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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.	)	Civil Action No. 5642
UOP INC., et al., Defendants.	)	

POST-TRIAL BRIEF OF THE SIGNAL COMPANIES, INC. AND UOP INC.

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September 19, 1980

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I

PREFACE

This case is neither factually nor legally complicated, nor is there any real conflict in the evidence. It is quite apparent from the plaintiff's post trial briefs that his case is based on innuendoes and unsupported arguments and generalities and, instead of viewing the "total mix" of the information supplied to UOP's stockholders, bores in on several inconsequential trivialities in an effort to support his claims of misrepresentation. Therefore, rather than attempt to respond to all of plaintiff's unsupported assertions and mischaracterizations of the evidence, defendants will in this brief try to analyze the evidence before the Court and present their own evaluations thereof.

II

NATURE AND STAGE OF THE PROCEEDINGS

A. Stage Of The Proceedings

The complaint in this action was filed on July 6, 1978, alleging individual, class action, and derivative claims arising from the merger on May 26, 1978, of two Delaware corporations, UOP Inc. ("UOP") and Sigco Incorporated ("Sigco"), a wholly-owned subsidiary of The Signal Companies, Inc. ("Signal"), also a Delaware corporation (the "Signal - UOP merger," or simply, "the merger").

By Order dated April 26, 1979, the derivative counts were dismissed, with prejudice, and stricken from the complaint. On the same date, this Court entered an order: (a) certifying this action as a class action pursuant to Chancery Court Rule 23(b)(3); (b) certifying the named plaintiff, William B. Weinberger, as the class representative; and (c) including as members of the class those former UOP shareholders who voted against the merger and/or who have not turned in their UOP shares for the merger price.*

On December 17, 1979, for the reasons set forth in its Opinion of November 28, 1979, this Court entered an order dismissing the original complaint. The same order granted

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* For purposes of notice to the class, the parties agreed that the class consisted of those shareholders of UOP as of May 26, 1978, who have not exchanged their shares for the merger price (Order dated March 11, 1980, p. 2, fn.).

plaintiff leave to file an amended complaint in the form attached to his Motion For Leave To File An Amended Complaint filed on September 6, 1979 (Docket Entry #113).

After full discovery by all parties, trial was held with respect to the allegations of the amended complaint from May 19 through June 3, 1980. This is Signal's opening brief after trial.

B. Nature Of The Proceedings

Before May 26, 1978, UOP Inc. was a publicly-traded company, 50.5% owned by one stockholder, Signal, and the other 49.5% owned by several thousand other, "minority" stockholders. Following the UOP stockholders' meeting on May 26, 1978 at which the merger was approved by a majority of the stockholders, including a majority of the minority stockholders, Signal owned all of UOP, and the minority stockholders owned the right to be paid $21 per share for each share of UOP stock they previously had. As of the time of trial, May, 1980, all but about 100,000 shares had been turned in for the $21 per share payment.

No one has challenged Signal's right to propose or to consummate the merger, and clearly no valid challenge of that kind could legitimately have been raised. Section 251 of the Delaware General Corporation law (8 Del.C. §251) gives a majority stockholder the right to merge out the minority.* There have, however, been two other challenges raised, both by the plaintiff in this case:** first, plaintiff alleged that in consummating the merger Signal violated its fiduciary obligations to the minority stockholders (because, according to the plaintiff, there was no valid business purpose and the price of $21 per share was inadequate); next, more than a year later, and only after this court ruled that there was no legal basis for plaintiff's first challenge, plaintiff challenged the merger on the ground that the minority stockholders had been intentionally and fraudulently misled into approving the merger, and that therefore their approval should now, in effect, be set aside by this Court.

It is on this latter challenge that the case went to trial in May, 1980 and on which the plaintiff must carry his burden of proof.*** Unless this Court is convinced by the

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* As the Delaware Supreme Court held in <u>Singer v. Magnavox Co.</u>, Del.Supr., 380 A.2d 969, 973 (1977):

> "To state the obvious, under §251 two (or more) Delaware corporations 'may merge into a single corporation.' Generally speaking, whether such a transaction is good or bad, enlightened or ill-advised, selfish or generous--these considerations are beside the point. Section 251 authorizes a merger and any judicial consideration of that kind of togetherness must begin from that premise."

** No appraisal actions were begun, and no other lawsuits or other legal challenges to the merger have been started.

*** The plaintiff apparently recognizes this. See Plaintiff's Post Trial Liability Brief at p.6.

evidence presented that the decision of the overwhelming majority of the minority shareholders who voted on the merger was obtained through intentional misrepresentation and fraud, intertwined by a conspiracy of the defendants, and therefore should be disregarded, the case is over. It is only if the Court first concludes that the minority stockholders' vote should be disregarded that the case requires a so-called "fairness hearing." Consequently, it is necessary to review the facts in this case, and to analyze the law and the facts, with the question in mind: does this or that fact (or issue) relate to misrepresentation, i.e. does it or should it affect the decision to set aside the stockholders' vote, or does it relate to the question of "fairness?" The distinction is obviously not merely of academic interest: for example, even if someone else might not think $21 a share is a "fair" price, the decision of a stockholder to sell his shares at that price (where the decision is not tainted by fraud) must be permitted to stand. To conclude otherwise is to open up every corporate act, whether approved in the first instance or later ratified by the stockholders, to legal challenge and a later court's or jury's determination that the action approved was not "fair".

In view of the foregoing, defendants intend to present their brief in the following manner: first, a review of the relevant facts on both the issues of misrepresentation and fairness (to try to give a complete review of what, in fact, happened in connection with the merger); next, an analysis of the issues relating to the case for misrepresentation (whether the vote of the minority shareholders can and should be set aside); then, should the Court need to reach the issues, those of a so-called "fairness" case and then, the question of remedies. Defendants' arguments relating to the size and composition of the class will be reserved for a later time.

III

STATEMENT OF FACTS

A. The Signal Companies, Inc.

Signal is a diversified, technologically based company whose operating subsidiaries are engaged, among other things, in the design, engineering, manufacture and sale of transportation related equipment and services, including aerospace, through The Garrett Corporation, and heavy-duty motor trucks and truck tractors, through Mack Trucks, Inc. (PX-LB-55, p. 1; TR 1631-32). Garrett was acquired by Signal in 1963, and Mack Trucks was acquired in 1967. In 1975, Signal acquired 50.5% of the outstanding common stock of UOP,* which at that time was engaged in six major lines of business, including petroleum and petrochemical services and related products, construction, fabricated metal products, transportation equipment products, chemicals and plastics, and other products and services including land development, lumber products, and a process for the conversion of municipal sewage sludge into organic soil supplements (PX-U-7, p. 5). Through ownership of, or substantial investments in, Dunham-Bush, Inc., Golden West Broadcasters and American President Lines, Ltd., Signal is also

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* In 1975, prior to Signal's acquisition of 50.5% of its stock, UOP was known as Universal Oil Products Company (PX-U-326). Thereafter, the name of the company was changed to UOP Inc. References herein to "UOP" refer to both UOP Inc. and Universal Oil Products Company.

engaged in the manufacture of industrial products, land development, radio and television broadcasting, entertainment, and shipping (PX-LB-55, pp. 1, 13-14). Although Signal is not involved in the day-to-day management of its subsidiaries, it does coordinate operations and financial planning and controls overall policy (TR 1631-32; PX-LB-55, p. 1).

Signal's stock is publicly held and is listed on the New York, Philadelphia, and Pacific Stock Exchanges. In May, 1978, there were approximately 19 million Signal common shares outstanding.* As of that time, no stockholder of Signal beneficially owned more than 5% of its common stock except for the trustee for Signal's Savings and Stock Purchase Plan which owned about 19% of Signal's common stock (PX-U-7, p. 6). Signal's gross revenues in 1976, 1977, and 1978, were $2.5 billion, $3 billion, and $3.6 billion, respectively; its income from continuing operations for the same years was $59.9 million, $95.1 million, and $145.2 million.

B. UOP Inc.

In May, 1978, UOP was a New York Stock Exchange listed company with its principal headquarters located in Des Plaines, Illinois. As of March 31, 1978, there were 11,488,302 UOP common shares outstanding, of which Signal owned 5.8 million (or approximately 50.5%). (PX U-7, p. 4). For the years 1973

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* As the result of a 2 for 1 stock split in 1979, there are presently approximately 38 million Signal shares outstanding.

through 1977, UOP had gross revenues of $601 million, $781 million, $615 million, $677 million, and $730 million, respectively (id. at p. 19); for the same years, UOP had income (loss) from continuing operations before extraordinary items of $15,588,000, $24,603,000, ($31,360,000), $15,441,000, and $24,328,000, respectively (Id. at p. 15). As of May, 1978, UOP was the only major subsidiary of Signal that Signal did not wholly own.

C. Signal's Original Acquisition Of An Interest In UOP

In January, 1974, Signal received $420,000,000 in cash from the sale of its wholly-owned subsidiary, Signal Oil and Gas Company. In looking for investment opportunities for the proceeds of that sale, Signal evaluated many companies as possible acquisition candidates (TR 1632). However, as explained by William E. Walkup, the Chairman of the Board of Signal from 1969 through 1979, Signal was somewhat restricted in its search because most companies are not receptive to tender offers and Signal would not involve itself in an unfriendly acquisition (Ibid.). Signal's acquisitions of Garrett and Mack Trucks had both been on a friendly basis, as had all of its other acquisitions and investments (Ibid.).

As a result of its studies, Signal decided that UOP was a desirable acquisition candidate (Logan Dep., p. 27). After preliminary discussions and meetings in late 1974 and early 1975, in April, 1975, John O. Logan, then Chairman of UOP's

Board, met in New York with Forrest N. Shumway, then Signal's President and Chief Executive Officer. Also present at that meeting on behalf of Signal were Felix A. Rohatyn and Frank J. Pizzitola of Lazard Freres & Co., and Charles S. Arledge, a Signal Vice President. Others present on behalf of UOP were James W. Glanville and Roger Altman of Lehman Brothers Incorporated (now Lehman Brothers Kuhn Loeb Incorporated, "Lehman Brothers") (TR 1632; Logan Dep., pp. 38-39; Pizzitola Dep., pp. 8-9; Glanville Dep., p. 19; Arledge Dep., pp. 7-9).

As a result of this meeting in New York, Signal agreed to purchase directly from UOP, and UOP agreed to sell to Signal, 1.5 million authorized but unissued UOP common shares at $21.00 per share, or a total of $31.5 million (DX-6, p. 1). The purchase by Signal of the 1.5 million shares was, however, contingent upon Signal making a successful cash tender offer for 4.3 million shares of UOP's outstanding common stock at $21.00 per share. (DX-12). In connection with the tender offer dated April 21, 1975 (PX-U-326), which expired on May 2, 1975, UOP's Board of Directors advised the UOP shareholders "...that it has no objection to the tender offer, that it welcomes the investment of Signal in UOP, and that it will cooperate in the making of the tender offer." (DX-12). UOP's shareholders were also advised that a majority of the members of UOP's Board, including the Chairman, had indicated that they intended to tender some or all of their shares of UOP in connection with Signal's offer (DX-11).

