of UOP that $21.00 was a fair price to the minority shareholders in 1978, saw the report that Lehman Brothers had prepared in 1976 for Signal that Signal would be well advised to pay up to $21.00 for the minority shares (Schwarzman 17-25). Mr. Glanville, who directed that the 1976 report to Signal be prepared, denied having any recollection of it (Glanville 24-28).

Third, the defendants represented in the proxy statement that the management and Board of UOP had evaluated and considered the merger terms (EX U-7). As to UOP management, there is nothing in the record to indicate that UOP management, other than Mr. Crawford, himself a Signal director, had anything whatsoever to do with consideration of or evaluation of the Signal proposal from the point of view of the minority shareholders (unless it is claimed that Mr. Shuman, by presenting financial data to the UOP directors at the March 6th meeting, had somehow participated in the UOP management decision (EX U-222). So far as the Board of UOP is concerned, to represent that they evaluated the merger is a gross misrepresentation. Actually, the Board was hastily assembled on March 6, 1978, only three business days after the proposed merger was first privately announced by the dominant stockholder, Signal, to Mr. Crawford. The Board of UOP was not given any advanced written information on the value of the minority stock nor did the UOP Board request the requisite time to weigh and consider the pros and cons of the majority proposal. The Board did not even inquire how the price and other terms were arrived at: some of them assumed (incorrectly) that there had been arm's length negotiations conducted by Mr. Crawford on behalf of the minority stockholders (Clements 39) because it was Mr. Crawford's responsibility to do so (Pizzitola 33; Glanville 92-96). The Board did not attempt to structure a "team" of independent directors free of conflicts to negotiate for the minority. See Harriman v. E. I. DuPont de Nemours & Co., supra, at 142. The Board voted immediately to accept the proposal of the dominant stockholder, Signal. See Gimbel v. Signal, Del. Ch., 316 A.2d 599 (1974), aff'd. Del. Supr., 316 A.2d 619 (1974) for the proposition that under Delaware law a board of directors must take the requisite time and steps to weigh and consider a proposal in exercising their powers.

(2) and (3) The foregoing representations were "false" and were known to be false at the time they were made.

Some or all of the defendants knew that there had been no negotiations (Walkup 1719); that there had been no evaluation by an independent investment banker; that Lehman Brothers' independence had been compromised by their 1976 opinion that Signal's interest would be served by cashing out the minority shareholders (Glanville 117-118; Schwarzman 17-25; EX LB-5); and that there had been no consideration or evaluation of the Signal proposal from the point of view of UOP's minority shareholders by the UOP management or Board in terms of what has been held to be appropriate when a Board has before it a delicate and important matter (Gimbel v. Signal supra) (U-233).

(4) <u>The foregoing representations were made "with the intention of inducing the plaintiff(s) to act" upon them.</u>

All the above representations (or omissions) were made with the intention of persuading the plaintiffs to vote for the merger proposal. <u>Denison v. Fibreboard</u>, D. Del., 388 F.Supp. 812 (1974). The dissemination by the defendants of press releases to the media, the letter from the President of UOP to the outside shareholders and the Proxy Statement itself, were designed to induce the outside stockholders to vote for the merger in the belief that their interests had been safeguarded by negotiations on their behalf by their fiduciaries. <u>Mitchell v. Texas Gulf Sulphur</u>, 10th Cir., 446 F.2d 90 (1971), cert. denied, 404 US 1004, rehearing denied, 404 U.S. 1064, cert. denied, 405 US 918; <u>Berland v. Mack</u>, S.D.N.Y., 48 F.R.D. 121 (1969); <u>SEC v. Great American Industries, Inc.</u>, 2d Cir., 407 F.2d 453, 456 (1968). In the same way, the representations that the merger had been evaluated by an independent banker were designed to induce the stockholders to believe that their interests had been considered by a knowledgeable outsider and the proposal had been found to be fair to them. See <u>Denison v. Fibreboard</u>, <u>supra</u>. (Walkup TR 1722) Finally, the representation that the management employed by the stockholders and the Board of Directors elected by the stockholders to represent them had considered and evaluated the situation was also made to induce the stockholders to vote for the merger (Walkup TR 1730-1731). <u>Gimbel v. Signal</u>, <u>supra</u>.

(5) <u>That the plaintiff(s) were misled thereby and in reliance thereon did act on and thereupon suffered damages</u>.

In <u>Mills v. Electric Auto-Lite Co.</u>, 306 U.S. 375, 90 S.Ct. 616 at 622, L.Ed. (1970), the Supreme Court held:

> "There is no need to supplement this requirement, as did the Court of Appeals with a requirement of proof of whether the defect actually had a decisive effect on the voting. Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. This objective test will avoid the impracticalities of determining how many votes were affected, and, by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions. Cf. Union Pac. R. Co. v. Chicago & N.W.R. Co., 226 F.Supp. 400, 411 (D.C.N.D.Ill. 1964); 2 L. Loss, Securities Regulation 962 n. 411 (2d ed. 1961); 5 id., at 2929-2930 (Supp. 1969)."

In <u>Blackie v. Barrack</u>, 9th Cir., 524 F.2d 891, 905-906 (1975), the Court held:

> "Individual questions of reliance are likewise not an impediment -- subjective reliance is not a distinct element of proof of 10b-5 claims of the type involved in this case.
>
> "The class members' substantive claims either are, or can be, cast in omission or non-disclosure terms -- the company's financial reporting failed to disclose the need for reserves, conditions reflecting on the value of the inventory, or other facts necessary to make the reported figures not misleading. The Court has recognized that under such circumstances
>
> > "'involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary

> is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact.' (citations omitted)
>
> "Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 153-154, 92 S.Ct. 1456, 1472, 31 L.Ed.2d 741 (1972). See U.S. Financial Securities Litigation, supra, at 451; Caesars Palace Securities Litigation, supra, at 399; In re Penn Central Securities Litigation, 347 F.Supp. 1327, 1344 (E.D. Penn. 1972)."

All of the foregoing misrepresentations were made to the minority stockholders in order to get them to vote affirmatively for the merger. The majority of UOP stockholders who did, in fact, vote did so in reliance on the truth of the representations. In voting in favor of the merger, they were induced to accept a price that was not only, not a negotiated price as repeatedly represented but, as was proved at trial, was a grossly inadequate price.

In summary, when the defendants' conduct is measured by the standards of the Nye case, which the defendants themselves have chosen to be measured by, the plaintiff has proved liability.

B. The Representations Were Material

The second aspect of the defendants' preliminary argument was that the foregoing misrepresentations were not "material". The defendants said (TR 984-5): (Note)

Note: The plaintiff cited the Lynch case in its Pre-Trial Memorandum on Liability on pages 51 and 69. The parties are therefore in agreement that Lynch correctly states the applicable standard in regard to materiality.

"Before I turn and review briefly each of these allegations I think it is important to consider the standard by which the review should be made, and I turn first to Lynch v. Vickers Energy Corporation, Delaware Supp. 383 A.2d, 278 at Page 281:

"'In other words, the limited function of the Court was to determine whether defendants had disclosed all information in their possession germane to the transaction in issue, and by germane we mean for present purposes information such as a reasonable shareholder would consider important in deciding whether to sell or retain stock.'

"There is then a citation.

"'The objective, of course, is to prevent insiders from using special knowledge which they may have to their own advantage and to the detriment of the stockholders. Compare --' and then there are cases cited."

The defendants then quoted from Kaplan v. Goldsamt, Del. Ch., 380 A.2d 556 (1977), which holds that the Delaware Courts have adopted the following standard of materiality promulgated by the Supreme Court of the United States (TR 986-7):

"'This long standing view of the Delaware courts comports with the recent expression of the United States Supreme Court in TSC Industries, Inc. vs. Northway, 426 U.S., 438, et cetera, 1976, wherein it was stated that in order for an omission to be material, "there must be a substantial likelihood that the disclosure of the fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."'"

"In the case cited by the court in the Goldsamt opinion, TSC Industries vs. Northway, 96 Supreme Court, et cetera, the court stated in part:

> "'The general standard of materiality that we think best comports with policies of Rule 14(a)(9) is as follows:
>
> "'An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.'"

The plaintiff's proof at trial established clearly that the defendants did not disclose all of the information "in their possession germane to the transaction in issue *** such as a reasonable stockholder would consider important in deciding how to vote." The defendants not only were guilty of omissions but, worse than that, made deliberate misrepresentations that have been enumerated above. All of these misrepresentations were clearly matters that were germane to the transaction.

It is clearly germane to a stockholder to know how merger terms, particularly the price, are arrived at. A minority stockholder had the right to assume that the majority stockholder, his directors and the management have carried out their fiduciary duties.

In addition, a reasonable stockholder would consider it important in deciding how to vote on a proposed merger to know:

(a) That the merger terms and price were not negotiated but were set by the controlling stockholder and agreed to forthwith by the President and Chief Executive Officer of UOP.

(b) That the merger price and terms had not been carefully considered by an independent banker retained at company expense to opine on the fairness (but that instead, he had in fact decided at the very outset that the price was fair simply because it represented a premium of 50% above market).

(c) That this same banking house had prepared an opinion not two years before that stated that from the point of view of the purchaser, Signal, in 1976, it would have been in Signal's best interest to pay up to $21.00, the very price that the same banker was opining was fair in advising the independent stockholder. (At the very least, a stockholder would want an explanation as to how the banker could reconcile the 1976 opinion and the 1978 opinion, especially as the economic fortunes of UOP were at about their nadir when the opinion was prepared that it was in Signal's best interest to pay up to $21.00 for the shares of the independent stockholders.)

(d) That no member of UOP management (other than Mr. Crawford, himself a director of Signal and fully committed from the outset) had been informed of the Signal merger terms or price.

(e) That the Board of UOP had not performed its function of considering and evaluating the Signal proposal (i.e., that it was a misrepresentation to represent that the UOP Board had considered and evaluated the merger proposal).

In conclusion, there were misrepresentations and omissions in connection with Signal's cash-out merger proposal. These misrepresentations and omissions were material in terms of the duty of "complete candor" (Lynch v. Vickers, supra) owed to minority stockholders. The misrepresentations and omissions vitiate the ostensible approval of the majority of the minority stockholders. Their vote could only insulate the transaction if it were the fact that the defendants had made complete disclosure to the minority. The "overwhelming" vote which the defendants vaunt so proudly is fatally tainted by their own deliberate omissions and misrepresentations.

