Mr. Prickett

4:10

Doc.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WILLIAM B. WEINBERGER,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	Civil Action No. 5642
	:	
UOP, INC., et al.,	:	
	:	
Defendants.	:	

RECEIVED
1980 SEP 19 PM 4:50
PRICKETT, JONES
ELLIOTT & BRISTOL

POSTTRIAL MEMORANDUM OF DEFENDANT
LEHMAN BROTHERS KUHN LOEB INCORPORATED

R. Franklin Balotti
Richards, Layton & Finger
One Rodney Square
Post Office Box 551
Wilmington, DE 19899
Attorneys for Defendant
Lehman Brothers Kuhn
Loeb Incorporated

September 19, 1980

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WILLIAM B. WEINBERGER, Plaintiff,	:	
vs.	:	Civil Action No. 5642
UOP, INC., et al., Defendants.	:	

POSTTRIAL MEMORANDUM OF DEFENDANT
LEHMAN BROTHERS KUHN LOEB INCORPORATED

INTRODUCTION

Defendant Lehman Brothers Kuhn Loeb Incorporated ("Lehman Brothers") submits this posttrial memorandum in connection with the claims asserted against it at the trial of this action. It is respectfully submitted that upon the evidence in the record and the applicable law, there should be no finding of liability against Lehman Brothers in this proceeding.

Plaintiff's claims against defendants, including Lehman Brothers, arise out of the 1978 acquisition by The Signal Companies, Inc. ("Signal"), of the remaining 49.5 percent of the outstanding shares of UOP Inc. ("UOP") at a price of $21 per share. Lehman Brothers, an

investment banking firm long familiar with the business of UOP, was retained by UOP to render an opinion whether the merger price was fair to the minority shareholders of UOP.

Plaintiff's claims received a full and complete trial before the Court. This brief is submitted by Lehman Brothers in response to the three posttrial submissions of plaintiff.

Signal and UOP are filing a joint posttrial brief in which the complete nature and stage of the proceedings, all of the relevant facts, and the complete response to plaintiff's arguments are set forth. Rather than repeat those statements herein, Lehman Brothers will limit this brief to a discussion of the facts relevant to it and a brief argument relating to plaintiff's claims against it.

STATEMENT OF FACTS

A. Historical Relationship.

Plaintiff, in claiming that the fairness opinion of Lehman Brothers was unstudied and casual, conveniently overlooks both the long-standing investment banking relationship between Lehman Brothers and UOP, as well as the fact that Mr. James Glanville, a managing director of Lehman Brothers, had been an active member of the UOP board of directors since 1972 and a member of the audit committee of the board.

In 1959, Lehman Brothers had served as UOP's investment banker in the initial public offering of UOP common stock when the company came out of the trust for the American Chemical Society (Glanville Dep.* 12). Subsequently, Lehman Brothers worked on several transactions to secure necessary financing for UOP, including the financing of a catalyst plant and a mortgage on its Des Plaines building (Glanville Dep. 12), and a possible private placement of UOP notes (Seegal Dep. 12-14). In addition, because of UOP's need for additional equity, Lehman Brothers had made various efforts to develop public offerings of UOP shares (Glanville Dep. 14).

* The depositions of Lehman Brothers personnel (Mr. Glanville, Mr. Schwarzman, Mr. Seegal and Mr. Pearson) were placed in evidence by plaintiff as part of his case and thus are binding on him.

B. 1975 Signal-UOP Transaction.

In 1975, Lehman Brothers acted as UOP's investment banker in Signal's combination tender offer and direct purchase of UOP stock which resulted in Signal's acquisition of 50.5 percent of UOP's outstanding shares. This transaction was "a significant plus for UOP" (Logan Dep. 51), providing the company with a needed infusion of equity funds of approximately $30 million (Glanville Dep. 18; Logan Dep. 41, 53, 84) and UOP's shareholders with a favorable offer to tender their shares at a price of $21 per share (Glanville Dep. 23). The stock had closed just prior to announcement of the tender offer at a price of $13-7/8 per share. The 1975 tender offer was substantially oversubscribed (see Logan Dep. 94) by a factor of almost two to one.*

Mr. Glanville of Lehman Brothers had participated in discussions developing the structure of the transaction, concerning the prospective price UOP was prepared to accept (Logan Dep. 42; Glanville Dep. 21-22). Mr. Glanville and Mr. Roger Altman, an associate at Lehman

* In an enthusiastic response to Signal's offer to purchase 4.3 million, or 43 percent, of the total outstanding UOP shares, the shareholders tendered 7.8 million, or 78 percent, of all outstanding shares- But Signal only purchased 55 percent of the tendered shares, returning the remaining 3.5 million shares to the stockholders.