Prior to the announcement of the tender offer, UOP's common stock traded on the New York Stock Exchange at 13 7/8 per share (PX-U-326, p. 3). The tender offer was greatly oversubscribed. Although Signal offered to purchase only 4.3 million of the 9.98 million shares then outstanding, 7.8 million shares (78.2% of the total outstanding) were tendered. Thus, Signal purchased on a <u>pro rata</u> basis only 55% of the shares tendered and was required to return the balance of the shares (3.5 million) to the tendering stockholders (DX-40, pp. 5-6). By mid-May, 1975, as a result of the tender offer and direct purchase from UOP, Signal owned 5.8 million shares of UOP common stock, or approximately 50.5% of the total then outstanding. In 1975, Signal was not interested in acquiring 100% of UOP because at that time its corporate policy was to maintain some flexibility with respect to additional diversification so as to be able to acquire 100% of another medium-sized company, or minority interests in two or three other companies (TR 1634). In addition, UOP's management appeared receptive to Signal's ownership of a majority interest in UOP only if management could remain somewhat independent and if the listing of UOP's common stock on the New York Stock Exchange could be maintained (TR 1634-35).

D. <u>UOP - June, 1975 through 1977</u>

Pursuant to the agreement between UOP and Signal in connection with the tender offer and direct purchase, after

Signal acquired its 50.5% interest in UOP, Signal had the right to have its nominees elected as a majority of UOP's Board (DX-6, p. 3, ¶ 9; PX-U-326, pp. 4-5). However, Signal did not exercise that right. At the UOP 1975 Annual Meeting, five directors or employees of Signal were elected to UOP's thirteen member Board (Arledge, Chitiea, Shumway, Walkup and Wetzel) (PX-U-7, pp. 31-32). Pizzitola, a general partner of Lazard Freres & Co., which had represented Signal in the earlier 1975 acquisition, was also elected to UOP's Board as one of Signal's six nominees (Ibid.).

James C. Crawford, who has a master's degree in mechanical engineering, was employed by The Garrett Corporation upon his graduation from the California Institute of Technology in 1941 (TR 1414-15), and he remained with Garrett after it was acquired by Signal in 1963 (TR 1416). In September, 1975, Harry H. Wetzel, the President and Chairman of Garrett, and a director of both Signal and UOP, discussed with Crawford the possibility of Crawford becoming the President and Chief Executive Officer of UOP (TR 1417-18). The then President and Chief Executive Officer of UOP was about to retire, and in addition, there was some dissatisfaction among the members of the Board of UOP as to the course of events at UOP (TR 1418). Crawford was at this time Senior Executive Vice President of Garrett (TR 1416-17), and he had played no part whatsoever in Signal's acquisition earlier that year of UOP's common stock (TR 1413). Crawford accepted UOP's invitation and became a director of UOP and its

President and Chief Executive Officer on October 17, 1975 (TR 1474-76). The UOP Board was expanded from thirteen to fourteen members before Crawford was elected to membership (TR 1475). Crawford was never an employee of Signal, nor did he serve in any other capacity directly for Signal until he became a member of Signal's Board in 1976 (TR 1413-16, 1418).

Shortly after Crawford joined UOP, he became aware for the first time of significant financial and operating problems with respect to the refinery constructed by UOP's Procon Division at Come-By-Chance, Newfoundland (TR 1419-20; DX-19, p. 8). Similarly, prior to Signal's acquisition of the 50.5% interest in UOP, no one at Signal had any knowledge of the impending Come-By-Chance "disaster" (TR 1635, 1420).

As the result of the bankruptcy of the Come-By-Chance Refinery, UOP suffered a net loss from operations in 1975 of almost $35 million (TR 1419-20; PX-U-1-2, p. 1; DX-40, Ex. 2B). Further, in February, 1976, suits were filed in New York against UOP and certain of its subsidiaries in which the plaintiffs alleged delays in the construction of the Come-By-Chance Refinery, breach of contract and misrepresentation, and claimed damages in the amount of $189 million (PX-U-1-2, Consolidated Financial Statements Section, p. 15). Management and general counsel for UOP have opined that such litigation can be successfully defended, and in any event the ultimate liability, if any, will not materially adversely affect UOP's financial position on a consolidated basis (Ibid.; PX-U-7, p. 26).

Notwithstanding that opinion, the independent certified public accounting firms for both Signal and UOP have qualified both companies' financial statements because of the litigation (PX-U-1-2, Consolidated Financial Statements Section, p. 46; PX-U-7, p. 43; PX-LB-50, p. 29; TR 1420-22; 1468-71).

1976 was a year of conservatism and consolidation for UOP (PX-U-1-2, p. 3). Net income for 1976 totaled $23,591,000, or $2.06 per share, as compared to the net loss in 1975 of $34,868,000, or $3.19 per share. Income from continuing operations in 1976 was $15,441,000, or $1.35 per share, as compared to the loss of $31,360,000, or $2.87 per share, in 1975 (Id. at p. 1).

UOP had a good year in 1977. Exhibit 2B to Defendants' Exhibit 40 sets forth relevant financial data for UOP for the years 1972 through 1977. As that exhibit shows, following the financial disaster in 1975, UOP's performance improved so that by the end of 1977 it had essentially returned to where it was in 1974. For example, UOP's gross revenues were $781,003,000 in 1974, and $729,878,000 in 1977; income from continuing operations before extraordinary items was $24,603,000 in 1974, and $24,328,000 in 1977; and income before extraordinary items was $27,752,000 in 1974, and $24,328,000 in 1977. Net income per share was $2.78 (including $0.32 per share from discontinued operations) in 1974, and $2.74 (including an extraordinary item of $0.62 per share) in 1977.

E. The Signal - UOP Merger

1. Initial considerations

After the 1975 acquisition, the acquisition of the balance of the UOP shares was an alternative investment possibility considered by Signal (Walkup Dep., pp. 11-12). As William E. Walkup, Signal's former Chairman of the Board (PX-LB-55, p. 28), explained at trial:

> "Well, ever since the original acquisition of the 50.5 percent the acquisition of the balance of [the] shares was always an investment consideration, but we were evaluating other companies, and always when we would evaluate a company we would then compare it with what would it cost us to acquire the UOP stock, and what would the return on that investment be against the return on the possible acquisition." (TR 1637).

Signal did not seriously consider acquiring the balance of the UOP shares until early 1978 (TR 1637-38, 1669-72; Arledge Dep., pp. 9-12; Shumway Dep., pp. 17-18). In 1977, Signal had had serious, but fruitless, discussions with another company concerning a possible acquisition by Signal (TR 1637-38). In late 1977, Signal had discussions with another company, but those discussions also came to naught (Ibid.). In one instance, personality conflicts at the top level led to a termination of discussions, and in the other, the potential acquiree simply decided that it was not available for acquisition (TR 1671).

In early 1978, Signal had no real prospects for investment or acquisition, at least on a friendly basis, other than the balance of the UOP shares held by the public (TR 1638, 1670-72). On or about February 8, 1978, Forrest N. Shumway, Signal's then President and Chief Executive Officer, requested Andrew J. Chitiea, Signal's Senior Vice President - Finance, to make a feasibility study of acquiring the other outstanding UOP shares (PX-68-3; Arledge Dep., p. 11). Chitiea and Charles S. Arledge, Signal's Vice President - Planning and Administration, undertook that task (PX-68-3; Arledge Dep., pp. 4-5, 11, 15-16; Chitiea Dep., pp. 24-25; Shumway Dep. 34-35). Signal had made a thorough study of UOP prior to the 1975 acquisition, and because Signal had had representatives on UOP's Board since that time, it was generally current and familiar with UOP's operations and prospects (TR 1639). Chitiea and Arledge updated the previous studies and prepared various schedules for management (Ibid.; PX-68-1, 68-2, 74).

There were compelling business reasons for Signal to acquire the remaining outstanding shares of UOP in 1978. First, because of certain accounting rules, even though Signal owned only 50.5% of the common stock of UOP and therefore could report only 50.5% of UOP's earnings, Signal had to report 100% of UOP's gross revenues and debt in its consolidated financial statements (TR 1640; Shumway Dep., p. 56; Walkup Dep., p. 16). Because of these accounting requirements Signal's operating and balance sheet ratios were distorted, which resulted in serious problems with shareholders and the investment community (Shumway Dep., p. 56). As Mr. Walkup explained:

"Q What effect would distorted ratios have on the financial community's analysis?

A Well, it created a greater number of sales with a smaller percentage of earnings, so that your return of earnings on sales was, in one sense, not competitive. That is one of the parameters investment analysts use, and so maybe establish a lower price/earnings ratio or put a lower value on your stock.

Q What effect, if any, would that have on the Signal shareholders?

A Well, if the investment analysis community is not enthusiastic about it for one reason or another -- these are very good reasons -- why, then, they don't write reports on the stock and don't give it a high rating. It also distorted our ratios as far as the balance sheet was concerned with the debt and could have affected us, for instance, if we had another acquisition potential and the increased debt of UOP might have encroached upon the limits in our loan covenants. Why, I think that was a restriction on us.

All in all, I think we were suffering because of it, and I think our stockholders were suffering." (TR 1641).

By owning 100% of UOP, the distortion of Signal's financial ratios would be cured, and the investment community would be presented with a more accurate financial picture of Signal and its operations, thus benefitting both Signal and its stockholders.

In addition, 100% ownership of UOP by Signal would avoid potential conflicts of interest between Signal, its wholly-owned subsidiaries, and UOP. After the acquisition in 1975, Signal began to "...see great areas of potential conflicts of interest, among Signal and UOP, among the Research

Departments of UOP and Garrett, which is a high-technology company, and among Mack and UOP in the automotive industry." (TR 1640; Arledge Dep., pp. 35-36; Chitiea Dep., pp. 60-61). As John O. Logan, UOP's former Chairman of the Board, testified:

> "[I]n the areas of energy research, Garrett, as a division of Signal, had certain approaches to problems. UOP had certain approaches.
>
> "In some cases, the progress of UOP [and Garrett] could be enhanced by integrating these activities, but it was pretty difficult to do that as long as the basic posture of UOP was a public company working on the sale of private technology." (Logan Dep., p. 88).

Crawford explained that there had been opportunities for various transactions between UOP and Signal which might have been beneficial for both, but were never entered into because of possible conflicts, or at least a perception thereof:

> "None of these were considered appropriate for the reason that since it would be financial transactions between the two companies, it could be misunderstood by stockholders of UOP or stockholders of Signal as favoring the other party." (Crawford Dep., p. 94).

Shumway specifically recalled that Garrett could have been of technical assistance to UOP in its catalyst and nickel recovery programs, but those opportunities were not pursued because of the potential conflicts involved (Shumway Dep., p. 126-127). 100% ownership of UOP would also facilitate the freer flow of resources and technology among Signal and its wholly-owned subsidiaries, and UOP (TR 1664-66; Arledge Dep., p. 34; Chitiea Dep., pp. 60-61; Shumway Dep., pp. 124-125). In short:

> "Signal was very cognizant of the rights of the minority shareholders as was the UOP Board. And in many business transactions both groups were scrupulously careful to protect the rights of the minority shareholders. And this was a factor in a number of business decisions. This concern and the time devoted to the protection of those rights would not be a continuing problem in the event that Signal acquired all of the stock of UOP." (Crawford Dep., p. 87).