* * *

On the very basis which the defendants have selected to have their conduct measured, the defendants are liable to the minority shareholders.

III. THE PRESIDENT OF UOP VIOLATED HIS FIDUCIARY DUTY TO THE UOP MINORITY SHAREOLDERS AND COMPOUNDED HIS DERELICTION BY CONCEALMENT

Paragraph 11 of the Amended Complaint provides:

> "11. The conspiracy had its inception on February 28, 1978, when Crawford, a director of Signal and UOP's President and Chief Executive Officer, was informed of the prior determination of the majority stockholder of UOP, Signal, by its officers and Executive Committee, that Signal had decided for its own economic advantage to effect a merger of UOP into a wholly owned subsidiary of Signal called Sigco, including the cash-out of the minority shareholders at a price in the 'range' of \$20-\$21 per share (though Signal management had obtained figures indicating that a price of \$25.00 or more would be economically advantageous to Signal).
>
> "(a) Crawford disregarded the best interests of the minority shareholders of UOP by immediately agreeing to Signal's proposed merger and the cash-out of the outside stockholders without any evaluation or consideration by management or directors of UOP or independent experts of the merger nor the price which the majority was going to cash out the minority.
>
> "(b) Crawford agreed to the majority's price, without attempting to negotiate any higher price and without attempting to negotiate a tax-free exchange of securities or any sort of a securities exchange.
>
> "(c) As part of the conspiracy, Crawford did not reveal to the outside stockholders that, at the initial meeting with the majority stockholder, he had agreed to (a) and (b) above."

The defendants filed a general denial:

> "11. Denied.
>
> "(a) Denied.
>
> "(b) Denied.
>
> "(c) Denied."

1. The Evidence Shows That Crawford Did Agree to Signal's Proposal as Alleged

The defendants said (TR 987):

> "The first group of alleged misrepresentations or omissions are in Paragraph 11, and relate to Mr. Crawford and his not revealting to outside stockholders that at his initial meeting with the majority stockholder he had immediately agreed to Signal's proposed merger without any evaluation or consideration by management or directors of UOP or independent experts. Now, first of all, that simply is not the case. That is not what the evidence shows."

The defendants' justification for Mr. Crawford's conduct is (TR 988):

> "At that time the only thing that Mr. Crawford did was to express his own opinion that the price which was then stated by Signal as being in the range of 20 to $21 per share seemed fair, in fact seemed generous, and he, Crawford, said that he felt that this was something that should be given to the stockholders, and they should be given the right to decide."

First, Mr. Crawford was meeting with the President of Signal, Mr. Shumway, and the Chairman of the Board of Signal, Mr. Walkup, in his capacity as President and Chief Executive Officer of UOP (TR 1502). Second, the claim that at the very outset Mr. Crawford gave his ready and complete assent simply to safeguard the opportunity for the minority stockholders to vote on the Signal merger will not withstand scrutiny. There is not a scintilla of evidence to suggest that Signal might have withdrawn its merger proposal if it did not receive the immediate and unqualified assent of UOP's President and Chief Executive Officer. On the contrary, Mr. Crawford admitted that he was told at that very meeting that Signal had explored other investment opportunities but that the UOP merger from Signal's point of view represented "the best use of the Signal money at that time ..." (TR 1489). Mr. Shumway stated the same thing (Shumway 43, 78).

Finally, the defendants try to avoid the allegations of paragraph 11(a) by claiming that Mr. Crawford did not give an immediate assent (TR 988-9):

> "The evidence then shows that that same evening and the following day he made attempts to contact, and he did contact his directors, that is the UOP directors. He then contacted Lehman Brothers, and arranged to have through Lehman Brothers an outside analysis and fairness opinion. The facts also show that he had internally within UOP his financial people start to put together the data upon which a decision could be made, and the facts further show that the matter was not presented to the UOP board until March 6, a week later, at which time the UOP board considered the matter and decided that from the board's standpoint it would accept the proposed merger."

Mr. Crawford did contact his UOP directors but the point is that Mr. Crawford had <u>already</u> signified his agreement that the price range was "generous". Signal knew it could count on Mr. Crawford to deliver. The depositions (Crawford 44-57; Shumway 63), the Signal minutes (Ex. 37), and the admissions of Mr. Crawford himself at trial (TR 1311) all confirm that Mr. Crawford did in fact immediately agree and announce his agreement to the Signal proposal precisely as alleged.

*   *   *

The foregong is defendants' only response to paragraph 11 of the Amended Complaint. The fact is that the plaintiff has proved the allegations of paragraph 11: that is, that Mr. Crawford stated his agreement immediately to the Signal proposal, including characterizing the price range as "generous" without any attempt to negotiate to better the terms or the price. This supine acquiescence to the interests of Signal, the majority stockholder, was not revealed to the minority stockholders. This revelation of the failure of the President of UOP to carry out his fiduciary responsibilities to the minority clearly would have been of significance to a reasonable stockholder in determining how to vote on the merger.

IV. THE DEFENDANTS FALSELY REPRESENTED THAT THE MERGER TERMS AND PRICE HAD BEEN ARRIVED AT AFTER NEGOTIATIONS

Paragraph 12 of the Amended Complaint provides:

> "12. As part of the conspiracy, after the meeting between Crawford and the officers and Executive Committee of the majority stockholder on February 28, 1978, a press release was issued on February 28, 1978, jointly by Signal and UOP announcing that Signal and UOP 'are conducting negotiations'.
>
> "(a) No negotiations ever took place between Crawford and/or the management of UOP and representatives of the majority stockholder either as to the merger itself, the price or other terms.
>
> "(b) The press release announcing 'negotiations' was never corrected by a correct press release or notice to the outside stockholders of UOP that no negotiations had taken place: a later press release referred to 'negotiations' that never took place.
>
> "(c) The Proxy Statement and Notice of the Annual Meeting of UOP (i) never stated that there had been no negotiations at all, (ii) affirmatively referred to negotiations, and (iii) elsewhere deceptively and falsely stated that the price had been arrived at 'after discussions' and 'conversations' between Crawford and the officers of Signal."

The defendants filed a general denial:

> "12. Denied, except alleged that on February 28, 1978, James V. Crawford, a director of Signal and UOP's President and Chief Executive Officer, discussed with officers and directors of Signal the possible acquisition by Signal for cash of the approximately 49.5% of UOP's outstanding common stock which Signal did not own, and that on February 28, 1978, a joint press release was issued by UOP and Signal. Said press release speaks for itself. Further alleged that on March 6, 1978, after further discussions and approval of the transaction by the Boards of UOP and Signal, a public announcement was made that the agreed price per share was $21.00.

"(a) Denied.

"(b) Denied.

"(c) Denied."

A. There Is No Uncertainty in the Meaning of the Word "Negotiation" and There Were No Negotiations

The defendants' first argument is based on the definition of the word "negotiate" (TR 991). The defendants try to equate arm's length bargaining or negotiations with the word "discussion". (In this context, it should be noted that the SEC forced the defendants to use the word "discussion" rather than the word "negotiate" that had appeared in the original draft of the Proxy Statement. When the SEC asked for the details on the alleged "negotiations", the defendants were forced to retract the claim that there had been negotiations (EX U-81, 82).) There was no correction of the repeated earlier assertions in press releases and letters to the minority stockholders. However, there is no necessity to turn to the dictionary. In 1975, Signal and UOP had negotiated at arm's length by offers and counter-offers terms and arrived at the $21.00 price for both the tender offer and the direct purchase. (Note) Mr. Shumway was the negotiator for Signal and Mr. Glanville was the adviser to Mr. Logan, the negotiator for UOP.

Note: EX U-49-3 is a note dated March 3, 1978, made by Mr. Crawford of a discussion which he had with Mr. Logan reviewing the negotiations of 1975 in which UOP had originally offered $25; Signal had responded with $19, and the bargain had been struck at $21.

That the defendants recognize the critical difference between the negotiations such as took place in 1975 and the "discussions" of 1978 is shown by the following part of the defendants' argument (TR 1005-6):

> "For example, whatever may have been the situation in terms of negotiations which culminated in the price of $21 per share in 1975, that has got to be recognized, that those negotiations were indeed being conducted at arm's length by Signal who then had no controlling position with UOP and the management of UOP. We had two people wearing separate hats instead of the situation in February 1978 where Signal had to approach the process wearing both hats."

In addition, Mr. Crawford conducted vigorous negotiations with Mr. Glanville on the price for a fairness opinion from Lehman Brothers (EXS U-71; U-49-083; U-49-23; U-25-127). The defendants are toying with the Court (as they did with the minority) in suggesting that arm's length negotiations are really the same thing as "discussions".

B. The First Press Release Was Issued Even Before the Alleged Negotiations Took Place

The defendants then say (TR 991):

> "Now what in fact did happen? The facts show that on February 28, 1978, Mr. Crawford met first with Mr. Walkup, the then Chairman of the Board of Signal, and Mr. Shumway, the then President of Signal, following which there was a meeting of the Executive Committee at which, among other things,

the possibility of this merger was discussed." (Note)

<u>After</u> meeting with Mr. Shumway and Mr. Walkup and <u>after</u> stating his agreement to the merger proposal and stating that the price range was "generous", and <u>before</u> talking to any of his directors, Mr. Crawford issued a joint press release with Signal in which it was represented that Signal and UOP <u>were negotiating</u> on the terms of the merger and the price (PX 146). No negotiations had taken place. Before Mr. Crawford talked to anyone, including other UOP directors, the merger had been announced, the price range disclosed and Mr. Crawford had indicated his agreement that the price was "generous" (Crawford 41-42, 44, 47).

Note: The defendants understate what happened: Mr. Crawford was summoned by Mr. Walkup and Mr. Shumway to come from Chicago to Los Angeles, there to meet privately with them to be told that there was going to be a proposal to the Executive Committee of the Signal Companies to carry out the best economic alternative for the use of Signal's available cash (i.e., the cash-out merger of the minority shareholders of UOP). Furthermore, Mr. Crawford was told that the price range was going to be $20-21. The cash-out merger at that point was not a mere "possibility" nor are the defendants being candid in saying that Signal was "considering making an offer". Signal's inner management had studied and rejected other alternatives and had had appropriate financial studies made that demonstrated that the cash-out merger at any price up to $25 would be financially advantageous <u>to Signal</u> (Shumway 28-29; PX 68).