Brothers, had primary responsibility on the firm's behalf. Frederic Seegal, another young Lehman Brothers associate, performed statistical and other backup work for Mr. Altman (Seegal Dep. 9).

C. The 1976 Draft Memorandum (LB-40).

Sometime in the spring of 1976, Mr. Altman approached Mr. Seegal and asked him to look at the considerations which might be involved in the possible acquisition by Signal of the remaining shares of UOP (Seegal Dep. 19). Mr. Seegal thereafter assembled statistical materials on the subject and prepared a draft for submission to Mr. Altman (Seegal Dep. 22-23). Messrs. Altman and Seegal subsequently revised the first draft into its present draft form.*

Plaintiff continually mischaracterizes LB-40 as a Lehman Brothers opinion to the effect that Signal should purchase the remaining outstanding stock of UOP by means of a cash offer of $21 per share (Plaintiff's Posttrial Brief on Liability, p. 51). Far to the contrary, the draft simply set forth for possible consideration certain

* The draft is labeled "Confidential Draft Memorandum to Mr. Forrest Shumway, Considerations Relating To The Signal Companies' Investment in UOP" (LB-40).

advantages and disadvantages which Signal's acquisition of full control of UOP would have. The draft expressed the view that Signal should consider the acquisition and that, if it wished to accomplish the transaction, the company should be prepared to pay in the range of $17 to $21 per share in some combination of cash, stock and debt. The draft expressly refrained from attempting to set any particular price which Signal should pay for the stock, including any consideration of what would be a fair price to the UOP shareholders. Rather, it confined itself to an analysis of the price range within which a transaction might be negotiated from a business or financial view. Indeed, from an investment banking standpoint, the draft indicated that an offer below the 1975 $21 tender price might well be in order. The only reason supporting a $21 price was said to be a nonfinancial one--the risk of litigation should a second offer be for a lesser price than Signal's original tender price.

Mr. Seegal never spoke to Mr. Glanville with respect to the memorandum or its subject matter (Seegal Dep. 26, 42). He did not know whether, in fact, Mr. Glanville had requested preparation of the draft, or whether it was ever submitted to him (Seegal Dep. 23).

Mr. Glanville testified at his deposition that he did not recall seeing the document before (Glanville Dep. 24).*

The draft memorandum was never put in final form, was never adopted by senior management at Lehman Brothers, and was never sent to Signal or UOP (Seegal Dep. 30). In short, the draft never law the light of day outside of Lehman Brothers (Glanville Dep. 31). None of the top executives of Signal or UOP recalled

* At the time of trial, both Messrs. Glanville and Altman were no longer associated with Lehman Brothers. Mr. Glanville's deposition was taken during discovery, and the transcript has been submitted to the Court. Plaintiff never sought to depose Mr. Altman. Plaintiff's inexplicable and unfair comment on the fact that Mr. Glanville did not testify at trial (Plaintiff's Post-trial Brief on Remedy, p. 7) seeks to inject into the record a matter which Lehman Brothers understood was clearly resolved at trial. Counsel for plaintiff was well aware that Mr. Glanville was not called to testify because, among other reasons, he was hospitalized, as Lehman Brothers' counsel stated to the Court on June 3, 1980 (Transcript pp. 1626-27). Counsel was prepared at that time to submit to the Court a letter from Mr. Glanville's physician substantiating the particulars of his medical condition. But because plaintiff's counsel stated to the Court that he accepted the fact of the hospitalization, the submission of the letter was considered unnecessary. Since counsel for plaintiff is now apparently retreating from his representation to the Court, it is respectfully requested that the physician's letter be added to the record at this time, and a copy of said letter is annexed hereto as exhibit A. Incidentally, the other reasons included the fact that plaintiff had already submitted as part of his case Mr. Glanville's testimony on deposition and the fact that plaintiff's trial testimony produced no reason for additional testimony from Mr. Glanville.

ever seeing the draft before it was shown to them during the course of or in preparation for their depositions in this action (Shumway Dep. 25; Crawford Dep. 184).