Another important business reason for Signal to acquire the shares held by the minority stockholders was the savings which would result from Signal owning 100% of UOP, including significant tax, accounting, and insurance expenditures (TR 1642). Arledge estimated that tax savings on dividends alone would be $350,000 per year, and that the total "tax savings alone would be roughly a million dollars" annually (Arledge Dep., p. 34). In addition, if Signal owned 100% of UOP, it could avoid duplicative reporting to regulatory agencies, and would have to have only one annual shareholders' report, proxy solicitation, and meeting, instead of two (TR 1642; Shumway Dep., p. 57). Some economies could also be effected in advertising and through national purchasing accounts (Ibid.).

Finally, Signal's acquisition of the minority interest of UOP was a reasonable investment for Signal. Despite the serious loss in 1975, by 1978 UOP had shown improvement and Signal continued to believe that UOP was a sound investment for the future. Walkup testified:

> "To date [December 14, 1978], it [UOP] has not been a good investment, but we are paid

> to take gambles and we were gambling in the future that it will be." (Walkup Dep., p. 18).

Arledge believed that UOP was a better acquisition opportunity for Signal than any others that he had recently seen (Arledge Dep., p. 33). Shumway believed that the acquisition of the balance of the UOP shares was a desirable investment for Signal because, inter alia, UOP's high technology businesses had a real future (Shumway Dep., pp. 135-36). As Shumway explained to his Board:

> "[Signal's management supports] an investment in the remaining ownership of UOP for the fundamental reasons which warranted this Corporation's initial investment in UOP." (PX-36, p.3).

In summary, it is absolutely clear that in early 1978, Signal had compelling and legitimate business reasons for considering the acquisition of, and later acquiring, the balance of the UOP shares which it did not then own.*

Chitiea and Arledge conducted their studies in mid-February, 1978 (PX-68-3; Arledge Dep., pp. 15-18; Chitiea Dep., pp. 24-28; Shumway Dep., pp. 34-35; TR 1639), and on February 17, 1978, Chitiea and Arledge made a presentation to Shumway, Walkup, and Brewster L. Arms, Signal's Vice President and General Counsel, concerning the possible acquisition of the

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* Shumway also testified that another business reason for acquiring the minority shares in 1978 was the fear of greater scrutiny by governmental agencies of proposed major acquisitions by domestic corporations, and consequently, more difficulty in effecting such acquisitions in the near future (Shumway Dep., pp. 57-58; TR 1683).

minority shares of UOP (PX-68-3; Arledge Dep., pp. 16-17; Chitiea Dep., pp. 27-28; Shumway Dep., p. 35; TR 1696). Walkup, Shumway, Chitiea, Arms, and Arledge at that time constituted Signal's senior management (TR 1644).

During the senior management meeting on February 17, 1978, and during informal discussions thereafter, a range of prices for the possible acquisition of the minority shares was discussed. Arms suggested, perhaps in the context of a possible tender offer, that a price in the range of $18-19 per share would be fair (TR 1642; Shumway Dep., pp. 59-62, 105; Walkup Dep., pp. 23-26, 28-29). Arledge believed that $21 per share was a fair price (Arledge Dep., p. 21). Walkup recalled that the members of management discussed prices in the range of $18-20 per share (Walkup Dep., p. 24). In any event, management decided to recommend to Signal's Executive Committee that Signal acquire the outstanding shares of UOP common stock not owned by Signal at a price in the range of $20-21 per share (TR 1643). However, before making that recommendation, Shumway wanted to discuss management's proposal with Crawford, UOP's President and Chief Executive Officer (TR 1645).

2. The Meetings of February 28, 1978

A regular meeting of Signal's Executive Committee had been scheduled for February 28, 1978 (PX-U-176, p. 1). Shumway called Crawford and requested that they meet in Los Angeles prior to the Executive Committee meeting (TR 1645). Crawford was not a member of Signal's Executive Committee,* and Shumway did not tell Crawford why he wanted to meet with him (Crawford Dep., p. 38).

Shumway explained that he wanted to meet with Crawford before the Executive Committee meeting as a "common courtesy" (Shumway Dep., p. 40). "[We wanted to] give him a chance to make any presentation he wanted to at the executive committee [meeting]" (Ibid.). And, Walkup testified that "[We wanted] to get his input and his reaction to what we were going to propose to the executive committee" (TR 1645).

Shumway, Walkup, and Crawford met prior to the Executive Committee meeting (Ibid.). Shumway advised Crawford that Signal's management had decided to propose to the Executive Committee that Signal purchase the minority interest of UOP at a price in the range of $20-21 per share (Shumway Dep., p. 40). Crawford recounted the discussion as follows:

> "Mr. Shumway indicated that the fact that Signal owned only 50-1/2 percent of UOP was operating at something of a disadvantage as far as the reporting of earnings and assets of the Signal Companies in that all of the balance sheet items were consolidated with the Signal accounts, and yet only 50-1/2 percent of the earnings of UOP [could be reported], and this made the ratios appear somewhat more adverse than if 100 percent of UOP's stock were acquired by Signal. In addition, he explained that Signal had been searching for investments to be made with

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* The members of the Executive Committee included Shumway, Walkup, Chitiea, Wetzel, Alfred W. Pelletier, and Clinton R. Stevenson (PX-U-176, p. 1). Pelletier was President and Chief Executive Officer of Mack Trucks, and Stevenson was a managing partner of the law firm of Latham & Watkins (PX-LB-50, p. 45).

cash that Signal currently had on hand, and that many alternative investments had been considered including the acquisition of other companies.

"After considerable study on that subject, the Signal staff had concluded that a further investment in UOP represented a better opportunity for Signal than any other alternative that had been presented to them. And for those reasons as well as expressing a general confidence in UOP Signal was interested in having their board consider acquisition of the remaining stock in UOP.

"Q. Now, during the course of that meeting was there any discussion of the price which Signal might offer for the UOP shares?

"A. Yes. Mr. Shumway indicated that that had been discussed with various members of Signal management, and that while there wasn't unanimity on that subject, it was his personal feeling that a price between $20 and $21 would probably be appropriate. He did indicate that there were other members of Signal management who felt that that price was higher than necessary and higher than required, and that some members of the board might very well conclude that the price should be as low as $19 a share.

"Q. Did Mr. Shumway give any indication as to what action he proposed to take in light of his personal feeling that Signal should make an offer of between $20 and $21 a share?

"A. He indicated in the meeting in the morning that it was his general feeling that he would recommend to the executive committee a price somewhere in the range of $20 to $21, but he couldn't be sure what the final decision of the executive committee might be. He expressed to me only his personal feeling as to an appropriate price, not a conclusion on the part of Signal management." (TR 1425-27). <u>See also</u>, Crawford Dep., pp. 41-42.

When asked by Walkup and Shumway for his views about the proposal, Crawford discussed his

> "various feelings both pro and con, and from consideration of my position as a member of the board of directors of UOP and as president of UOP as well as being a board member of Signal, I indicated that from the standpoint of the operating considerations, the acquisition by Signal of the remaining interest in UOP would somewhat hamper management freedom in that the availability of UOP stock would no longer become an incentive for UOP management. In other words, stock ownership in UOP could not be offered as an incentive or reward for managerial excellence, and I was somewhat apprehensive that this would diminish my efforts to create a very tight knit management at UOP.
>
> "On the other hand, I felt that the stockholders of UOP, the independent stockholders that is, should not be denied the opportunity to secure a price for their stock that was very substantially in excess of the then market value, and I discussed all of these aspects as well as several others during that meeting.
>
> "Q. Did you have a personal view as to the appropriateness of the price range which was proposed by Mr. Shumway?
>
> "A. Yes. I felt that a price in the range of $20 to $21 would be quite generous, and of great advantage to the independent shareholders of UOP. I thought it was a very fair price in view of the condition of UOP and the then market value of its shares.
>
> "Q. Now, at the morning meeting on February 28th did you purport to make any commitment on behalf of UOP with respect to the price range of $20 to $21 a share favored by Mr. Shumway?
>
> "A. No. It would have been inappropriate for me to make a commitment. I wouldn't have had the authority to do so in any event, and I made none." (TR 1427-29).

During the afternoon of February 28, 1978, a meeting of the Signal Executive Committee was held (PX-U-176). In addition to the members of the Executive Committee, Arms, Arledge, and C. Neil Ash, Signal's Secretary, were present. Crawford was present for a portion of the meeting (Id., at p. 1).

At the meeting, Shumway stated that after considering several alternative investments, Signal management unanimously recommended that Signal acquire, for cash, the outstanding minority shares of UOP. As the minutes of the meeting (PX-U-176) reflect, Shumway outlined the principal reasons for management's recommendation as follows:

> " - no other major cash expenditures by this Corporation are anticipated in the near future;
>
> - UOP's past performance has substantiated management's original recommendation of that company's attractiveness as one of The Signal Companies, Inc., and as a wholly-owned subsidiary there would be an elimination of any potential conflict of interests between this Corporation, UOP and this Corporation's other subsidiaries and for their common directors;
>
> - not having 100% ownership of UOP, this Corporation is confronted with an illogical burden of debt/sales-equity ratios which take into account only 50.5% of earnings but 100% debt/sales of UOP; and with UOP as a wholly-owned subsidiary, tax and accounting benefits for both this Corporation and UOP would be forthcoming; and
>
> - there is an increasing prospect of difficulty in effecting any corporate acquisition because of growing unwarranted governmental interference." (Id. at pp. 1-2).

Shumway advised the Executive Committee that although the members of management were not unanimous as to the price to be offered for the acquisition of the minority interest, he personally believed that a price in the range of $20-21 per share would be fair to the minority stockholders of UOP (Id. at p. 2; TR 1429). During the meeting, Arms reminded the common directors of UOP and Signal (Arledge, Chitiea, Crawford, Shumway, Walkup, and Wetzel) of their fiduciary responsibilities to both companies and their shareholders (PX-U-176, pp. 2-3). In fact, as Mr. Walkup explained at trial,

> "[E]ver since the acquisition of the 50.5 percent, Mr. Arms, our general counsel, continuously advised us in the Signal management of our fiduciary responsibilities to the minority shareholders, to UOP, as well as our obligations to Signal. And it was my responsibility, as I understood it, to deal fairly with both companies and their stockholders." (TR 1646).