C. The UOP Directors Did Not Mandate That Signal Offer the Upper End of Its Previously Announced Price Range

After this press release went out, Mr. Crawford got in touch with the UOP directors basically to inform them of a hastily called meeting of UOP in order to consider the merger (U-49-123, U-49-124, U-49-23, U-49-29). The defendants give the impression that Mr. Crawford received a mandate from the members of the UOP Board (TR 991):

> "Following that day Mr. Crawford, as I mentioned before, communicated with each of his directors. He then spoke to Mr. Walkup of the Signal Companies. He told Mr. Walkup in effect that based on his discussions with his own UOP directors that Signal had better come up with the $21.00 price if it wanted to get approval of the Board and that was the circumstance."

There is absolutely nothing in the discovery record that justified the defendants' claim that Mr. Crawford got a consensus of or directions from the UOP Board of Directors that the price had to be $21.00 rather than $20.00 (Crawford 58; 105-108; 118). All that Mr. Crawford could actually say was that he told Mr. Walkup that (Crawford 67) "... there was a general feeling that the upper end of the price range would be much more acceptable than the lower end."

The defendant Signal continues (TR 992):

> "There is absolutely no question at all that there were discussions between Mr. Crawford and representatives of the Signal Companies with respect to the merger itself and the price as falling in the range of between $20.00 and $21.00 a share."

There were apparently several informal telephone calls between Mr. Crawford and Mr. Shumway and Mr. Walkup. But it was grossly deceptive to issue formal press releases announcing that there were "negotiations" between Signal and UOP relating to the merger.

Actually, at trial (as contrasted with discovery), it was finally reluctantly admitted in the cross-examination of Mr. Walkup that the alleged negotiations between Signal and UOP consisted of one solitary phone call (TR 1718-19):

> "Q Okay. So that we come down to the fact that there was one phone call where there was a discussion or negotiation on price, is that correct?
>
> "A Yes.
>
> "Q. So far as that is concerned, Mr. Crawford said that the price had to be at the upper range, isn't that right? The upper end of the range?
>
> "A. I recall his telling me it had to be 21.
>
> "Q. No. Did Crawford ever ask you on behalf of the minority shareholders for anything more than 21?
>
> "A. No.
>
> "Q. Did he ever ask you for a delay in the time to consider the proposal?
>
> "A. No.
>
> "Q. Did he ever ask for a stock-for-stock deal?
>
> "A. Not to my knowledge.
>
> "Q. Did he ever ask you for consideration of payment of the dividend in the second quarter, or that part of it that would be attributable to the period before the date of the annual meeting?
>
> "A. Not as I recall.
>
> "Q. Did Mr. Crawford ever ask you for a provision for an escalation to reflect increases in the general market price -- I'm sorry -- the New York Stock Exchange general price level?

"A. No.

"Q. Did he ever ask you for a provision for escalation in terms of the increase of the Signal stock?

"A. No.

"Q. Did it ever occur to you as a fiduciary of the minority shareholders of UOP that terms along those four general points be considered?

"A. No."

There was no indication in the discovery or trial testimony that Mr. Crawford had conferred with each of his directors and that they had reached a consensus or even individually had advised him that Signal "had better" come up with a price of $21.00. In addition, the press release speaking of negotiations was issued the same day of the meeting of Signal's Executive Committee: thus, the press release was issued even before the alleged conversations with each of the directors (EX 110). At the time, therefore, when the press release was issued, there had been no negotiations at all even by the defendants' own recitation. Mr. Crawford had simply been summoned to Signal's headquarters; the impending cash-out merger and the price range had been disclosed; Mr. Crawford agreed forthwith. There had been no negotiations, but a press release was issued reciting that negotiations were taking place. On March 6, 1978, another press release was issued reciting negotiations between Signal and UOP (EX U-49-175). In the interim, there had been one solitary phone call between Mr. Crawford and Mr. Walkup in which the price within the previously announced

Signal range allegedly came up. (No written record of any kind relates to this phone call.) It was misleading to represent that there were negotiations between Signal and UOP relating to the merger including the merger price.

D. The Difference Between Negotiations and Discussions is Not Mere Semantics

After an overnight recess, Signal continued (TR 998):

> "The plaintiff's assertions in this case with regard to negotiation are we submit basically semantic. Why did you say discussions instead of negotiation, etc.?"

The representations made as to how the terms were arrived at were of critical interest to the minority stockholders. The defendants deliberately represented repeatedly to the minority that the terms and price were the subject of "negotiations". The minority stockholders were fully justified in relying on the representation that negotiations were taking place since the defendants, as corporate fiduciaries, had the duty to get the best possible terms and price for the minority (i.e., negotiate at arm's length). Arm's length bargaining could fulfill the defendants' fiduciary obligation to the minority: mere discussions (not to mention supine and immediate acquiescence) would not. The difference is not semantics: it is the difference between night and day. Not only did the defendants not negotiate as they were required to do but represented that they were doing so. Negotiations were vital to protect the interests of minority shareholders.

E. The Defendants Admit That There Were No Negotiations Because Signal Stood on Both Sides of the Transaction

Flatly contradicting their prior position, the defendants then take the position that they are excused from their misrepresentations because, in view of the conflict of interest, Signal and UOP could not negotiate (though the press releases of February 28th and March 6 stated flatly to the public and UOP's shareholders that Signal and UOP were conducting negotiations). The defendants said that Signal and its management were wearing "two hats" and, thus, there was no way that they could conduct negotiations (TR 998):

> "Consequently, throughout this transaction, Signal and its management wore, so to speak, two hats. There is no way to consider this transaction other than in the light of the fact that Signal wore two hats. You cannot analyze the questions that are involved in this case as if they did not. It is not possible to say let us analyze it as if they wore one hat and then let us analyze it as if they wore the other hat. They can't do that. They had to wear at all times two hats."

The defendants then say (TR 999):

> "Plaintiff in this case would urge upon the Court that there should have been in the 1978 transaction a process by which one side, perhaps Signal, started with the low number and the other side, UOP, started with a high dollar number and that in some process of hammering out they would have then come to a compromise or lower figure. But if one analyzes that approach, recognizing that Signal had this fiduciary duty in wearing two hats, if indeed Signal believed that $20.00 to $21.00 a share was a fair price to pay for the UOP minority shares, then would it not have been a breach of its fiduciary duty to the UOP minority shareholders to come in and start at $16.00 and $17.00 and, in other words, try to bargain on behalf of Signal shareholders for the lowest price that could be obtained? Of course not. They

> could no more take that side than they could take the other side. They were required to start the process by ascertaining what was the reasonable price and to present that as a starting point of discussions or negotiatons and that's what they did."

It was a fact that Signal was wearing "two hats" (i.e., standing on both sides of the transaction). In view of this situation, the defendants should never have published press releases stating that Signal and UOP were "conducting negotiations". They should have stated that because of the conflict of interest (and the two hats that UOP and Signal were wearing), Signal was offering a price of $20.00 to $21.00 and that there could be no negotiations. Instead, they deliberately represented to the UOP stockholders and the general public that the price was being arrived at by "negotiations".

The defendants then go through the same process so far as the UOP directors are concerned, saying (TR 1001):

> "By the same token, UOP directors obviously recognized that all they could hope to negotiate for was Signal's upper range of fairness. To have suspected or believed that the $20.00 to $21.00 price offered by Signal was some sort of a bargaining or haggling price no more makes sense in this situation than the opposite side of the coin. Consequently what we had was, we had a process which began between them with Signal offering what it believed was a fair price in the range of $20.00 to $21.00 and the directors of UOP looking at that to determine where within that range they felt they could and should arrive in this transaction."

The defendants have thus admitted that (1) there was a conflict of interest both as to Signal and UOP, (2) that there could be no arm's length negotiations between them, and (3) that there were no such negotiations. The defendants are forced to claim that Signal, the majority stockholder, unilaterally set what it considered to be a fair price for the minority shares (Note) and that the UOP directors considered the Signal price and then agreed to it. The foregoing is a far cry from the intense negotiations that took place between UOP and Signal in connection with the 1975 transactions or indeed what Mr. Crawford and Mr. Glanville did by way of negotiations in connection with a price to be paid for Mr. Glanville's fairness opinion. However, to assert that the price was being arrived at by negotiations when the price was arrived at in such an arcane fashion was the gross deception of the stockholders. The minority stockholders of UOP had a right to insist that their Board and management not compromise themselves (or "wear two hats") to such an extent that they could not negotiate on behalf of the minority. (If the true facts had been made clear to the minority, then the vote would have been far different.) What was represented in the press releases of February 28, 1978, and March 6, 1978, the letter to stockholders of March 6th, and indeed repeated in the Proxy Statement was an affirmance that there had been negotiations arriving at the merger price. Signal's

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Note: The record proves that the foregoing is not correct. Signal had research done by Mr. Arledge not to determine the fair price or value for the UOP shares but rather what price would the cash-out of the minority be economically advantageous to Signal (PX 68).

argument proves the plaintiff's case -- that is, that the press releases and the Proxy Statement were in fact false and screened the fact that there was no negotiation on the price and terms of the merger.

The defendants then said that the same situation was applicable so far as UOP's directors are concerned (TR 1001):

> "By the same token the UOP directors obviously recognized that all they could hope to negotiate for was Signal's upper range of fairness."

This is the heart of the defense: it comes down to the claim that because the defendants had conflicting fiduciary obligations to both UOP and Signal stockholders, the defendants could entirely fulfill both fiduciary obligations by claiming that they had steered a middle course between the two positions with pure hearts. There are several responses. First, the defendants did not in fact steer a middle course -- they preferred the economic interest of the dominant stockholder, Signal, which would, of course, be the surviving corporation, rather than the interests of the leaderless minority who were to be cashed out and disappear forever.