The document lay unused in the files until Lehman Brothers began its 1978 work in connection with Signal's merger proposal. It was then retrieved from the files by Mr. Seegal because it contained useful statistical data as to Signal's 1975 tender offer which Mr. Seegal believed would facilitate analysis of the proposed 1978 transaction (Seegal Dep. 63-65). William Pearson, the Lehman Brothers associate responsible for statistical analysis of the 1978 merger proposal, confirmed that he used only the statistical information in the draft (Pearson Dep. 45). The senior members of the Lehman Brothers team involved with the 1978 merger either never reviewed the document (Schwarzman Dep. 22) or were unaware of its existence (Glanville Dep. 24). There is simply no evidence whatever which suggests that the substance of the draft memorandum was used in any way in connection with Lehman Brothers' work on the 1978 merger proposal.*

* In an attempt to suggest that the memorandum was in fact used, plaintiff has blatantly misstated the record by claiming that Mr. Schwarzman "saw" the [continued next page]

In fact, even if Lehman Brothers had used the draft memorandum in connection with its work on the 1978 transaction, nothing in the draft was either prejudicial to the UOP stockholders or in any way harmful to their interests. The memorandum explicitly identified the fairness of the price to the UOP shareholders as a factor to be considered but specifically did not address that issue or select any particular price as the price to be offered. It noted the possibility of shareholder litigation should a price less than the 1975 tender price of $21 be offered, although investment banking analysis indicated a lesser price to be appropriate. Moreover, the draft involved a consideration of the advantages and disadvantages of the acquisition as they existed in 1976, a wholly different period from 1978.

Plaintiff's question why, if $21 per share was in Signal's best interest in 1976, the same price was in the best interests of the UOP stockholders in 1978 (Plaintiff's Posttrial Brief on Liability, p. 50) is easily answered. Plaintiff, of course, has totally misread the 1976 report. The memorandum never

* [footnote continued from preceding page] report (Plaintiff's Posttrial Brief on Liability, pp. 12-13). The record is clearly to the contrary that, although Mr. Schwarzman saw the title page of the report, neither he nor anyone at Lehman Brothers used or relied upon its substance (Schwarzman Dep. 22).

attempted to render an opinion on the fairness of any price to the UOP shareholders and, indeed, specifically disclaimed selecting any particular price which Signal should pay for the stock. The draft was totally nonmaterial in the context of Lehman Brothers' work on the 1978 transaction, and plaintiff's claim that there was some obligation to disclose the mere existence of the draft to the UOP shareholders is clearly without merit.

D. UOP After the 1975 Transaction.

Toward the latter part of 1975, significant financial problems, which had been unforeseen at the time of the April 1975 Signal transaction, surfaced at UOP. These arose out of the bankruptcy of the Come-By-Chance refinery in Newfoundland, which UOP had constructed. As a result, UOP ended 1975 with a net loss of $34.9 million, and both its own and Signal's financial statements were qualified. Litigation over the matter ensued and remains pending.

Following these developments in late 1975, UOP's performance slowly began to improve. By the beginning of 1978, the financial picture had recovered to the extent that it was essentially the same as at the end of 1974, before Signal's initial acquisition (see Defendants' Ex. 40, Ex. 2B). However, even in 1978, at the

time of the Signal offer, it was Lehman Brothers' opinion that UOP's future was "flat" (Glanville Dep. 112).

E. 1978 Signal-UOP Merger.

On Tuesday, February 28, 1978, the secretary to Mr. James Crawford, President of UOP, informed Mr. Glanville, as one of UOP's directors, that Signal intdended to propose the acquisition of the remaining shares of UOP at a price in the range of $20 to $21 per share, and that the UOP board would meet to consider the offer in one week, on March 7, 1978 (Glanville Dep. 38-40).* The closing price of UOP stock just prior to announcement of the merger discussions was $14.50 per share.

1. UOP's Retention of Lehman Brothers to Render Fairness Opinion.

On or about the next day, Wednesday, March 1st, Mr. Crawford telephoned Mr. Glanville and asked if Lehman Brothers could provide an opinion as to the fairness of the transaction for consideration at the UOP board meeting (Glanville Dep. 43). Mr. Glanville replied that Lehman Brothers would have to work very quickly considering the time constraints, but that he believed they could render such an opinion (Glanville Dep. 43).

* The board actually met one day earlier, Monday, March 6th.

According to Mr. Crawford, one of the major reasons he asked Lehman Brothers to give the fairness opinion was because of its long association with UOP and its knowledge of UOP's business and financial condition (Transcript pp. 1451-52).