Crawford commented at the meeting on the recent price range of UOP's common stock* and its book value, and he compared 1977 earnings and dividend rates to the same factors prior to the 1975 acquisition (TR 1433; PX-U-176, p. 3). Crawford advised the Executive Committee that UOP had no new undisclosed liabilities, and that even though January results had been

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* In 1978, prior to the first public announcement concerning the proposed merger, UOP's stock traded at between $15.875 and $14.00, closing on February 28, 1978, at $14.50 per share (DX 40, p. 4).

poor,* he expected that UOP's earnings budget for 1978 would be met (TR 1433-34; PX-U-176, p. 3). Crawford also recalled the response to the 1975 tender offer, and after considering all factors, indicated that a price in the range of $20-21 per share appeared to be advantageous to the UOP minority shareholders (PX-U-49-17; TR 1431-32). Crawford testified:

> "I knew that a great many shareholders had tendered their shares at the time that Signal acquired 50 and 1/2 percent of the UOP stock in 1975, and that because Signal was only interested in acquiring a little over half of the company, there were many disappointed shareholders whose stock was not purchased by Signal but that had tendered it with the expectation that Signal might buy it.
>
> "And so in the first part of that sentence I was recalling that at a price of 21 there had been a great majority of UOP shareholders tender their stock and that only a portion of them were able to complete the disposition of their stock to Signal.
>
> "Q And what were the other factors that are referred to in that sentence, if you recall?
>
> "A And those factors, I am referring to many of the things mentioned in the earlier part of that paragraph, the recent price range of the stock, the past earnings of UOP, the problems of qualification of the financial statement and the Come-By-Chance litigation, and considering everything that might bear on the value of UOP stock.
>
> "In evaluating all of those factors in my mind, I felt that a price range of 20 to

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* By letter dated February 24, 1978, UOP's directors had been advised that UOP's January, 1978, net income was $399,000 behind budget (DX-1).

21 would be advantageous to the UOP independent shareholders."

* * *

"I was purporting to say that in my personal opinion I thought it would be advantageous to the UOP shareholders, and I would convey all of the pertinent information that might be required in evaluating that offer to the board members of UOP for their consideration, and that I felt that, in my own personal view, the independent shareholders of UOP should not be denied the opportunity to consider such an offer." (TR 1435-37).

Finally, Crawford discussed the possible negative effect that the proposed acquisition might have on UOP's management. Crawford explained that UOP had several incentive plans that utilized UOP stock, and that if UOP were to become a wholly-owned subsidiary of Signal, alternative means for incentive programs for UOP's executives would have to be found. Crawford concluded that alternative programs for motivating UOP's management could be achieved, so that his preliminary concern as to this issue should not be a major factor in considering the proposed transaction (PX-U-176, p. 3). Following his discussion, Crawford left the meeting (Id. at pp. 3-4).

After Crawford departed the meeting, there was a lengthy discussion about the proposed acquisition (Id. at p. 4). Thereafter, the Signal Executive Committee concluded that a "purchase price of $20 to $21 per share of UOP stock would be fair for this Corporation, as well as the minority holders of

UOP," and the Committee authorized management "to negotiate with UOP for a cash acquisition of the minority ownership in UOP Inc. with the intention of presenting a proposal to the Board of Directors of this Corporation on March 6, 1978" (Ibid.). When asked what information had been presented to the Executive Committee in connection with its determination that a price of $20 to $21 per share would be fair to Signal and UOP's minority shareholders, Shumway responded:

> "A. Well, it was a myriad of material. If you take a look at the financials of UOP you would find an extraordinary correlation between their financial condition in February and March and their -- in February and March of '78 and their financial condition at the time of the original tender in '75.
>
> "The book values were precisely the same, the market values were precisely the same, the ratios are similar.
>
> "At the -- in the '75 tender we tendered for four-odd million and received eight as a response, so everyone was prorated to 45 or 50 percent.
>
> "In the business world if you chronicle acquisitions, friendly and unfriendly, the average premium is somewhere around 40 percent of the market. This was in excess of that. There were all kinds of factors presented to the [Executive Committee]." (Shumway Dep., p. 76).

Following the Executive Committee meeting Signal issued a press release concerning the events which had occurred. The press release, dated February 28, 1978, stated, inter alia:

> "The Signal Companies, Inc. and UOP Inc. are conducting negotiations for the acquisition for cash by Signal of the 49.5% of UOP which it does not presently own,

announced Forrest N. Shumway, president and chief executive officer of Signal, and James V. Crawford, UOP president.

"Price and other terms of the proposed transaction have not yet been finalized and would be subject to approval of the boards of directors of Signal and UOP, scheduled to meet early next week, the stockholders of UOP and certain regulatory agencies. The closing price of UOP's common stock (NYSE) on February 28, 1978, was $14.50 per share." (PX-U-49-109).

Walkup explained that the purpose of the press release was

"...to tell the world, the stockholders, that something was going on but hadn't been concluded. And in one sense you're protecting the UOP shareholders, telling them, look, don't sell your stock; maybe something is going to happen. But essentially that we are looking at it, but there is no deal, but be aware." (TR 1648).

3. February 28 through March 5, 1978

Immediately after leaving the Signal Executive Committee meeting, Crawford telephoned his secretary and instructed her to give the following message, by telephone, to the non-Signal directors of UOP:

"Signal will be announcing tomorrow that they are negotiating for the purchase of the remainder of UOP stock and that Signal is thinking of a price in the range of $20-$21.00.

"We would like to have a UOP board meeting at 9:30 a.m. on Tuesday, March 7 to consider this offer. It is particularly important that the outside directors of UOP take the lead in evaluating whatever offer is announced as a result of a Signal board meeting which will take place on March 6.

> "Signal will be issuing a press release requesting that the trading of UOP stock be suspended. This release may be issued this evening or first thing tomorrow morning. The press release will only indicate that negotiations are in progress, without any indication of the probable offering price.
>
> "Mr. Crawford would appreciate it if any outside directors who are unable to attend the meeting on March 7 would be standing by a telephone while our board meeting is in progress." (PX U-49-30; TR 1438-40).

Crawford's secretary relayed that message, by telephone, during the evening of February 28, 1978, to Glanville, Pizzitola, Quinn, Clements, Stevenson, and Venema (PX-U-49-30). Crawford personally advised Logan of the developments in the morning of March 1, 1978, following his return to Chicago (TR 1440; Crawford Dep., p. 58)

In light of the February 28, 1978 press release, trading in UOP common stock on the New York Stock Exchange was halted on March 1, 1978 (TR 1560). Signal and UOP wanted the halt of trading to continue until final action had been taken by both Boards, but the Stock Exchange refused the companies' request for such action (Ibid.). In order to keep the public advised, Signal issued another press release on March 2, 1978. That release stated:

> "Forrest N. Shumway, president and chief executive officer of the Signal Companies, Inc. announced today that Signal management will recommend to its directors for their approval a price in the range of $20 to $21 a share in the proposed acquisition of the outstanding 49.5% minority interest in UOP Inc.

> "Last Tuesday the company announced it was conducting negotiations for Signal's acquisition of this interest. If Signal's directors approve, the offer will be presented to the UOP directors for their review and approval. Both boards are scheduled to meet Monday, March 6. A further announcement will be made following the meetings." (PX-U-153, Ex. C; PX-283).

As of February 28, 1978 (and until the consummation of the merger on May 26, 1978), UOP's Board of Directors included the following Signal directors: Arledge, Chitiea, Crawford, Shumway, Walkup, and Wetzel. In addition, UOP's Board included: George L. Clements, the retired Chairman of the Board of the Jewel Companies, Inc.; James W. Glanville, a Managing Director and Member of the Board of Lehman Brothers; Richard A. Lenon, the Chairman of the Board, President and Chief Executive Officer of International Minerals and Chemical Corporation; John O. Logan, Chairman of the Board of UOP; Frank J. Pizzitola, a General Partner of Lazard Freres & Co.; William J. Quinn, Chairman and Chief Executive Officer of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Robert S. Stevenson, the retired Chairman of the Board of Allis Chalmers Corporation; and Maynard P. Venema, the retired Chairman of the Board of UOP (PX-U-7, p. 30; TR 1466-67).

From March 1 through March 5, 1978, Crawford personally contacted each of the non-Signal directors of UOP on one or more occasions (TR 1440). Crawford solicited from each of those directors their express views concerning the anticipated Signal offer (TR 1440-41). Clements expressed some reservation about the price, and some of the other directors advised Crawford that the price would have to ". . . be at the upper end of the $20 to $21 range in order for them to be satisfied." (TR 1447; PX-U-49-123; PX-U-49-124; PX-U-49-29). In addition to speaking with Crawford, Lenon also called Glanville about the price. Lenon testified:

> "I called Jim Glanville. It was not a discussion, I called him.
>
> "Q. How did you happen to call Mr. Glanville?
>
> "A. Well, he had been a very active and strong director in some fairly turbulent times and I wanted to tell him that I thought that it had to be $21." (Lenon Dep., p. 11).

Having polled the outside directors, Crawford communicated their views to Shumway and Walkup (TR 1445; 1528-29). Crawford advised Shumway and Walkup that certain members of the UOP Board would react favorably to a proposal from Signal, but only if the price would "... be at the upper end of the $20 to $21 range." (TR 1447; 1524-31). Walkup testified:

> "Mr. Crawford called me on, I believe two occassions. * * * He said one of them [the members of UOP's Board] had reservations. He said that they were generally favorable to the concept, but that the price had to be 21, and he, Jim Crawford, said in his opinion it had to be 21 or he couldn't get the board to vote for it." (TR 1649).

Walkup reported his conversation with Crawford to Shumway as follows:

"I immediately went to Mr. Shumway and said, 'Well, we may have arranged a 20 to 21, but Crawford said he strongly recommends that it be 21 or we have no deal." (Ibid.)

In addition to contacting UOP's outside directors and reporting their views to Shumway and Walkup, Crawford also retained Lehman Brothers to render an opinion on the fairness to the minority shareholders of UOP of any offer which might be forthcoming from Signal (TR 1450). Crawford contacted Lehman Brothers, through Glanville, about the assignment on March 1 or 2, 1978. (Ibid.)

Lehman Brothers had long been knowledgeable about UOP. They had done the initial public offering of UOP common stock in 1959 (Glanville Dep., p. 9), and Glanville, a Managing Director of Lehman Brothers in 1978, had been a member of UOP's Board since 1971 (PX-U-7, p. 31). Lehman Brothers had also acted as UOP's investment banker with respect to a number of financings, and had represented UOP in connection with Signal's 1975 acquisition of UOP stock (Glanville Dep., p. 12, DX-15).

In regard to the retention of Lehman Brothers by UOP, Crawford testified:

> "Q. And why did you contact Lehman Brothers as opposed to some other investment banker?
>
> "A. In view of the short time schedule that had been set between the first announcement relative to the merger and the near term date for the UOP board of directors' meeting, I realized that it would be beneficial to engage a firm that already had substantial familiarity with UOP. Lehman Brothers had such a familiarity for the reason that Mr.

Glanville himself had been on the UOP board, and the firm had long been a financial advisor to the company.

"In addition, Lehman Brothers was eminently qualified from the standpoint of experience and reputation, and were distinguished investment bankers, and I knew their work would be carefully done, and that any conclusion to which they would arrive would carry considerable weight with the members of the board of directors and the investing public.

"Q. Now, prior to retaining Lehman Brothers did you ask any questions of Mr. Glanville?

"A. Yes, I did. I asked him whether or not he felt that the work could be completed in time. I also asked him whether or not Lehman Brothers was in a position to accept such an assignment, and whether they had done any work for Signal, or would know of any other reason why they would have a conflict of interest in undertaking the work.

"Q. What were Mr. Glanville's responses to those inquiries?