Second, this "pure heart" defense surfaced for the first time at trial. Nowhere was it revealed to the minority shareholders in the proxy material that the defendants (because of conflicting fiduciary obligations to UOP and Signal) were trying to steer a middle course between the antagonistic interest of Signal's stockholders and UOP's minority stockholders. On the contrary, the UOP minority stockholders were affirmatively told that there were negotiations between UOP and Signal. Had they been told the truth, they could have voted against the merger or sought appraisal to get the "high side" price their directors were afraid to seek for them. Every appearance was deliberately given that there had been arm's length negotiation by fiduciaries representing the minority shareholders.

Third, the "pure heart" defense is a novel approach to the handling of conflicting fiduciary obligations. The defendants cite no authority or cases in support of their theory. The answer is that one can not fulfill a fiduciary obligation simply by saying that one is steering or has steered a middle course with a "pure heart": one must take appropriate steps to get out of the conflict of interest and then use one's full energies and abilities to fulfill one's fiduciary responsibility. Harriman v. E. I. DuPont de Nemours, supra, at pg. 142.

F. The Defendants Admit That the Solution to Their Problem May Have Been the Appointment of a Committee of Independent Directors to Represent and Negotiate for the Minority

The defendants quote from 2 Delaware Journal of Corporate Law 1977, pg.46, saying (TR 1001-2):

> "Although the Delaware Courts do not normally articulate the concept as such, the 'intrinsic fairness' doctrine appears to be an attempt to use the process of an independent judicial review of the terms of the challenged merger as a substitute for the arm's length negotiation that the Courts

> presume to have been absent in situations involving the controlling and controlled corporations." (Note)

The defendants admit that there is a familiar procedure available to avoid the problem of a conflict of interest (TR 1002-3):

> "Now, there is, in addition, and as pointed out on Page 47 of this article, perhaps an alternate or one alternate to that judicial review. And to read from that article, beginning at the top of Page 47, 'In order to avoid a claim that the controlling corporation has unilaterally dictated the terms of the merger or otherwise sought unfair advantage from its control position, it is common practice for the controlled corporation to appoint an independent negotiating committee composed of board members who are not affiliated with the other corporation, to charge that committee with the explicit function of representing the public stockholders, and to have the independent negotiating committee retain independent investment bankers and legal counsel to assist in the negotiation and the valuation of proposed merger terms.' There is, of course, no requirement, legal or judicially established, that in the control merger situation such a process is mandatory. Looking at it for a minute, it certainly is one option that might be followed. But is it a good one?"

The appointment of a Board committee consisting of independent directors is scarcely novel. In _Harriman_ _v._ _DuPont_, _supra_, the affairs and personnel of DuPont Company and Christiana Securities were hopelessly entwined. However, Judge Schwartz noted that prior to the _outset_ of _negotiations_, the following took place (pg. 142-3):

Note: The foregoing is precisely what is happening in this case between the controlling and the controlled corporations. There was the absence of arm's length negotiations. Because of the absence of arm's length negotiations, this Court is being asked to review the merger.

"Merger negotiations between Du Pont and Christiana were initiated in late April of 1972 when Christiana's President, Irenee du Pont, Jr., sent a letter dated April 20, 1972, to C. B. McCoy ("McCoy"), then President and Board Chairman of Du Pont, suggesting that a merger between the two entities would be advantageous to both parites. As a result Du Pont agreed to consider such a merger.

"Prior to the start of negotiations the Christiana and Du Pont boards took two basic steps prompted by the extremely close historical relationship and interlocking directorates of the two companies: The appointment of special negotiating committees composed of persons unconnected with the opposing negotiating party and the retention of three investment banking firms to provide financial advice with respect to valuations to be employed during negotiations and the fairness of any proposed merger terms.

"The Du Pont board named McCoy and Irving S. Shapiro ("Shapiro"), then Senior Vice-President and a Director of Du Pont as its negotiating committee. Christiana similarly designated a two-man board composed of A. Felix du Pont, Jr., a Christiana Vice-President and Director, and E. B. du Pont, its Assistant Treasurer and also a Director. Du Pont and Christiana jointly retained Morgan Stanley & Co. ("Morgan Stanley"), an investment banking firm, as a financial advisor in connection with the merger. Morgan Stanley had previously assisted both of the merger parties. Christiana and Du Pont each then retained separate financial advisors, choosing Kidder, Peabody & Co., Incorporated ("Kidder Peabody") and the First Boston Corporation ("First Boston") respectively. Neither Kidder Peabody nor First Boston had any prior significant relationship with either of the merger parties."

See also this Court's unreported opinion, <u>Casella v. GDV, Inc.</u>, No. 5899 (Sept. 13, 1979), a copy of which is attached, marked Exhibit "A".

Of course, there is nothing to show that there was ever any consideration given to appointing such an independent committee of the Board. The defendants' ex post facto justification for not having done so is (TR 1003-4):

> "If an independent committee of the board of the acquired corporation is appointed, it raises precisely the same type of questions that are raised in this case. Indeed, is the board itself independent? Is the board not controlled by the majority shareholder? And you are right back into the same position, with somebody saying, 'Well, now we are going to go to court to test the independence of these independent committee members.'
>
> "Secondly, and I think significant on this point, is a very recent decision of Vice Chancellor Hartnett in Maldonado versus Flynn, which was decided on March 18, 1980. Now, that is not directly on point here, but that case dealt with a situation in which an independent committee of the board was appointed to decide whether or not a derivative suit brought by a stockholder on behalf of the corporation could and should be dismissed following some precedent established in the federal courts. This court, then, determined that that was not an appropriate way to proceed, and the effort, then, to dismiss the derivative suit by means of an independent committee failed."

The defendants thus are forced to seek refuge in the recent decision of Maldonado v. Flynn, Del. Ch., ____ A.2d ____ (1980). Maldonado, as defendants concede, is not in point: what it did decide was that a derivative suit could not be dismissed whether by committee of the Board, whether the committee was independent or not. Vice Chancellor Hartnett did not even suggest that, where there is a conflict of interest affecting some members of the Board, an independent committee of directors unaffected by the conflict is not an appropriate way to deal with a matter that is properly subject to Board action.

The defendants' own claim elsewhere that seven members of the UOP Board in fact were independent of Signal is a complete answer in itself (TR 1019). If, as defendants claim, there were seven directors who were truly independent, then a committee consisting of some or all of these directors should have been given the authority and responsibility of seeing that the interests of the minority were insulated and protected from the predatory appetite of the dominant shareholder, Signal.

The defendants' next argument is (TR 1007):

> "And finally, in Paragraph 12, that the defendants falsely stated that the price was arrived at after discussions and conversations with Crawford. In fact that is a correct statement. That's precisely what the evidence shows did happen in this case.
>
> "Now, assuming for a moment, and purely for purposes of argument, that the events which transpired should not, or could not properly be classified as negotiations, and therefore the use of that word in the press release was erroneous, would that then be material within the context of setting aside the vote of the minority shareholders on the question presented to them? In doing so, one must consider the total mix of the information given and whether that fact would create a substantial likelihood to have affected the vote ..."

The defendants seek to avoid the effect of having repeatedly represented that there were negotiations when there in fact were not any. The "total mix" argument fails because throughout the Spring of 1978, the defendants repeated the false assertion of negotiations over and over and never corrected it even after it was forcibly brought home to them by the SEC that there had been no negotiations.

A representation was made to the minority shareholders of UOP in the Proxy Statement (EX U-7):

> "The price of $21.00 was determined after discussions between James V. Crawford, a director of Signal and the President and Chief Executive Officer of UOP, and the officers of Signal which took place during meetings held on February 28th and in the course of several subsequent telephone conversations."

When measured by the obligation of <u>complete candor</u> owed by a corporate fiduciary to a minority stockholder, it is now obvious that this was a gross misrepresentation of what actually took place. Giving the defendants the benefit of the doubt that the word "negotiation" is synonymous (which it is not) with "discussion", it is totally incorrect that the price was "determined after discussions" between Mr. Crawford and the officers of Signal. Complete candor would require (a) that it be stated that Signal disclosed in its initial meeting with Mr. Crawford that Signal's inner management had studied the matter and had decided to propose to the Executive Committee of Signal a price range of $20.00 to $21.00, (b) that there was never any attempt by Mr. Crawford (or anybody else) to obtain anything on behalf of the minority shareholders above the price range first disclosed, (c) that the most that Mr. Crawford can be said to have done was to use his "influence" to get Signal to offer the top end of their price range, and (d) that the "discussions" was only one telephone call to Mr. Walkup. Complete candor also required that it be disclosed (1) that at the original private meeting between Mr. Shumway and Mr. Walkup on the one hand and Mr. Crawford on the other, Mr. Crawford did not discuss (negotiate) the price or terms, (2) that Mr. Crawford said that he thought that the price was "generous", an opinion he re-expressed at the meeting of the Executive Committee, (3) furthermore, that so far as Mr. Crawford was concerned, having made his own determination that the price was "generous", that he felt no obligation whatsoever, even as a fiduciary, to negotiate for anything better on behalf of the minority shareholders.

The defendants then attempt to justify their misrepresentations or negotiations relating to the 1978 cash-out merger by pointing to the plaintiff's acceptance of the 1975 tender (TR 1008):

> "On that score, I think it is somewhat illuminating that the very plaintiff in this action, Mr. Weinberger, in 1975 tender his share in a tender offer at $21.00 per share. He told us that the other day when he was called as a witness by the plaintiff and he also told us that he didn't complain and voluntarily tendered those shares. There is absolutely nothing whatsoever in the tender offer that would give anybody a clue as to how the $21.00 per share price was reached, whether through negotiations or otherwise, either as to the tender offer price of the transaction also reported in that tender offer, mainly the purchase of 1,500,000 shares from UOP itself."

There is an obvious difference between the 1978 cash-out merger and the 1975 tender offer. The tender offer was, as the name implies, an offer to each of the individual stockholders of UOP. They could accept or decline the tender. There was no requirement that the amount of the tender offer in 1975 be "fair" or "adequate" or anything else. Each stockholder had the right to either accept or decline. (Note) Mr. Weinberger accepted the offer.

Note: As it turned out, the 1975 tender offer may have perhaps been overly generous since it was oversubscribed. A lesser offer might have resulted in an acceptance by the requisite number of shares.