Accordingly, on or about March 1, 1978, Lehman Brothers began to work on its assignment: to determine whether the price Signal intended to offer the UOP shareholders, which would be in the range of $20 to $21 per share, was fair to the minority stockholders of UOP.

2. Preliminary Work on the Fairness Opinion.

Mr. Glanville contacted Stephen Schwarzman, a Lehman Brothers vice president (now a managing director) with substantial experience (Glanville Dep. 61), who had worked with Mr. Glanville on other matters (Schwarzman Dep. 6), to organize a team at Lehman Brothers to initiate a due diligence investigation of UOP as soon as possible, and they set out a work plan to accomplish the matters which had to be covered (Glanville Dep. 58). Mr. Schwarzman contacted Fred Seegal because of his previous experience on UOP matters, including the 1975 transaction, and Bill Pearson, a new young associate, to form the Lehman Brothers team (Schwarzman Dep. 12).

Mr. Pearson was assigned to review Lehman Brothers' files and assemble all relevant public

documents on UOP in order to gain a better understanding of the company's business (including a five-year history of annual reports, 10K-s, 10Q's, Moody's summaries, proxy statements, public news releases, etc.) (Schwarzman Dep. 11). Mr. Pearson was also assigned to assemble information on multiple-stage mergers, premiums and other matters relevant to the fairness determination (Schwarzman Dep. 11-12). Each Lehman Brothers member of the team was to review all of the public information and written background material to have a common basis for discussion (Schwarzman Dep. 14). Mr. Pearson was given responsibility over the statistical work, while Messrs. Schwarzman and Seegal were to apply their business and financial judgment to the transaction (Schwarzman Dep. 14).

Mr. Seegal, based upon his prior experience with the company, brought Messrs. Schwarzman and Pearson up to date on UOP's business and prospects (Seegal Dep. 50). By the time of their due diligence visit to the company's headquarters, they had each reviewed a wide range of publicly available information on UOP (Seegal Dep. 51).

3. Lehman Brothers' Due Diligence Visit to UOP Headquarters.

On the evening of March 2, 1978, Messrs. Schwarzman, Seegal and Pearson flew to Chicago for their due diligence

visit to UOP on the following day (Seegal Dep. 50). Their investigation on Friday, March 3rd, consisted of a day-long series of meetings with Mr. Crawford, the president of the company, and with its various operating heads, general counsel, and independent auditors. As Mr. Schwarzman described the purpose of the investigation:

> In matters of this type, it's very important for someone in my position to ascertain that there is nothing material that has happened that has not been revealed in the public information and financial statements or on a prospective basis, that is likely to top the company which would increase its value to a substantial degree. The due diligence process itself, which is designed to be one of almost overlapping checks on what any individual might tell you about the business and its prospects, is very important to us, in order to confirm our initial judgments regarding value, which are obtained from a review of the historical financial numbers and our understanding of the business.

(Schwarzman Dep. 15.)

In the meetings with Mr. Crawford, they discussed UOP's recent operating performance and prospects, reviewed budgets and forecasts, and compared 1977's results with 1978's projections. They found "that UOP was an ongoing concern that would not involve any material surprises" (Pearson Dep. 9). Mr. Schwarzman recalled:

> [Crawford] indicated to me that it would be unreasonable to assume that the business was capable of rapid growth. That in terms of its -- of restoring its financial health from the period ending December 31, 1975, he indicated that great strides had been made

> and I agreed with him and upon reviewing with him each of the individual areas of the businesses, he indicated that there was nothing of an extraordinary nature to be considered by an outsider, in assessing the business.

(Schwarzman Dep. 49.)

A line-by-line review of UOP's balance sheet and operating statements with the company's chief financial officer came to the same conclusion (Pearson Dep. 10; Seegal Dep. 55). Discussions with UOP's general counsel concerning the Come-By-Chance litigation sensitized the Lehman Brothers group to its complexities and was a factor in the determination of value (Schwarzman Dep. 30-31, 34).

Upon conclusion of the visit on the evening of March 3rd, Mr. Schwarzman conferred by telephone with Mr. Glanville. He told Mr. Glanville that in his judgment, a price in the range of $20 to $21 would be a fair price for the remaining shares of UOP (Schwarzman Dep. 38).