"A. He indicated that the time schedule was short, but that they had a great deal of information on UOP already, and that he believed that the work could be accomplished in time. He also indicated that he had done no work for Signal, and knew of no other reason, or knew of no reason why a conflict of interest would exist." (TR 1451-52).

In connection with its assignment, representatives of Lehman Brothers reviewed all relevant documents and information, including, for example, UOP's Annual Reports for the years 1973 through 1976, and its audited financial statements for 1977; UOP's SEC Form 10-K reports for 1973 through 1976, Form 10-Q reports and Interim Reports to Stockholders for the periods ending March 31, 1977, June 30, 1977, and September 30, 1977; a Report to UOP's Audit Committee dated February 9, 1978; the historical and recent market prices and trading volumes of UOP common stock; Signal's 1975 Offer to Purchase; and certain comparable transactions (Schwarzman Dep., pp. 11-12, 14; PX-U-7, p. D-1; PX-U-49-098, p. 2).

In addition to reviewing all of the relevant documents and financial information, representatives of Lehman Brothers also made a due diligence visit to UOP's headquarters in Des Plaines. As explained by Stephen A. Schwarzman, a Vice President of Lehman Brothers in March, 1978 (and a Managing Director since September 30, 1978) (Schwarzman Dep., p. 4):

> "Q. What was the purpose of the due diligence visits?
>
> "A. 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, and 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., p. 15).

On March 3, 1978, Schwarzman and Frederic M. Seegal and William J. Pearson, associates of Lehman Brothers, interviewed Crawford, Carl H. Schumann (UOP's Chief Financial Officer), John G. Woods (UOP's Vice President - General Counsel), UOP's director of research and development, UOP's public accountants, and executives from various UOP divisions (Pearson Dep., pp. 3-4, 9-12; Seegal Dep., pp. 5-6, 51-57, 59-60; Schwarzman Dep., pp. 29-30, 39). In general, as a result of their due diligence interviews at UOP's headquarters, Schwarzman, Seegal and Pearson learned that UOP was an ongoing concern which did "...not involve any material surprises." (Pearson Dep., p. 9). Thus, they confirmed that there was nothing of substance which was not set forth in the reports and financial documents which they had reviewed. (Id. at p. 10).

Schwarzman, Seegal and Pearson conferred by telephone about Lehman Brothers' assignment during the weekend of March 4 and 5, 1978. (Schwarzman Dep., p. 35). Over the weekend, Seegal also called Glanville and read him a draft of Lehman Brothers' opinion letter (Seegal Dep., pp. 48-49; PX-LB-15). Schwarzman called Glanville during the evening of March 3 and reviewed his impressions of the due diligence visit earlier that day (Schwarzman Dep., p. 36). Schwarzman advised Glanville that ". . . in my judgment, the price of either 20 or $21 would be a fair price for the remaining shares of UOP." (Id. at p. 38). Pearson reached the same conclusion (Pearson Dep., p. 28).

Between March 1 and March 5, 1978, Crawford directed the preparation of a great deal of financial material which was given to UOP's outside directors to assist them in evaluating the anticipated offer from Signal, including UOP's recent past performance and budgeted future performance. (TR 1448).

Crawford also helped prepare other material presented at the UOP Board meeting, and he requested counsel to be prepared to report on the legal aspects of any proposal from Signal. (Ibid.)

Signal and UOP representatives were also meeting during the period February 28 to March 6. As Crawford explained:

> "[There were a] great many contacts between Signal and UOP people in that interim in order that the draft of a merger agreement could be prepared and that the mechanics of the merger could be proposed to the board in a reasonably complete way. Also there were numerous legal questions to be answered, and many of these required close coordination between the legal staffs at Signal and at UOP, and also there was close coordination between the financial staffs at the two companies between the February 28th meeting and the UOP board meeting." (TR 1449)

Walkup testified from his perspective that between February 28 and March 6, the staffs of UOP and Signal were involved in "myriad other negotiations that went on; not [only] as to price." (TR 1717-18).

4. The Meetings of March 6, 1978

A special meeting of Signal's Board of Directors was held on March 6, 1978 in Beverly Hills, California (PX-36, p. 1). The Signal directors present at the meeting, in person or by telephone, included Arledge, Arms, Chitiea, Stevenson, Shumway, and Wetzel, all of whom have been previously identified in this brief, and Arch Monson, Jr. (the President and owner of Monson-Pacific, Inc., a manufacturer and distributor of electrical equipment), Robert O. Reynolds (a private investor), Edward J. Boling (the President of the University of Tennessee), Carla Anderson Hills (a partner in the law firm of Latham, Watkins & Hills), and Henry G. Parks, Jr. (the Chairman of the Board of H. G. Parks, Inc., a food processing company) (PX-36, pp. 1, 3; PX-LB-50, inside back cover). Shumway advised the Board that the purpose of the meeting was to consider the acquisition of the outstanding minority shares of UOP by means of a cash merger (Ibid.). Signal's staff had prepared for the directors a lengthy document which reviewed the purposes of the proposed merger, its financial impact on Signal, and the manner of financing (PX-74). Each director was also given drafts of an Agreement Regarding Merger and a Merger Agreement (PX-36, p.4). Shumway discussed the purposes of the proposed merger as had been outlined in a schedule provided to each director (PX-36, p. 3). That schedule (PX-74, p. 3) stated:

"PURPOSE OF THE MERGER

"1. Provides An Outstanding Investment Opportunity For Signal

2. Increases Signal's Earnings

3. Facilitates The Flow Of Resources Between Signal And Its Subsidiaries

4. Provides Cost Savings Potential For Signal And UOP

5. Improves The Percentage Of Signal's 'Operating Earnings' As Opposed To 'Holding Company Earnings'

6. Simplifies The Understanding Of Signal

7. Facilitates Technological Exchange Among Signal's Subsidiaries

8. Eliminates Potential Conflicts Of Interest"

Arledge and members of Signal's staff visually projected the various schedules which had been provided to each director (PX-74), and Arledge reviewed at length the purposes and terms of the proposed acquisition and its financial impact on Signal (PX-36, p. 5; PX-74, pp. 3, 6-8). Other members of Signal's staff reported on the status of UOP's employee stock options and the treatment of such options in connection with the proposal, and the financing contemplated by management for the merger (PX-36, p. 5; PX-74, pp. 9-14).

Shumway advised the Board that "he and the other members of the corporate management and staff unanimously recommend $21 per share as being fair to the stockholders of both companies." (PX-36, pp. 2-3). Shumway also advised the Board that the proposed acquisition would be accomplished by a merger pursuant to which the minority shareholders of UOP would receive $21 cash per share, and that the merger would be subject to the approval of a majority of the minority shares present and voting on the issue (Id. at p. 4). After discussion, Signal's Board unanimously adopted a resolution which authorized Signal to propose to UOP a cash merger as outlined in the drafts of the Agreement Regarding Merger and Merger Agreement which had been given to each director (PX-36, p. 4).

A special meeting of UOP's Board of Directors was also held on March 6, 1978, in Des Plaines, Illinois (PX-U-223,

p. 1). All of the non-Signal directors were present at the meeting, although Lenon, Pizzitola, and Stevenson participated by means of conference telephone (<u>Ibid</u>.). Copies of the proposed Merger Agreement were distributed to the directors attending the meeting, and the minutes of the meeting reflect that copies of the proposed Merger Agreement had been delivered by messenger to Lenon, Pizzitola, and Stevenson prior to the meeting (<u>Ibid</u>.). In addition, each director received relevant financial data for UOP for the years 1974 through 1977, UOP's most recent financial statement, information relating to UOP's recent market prices, budget projections for different periods in 1978 and 1978 as a whole, and various press releases and articles (TR 1455; PX-U-49-111 through 115; PX-U-202).

Crawford advised the Board that the proposed merger would have little effect on UOP's employees or their benefits. He noted that about 250 UOP employees held exercisable stock options, and that some equitable arrangement would have to be reached as to the treatment of those options in connection with the proposed merger (PX-U-223, p. 1). Crawford opined that if the proposed merger were consummated, it would have a beneficial effect on UOP's customers. He also pointed out that Signal's offer, if accepted by the Board, would give the UOP minority shareholders an opportunity to accept or reject a price for their shares which amounted to about 45% more than the current market price for UOP stock (<u>Id</u>. at pp. 1-2).

Walkup attended the UOP Board meeting in order to explain Signal's philosophy for the proposal, and to be available to answer any questions which the outside directors might have (TR 1650). Walkup reviewed Signal's purposes for the proposed merger and how the merger would be beneficial to both Signal and UOP (PX-U-223, p. 2). He also explained how Signal had reached the offering price of $21 per share (Ibid.). Walkup concluded by stating that he expected no problems in concluding the merger and that Signal intended to retain UOP's employees after the merger (Ibid.).

Woods reviewed the proposed time-table for the merger and the principal terms of the proposed Agreement Regarding Merger and Merger Agreement, pointing out that Signal had advised UOP that the proposed transaction was contingent upon the approval of a majority of the minority shares being voted in favor of the merger (PX-U-223, pp. 2-3).

Ronald E. Brackett, a partner of Rogers & Wells, UOP's outside counsel, advised the directors of applicable Delaware law regarding mergers and pointed out the strict standards of fiduciary behavior which applied to the conduct of majority stockholders in their dealings with the minority (Ibid.). Brackett also reviewed the procedures which would have to be followed by the Board and UOP's stockholders in order to consummate the merger, including the filings required by the Securities and Exchange Commission (Ibid.).

At Crawford's request, Schumann projected visually, and stated for the benefit of Lenon, Pizzitola, and Stevenson:

> "a comparison at the end of each of the past four years and an estimate for the end of the first quarter 1978 of the Corporation's book value per share, earnings per share, current ratios, percentage of long-term debt to total capital, price range of the common stock and accounts of working capital..., the estimated net income of the operating units and groups for each month of the first quarter, 1978 and budgeted amounts for the remaining quarters of 1978 and for the year 1978." (Id. at pp. 3-4). See also, PX-U-202.

Logan then presented to the Board the opinion of Lehman Brothers with respect to the proposed merger (Id. at p. 4). That opinion, after reviewing the assignment of Lehman Brothers and the work done in connection therewith, and after pointing out that Glanville, a managing director of Lehman Brothers, had been a director of UOP since 1972 and was familiar with the business and future prospects of UOP, concluded:

> "On the basis of the foregoing, our opinion is that the proposed merger is fair and equitable to the stockholders of UOP rather than Signal." (PX-U-7, p. D-2).

Glanville, who had flown in from New York with Schwarzman, discussed the contents of various documents prepared by Schwarzman, Seegal and Pearson (PX-LB-5). He reminded the Board of his first contacts with UOP in 1959; that he had been a director of UOP since 1972; and that he had been familiar with UOP for many years (PX-U-223, p. 4). With respect to Lehman Brothers' opinion, Glanville explained that "[a]fter he and his staff had reviewed what they believed to be pertinent financial and other materials, with complete cooperation of management of UOP,...[Lehman Brothers] concluded that the proposed offer is fair and equitable to the stockholders of UOP other than Signal." (Ibid.).