Quite different was the 1978 cash-out merger. This was a situation where, depending on the vote of the majority of the minority, <u>all</u> of the minority stockholders were going to be bound. In addition, the price was a merger, not a tender offer, price. Therefore, it was critical to know how the price had been arrived at before voting on the merger proposal. It was represented throughout by the defendants that the price had been arrived at through negotiations. (Presumably, therefore, the maximum price had been obtained through the arm's length bargaining by corporate fiduciaries fully carrying out their responsibilities.) That material representation was false.

* * *

No matter what the defendants now say, the fact of the matter is that they made repeated material misrepresentations to the minority shareholders that the terms, including the price, of the merger were negotiated. In view of the uncorrected misrepresentations, the Court should void the alleged merger ratification and consider the relief appropriate to make the minority whole.

V. THE DEFENDANTS MISREPRESENTED THAT AN EVALUATION OF THE FAIRNESS OF THE MERGER TERMS AND PRICE HAD BEEN OBTAINED FROM AN INDEPENDENT INVESTMENT BANKER

Paragraph 13 of the Amended Complaint provides:

> "13. As part of the conspiracy, the defendants made it appear and the outside stockholders were led to believe that an independent evaluation of the fairness of the proposed merger to the outside stockholders had been obtained from Lehman Brothers, an investment banker.
>
> "(a) It was not revealed that Lehman Brothers was not independent since it had previously prepared a memorandum directed to Signal advising Signal that it was in Signal's best interest to cash out the outside shareholders for $21.00 per share.
>
> "(b) It was not revealed that Mr. Glanville who gave the fairness opinion made no review or study nor made any calculations but simply gave his personal opinion that the price was fair."

The defendants' answer provides:

> "13. Denied, except alleged that the merger proposal was formally presented to UOP's Board at its meeting on March 6, 1978; that at such meeting UOP's Board considered, _inter alia_, an opinion of the independent investment banking firm of Lehman Brothers that the proposed merger was fair and equitable to the stockholders of UOP other than Signal; and that James W. Glanville was a Managing Director and Member of the Board of Lehman Brothers and a director of UOP.
>
> "(a) Denied.
>
> "(b) Denied.

The defendants begin their argument on paragraph 13 of the Amended Complaint by stating (TR 1009):

> "That appears at paragraph 13 of the amended complaint in which they state, first of all that the defendants made it appear that they had an

> independent evaluation of the fairness from Lehman Brothers. Well, first of all, they did have an evaluation of fairness from Lehman Brothers as part of the proxy statement."

There is no question that UOP had a fairness opinion from Lehman Brothers. Indeed, in the proxy statement (EX U-7, pg. 9), the Board recited to the stockholders that the Board considered the Lehman Brothers opinion in recommending Signal's merger proposal to the minority shareholders.

The obvious purpose of a fairness opinion is to persuade the minority stockholders that an independent evaluation of the fairness and desirability of the merger had been made for their benefit. In Denison v. Fibreboard, supra, at 821-3, Judge Stapleton said:

> "As noted at the outset, the Proxy Statement presents the proposed transaction as one in which a principal portion of the considerations to be received by Fibreboard will be in the form of the acquisition of certain Yuba assets. Because of the nature of these assets, a stockholder's decision on the benefits of the transaction as a whole must necessarily rest in part on his faith or lack of faith in the judgment of others closer to the situation. The Proxy Statement represents that management has considered the value of the transaction to Fibreboard, including the value to it of Yuba's timberlands, and has concluded that it is fair to the company and its stockholders. It goes further, however, and suggests that Lehman Brothers has made a similar evaluation and has reached the same conclusion. The reason this representation was made is obvious. Because of the independence of Lehman Brothers, as well as its reputation in the investment banking field, its opinion added persuasive support for management's view. In the context of this Proxy Statement, the Court believes the impact of the reference to Lehman Brothers' opinion on a substantial number of stockholders would be difficult to overestimate.
>
> ***

> "On the present record, however, I find that the bare reference of the Proxy Statement to an opinion of an independent investment firm that the transaction was 'fair to the company and its stockholders' without further reference to the basis for that opinion was misleading."

Critical to any minority stockholder's evaluation of the merger was the fact that an "independent" investment banker was supposed to have made an informed evaluation of the merger from the point of view of the minority shareholders and confirmed that the terms, including the price, were fair to the minority.

The defendants claim that they do not know what the word "independent" means (TR 1010):

> "Apparently the question there -- we get back to semantics again as to whether or not that evaluation was 'independent' or not. Now I am not really sure what 'independent' means but clearly to the plaintiff's own expert, whom we got to know over the last few days at least, he testified that within the financial community one can present an independent evaluation of fairness notwithstanding the fact that the one giving that opinion has provided over a period of time various services to the company involved and for whom the fairness opinion is being given."

Independent plainly means that the investment banker chosen had no commitment that would impinge on their giving an unqualified opinion to the Board of UOP and the minority. The <u>independence</u> of the investment banker is more significant than it ordinarily would be because of the fact that the minority stock was being acquired by the majority stockholder (in contrast to purchase by a third party with no fiduciary obligations).

The defendants then come reluctantly to LB-40, saying (TR 1012): "That brings us to the infamous LB-40." LB-40 is a Lehman Brothers' document entitled "Memorandum to Mr. Forrest Shumway - Confidential Draft - Considerations Relating to the Signal Companies' Investment in UOP - Lehman Brothers Incorporated - June 1976".

The defendants first say that LB-40 was a document prepared solely for Lehman Brothers (though it was specifically addressed to Mr. Shumway, President of Signal) and that neither UOP nor Signal knew of it. The defendants say (TR 1012):

> "Consequently in terms of an obligation on the part of UOP and/or Signal to have made disclosure about something that they had absolutely nothing to do with makes no sense whatsoever."

Of course, if it is a fact that neither Signal nor UOP knew about LB-40, and had no way to know of its existence, they could hardly have an obligation to disclose it. Mr. Glanville directed the preparation of LB-40 (Seegal 20; Glanville 24-28). Since Mr. Glanville was a director of UOP, his knowledge of LB-40 is imputed to UOP. Clearly, Lehman Brothers did know about it. It did have an obligation to disclose its existence not only to Signal and UOP but to those to whom they had an ultimate responsibility -- the outside stockholders.

It should be kept in mind that this opinion was prepared in 1976 shortly after the disastrous Come-By-Chance situation came to light and the write-off by UOP of $31 million. At that time, Lehman Brothers concluded that it would be in Signal's best interest to purchase the stock of the outside stockholders of UOP for up to $21.00. Though Mr. Glanville, the man who had directed that the opinion be prepared, claims that he had no recollection whatsoever of LB-40 (Glanville 43), it is perfectly clear that the fact of the existence of LB-40 was not only known to the employees of Lehman Brothers working on the UOP fairness opinion but it was actually reviewed and used by them (Seegal 19-29, 65-75; Pearson 45-48). It came to Mr. Schwarzman's attention; he recognized its importance but claimed that he specifically decided not to look at its contents. (Mr. Schwarzman obviously recognized the conflict and sought to avoid it by looking the other way.) (Seegal 65; Schwarzman 20) Thus, LB-40 was not an old document that lay unknown to Lehman Brothers in the storage files of Lehman Brothers: it was a document that Lehman Brothers reviewed at the very time they were preparing a conflicting opinion.

The critical question that Lehman Brothers never answered in the course of the preparation of the UOP fairness opinion (or at trial) was why, if a price of up to $21.00 a share was in Signal's best interest in 1976, precisely that same price was in the best interest of the stockholders in 1978 when the fortunes of UOP had changed so radically for the better in the interim.

The defendants say (TR 1012):

> "Secondly, in terms of Lehman Brothers supposedly having some duty to make such a disclosure, that again makes no sense. It (LB-40) is a document done internally by Lehman Brothers two years prior to the transaction and there is no showing why or what relevance that would have to anyone."

The document is clearly relevant: it shows that at the nadir of the fortunes of UOP, Lehman Brothers had prepared a study that showed that it was in Signal's, the eventual purchaser's, interest to purchase the shares of the outside stockholders at $21.00 per share. Any knowledgeable shareholder would certainly want to know how Lehman Brothers, having prepared that 1976 opinion for Signal, could justify a 1978 opinion to the outside stockholders that the same $21.00 was favorable to the stockholders when clearly the fortunes of UOP had improved to such an extent.

The defendants then attempt to convince the Court that Mr. Glanville did not give the opinion -- that Lehman Brothers did (TR 1013):

> "Going back to paragraph 13 of the amended complaint, the plaintiff then alleges that the defendant did not reveal that Mr. Glanville who gave the opinion, made no review nor calculations. So on that subject I think it is important to realize that Mr. Glanville did not give an opinion. The opinion was requested of Lehman Brothers and the opinion letter is indeed from Lehman Brothers."

There are several comments on this bit of legal legerdemain. First, it is perfectly clear from the Proxy Statement that the Lehman Brothers fairness opinion was based on Mr. Glanville's personal familiarity with UOP (EX U-7, pg. 3):

> "The investment banking firm of Lehman Brothers Kuhn Loeb Incorporated ('Lehman Brothers') furnished the Board of Directors of UOP at its March 6, 1978 meeting an opinion that the Merger, including the price of $21 per share, is fair and equitable to the stockholders of UOP other than Signal. The procedures followed by Lehman Brothers in forming its opinion are set forth in its opinion, a copy of which is attached as Appendix D. <u>It should be noted that Lehman Brothers did not make</u>

> or obtain independent reports or verification but relied entirely on materials supplied by UOP and that Mr. James W. Glanville, a director of UOP and a member of its Audit Committee, as described in the opinion letter is familiar with the business and future prospects of UOP."

The opinion letter of Lehman Brothers itself states (EX U-7; EX D pgs. 1 and 2):

> "In the process of forming our opinion expressed herein, we did not make or obtain independent reports on or appraisals of any properties or assets of UOP and have relied upon the accuracy (which we have not independently verified) of the audited financial statements and other information furnished to us, or otherwise made available, by UOP.
>
> "Mr. James W. Glanville, a managing director of Lehman Brothers Kuhn Loeb Incorporated, has been on the Board of Directors of UOP since 1972 and is familiar with the business and future prospects of UOP."