Mr. Schwarzman testified that in expressing the opinion that $20 or $21 would be fair:

> I meant that the price being paid to the minority shareholders, given my understanding of the business of UOP and its operating history, which was not distinguished....[t]he earnings for the 12 months prior to the offer in 1978 were approximately 13 percent below what they had been for the 12 months preceding the offer in 1975. The stock market in 1978, during the relevant period, was approximately eight

> percent below....[t]he market price in 1975. The company, during this period, had had a very unimpressive record. The Come-By-Chance situation was a cloud over the company's future.
>
> A review of the company's lines of business with executives in the divisions, indicated that there were no unusually optimistic prospects for the business. Many of the operations, in terms of profit credibility seem to have an erratic pattern over the previous five years, and there was nothing discovered from the due diligence process, which would indicate a change from that pattern.
>
> And if the stock market had accorded -- well, if the company's fortunes had indeed improved expeditiously, it was undiscovered by the stock market as well as myself, as compared with the period prior to the 1975 tender.

(Schwarzman Dep. 38-40.)

4. Lehman Brothers' Statistical Analysis and Preparation of Opinion Letter--March 4th and 5th.

During the weekend of March 4-5, Messrs. Seegal and Pearson made a final review of statistical and other materials necessary to make a final evaluation of the fairness of the proposed transaction, prepared a draft opinion letter, and compiled a package of materials for possible use by Messrs. Glanville and Schwarzman at the UOP board meeting scheduled for Monday, March 6th (Seegal Dep. 70, 80; Pearson Dep. 48). During the course of the

weekend, they spoke with Mr. Schwarzman several times (Seegal Dep. 80; Schwarzman Dep. 35), and Mr. Seegal discussed the draft opinion letter with Mr. Glanville by telephone (Seegal Dep. 49, 70).

Mr. Pearson prepared the statistical tables which were incorporated into the package of materials taken to the UOP board meeting, entitled "Summary Data Regarding An Offer By The Signal Companies, Inc. To Acquire The Remaining Common Shares of UOP Inc." (LB-5) (Pearson Dep. 26; Schwarzman Dep. 51). A key element of the statistical analysis was a comparison of the proposed transaction with the 1975 tender offer, set forth in Table 1 of LB-5 (Pearson Dep. 13). In addition, Messrs. Seegal and Pearson carefully reviewed other multiple-stage acquisitions to determine if they were comparable with Signal's proposed transaction (Pearson Dep. 19). Results of this comparison were incorporated in both chart and amplified forms in Table 2 and the following pages of LB-5 (Pearson Dep. 17-19). Based upon the statistical analysis itself, Mr. Pearson concluded "that either 20 or 21 was a fair price" (Pearson Dep. 28).

5. UOP Board Meeting--March 6, 1978.

On Monday, March 6, 1978, Messrs. Glanville and Schwarzman flew to Chicago to attend the meeting of the UOP board which was to consider Signal's offer. On the plane, Mr. Glanville reviewed the papers Mr. Schwarzman had brought with him (Glanville Dep. 70). These included LB-5 and the final draft opinion letter (Schwarzman Dep. 51; Glanville Dep. 73).*

Mr. Glanville had previously reviewed the substance of the various tables of statistics and the draft opinion with Mr. Schwarzman by telephone (Glanville Dep. 71-72).

At the board meeting, after it was learned that Signal's price would be $21 per share, Mr. Glanville delivered Lehman Brothers' opinion that the offering price was fair to the UOP shareholders. Mr. Glanville read the opinion letter and then responded to questions posed by the board (Glanville Dep. 100; Schwarzman Dep. 52).

* Plaintiff claims Mr. Glanville did nothing "except perhaps to 'glance' at" the backup material and maybe to "have 'thumbed' through it", misleadingly citing to particular deposition transcript pages following his "quotations" (Plaintiff's Posttrial Brief on Liability, p. 53). Not only was there no such testimony, but, in fact, Mr. Glanville testified:

"Q. On the way out, did you review the papers that he [Mr. Scharzman] brought with him?

"A. I'm sure we did." (Glanville Dep. 70.)

F. The Basis for Lehman Brothers' Opinion on Fairness.

The letter of Lehman Brothers to the UOP board stating that Signal's offering price was "fair and equitable to the stockholders of UOP other than Signal" (Proxy Statement at D-1 and 2) advised that the opinion was based primarily on two elements:

(1) the familiarity of James Glanville "with the business and future prospects of UOP", and

(2) the work performed by Lehman Brothers, including the review of various financial information concerning UOP, review of the 1975 tender offer, review of market prices, review of other multiple-stage acquisitions and conduct of the due diligence investigation.