After Glanville's presentation, the directors asked various questions of Glanville, Walkup, Woods and Brackett concerning the proposed transaction. After those questions were answered, Walkup and Crawford excused themselves from the meeting (Id. at p. 4). Crawford explained that he left the meeting at that point because he believed that the outside directors would be less inhibited in their discussions if he was not present (TR 1579). Walkup put it more plainly:

"We had some prestigious Chicago businessmen on that board, and we owed it to them to have a free discussion, I felt.

"Q Why did you feel that they could not have a free discussion if you and Mr. Crawford had remained?

"A Well, I think it's just common sense that they are much more free to -- if they didn't like Signal, to say something about it. If they didn't trust the way we were going to manage it, to say something about it. Give them that opportunity." (TR 1725-26).

After further discussion among the remaining directors, a motion was made and seconded to adopt various resolutions accepting Signal's offer (PX-U-223, pp. 4-5). The preambles to those resolutions recite:

"WHEREAS, the Board has considered the report of Lehman Brothers Kuhn Loeb Incorporated, dated March 6, 1978, which states, inter

> alia, that the proposed merger is fair and equitable to stockholders of the Corporation other than The Signal Companies, Inc. and the Board has considered other factors and deliberated further as was deemed appropriate, copies of said report were distributed to the Directors at the beginning of the meeting;
>
> "WHEREAS, the Board believes it to be in the best interest of the Corporation to approve the merger of Sigco Incorporated, a wholly-owned subsidiary of The Signal Companies, Inc. (Sigco), into the Corporation and to recommend to the stockholders of the Corporation that they accept the offer to purchase for cash the remainder of the Corporation's common stock which is not presently owned by The Signal Companies, Inc., on the basis set forth in the proposed Merger Agreement, copies of which were distributed to the Directors at the beginning of the meeting;" (Id. at p. 4).

Walkup and Crawford rejoined the meeting and a conference call was placed to Signal's headquarters so that Shumway, Wetzel, Chitiea, and Arledge could also participate in the meeting (Id. at p. 5). Logan reviewed for the latter individuals what had previously transpired at the meeting and then called for a vote on the resolutions (Ibid.). Lenon, Pizzitola, Stevenson, Quinn, Glanville, Clements, Venema, Logan, and Crawford, having each been individually polled by the Secretary, voted in favor of the resolutions (Ibid.). Walkup, Shumway, Chitiea, Wetzel, and Arledge abstained from voting, on the advice of counsel, but indicated that if they had voted they would have voted in favor of the resolutions (TR 1728; Arledge Dep., p. 27; Chitiea Dep., pp. 53-54; PX-U-223, p. 6). On March 7, 1978, UOP sent a letter to its stockholders advising them of the action taken by the Board with respect to Signal's offer (PX-U-49-075).

5. Fiduciary Responsibilities and the Fairness of the Merger

It is absolutely clear that all concerned with the merger recognized their fiduciary obligations and scrupulously met those obligations in connection with the merger. The record permits no other conclusion.

The directors of Signal who were also directors of UOP recognized that they had dual responsibilities to both companies and their shareholders. For example, Crawford testified:

> "Q. Did you think that in the situation that you found yourself, in regard to UOP you had a fiduciary responsibility to the majority stockholder?
>
> "A. I felt I had a fiduciary responsibility to all stockholders of UOP.
>
> "Q. I see. So that you did not feel -- and I'm talking about you now personally. I've changed a little bit from Signal.
>
> "You felt in this situation you had the same fiduciary responsibility towards Signal as you did to the other stockholders; that is, the minority or outside stockholders, is that correct?
>
> "A. I felt I had responsibilities to each, and those responsibilities to each were very important, and that I made it a duty and a practice to be scrupulously careful of the interests of the outside shareholders of UOP.
>
> "Q. Well, I perhaps am not making it clear.
>
> "So far as you were concerned as the chief executive officer of UOP, did you feel

that you had a fiduciary responsibility to the minority?

"A. Yes.

"Q. Now, did you feel you had the same fiduciary responsibility to --

"A. And I --

"Q. Excuse me. Just let me get this out so we can focus on it. --to the majority stockholder as you did to the minority?

"A. I felt that I had a fiduciary responsibility to each. I wouldn't indicate that they were identical, or that there were substantial differences in them, but I was particularly careful relative to the minority on matters of communication of financial condition of UOP because Signal had the advantage of participating on the UOP board of directors, and through that route they had access to business plans and financial plans of UOP that would not ordinarily be communicated to the independent shareholders.

"So I took particular pains with the outside shareholders that I did not necessarily have to take with Signal to be sure that our communications were complete and accurate.

"Q. Well, you've gone a little bit beyond where I had intended for the moment.

"I take it then that you felt from the first part of your answer that you had a fiduciary responsibility both to the minority and to the majority.

"A. That's correct.

"Q. And that it was a responsibility that you had to carry out both to the majority and to the minority, and there was -- is that correct?

"A. I had a fiduciary responsibility that I had to carry out with respect to each." (TR 1479-81).

Crawford continued:

"Q Now, in this connection did you feel any fiduciary obligation on behalf of the UOP minority affirmatively to request something more than Shumway had disclosed was going to be his recommendation to the Signal executive committee?

"A He disclosed, as we have discussed earlier, that his recommendation was going to be in the range of 20 to 21. I did exercise some influence to suggest that the upper end of that range be considered for the final decision. I did not feel a fiduciary responsibility to go beyond that.

"Q I take it, then, that you felt you did not have a fiduciary responsibility to take affirmative action to go get something more than 20 to 21?

"A I felt that the price of 20 to 21 and, in particular, the price of 21 was both fair and generous. I didn't feel any fiduciary responsibility to go beyond what I considered a generous price.

"Q Well, in this context I take it that you felt that you had a fiduciary responsibility to represent the minority stockholders; isn't that correct?

"A Yes, that's correct.

"Q You couldn't represent both Signal and the minority in this situation, could you?

"A I had to represent both. I was serving as a member of the board of directors of both companies, and it would have been impossible for me to separate responsibilities between the two.

"Q Did you ever ask counsel whether in this context you had to choose between your fiduciary responsibilty to the minority stockholders of UOP as contrasted with your fiduciary responsibilities, as you have already told us, to the majority holder? Did you ever ask him whether you had to choose there?

"A No, it wouldn't have occurred to me, because I knew that I couldn't abdicate either responsibility.

"Q Well, did it ever occur to you to ask counsel whether in this situation, where you felt you had responsibilities both to the minority and the majority, as to whether you should seek to insulate yourself from any responsibility or one fiduciary responsibility versus the other?

"A No, I didn't.

"Q Now, in this particular situation you had sort of three fiduciary responsibilities, did you not?

"A That's right.

"Q You first of all had a fiduciary responsibility to the minority shareholders of UOP; is that right?

"A That was one of the three.

"Q Now, let's go to the second one. You have also told us that in this same situation you had a fiduciary responsibility to the majority stockholders of UOP?

"A That's correct.

"Q And in addition to that, you had a fiduciary responsibility, since you were a director of Signal; is that correct?

"A Yes. If you classify the responsibilities that way, I feel I had four responsibilities rather than three.

"Q Well, then I have missed one. What was the other fiduciary responsibility that is something different from your fiduciary responsibility to the minority of UOP, to the majority of UOP stockholders, and as a director of Signal? What was the fourth one?

"A As the chief executive of UOP, I owed a responsibility to the employees, the assets and the customers of UOP.

"Q Okay. Now, in this context did you ask for any guidance from inside or outside counsel as to how to handle or discharge these three, and you have suggested four, responsibilities?

"A I discussed that sort of thing in great detail both with inside and outside counsel, and most of the action that I took during the period from February 28 until May 26, 1978 was in accordance with the recommendations and advice of both counsel.

"Q. Without seeking to find out what they told you, I take it that you at no time took the position that in this situation you were going to respond as a fiduciary of the minority and allow others to carry the burden of acting as fiduciaries for the majority stockholder of UOP, is that right?

"A. Well, I would rather express it in terms that I never considered that I should abdicate any one of the responsibilities that we have enumerated before." (TR 1493-97).

When asked how he regarded his obligations as a director of both Signal and UOP, and a member of Signal's senior management, Walkup responded:

"Well, ever since the acquisition of the 50.5 percent, Mr. Arms, our general counsel, continuously advised us in the Signal management of our fiduciary responsibilities to the minority shareholders, to UOP, as well as our obligations to Signal. And it was my responsibility, as I understood it, to deal fairly with both companies and their stockholders.

"As far as the acquisition of the 49.5 percent, I understood it was my responsibility to transact a deal that was fair to both parties." (TR 1646-47).

Arledge was also aware of his dual responsibilities (Arledge Dep., pp. 21, 23, 29-31), as were Chitiea (Chitiea Dep., pp. 12-13, 56), and Shumway. Shumway testified:

"As I said, we wanted them [the UOP minority shareholders] to have a fair shake and we wanted the Signal shareholders to have a fair shake on the other side, so we tried to come up with a price that we felt was fair to both sides." (Shumway Dep., p. 154).

Because Signal had the right to obtain the minority shares without the approval of the minority, the fact that Signal conditioned the transaction on the prior approval of UOP's minority shareholders is a clear indication of the desire on the part of Signal and its directors to fully observe all fiduciary obligations owing to UOP's minority shareholders. As Walkup explained:

"[I]n light of the fact that the price of the UOP stock was about $14.50 and we were going to tender at -- or offer the cash merger at 21 which represented a 45 percent premium, I felt it was certainly a fair deal to both Signal and to UOP, but especially to UOP because we had advised UOP -- Signal had advised UOP that we wouldn't proceed with the merger unless a majority of the minority UOP shareholders voting on it approved it. So even though I felt that it was a fair deal, I felt that the UOP shareholders should make that determination on their own. To me the ultimate test of fairness is shareholder approval, and those shareholders voting on it approved it 92 percent." (TR 1653).

The outside directors of UOP also recognized their fiduciary obligations and independently determined that the merger was fair. For example, Lenon, who was also a member of UOP's Audit Committee (Lenon Dep., p. 6), testified:

"I went through the process which I described to you as my reasons and brought to bear the best judgment I could bring on the subject of the price being fair.

"It was done with recognition of the minority. I contributed the best to it I knew how to do."

*　　　　*　　　　*

"I suppose you can make an argument that $20 was almost as good as $21. It was not as far as I was concerned.

"Q. Did you ever consider whether $22 would be a fair offer?

"A. Well, it obviously is better. I came down, though, on $21 because I felt it was fair.

"I went through the reasoning. I certainly felt that this was a good transaction for the minority. It was a fair price."

*　　　　*　　　　*

"Q. In this context, did you feel any responsibility towards Signal?

"A. None.

"Q. Did you make any determination as to what had been done to maximize the price as far as UOP stockholders were concerned, minority stockholders were concerned, or were you satisfied that $21 was fair and that was all you were interested in?

"A. I went through the reasoning that it was fair, that I had been a good Director here, hard working, knowledgeable about business.

"　I came down to $21." (Lenon Dep., pp. 19, 21, 26).

Pizzitola, an investment banker, recognized his obligation to the minority stockholders in terms of the fairness of the proposal (Pizzitola Dep., p. 31). When asked the basis on which he voted in favor of the merger, Pizzitola responded:

> "I think the basis on which I voted for the proposal lies in my background and experience and whatever knowledge I had of UOP and industry in general and the marketplace. There are a myriad of elements that constitute that judgment." (Ibid.).