Thus, the stockholders are led to believe that because of Mr. Glanville's long tenure as a director of UOP, he has a special knowledge of the financial affairs of UOP that makes his opinion on fairness especially significant. At the time of the merger, the defendants wanted the advantage of the contrast between Mr. Glanville and some other independent investment banker who had not had Mr. Glanville's long and intimate association with UOP. Now, they seek to disclaim Mr. Glanville for the obvious reason that his fairness opinion was simply an "off the cuff" reaction (Glanville 117-118).

Actually, the position now taken by the defendants confirms that the defendants (particularly Mr. Crawford) knew that Mr. Glanville had not made any study or evaluation as was represented to the stockholders (Crawford 119-120). Mr. Glanville stated candidly at his deposition how he arrived at his opinion: it was simply that the proposed merger price was 50% over the market price (Glanville 117-118). Mr. Glanville did not even take the trouble to review the pro forma backup work that had been done by his juniors except perhaps to "glance" at it on the early morning flight from New York to Chicago (Schwarzman 53). Mr. Glanville did not participate in the research but may have "thumbed" through it on the way to Chicago (Glanville 73). It is also clear, contrary to Mr. Halkett's bland assertion, that Mr. Glanville was the only Lehman Brothers representative who spoke at the Board of Directors meeting on March 6, 1978. Mr. Schwarzman was present but was a silent participant (Schwarzman 52). (Note)

Of course, the reason that the defendants now attempt to make it appear that Lehman Brothers gave the fairness opinion rather than Mr. Glanville is because Mr. Glanville candidly admitted that the basis for his opinion was not study or evaluation of the worth of the UOP shares but simply his "horseback" opinion that $21.00 represented a 50% premium above market and, hence, was fair (Glanville 117-118).

Note: When this litigation arose, Mr. Glanville knew that his cavalier approach on the fairness opinion would not stand up. He therefore sent a jocular note to Mr. Schwarzman saying (LB-48): "It looks like you will earn your fee."

The defendants say (TR 1013):

> "The record shows that at least three people, if not more, at Lehman Brothers spent a number of days doing a lot of work in preparation for being able to give an opinion of fairness in this particular case. The individuals involved in that went out to UOP headquarters. They interviewed management, they prepared documents."

Actually, the total Lehman Brothers effort of the two juniors and Mr. Schwarzman at Lehman Brothers consisted of a due diligence visit of one day to Chicago that included a discussion with Mr. Crawford and Mr. Woods (Pearson 9-11; Seegal 50-60). There was a discussion with the financial vice president, Mr. Shuman (Pearson 10), but there was apparently no question raised of the true value of UOP's non-income producing assets, the vast timber acreage or whether there should be an appraisal made of these. Nor was there any inquiry about UOP's excess cash nor of the patents and royalties or their correct valuation (Pearson 10). The so-called backup work (which incidentally was <u>not</u> presented to the Board of Directors of UOP) was entirely done by the two juniors, Messrs. Seegal and Pearson. Their joint work was done on Saturday, March 4, 1978 (Pearson 26). The final work on the report was completed on Sunday, March 5, 1978 by Mr. Pearson, an associate who was but one year out of business school (Seegal 81; Pearson 4).

The defendants say (TR 1013):

> "And as far as Mr. Glanville is concerned, the record shows that Mr. Glanville communicated by telephone with the other people in his office over the weekend prior to March 6th, that he and Mr.

> Schwarzman discussed the data and details on the way to the Board meeting on March 6, 1978, and that all of this activity occurred prior to Lehman Brothers giving the opinion."

The records show that all Mr. Glanville had was a draft of the opinion letter (without the price) read to him over the phone by a junior, Mr. Seegal, on Saturday, March 4, 1978 (Schwarzman 35; Seegal 70). Mr. Glanville told Mr. Crawford that there was no necessity for him to look at the proposed merger: all he had to do was to have the proposed opinion letter read to him (EX U-49-25). So far as the alleged conversation between Mr. Schwarzman and Mr. Glanville is concerned, neither Mr. Glanville's deposition nor Mr. Schwarzman's deposition indicates that there was any detailed conference on the early morning flight on the morning of March 6th from New York to Chicago (Glanville 69, 72; Schwarzman 37-38) though they had discussed the merger by phone Friday, March 3, 1978.

The defendants then claim the only opinion that Mr. Glanville gave was when he voted (TR 1014):

> "The only opinion, if it can be called that, of Mr. Glanville was when Mr. Glanville as a director voted in favor of the transaction. Consequently, to say that Mr. Glanville who gave the fairness opinion made no review or study or calculation makes no sense within the context of the facts of this litigation."

The plaintiff appreciates the embarrassment that the defendants have with Mr. Glanville but there are limits even to advocacy. The fact is that the minority stockholders were deliberately led to believe that the opinion delivered to the Board and on which the Board recites that it relied in the Proxy Statement was that of Mr. Glanville. It was specifically recited that he was a director and was "familiar with business and future prospects of UOP" (EX U-7, pg. 3). If what the defendants now say is correct, then the Proxy Statement should have stated that Lehman Brothers gave an opinion, and that Mr. Glanville was a managing partner of Lehman Brothers but that his participation in the merger was solely in his role as a UOP director. As was pointed out in the original brief, what Mr. Glanville did was to charge UOP $150,000.00 for his opinion and vote as a director (Plaintiff's Pre-Trial Brief on Liability, Footnote, pg. 18).

The defendants' final argument is that the omission by Lehman Brothers of disclosing its prior opinion is that it was not "material" (TR 1014):

> " *** We respectfully submit that within the standards we have mentioned, that (LB-40) would not be material to that which was presented to the minority shareholders; namely the question of whether they wanted to vote for a merger under which they would receive a cash price of $21.00 a share for their stock."

It is difficult to imagine anything more material than disclosure of a prior opinion prepared by the supposedly independent banker on the very subject. Lynch v. Vickers, supra; Kaplan v. Goldsamt, supra. The foregoing is especially so since the prior opinion was prepared for Signal, the other party to the merger, two years earlier and concluded that it was in Signal's best interest to buy the minority stock at up to $21.00. Clearly, it was material to the minority shareholders in deciding how to vote on the merger and should have been disclosed.

* * *

The plaintiff has proved that the defendants misrepresented that an evaluation of the merger terms and price had been obtained from an independent investment banker.

VI. THE BOARD AND MANAGEMENT OF UOP FAILED TO CARRY OUT THEIR FIDUCIARY RESPONSIBILITIES TO THE MINORITY

Paragraph 14 of the complaint states:

> "14. As part of the conspiracy, the defendants made it appear and the outside stockholders were led to believe that the management and the Board of UOP had carefully considered and unanimously approved the proposed merger.
>
> "(a) It was not revealed that the Board of UOP was nominated and controlled by Signal.
>
> "(b) It was not revealed that the Board of UOP (1) did not itself consider the merger from the point of view of the outside stockholders as opposed to the economic interest of the majority stockholder, Signal, nor (2) refer the consideration of the proposed merger to an independent group of directors, nor (3) inquire as to whether there had been any negotiations on price or other terms on behalf of the outside stockholders, nor (4) make any inquiry as to the independence of Lehman Brothers or the basis for Lehman Brothers' fairness opinion."

The defendants answered:

> "14. Denied.
>
> "(a) Denied.
>
> "(b) Denied."

The defendants deny the allegations of paragraph 14 and claim that the Board carried out its responsibilities, saying (TR 1015):

> "Paragraph 14 of the complaint alleges that the defendants made it appear and that the outside stockholders were led to believe that the management and Board of UOP had carefully considered and unanimously approved the merger, and the allegation is that that in someway was false. Now, first of all, it is very, very clear from the record here that this is precisely what they did do."

The defendants' first argument is that because there were some knowledgeable people on the Board of UOP, this somehow proves that the Board of UOP considered Signal's cash-out merger proposal (TR 1015-1016).

The Board of UOP had a serious responsibility to weigh and evaluate a proposal by the dominant stockholder to merge out the minority stockholders. Gimbel v. Signal Oil Co., supra. The Board of UOP did not discharge its fiduciary responsibility by simply going through the motions, particularly where there was no attempt to evaluate the worth of the minority shares by the management, the Board itself nor by the investment adviser, Lehman Brothers. Nowhere is the real question of the value or worth of the minority shares raised, much less considered or answered in the minutes of the Board or the documents or information presented to the Board. The Board simply decided on the basis of Mr. Glanville's oral opinion, and the fact that $21.00 was the same price as the 1975 tender and direct purchase price that Signal's offer was fair.

The UOP Board was summoned to assemble in Chicago three business days after Signal had privately first announced its proposed merger to the President of UOP. The Board of UOP was given no advance documentary information on the Signal merger proposal nor a written evaluation with supporting reasons or explanations of the worth of the minority shares. See Gimbel v. Signal, supra. The Board was simply assembled, given the Signal proposal and some financial information on

UOP's performance. The Board immediately voted on the Signal proposal.

The Signal directors of UOP (Messrs. Shumway, Walkup, Arledge, Chitiea and Wetzel) abstained "on the advice of counsel" though they affirmatively put in the minutes that they would have voted for the Signal proposal but for the conflict of interest (EX U-298). It was represented to the public and the minority stockholders through a press release that the vote was "unanimous" (EX U-69-099). Mr. Crawford, who was a director of both UOP and Signal, did vote in favor of the Signal proposal. (Note) The UOP Board was faced with a delicate situation in which the controlling stockholder was seeking approval of the UOP Board. The UOP Board did go through the formalities but not the substance of the consideration required for such a serious matter. However, the proxy statement made it appear to the outside stockholders that their fiduciaries had, in fact, carried out their duties. The law of Delaware is clear: insiders and dominant stockholders cannot use the corporate machinery to

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Note: Mr. Crawford's conflict of interest was precisely the same as all the other "Signal" directors of UOP and, hence, if they could not vote, neither could he. However, the defendants were in a dilemma: it had already been represented in a press release that UOP and Signal were negotiating. If Mr. Crawford had not voted because of a conflict of interest, it would have highlighted the falsity of the claim that there had been negotiations. "What a tangled web we weave, when first we practice to deceive." Scott circumvent the rights of minority shareholders. Condec v. Lunkenheimer Co., Del. Ch., 230 A.2d 769 (1967); Schnell v. Chris-Craft Industries, Del. Supr., 285 A.2d 437 (1971).