The first basis for Lehman Brothers' opinion of fairness, its familiarity with UOP's business and prospects, has already been described above in detail. Indeed, it was one of the reasons, particularly in view of the time constraints involved, why Mr. Crawford asked Lehman Brothers to take on the assignment (Crawford Dep. 119). Mr. Glanville, of course, had the benefit of nearly 20 years' experience as UOP's investment banker, had been intimately involved in the 1975 tender offer, was fully familiar with the results of UOP's operations, including

the problems it had encountered following the 1975 tender offer, and was also familiar with the future prospects of UOP, in part based upon discussions he had as a director at various UOP board meetings (Glanville Dep. 112).

It is true that, even before Lehman Brothers' investigation was completed, based upon his own knowledge of the company, Mr. Glanville believed that $21 per share was a fair price (Crawford Dep. 119).* But it is

* Plaintiff has continually claimed that Mr. Glanville made no analysis other than an "off-the-cuff" reaction that $21 was fair based solely upon the premium (Plaintiff's Posttrial Brief on Liability, p. 52). The record is clear, however, that plaintiff's counsel never attempted to elicit from Mr. Glanville the factors upon which he based his conclusion. Rather, plaintiff's counsel, couching his questions in terms of whether there was a "proper" premium, merely asked on deposition:

> Q. Did you yourself make any computation as to what the proper premium was in this case?
>
> A. In my head -- first, I don't understand the expression proper premium. The premium in this case was about 50% and that was a calculation I did in my head when I first heard what the price level was.
>
> Q. I see. So that when you first heard what what the price was to be -- is that $21? --
>
> A. 20 to 21.
>
> Q. -- so that you did a calculation in your head that the premium was in the area of

[footnote continued next page]

also true that Mr. Glanville did not rest Lehman Brothers' conclusion on his personal raction. Instead, he designated an able team of Lehman Brothers personnel to study and report in order to confirm that what he believed to be the case concerning UOP's business and future prospects was accurate.

The second basis for the opinion of Lehman Brothers, the work performed by its team that week, has also been described above. This research and statistical analysis also led inevitably to the conclusion that the merger price was fair.

First, numerical measures of performance, contained in Table 1 of LB-5, clearly indicated that UOP was not performing as well in 1978 as it had been at the time of the 1975 tender offer (Pearson Dep. 30-32). Mr. Pearson clearly summarized these reasons in a report he later prepared for Mr. Schwarzman:

---

* [footnote continued from preceding page]

A. That sounded appropriate, correct.

Q. And therefore, if they had said, at that time the price is 21, you could have said, that price is fair at that time?

A. Correct, from that point of view.

(Glanville Dep. 117.) Plaintiff's counsel made no further inquiry, obviously never even asking Mr. Glanville why $21 was a fair price.

Simply put, our analysis was that at a price of $21 the UOP shareholders were obtaining the same price as offered two years previously in spite of the facts that:

1) The Dow Jones Industrial Average had declined 8.2% from 808.43 to 742.12;

2) UOP earnings per share for the twelve month periods preceding the offers had declined 12.0% from $2.41 to $2.12; and

3) The market price of UOP common stock prior to the 1978 announcement was only marginally (9.6%) higher than prior to the 1975 announcement ($14.50 versus $13.875).

Also, we noted that the $21.00 price was greater than book value of $19.86 at 12/31/78, and also 12% higher than the highest recorded sale value over the last four years ($18.75).

(LB-9 at 2-3.)

Second, it was fair to offer a slightly lesser premium in 1978 than in 1975 (45 percent compared to 51 percent) because, as Mr. Pearson testified:

The first thing is that since the time of the 1975 offer, UOP had suffered dramatic losses, which to the best of my knowledge, had not been anticipated at the time of the 1975 offer.

So that it can be easily argued that investor expectations as to the future value of UOP stock were substantially lessened in 1978 as opposed to the time of the 1975 offer. I also note that the stock market had declined, which is an indication of

> overall equity investor expectations, and finally, that the numerical measures of the company's performance, principally earnings per share, measured just prior to each of the offers indicated that, at the time of the 1978 offer, the company was not performing as strongly as it was at the time of the 1975 offer.
>
> All of which justify a lower market premium.

(Pearson Dep. 35.)