Clements believed his obligation to the minority shareholders required him "...to be sure that it was a reasonable offer." (Clements Dep., p. 30). Clements independently determined that the price was fair based on the premium over market value, the relationship of the price to book value, and the response of the stockholders to the 1975 tender offer (Id. at p. 37). He also considered Lehman Brothers' opinion in forming his judgment that the offer was fair (Id. at p. 50). Logan determined that the price was fair, not only as a director, but also as a substantial minority stockholder of UOP* (Logan Dep., p. 94). Glanville, of course, signed the Lehman Brothers' opinion letter which was presented to the UOP Board on March 6, 1978, and which concluded that the "proposed merger is fair and equitable to the stockholders of UOP other than Signal." (PX-U-7, p. D-2).

6. March 7 through May 26, 1978

After the Board meetings on March 6, representatives of Signal and UOP continued to discuss and negotiate the various terms and conditions of the proposed merger (TR 1449; PX-U-150;

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* At the time of the merger, Logan owned 7,200 shares of UOP common stock. Venema, who also voted in favor of the merger, owned 8,754 shares (PX-U-7, p. 30).

PX-U-49-117). For example, no definitive understanding had been reached with respect to the treatment of UOP Stock Options, Share Units, and Stock Appreciation Rights in connection with the merger (PX-U-9-11 through 13; PX-U-30). However, by the time the final proposal was submitted to the shareholders, express provision had been made for those items (PX-U-7, p. B-2). Similarly, as of March 6, although the consummation of the merger was specifically conditioned on the approval of the minority shareholders, no specific arrangements had been made for the total vote of outstanding shares which would be required to consummate the merger (PX-74, draft of Agreement Regarding Merger, p. 15). After further negotiations, the final agreement called for not only the approval of a majority of the minority shares voting on the merger, but also the affirmative vote of not less than two-thirds of the total outstanding common stock (PX-U-7, p. C-4). This provision gave further protection to the minority shareholders, since without a substantial favorable vote of minority stockholders, the merger could not be completed (PX-40, p. 6).

Representatives of Signal and UOP and their counsel began drafting a proxy statement to be submitted to the shareholders in connection with the merger shortly after the March 6 meetings (TR 1449; PX-U-49-117). A draft of the proxy statement was filed with the Securities and Exchange Commission on March 17, 1980 (PX-U-123-1). After receiving comments from the SEC (PX-U-126), UOP filed final drafts with the Commission on April 30, 1978 (PX-U-81).

On May 5, 1978, a Notice of Annual Meeting of Stockholders and Proxy Statement was mailed to UOP's shareholders (PX-U-7). The Proxy Statement made full disclosure of all material facts related to the proposed merger. It included, among other things, a discussion of the terms and effects of the merger, the vote required to approve the merger, the business and recent financial history of UOP, the interests of directors and officers of UOP in the outcome of the merger, market price information, appraisal rights, and federal income tax consequences (Id. at pp. 3-6).

The Proxy Statement also outlined Signal's businesses and the source of funds required to consummate the merger (Id. at pp. 6-7). It detailed Signal's purposes for the merger as follows:

> "Signal has informed UOP that Signal decided to propose the Merger to UOP for several reasons. Among these reasons are: to increase its investment in UOP's high technology businesses, to increase Signal's earnings and return on sales (Signal now consolidates in its financial statements 100% of UOP's operations and balance sheet items but only its 50.5% share of UOP's earnings), to improve investors' understanding of Signal, to eliminate potential conflicts of interest, to provide for a freer flow of resources and technology among UOP, Signal and Signal's wholly-owned subsidiaries and to benefit from certain tax, accounting and other economies that wholly-owned operations can provide." (Id. at p. 7).

The Proxy Statement told the shareholders how the $21 per share price had been reached, and that UOP's management recommended a vote in favor of the merger (Id. at pp. 9-10). The shareholders were also told that UOP's Board had received the opinion of Lehman Brothers on March 6, 1978, and that Lehman Brothers would receive a fee of $150,000 in connection with that opinion (Id. at p. 10). They were told that Glanville was a director of UOP and a member of its Audit Committee, as well as a Managing Director and Member of the Board of Lehman Brothers (Ibid.). The Proxy Statement disclosed that Lehman Brothers had performed various financial services for UOP during the preceding five years, and that Lehman Brothers had performed no financial services for Signal or its subsidiaries during the same period except that until November, 1973, it served as an investment advisor and broker for certain funds in Signal's Savings and Stock Purchase Plan (Ibid.).

The Proxy Statement set forth the price range of UOP's stock from 1973 through the first quarter of 1978, and provided per share information with respect to book value, income (loss) before extraordinary items, net income (loss), and dividends for the same period (Id. at pp. 12-13). The shareholders were also given information concerning UOP's capitalization and a five-year summary of operations and retained earnings and other financial data (Id. at pp. 14-15).

The Proxy Statement contained management's analysis of operations and a five-year summary of UOP's operations in different industries (Id. at pp. 16-19). There was a detailed description of each of UOP's lines of business, and a description of material litigation in which UOP was involved (Id. at pp. 20-27). The Proxy Statement also described the properties which UOP owned or leased around the world (Id. at pp. 27-29).

The directors and executive officers of UOP were listed, together with the shares of UOP owned by them, and the principal affiliations of the non-officer directors (Id. at p. 30). The nominees for election as directors were also listed, together with a description of each nominee's principal occupation, his period of service as a director and the shares of UOP owned (Id. at p. 31-32). The Proxy Statement disclosed the remuneration of UOP's directors and officers, and gave detailed information as to employment and deferred compensation agreements, incentive and bonus plans, and stock option and stock incentive plans (Id. at pp. 33-40). The shareholders were also advised that Arthur Andersen & Co. had been selected as UOP's independent public accountants, and that Georgeson & Co. had been retained (for $6,000.00) to assist in the solicitation of proxies (Id. at p. 41).

The Auditor's Report, which is set forth at pages 43 through 64 of the Proxy Statement, contains detailed financial statements for UOP for the years 1976 and 1977. Attached as appendices to the Proxy Statement are a copy of 8 Del.C. §262 (Appendix A), the proposed Merger Agreement (Appendix B), the Agreement Regarding Merger (Appendix C), Lehman Brothers opinion letter dated March 6, 1978 (Appendix D), and a copy of UOP's SEC Form 10-Q for the quarter ended March 31, 1978 (Appendix E).

Representatives of both Signal and UOP had carefully reviewed the Proxy Statement prior to its distribution to UOP's stockholders (PX-U-123-1; PX-U-49-047; PX-U-95; PX-U-300; PX-64; PX-U-224; PX-U-82; PX-U-81; PX-U-132; PX-U-126; PX-U-270). As Crawford testified:

> "Q Now, subsequent to the March 6 meeting and prior to the mailing of the proxy statement did you review drafts of the proxy statement sent to UOP stockholders in connection with the May 26 annual meeting?
>
> "A Yes, I did. I participated in a great deal of work in connection with the preparation of that proxy statement.
>
> "Q And what was the purpose of that review, in your mind?
>
> "A I wanted to make sure that the proxy statement was accurate and complete.
>
> "Q Why were you interested in assuring yourself that the proxy materials were accurate and complete?
>
> "A I wanted to be sure that UOP complied with all SEC regulations relating to the content of proxy statements, and I wanted to be sure that the shareholders of UOP had all necessary information in front of them on which they could make a judgment as to the acceptance of the merger offer by Signal." (TR 1457-58).

UOP's Annual Meeting of Stockholders was held on May 26, 1978. As of March 31, 1978, the record date for the meeting, there were 11,488,302 shares of UOP common stock outstanding. Of those shares, 5,688,302 were owned by stockholders other than Signal (PX-U-7, p. 9).

The minority shareholders voted overwhelmingly in favor of the merger. More than 56% of the minority shares (3,208,652) were voted on the merger, of which 2,953,812 voted in favor and 254,840 voted against (Link-Affidavit filed on June 8, 1979). Thus by a ratio of nearly 12 to 1, the minority shareholders who voted with respect to the merger enthusiastically endorsed it. The total vote, including Signal's shares, was 8,753,812 (76.2%) in favor, and 254,840 (2.2%) against. The merger became effective on May 26, 1978, and pursuant to the terms of the Merger Agreement, each share of stock of UOP, other than those owned by Signal, was automatically converted into a right to receive $21 in cash.

IV

QUESTIONS PRESENTED
(Stated Affirmatively)

A. THE PROXY STATEMENT MADE COMPLETE DISCLOSURE OF ALL RELEVANT FACTS UPON WHICH A REASONABLE SHAREHOLDER COULD MAKE AN INFORMED JUDGMENT CONCERNING THE PROPOSED MERGER.

B. ALL ASPECTS OF THE MERGER WERE ENTIRELY FAIR TO THE MINORITY SHAREHOLDERS OF UOP.

C. THE PLAINTIFF HAS FAILED TO PROVE ANY DAMAGES, INCLUDING MONEY DAMAGES, THE ONLY REALISTIC REMEDY IN THIS CASE.

D. CONSIDERATION OF PLAINTIFF'S MOTION TO ENLARGE THE CLASS SHOULD BE DEFERRED UNTIL AFTER THE MERITS OF THIS CASE HAVE BEEN DECIDED.

V

ARGUMENT

A. <u>The Proxy Statement Made Complete Disclosure Of All Relevant Facts Upon Which A Reasonable Shareholder Could Make An Informed Judgment Concerning The Proposed Merger.</u>

As this Court held in its earlier opinion in this action, the plaintiff has the burden of proving "...fraud, misrepresentation, or other conduct attributable to the majority stockholder which would warrant setting aside the affirmative vote of the minority for their own benefit." <u>Weinberger v. UOP Inc.</u>, Del.Ch., 409 A.2d 1262, 1268 (1979).

In <u>Lynch v. Vickers Energy Corp.</u>, Del.Supr., 383 A.2d 278 (1977), a case involving a tender offer by a majority shareholder of a Delaware corporation for all outstanding shares of such corporation, the Supreme Court outlined the test for disclosure owed by a majority stockholder to the minority stockholders as follows:

> "...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 to sell or retain stock. Compare <u>TSC Industries, Inc. v. Northway, Inc.</u>, 426 <u>U.S. 438, 96 S.Ct. 2126, 2133, 48 L.Ed.2d</u> 757 (1976)."

<u>Id</u>. at p. 281.