The defendants also say (TR 1017):

> "It is also the case, as pointed out in the minutes of this meeting at page 4, that Lehman Brothers, through Mr. Glanville and his staff, have reviewed what they believe to be pertinent to financial and other materials. A copy of their report was in each director's book."

In the first place, the plaintiff doubts that the full Lehman Brothers "report" itself (LB 5) was in each director's book. (The Lehman Brothers "report" referred to in the minutes (EX 298) was probably a draft of the Lehman Brothers letter. (Note) But, even if the "report" was LB-5 in its entirety, its significant aspect is only one page long (LB-5, Table I). It does not give any detailed information on the value of the minority shares but rather is simply a comparison between certain aspects of the 1975 transactions and the 1978 cash-out. Not only does it not focus on the value of the minority shares but it does not adequately consider what premiums have been offered and paid in comparable situations.

Note: LB-5 contains a copy of the opinion letter of March 6, 1978, with the cash-out price of $21.00. This price was not decided or known (if the Signal and UOP witnesses are to be believed) until the Signal Board met (Crawford 130-131, but see Crawford 119-120; U-49-123).

*　　*　　*

The defendants represented to the stockholders that the management and Board had carried out their fiduciary obligations to the minority stockholders to weigh and consider the cash-out merger proposal of the dominant stockholder, Signal. No member of UOP management, other than Mr. Crawford, himself a Signal director, participated. The UOP Board, dominated by Signal directors, was hastily assembled, was told of the Signal cash-out merger, heard Mr. Glanville's opinion and forthwith voted in favor of Signal's proposal without an inquiry into how the terms, including the price, were arrived at. They never gave any consideration to a possible improvement of the terms (i.e., stock-for-stock, escalation to reflect market increases or pro rata division of the second quarter dividend). They made no inquiry as to the basis for Mr. Glanville's fairness opinion. In addition, the recitation that the vote was unanimous was misleading if not false: some of the Signal directors abstained because of the conflict of interest.

VII. THE DEFENDANTS USED AND MANIPULATED THE CORPORATE MACHINERY OF UOP TO ACHIEVE THE ENDS OF THE DOMINANT STOCKHOLDER

Paragraph 15 of the Amended Complaint provides:

> "15. As part of the conspiracy, the defendants made it appear and the outside stockholders were led to believe that the management of UOP had considered the best interests of the outside stockholders and concluded that their best interests would be served by voting for the merger.
>
> "(a) It was not revealed the extent to which management had been assured favorable consideration by Signal if the merger were approved.
>
> "(b) It was not revealed that management of UOP had made no studies itself or consulted outside sources to provide a proper basis for the repeated urging of the outside stockholders to vote for the merger in the Proxy Statement and Notice of the Annual Meeting.
>
> "(c) It was not revealed that the management of UOP had retained, without Board approval, Georgeson & Co., a professional proxy solicitation firm, to solicit proxies in favor of the approval of the merger."

The defendants' answer provides:

> "15. Denied.
>
> "(a) Denied.
>
> "(b) Denied.
>
> "(c) Denied."

Paragraph 15 of the Amended Complaint states that the minority stockholders were led to believe that the management of UOP had considered the best interests of the outside stockholders and concluded that their best interest would be served by voting for the merger. There is no indication that the management of UOP was ever consulted in connection with the cash-out merger proposal of Signal. The only person in management who had anything to do with the merger was Mr. Crawford, himself a Signal director, and a former employee of another subsidiary of Signal. He was specifically transferred and promoted by Signal in making him President and Chief Executive Officer of UOP soon after Signal obtained control of UOP. The balance of the UOP management simply had nothing to do with the Signal cash-out merger. Indeed, the only other UOP employee whose name even appears in the record is Mr. Shuman, the Financial Vice President. Mr. Shuman was not consulted on the correct valuation of the timberlands of UOP nor its excess liquidity. He simply appeared at the meeting of the Board of UOP on March 6, 1978, and supplied certain financial information to the Board of Directors (EX 298). Specifically, Mr. Shuman did not participate in any review of the value of the shares of the minority stockholders. Mr. Woods, house counsel for UOP, also came before the Board of Directors to give certain advice on the legal aspects of the fiduciary obligations of the Board and the conflict of interest that existed in view of the fact that the dominant stockholder was cashing out the minority. However, so far as the record shows, Mr. Woods did not participate in a management decision that it was in the best interest of the stockholders to vote in favor of the merger proposal.

Paragraph 15(a) states:

> "(a) It was not revealed the extent to which management had been assured favorable consideration by Signal if the merger were approved."

The plaintiff withdraws this allegation of the complaint. The plaintiff was not able to assemble proof to substantiate this allegation. Of course, it is true that Mr. Crawford, President of UOP, was roundly congratulated by a fellow President of another 100% owned subsidiary of Signal on working out a deal that was very favorable to Signal (EX U-49-4).

So far as paragraph 15(b) is concerned, it reads:

> "(b) It was not revealed that management of UOP had made no studies itself or consulted outside sources to provide a proper basis for the repeated urging of the outside stockholders to vote for the merger in the Proxy Statement and Notice of the Annual Meeting."

In spite of the foregoing, the Proxy Statement recites in bold type the following (EX U-7, pg. 10):

> "Management recommends a vote in favor of approving the merger agreement."

Management is retained by the owners to run the company for the benefit of all of the owners, both the majority and minority. It should be strictly neutral as between the two rather than taking sides especially when a majority shareholder seeks to cash out the minority. It should not allow the corporate machinery to be used to accomplish the ends of the majority. In this case, there was an obligation of a fiduciary nature by the management of UOP to the minority stockholders. In this situation, it was another material misrepresentation to the minority to claim that there had been consideration by "the management" of UOP and that management (as contrasted with the Board) believed that it was in the best interest of the minority to vote to approve the merger.

As has been previously shown, management, as contrasted with the Board, made no studies nor had any studies made that provided any basis for management to take the position that the best interest of the minority stockholders would be served by voting for the Signal merger.

The defendants say (TR 1023):

> "And finally, last but not least, but certainly I believe the most ridiculous of the assertions made by the plaintiff in this case is that it was not revealed to the minority stockholders that the management of UOP had retained without the approval of the Board Georgeson & Company to solicit proxies in favor of the merger. If one turns to a page which I know is here, namely page 41, there is a section entitled in bold type "Proxy Solicitation -- Other Matters". In this paragraph it says that 'The Company has also retained Georgeson & Company to assist in the solicitation of proxies by the methods above referred to at an estimated expense -- ', etc. This paragraph appears immediately above 'By order of the Board of Directors, N. B. Peake, Secretary'. For the life of me, if the Board had not formally made such an approval, what possible relevance and consequence could it have had to the minority stockholders in deciding whether or not they would vote in favor of the merger?"

The defendants apparently deliberately choose to miss the point. (Note) So far as the plaintiff can tell, the

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Note: Actually, the attorney for the defendants seems to believe that because the secretary's name appears below the words "By order of the Board of Directors. N. B. Peake, Secretary" that this carries with it the authority to hire a stock solicitor. Clearly, what the Board authorized was the Proxy Statement. That statement certainly does not indicate Board approval for Georgeson & Company. However, if indeed the Board did authorize Georgeson & Co., by what authority does the Board go out and hire a professional stock solicitor to solicit proxies in favor of the proposal of the majority stockholder?

Board of Directors of UOP did not authorize the management of UOP to go out and retain Georgeson & Company to solicit votes in favor of the proposal of the dominant stockholder, Signal. Nevertheless, the management went out and hired Georgeson & Company at company expense to solicit votes in favor of the proposal of the majority stockholder, Signal. Such action is the use of corporate funds and corporate machinery to effectuate the purposes of the dominant stockholder. See Schnell v. Chris-Craft Industries, supra, and Condec v. Lunkenheimer, supra.

* * *

In summary, the management did not make any studies nor did it have any studies made that provided a basis for the management to urge the minority stockholders to vote for the merger proposal. In addition, there was no Board authority and no basis for the management to go out and retain, at company expense, a proxy solicitation firm to solicit in favor of the merger proposal of the dominant stockholder, Signal.

VIII. THE DEFENDANTS HAVE THE BURDEN OF PROVING THAT THERE WAS A PROPER BUSINESS PURPOSE AND THAT THE MERGER WAS INTRINSICALLY FAIR

Paragraph 16 of the Amended Complaint provides:

> "16. The conspiracy succeeded: the outside stockholders, deceived by representations and appearances that the defendants, their fiduciaries, had faithfully carried out their obligations, duly voted by a twelve-to-one ratio in favor of the merger. Signal, pursuant to the conspiracy, then voted in favor and the merger was adopted and carried out."

The defendants' answer provides:

> "16. Denied, except alleged that on May 26, 1978, the annual meeting of stockholders of UOP was held; and that of the 5,688,302 shares held by stockholders of UOP other than Signal, 2,953,812 shares were voted in favor of the merger, and 254,840 shares were voted against. Further alleged that Signal voted its 5,800,000 shares of UOP common stock in favor of the merger, and that the Merger Agreement was filed, and the merger became effective, on May 26, 1978."

The defendants so structured Signal's merger proposal so that it could only be adopted if a majority of the minority stockholders voted in favor of it. This gave the appearance that Signal, in recognition of its dominant and conflicting position, was not exercising its power to force the cash-out merger through over the opposition of the minority stockholders: rather, it was leaving the decision to the minority itself.