Third, Lehman Brothers took into account the fact that the 1975 offer, also at $21 per share, had been oversubscribed by a factor of nearly two to one, clearly confirming that a large percentage of UOP shareholders had considered $21 per share to be a very favorable price at a time (1975) when the company's prospects and record were superior to those at the time of the 1978 merger, and when the market price of the stock ($13-7/8 per share) was essentially the same as that in 1978.

Finally, the due diligence investigation of Lehman Brothers not only had discovered no surprises in UOP's various lines of business but had in fact permitted Lehman Brothers to confirm its initial judgment as to UOP's future prospects. Lehman Brothers concluded that the future earnings of UOP would be a function of the results of its various divisions and the growth possibilities of its various businesses. Indeed, given these

factors, Lehman Brothers believed that the future of UOP "was flat" (Glanville Dep. 112).

Accordingly, based upon its knowledge of UOP and analysis of the foregoing factors, Lehman Brothers concluded that the merger price of $21 per share was fair to the UOP shareholders other than Signal.

It is based on these facts that plaintiff attempts to hold Lehman Brothers liable for supposed harm to the minority shareholders of UOP as a result of their having received nearly 50 percent more than the market value of their stock. As will be shown below, plaintiff has never come forward with a theory with respect to Lehman Brothers despite repeated invitations to do so. We can only surmise that plaintiff has not developed any such theory or that, if he has, he is unable to prove it.

QUESTION PRESENTED
(Stated Affirmatively)

PLAINTIFF HAS NOT PRESENTED FACTS OR LEGAL THEORIES UPON WHICH LIABILITY OF LEHMAN BROTHERS COULD BE PREDICATED.

ARGUMENT

I. INTRODUCTION.

The amended complaint in this action basically makes only two allegations against Lehman Brothers. In paragraph 7, it is asserted that Lehman Brothers owed a fiduciary duty to the minority stockholders of UOP and that the duty was somehow breached. In paragraph 9, it is asserted that the "defendants", presumably including Lehman Brothers, entered into a conspiracy. Plaintiff has been requested repeatedly to educate the Court and Lehman Brothers as to the bases for these assertions.

For example, at the close of plaintiff's case, counsel for Lehman Brothers moved, pursuant to Rule 41 of the Court, for an order dismissing this action as to Lehman Brothers. During the argument, it was pointed out that neither in the pretrial memoranda of plaintiff nor earlier has plaintiff ever expanded on either of the allegations against Lehman Brothers. At no time has plaintiff ever attempted to set forth a legal theory and supporting facts in support of the bald assertion that Lehman Brothers owed a fiduciary duty to the minority stockholders. It was noted further that no evidence has been presented that a conspiracy among the defendants existed (Transcript pp. 1036-41).

One would have expected plaintiff to take advantage of his posttrial submissions finally to set forth his theories of liability as they relate to Lehman Brothers. However, once again plaintiff has failed utterly even to attempt to enunciate any theory which would support the conclusional allegations of the complaint. Rather, plaintiff chose totally to ignore paragraphs 7 and 9 of the complaint in his posttrial brief on liability.

While ignoring the separate arguments of Lehman Brothers with respect to its Rule 41 motion, plaintiff has chosen to treat Lehman Brothers in the same view as the other defendants by including it in his definition of "the defendants" (Plaintiff's Opening Posttrial Brief on Liability, p. 3, note). Signal and UOP have filed their posttrial brief in which they analyze the law and facts and conclusively demonstrate that the arguments of plaintiff are without merit. Rather than repeat these arguments, Lehman Brothers adopts them insofar as they relate to Lehman Brothers. However, several facts must be kept in mind in analyzing plaintiff's arguments insofar as he attempts to equate Lehman Brothers with the other defendants. There were only two connections between Lehman Brothers and UOP.

Mr. Glanville was a director of UOP and a managing director of Lehman Brothers. Second, Lehman Brothers served as the independent investment banker of UOP and, more specifically with respect to the 1978 merger, was retained as an investment banker to render an opinion with respect to the transaction.

Plaintiff chooses to ignore the fact that Lehman Brothers, not Mr. Glanville, was UOP's investment banker and was retained to render its opinion. The opinion which was rendered to the board of directors of UOP was that of Lehman Brothers, not Mr. Glanville. The fact that Mr. Glanville was the Lehman Brothers partner in charge of the matter does not make it anything other than an opinion of Lehman Brothers. When it suits his interests, plaintiff so concedes: "[t]here is no question that UOP had a fairness opinion from Lehman Brothers" (Plaintiff's Posttrial Brief on Liability, p. 47). However, throughout other sections of his posttrial submissions, plaintiff ignores this fact and attempts to equate the Lehman Brothers opinion with an opinion of Mr. Glanville.