The scenario is described in Carney, supra, pg. 129, f.n. 231:

> "Management wishing to survive judicial scrutiny of a one-step transaction may well wish to structure it to provide the appearance of the consent of, and benefit to, a majority of the

public shareholders. Courts looking to determine whether the terms of a self-dealing transaction are so unfair as to suggest fraud will look to the reaction of a majority of the public shareholders. Fairness issues are quickly dismissed where a majority approve an arm's-length asset sale or merger. Alcott v. Hyman, 42 Del.Ch. 233, 208 A.2d 501 (Sup. Ct. 1965); MacFarlane v. North Am. Cement Corp., 16 Del.Ch. 172, 157 A. 396 (Chan. 1928). Where self-dealing is involved, ratification by a majority of the public shareholders generally shifts the burden of proof of unfairness to the complaining minority. Wall v. Anaconda Mining Co., 216 F. 242, 244-45 (D.Mont. 1914), aff'd. sub nom. Wall v. Parrot Silver & Copper Co., 244 U.S. 407 (1917); Gottlieb v. Heyden Chem. Corp., 33 Del.Ch. 177, 91 A.2d 57 (Sup. Ct. 1952); cf. Bastian v. Bourns, Inc., 256 A.2d 680 (Del.Ch. 1969), aff'd. per curiam, 278 A.2d 467 (Del. Sup.Ct. 1970). Where the complaining minority represents an extremely small number of shares in a transaction that has been approved by a strong vote of the public shareholders, courts express extreme reluctance to overturn the decision, often referring to the risk that they may do more harm than good, thus invoking a utilitarian justification. General Inv. Co. v. Lake Shore & M.S. Ry., 250 F. 160, 177-78 (6th Cir. 1918); Binney v. Cumberland Ely Copper Co., 183 F. 650, 652-53 (D. Me. 1910); Imperial Trust Co. v. Magazine Repeating Razor Co., 138 N.J. Eq. 20, 46 A.2d 449, 453 (Ch. 1946); Schulwolf v. Cerro Corp., 86 Misc. 2d 292, 380 N.Y.S.2d 957 (Sup.Ct. 1976); In re American Tel. & Cable Co., 139 Misc. 625, 248 N.Y.S. 98, 100-101 (Sup. Ct. 1931). Courts have shown a proper reluctance to interfere with going-private tender offers, on the theory that each shareholder can make his or her own determination about whether tendering would be beneficial, thus negating questions of fairness. Kaufmann v. Lawrence, 386 F.Supp. 12 (S.D.N.Y. 1974), aff'd per curiam, 514 F.2d 283 (2d Cir. 1975), and Raffa v. Mechanics' Bldg. Material Co., Inc. Employee Stock Ownership Trust, [1975-1976 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶95,535 (E.D.N.Y. 1976). Where a tender offer was followed by a merger in a two-step transaction that the court found not unfair to the minority, special note was taken of the fact that it was approved by 59 percent of the independent stockholders. Levin v. Great W. Sugar Co., 406 F.2d 1112, 1120 (3d Cir.), cert. denied, 396 U.S. 848 (1969). While discussions of fairness may not be directly related to a business purpose, evidence of gains for the vast majority of the shareholders lends credence to such arguments. It also makes possible arguments based on the fallacy of composition."

If the defendants had not deliberately misrepresented material facts and omitted other material facts and Signal had not used its control position to manipulate the management, Board of UOP and the UOP machinery to obtain the vote of a true majority of the minority, then under familiar principles of ratification, the merger could not be attacked by those who have ratified corporate action and accepted the benefits can not be heard to complain of it. (Note)

Carney supra, pg. 100-101:

> "If an exchange is approved by the required majority of the shareholders, it is presumed to benefit the shareholders as a body, and no court will second-guess their benefit calculations. The business judgment rule applies in such cases. Here the courts rely on the enlightened self-interest of the shareholders, given full disclosure and an absence of actual fraud."

(See also the cases and authorities cited on page 50, et seq., of Plaintiff's Pre-Trial Memorandum on Liability.)

The defendants say that the vote was "overwhelming" (TR 1026). However, the actual numbers show that, in spite of the fact (1) that Signal used "all the king's horses and all the king's men" as well as a professional stock solicitor, and (2) that there were numerous material omissions and

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Note: Indeed, this Court, in its opinion on the limitation of the class, rested its opinion on just such a basis.

misrepresentations, still Signal did not obtain an "overwhelming" majority of all the minority shareholders. (The marginal outcome of the total vote on the Signal merger proposal stands in stark contrast to the situation back in 1975, where the $21.00 tender was vastly oversubscribed.) 43.6% of the minority shareholders did not vote at all. 7.9% of the minority voted against the merger. Thus, only 56.4% (2,953,812 shares) of the minority outsiders voted in favor of the merger proposal.

As pointed out in the Plaintiff's Pre-Trial Memorandum on Liability (pg. 51), ratification by the stockholders freshens "the entire atmosphere", and places the burden on those who would overcome the ratification only "... where formal approval has been given by a majority of fully informed stockholders ...". (Gottlieb v. Heyden Chem. Corp., Del. Supr., 91 A.2d 57 (1952).) In this case, there was not the requisite disclosure that "complete candor" requires. (Lynch v. Vickers, Del. Supr., 383 A.2d 278 (1978).) Since the vote of the minority was obtained by Signal without having lived up to the required standard, the burden of proof is on the dominant stockholder standing on both sides of the transaction. Thus, the defendants have the burden of proving a proper business purpose.

Furthermore, even if the ratification by the majority of the minority (in spite of defendants' non-disclosure, misrepresentations and overreaching) were held to place the burden of proving a proper business purpose on the plaintiff, still Signal, standing on both sides of the transaction, has the burden of proving the intrinsic fairness of the transaction. Vice Chancellor Hartnett said in Schreiber v. Bryan, Del. Ch., 396 A.2d 512, 519 (1978):

> "I find that the defendants have the burden of proving that POGO was not stripped of a corporate opportunity. The defendants have thus far failed to sustain this burden. The applicable test is intrinsic fairness rather than the business judgment rule. Although under the business judgment rule an aggrieved party bears the burden of showing gross and palpable overreaching (See Wolfensohn v. Madison Fund, Inc., Del. Supr., 253 A.2d 72 (1969), and Meyerson v. El Paso Natural Gas Co., Del. Ch., 246 A.2d 789 (1967), when the test of intrinsic fairness is deemed to apply, the burden shifts to the defendants to show the entire fairness of the transaction under the careful watch of the courts. Singer v. Magnavox Co., Del. Supr., 380 A.2d 969 (1977); Sterling v. Mayflower Hotel Corp., Del. Supr., 93 A.2d 107 (1952); and David J. Greene & Co. v. Dunhill Int'l., Inc., supra. The traditional prerequisite for invoking the intrinsic fairness test, in a parent-subsidiary context, is that the parent controls the making of the transaction and the fixing of its terms. This rule has been narrowed, however, to require that there also be a showing of self-dealing, i.e., that the parent benefitted to the exclusion of and to the detriment of the minority stockholders of the subsidiary. Sinclair Oil Corporation v. Levien, Del. Supr., 280 A.2d 717 (1971), and Getty Oil Company v. Skelly Oil Company, Del. Supr., 267 A.2d 883 (1970).
>
> "All the elements necessary to invoke the intrinsic fairness rule are present in the case before me. Pennzoil totally dominated and controlled POGO's management at the time of the 1972 transactions and set the terms of the PLATO arrangement. Thus, although Pennzoil chose not to exercise its voting control, it nonetheless controlled the corporate machinery of POGO, and may have stood to gain at the expense of its subsidiary. The possible detriment to POGO's stockholders is the alleged loss of a corporate opportunity and purported waste of assets. The

benefit received by Pennzoil is not only the $640,000 fee resulting from the transaction, but also the creation of a second subsidiary from which to receive hydrocarbons for refining." (Note 1)

* * *

The vote of the majority of the minority stockholders on the Signal cash-out merger proposal was vitiated by the omissions, misrepresentations and the use of corporate machinery by the dominant stockholder to obtain this vote. The defendants had the burden of proof of establishing at trial a proper business purpose. The trial record shows that Signal had no proper business purpose. The ostensible purpose of the merger was to eliminate actual and potential conflicts which were in existence (or which could have been foreseen) at the time that Signal acquired its dominant position (Walkup, TR 1662, et seq.). Signal's real purpose was to eliminate the minority shareholders and take over the economic position of the minority shareholders. (Note 2) Signal's lawyer succinctly described what Signal was doing, how it was doing it and why in his letter to the Commissioner of Internal Revenue of March 22, 1978 (EX 295):

Note 1: The defendants' motion for reargument to Vice Chancellor Hartnett was denied but the holding was applied to the factual situation involving waste.

Note 2: The purpose was to take over the economic position of the minority shareholders because it was not only the best but the only use for Signal's available cash (Walkup, TR 1669).

"2. <u>Business Purpose for Form of Transaction</u>

"Signal desires to preserve the UOP corporate entity and insure that it will acquire complete ownership of UOP. The use of a 'cash merger' will accomplish these objectives. Contracts and leases to which UOP and its subsidiries are parties will not be adversely affected by the form of the transaction and there will be no minority shareholders after the merger."

It is also clear that the defendants have the burden of showing intrinsic fairness in a merger where the dominant stockholder seeks to eliminate by a cash-out merger the minority stockholder. The defendants have not carried that burden.

CONCLUSION

The plaintiff has, in the foregoing sections of this brief, responded to the defendants' position to the extent that it can be determined based on the answers to the Amended Complaint and the Rule 41 motion. Even at the conclusion of plaintiff's case, it was very clear that the defendants really had no defense on liability. The admissions of Mr. Walkup and Mr. Crawford, the only two witnesses called by the defendants on liability, strengthened and confirmed the plaintiff's liability case.

There are only two other things that the plaintiff needs to say at this point. First, the plaintiff has alleged and proved, not only particular failures on the part of each defendant in performance of their individual fiduciary duties to the plaintiff class, but collectively an overall common plan of action participated in by all three corporate defendants and their agents. It is now clear from the testimony that the defendants from the outset acted in concert. The very evil that Singer averted to (i.e., a dominant stockholder with complete control, standing on both sides of a transaction, covertly using its power to achieve its economic self-interest) is found in this case.

Second, all of the defendants cooperated fully in carrying out Signal's rapid and precise plan to take over the economic interest belonging to the minority shareholders.

Signal proposed a merger, the terms of which were entirely for its own benefit. The price, the timing, the fact that Signal could back out but UOP could not, the absence of a stock-for-stock deal, and the fact that there was no possibility of a reflection of the stock market price rise and the fact that there was no provision for a pro rata division of the second quarter dividend all show that the Signal cash-out merger proposal was by its very terms grossly unfair to the minority shareholders of UOP.

The Court should decide the issue of liability against all three corporate defendants.

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