The simple fact remains that Lehman Brothers was invited to participate in this transaction because of its nearly 20 years' experience with UOP. It agreed to provide an opinion in exchange for its compensation

therefor. Lehman Brothers provided exactly what it agreed to provide: an opinion. The opinion stated exactly what an opinion should state: Lehman Brothers' belief and judgment that the price of $21 per share was fair from a financial point of view.

II. THE PLAINTIFF HAS FAILED TO PROVE THE ELEMENTS OF CONSPIRACY.

In order to establish a civil conspiracy, a plaintiff must show, in general, the combination of two or more persons for an unlawful purpose or a combination for the accomplishment of a lawful purpose by unlawful means, which combination results proximately in injury to another. 16 Am.Jur.2d Conspiracy §§49, et seq. More specifically, plaintiff must establish by a preponderance of the evidence the existence of each of the following elements:

(1) a conspiratorial object;

(2) a meeting of the minds on that object or an action;

(3) overt acts; and

(4) damages proximately caused to the plaintiff.

See, Van Royen vs. Lacey, 277 A.2d 13, 14 (Md. App. 1971); Baker vs. Rangos, 324 A.2d 498, 506 (Pa. Super. 1974).

As has been established in the Signal and UOP posttrial brief (pp. 94-95), plaintiff has failed to establish any of these elements. However, it should be emphasized once again that there has been absolutely no testimony or other evidence indicating that Lehman

Brothers ever sought to be or was in any way involved in a meeting of the minds with either Signal or UOP as to any object or action, conspiratorial or otherwise. Indeed, Lehman Brothers was not even a party to the meeting and conversations between representatives of Signal and UOP which ultimately resulted in the March 6th merger agreement. Lehman Brothers' sole function and responsibility was to provide its opinion on the fairness of the transaction proposed to it.

The specific acts of which plaintiff complains (see, e.g., Amended Complaint ¶13) as constituting "overt acts" in furtherance of the conspiracy do not directly involve Lehman Brothers. Most of the grumblings of plaintiff relate to supposed omissions or misstatements in the proxy materials forwarded by UOP to its stockholders. The only involvement of Lehman Brothers with the proxy statement was that it provided its fairness opinion and certain information concerning its background with UOP and Signal's pension trust for use in the proxy material. Lehman Brothers did not prepare the proxy materials, send them to the UOP stockholders, or undertake any responsibility concerning the proxy materials. In short, Lehman Brothers is not responsible for the proxy materials which were forwarded to the UOP stockholders. By this statement, Lehman Brothers is not indicating a criticism of

the proxy statement. It is, in fact, as complete and accurate a statement as is humanly possible. Rather, these statements are made solely to indicate to the Court that plaintiff has failed utterly to articulate any theory by which Lehman Brothers could be held liable had there been a misstatement and/or an omission from the proxy material, which there was not.

CONCLUSION

For the reasons stated above, plaintiff has failed to present any facts or theories which would support a finding of liability with respect to Lehman Brothers. Therefore, Lehman Brothers respectfully requests that a final judgment be entered in its favor.

Respectfully submitted,

R. FRANKLIN BALOTTI

R. Franklin Balotti
Richards, Layton & Finger
One Rodney Square
Post Office Box 551
Wilmington, DE 19899
Attorneys for Defendant
Lehman Brothers Kuhn
Loeb Incorporated

September 19, 1980

INTERNAL MEDICINE ASSOCIATES
OF STAMFORD, P.C.

19 THIRD STREET • STAMFORD, CONNECTICUT 06905 • TELEPHONE 203 - 327-1187

JERRY GOLDFARB, M.D.
LEWIS M. KARAS, M.D.

BURTON I. BENJAMIN, M.D.
NEIL P. DREYER, M.D.
STUART MUSHLIN, M.D.

May 29,1980

To Whom It May Concern:

Mr. James Glanville is under care and medical investigation for a possibly significant cardiac condition of recent onset.

I do not feel that he should be travelling for the next week until all investigations are completed, and an exact etiology of his symptoms are defined.

Sincerely,

Lewis M. Karas,M.D.

LMK/mmp

EXHIBIT A