Thus, the Delaware Supreme Court adopted the same disclosure requirements which are applicable under the federal securities laws, i.e., whether a reasonable shareholder would consider a fact important in deciding how to vote. TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

In Kaplan v. Goldsamt, Del.Ch., 380 A.2d 556, 565-566 (1977), this Court held:

> "To summarize this point, while a corporation must adequately inform shareholders as to matters under consideration, the requirement of full disclosure does not mean that a proxy statement must satisfy unreasonable or absolute standards. Many people may disagree as to what should or should not be in such a statement to shareholders, and as to alleged omissions the simplest test (sometimes difficult of application) is whether the omitted fact is material. Kaufman v. Shoenberg, 33 Del.Ch. 211, 91 A.2d 786 (1952). There is obviously no requirement to include insignificant information. Compare Baron v. Pressed Metals of America, Del.Supr., 35 Del.Ch. 581, 123 A.2d 848 (1956); American Hardware Corporation v. Savage Arms Corporation, 37 Del.Ch. 10, 135 A.2d 725 (1957). Provided that the proxy statement viewed in its entirety sufficiently discloses the matter to be voted upon, the omission or inclusion of a particular item is within the area of management judgment. Schiff v. RKO Pictures Corp., 34 Del.Ch. 329, 104 A.2d 267 (1954).
>
> "This long standing view of the Delaware courts comports with the recent expression of the United States Supreme Court in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed.2d 757 (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.' Id., 96 S.Ct. at 2133."

When plaintiff's allegations, evidence, and arguments are tested against these standards, defendants submit that he has utterly failed to meet his burden of proof in this case.

1. Negotiations

The central theme of plaintiff's case appears to be: there were no negotiations between Signal and UOP on the price and other terms of the merger and, because the UOP stockholders were told in the February 28 and March 2 press releases that negotiations were being conducted, their vote in favor of the merger should be set aside. Let us then analyze these assertions.

Webster's Third New International Dictionary defines "negotiate" as follows:

> "to communicate or confer with another so as to arrive at the settlement of some matter: meet with another so as to arrive through discussion at some kind of agreement or compromise about something: come to terms esp. in state matters by meetings and discussions."

Black's Law Dictionary (4th Ed.) defines "negotiation" as:

> "The deliberation, discussion, or conference upon the terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale, or other business transaction."

Whether, then, there were in fact "negotiations" between UOP and Signal on the terms of the merger means: were there discussions or communications so as to arrive at an agreement on the price and other terms of the proposed merger? Clearly there were.

The negotiations or discussions or conversations or communications between Signal and UOP regarding a possible merger began on February 28, 1978 at the meeting attended by Messrs. Shumway, Walkup, and Crawford, and they continued until well after the March 6 Board meetings. See Statement of Facts, supra at pp. 21-30, 32-34, 38, and 53-54. At the February 28th meeting and at the Signal Executive Committee meeting which immediately followed, the possible price range of $20-$21 was discussed, as were other aspects of a possible merger, including the effect on the morale of UOP personnel, stock option rights, and other matters. See Statement of Facts, supra at pp. 21-30. Following those meetings, Crawford conferred with the UOP directors who were not affiliated with Signal (the "outside" directors) and then advised Walkup that the price would have to be $21 in order for the proposal to receive favorable consideration by UOP's Board. Significantly, the merger proposal subsequently approved by Signal's Board and offered to UOP's Board was at a price of $21 per share. In arguing the absence of "negotiations" over the price,* plaintiff conveniently overlooks the very significant dollar difference to Signal of a merger at $20 per share and a merger at $21 per share, namely $5,688,302, since there were 5,688,302 outstanding minority shares at the time of the merger. If, as plaintiff

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* Plaintiff apparently believes one cannot negotiate a price within a range of $1 per share. No authority (or logic) is presented to support this belief.

suggests, Crawford and the other directors of UOP were simply doing Signal's bidding, it is difficult to conceive why Signal did not just offer $20 per share rather than offer to pay over $5.6 million more after the discussions with Crawford, and after Crawford's message from the UOP directors.

Plaintiff also conveniently overlooks the fact that there were continuing negotiations between representatives of Signal and UOP with respect to matters other than price. For example, as of March 6, 1978 (the date of the UOP and Signal Board Meetings at which the merger was approved, subject to final approval by the minority shareholders of UOP), the treatment of stock options and other executive compensation rights had not been agreed upon, and the total number of shares required to be voted for the merger had not been finalized. See Statement of Facts, supra at p. 54.

In summary, negotiations between Signal and UOP with respect to the terms and conditions of the proposed merger commenced on February 28, 1978, and the press release so advised the world.* Similarly, the Proxy Statement advised the minority shareholders that the cash price of $21 per share was reached after discussions between Crawford and officers of Signal on February 28, 1978 and in subsequent telephone conversations, and that is exactly what happened.

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* The press release was also notice to the shareholders that something material might be happening and that they should be aware. See Statement of Facts, supra at p. 30.

Let us assume for the sake of argument that for some reason or another, it was improper for Signal and UOP to have stated in the early press releases that "negotiations" were being conducted. So what? Nowhere in the record of this case is there any showing whatever that any stockholder paid any attention to that language in the press releases in deciding whether to vote for the merger. On page 33 of his Post Trial Liability Brief, plaintiff says: "The representations made as to how the terms were arrived at were of critical interest to the minority stockholders." The plaintiff, however, offers no support at all for this bald assertion: the plaintiff himself, Mr. Weinberger, didn't say so (in fact, he wasn't even asked, although he was called to the stand at trial by his own counsel); no other witness so testified; and there is no documentary evidence which so indicates. On the contrary, Mr. Weinberger had decided not to vote for the transaction for other reasons (Weinberger Dep., pp. 34-38, 97-98).

It seems to be just plain common sense that <u>how</u> one arrived at an offering price may be of some interest to the offeree, but is certainly not material to his decision whether to accept. For example, when Signal acquired its first major interest in UOP in 1975, the tender offer (at $21 per share) made no reference to how Signal had arrived at this amount, yet Weinberger himself and nearly 78% of the other UOP stockholders had no problem in arriving at the decision to sell their shares to Signal at that price. Also, whether one equates "negotiate" with "discuss" or not, in the Proxy Statement sent to UOP stockholders in early May, 1978, they were told that the price of $21 per share offered by Signal in the merger was arrived at after "discussions" with UOP. It seems unrealistic to believe that a UOP stockholder would have decided to vote for the merger (i.e., sell his shares), because he read a press release three months earlier which said "negotiation" while totally ignoring the word "discussion" in the contemporaneous, and more definitive, Proxy Statement.

In conclusion, defendants submit that there is no genuine issue in this case on the subject of negotiations. There were discussions, there were negotiations, by which UOP and Signal arrived at the price and other terms of the proposed merger, and neither the evidence nor common sense can support plaintiff's contention that the stockholders' vote in favor of the merger should be set aside because the word "negotiation" was used in the press releases.

2. Independent Evaluation of Fairness

The second of plaintiff's three pronged charge of misrepresentation deals with the role of Lehman Brothers (Plaintiff's Post Trial Liability Brief, pp. 12-13) and, more specifically, asserts that there had been no evaluation by an independent investment banker. This charge apparently breaks down into two sub-parts: (1) Lehman Brothers cannot be described as "independent"; and (2) in any event, Lehman

Brothers made no evaluation. Defendants submit that as to both parts, plaintiff's position is just plain wrong.

a. Independence of Lehman Brothers

At page 48 of his Post Trial Liability Brief, plaintiff states:

> "Independent plainly means that the investment banker chosen had no commitment that would impinge on their giving an unqualified opinion."

Even assuming that plaintiff's definition is correct, he has offered absolutely no proof that Lehman Brothers had any commitment to Signal or to UOP (or *vice versa*), or that there was anything else which would "impinge" on Lehman Brothers giving an unqualified opinion in connection with the proposed merger.

The record is clear. Lehman Brothers had served as UOP's investment banker since 1959 when the initial public offering of UOP common stock was made. Not only had Lehman Brothers acted as UOP's investment banker with respect to a number of financings and private placements, it also served UOP in that capacity when Signal acquired 50.5% of UOP's outstanding common stock in 1975. The only relationship between Signal and Lehman Brothers for the five years preceding the merger was the fact that until late 1973, Lehman Brothers had served as an investment advisor and broker for certain funds in Signal's Savings and Stock Purchase Plan, and that relationship was fully disclosed in the Proxy Statement (PX-U-7, p. 10). The record shows that Lehman Brothers was totally independent of Signal, and having served as UOP's investment banker for almost 20 years, Lehman Brothers was fully familiar with UOP's business and prospects.

There is no evidence that Signal had any communication with Lehman Brothers concerning the merger; there was nothing which Signal promised to Lehman Brothers, either immediate or prospective; and there is nothing to indicate that Lehman Brothers would have had any reason, vis-a-vis Signal, to give anything other than a wholly objective and unqualified opinion.

Likewise, with respect to UOP, there is no evidence whatsoever to show any reason why Lehman Brothers could not or did not render an objective and unqualified opinion. Indeed, in rendering the opinion which it did, Lehman Brothers was acting contrary to its own self-interest: it was likely to lose a long-standing client, one from which it had obtained substantial business over the years. It also makes no sense that in so doing, Lehman Brothers would have given a favorable opinion on a low merger price (something it was presumably doing as a "favor" to UOP or Signal) while at the same time agreeing to a lower fee than it had originally proposed. Given the scenario presented by the plaintiff, one would instead expect UOP to have agreed without question to whatever fee Lehman Brothers demanded as the quid pro quo for a favorable (but presumably unrealistic) opinion on the fairness of the transaction. Of course, just the opposite in fact occurred.

Undoubtedly because there are no facts to show that Lehman Brothers' opinion of fairness was anything less than independent (and entirely justified), the plaintiff keeps dragging out the Lehman Brothers 1976 draft memorandum (PX-LB-40) and parading it around as if it were in some way material to this case. It is not.

Sometime in early 1976, without any request from Signal or UOP, and indeed without their knowledge, Roger Altman, who had shared primary responsibility with Glanville in connection with Lehman Brothers' representation of UOP in the 1975 transaction, asked Seegal to look at the considerations which might be involved in a possible acquisition by Signal of the remaining shares of UOP (Seegal Dep., p. 19). Seegal thereafter assembled statistical materials on the subject and submitted a preliminary draft to Altman (Id. at pp. 22-23). Altman and Seegal subsequently revised Seegal's draft into its present draft form* (Id. at p. 25).

At that point, the draft memorandum was put into Lehman Brothers' files. It was never adopted by Lehman Brothers; and it was never sent to Signal or anyone else (Seegal Dep., p. 24; Glanville Dep., p. 31). As Glanville testified: "[PX-LB-40] is a draft document which, to my knowledge, never saw the light of day." (Glanville Dep., p. 31). No representative of Signal or

* PX-LB-40 is entitled: "CONFIDENTIAL DRAFT, Memorandum to Mr. Forrest Shumway, Considerations Relating To The Signal Companies Investment In UOP, LEHMAN BROTHERS INCORPORATED, June 1976".

UOP ever saw, or was even aware of the existence of, the draft memorandum prior to the discovery proceedings in this case (Arledge Dep., p. 10; Chitiea Dep., p. 35; Crawford Dep., p. 33; Glanville Dep., p. 24; Pizzitola Dep., p. 41; Shumway Dep., pp. 25-26; Walkup Dep., p. 14; TR 1423-24, 1635-36).

The undisputed evidence shows (contrary to plaintiff's innuendoes) that the draft memorandum lay unused in Lehman Brothers' files until Lehman Brothers began working on its assignment from UOP in early March, 1978. The document was retrieved from Lehman Brothers' files because it contained useful statistical data which could be used by Seegal and the other Lehman Brothers' personnel in analyzing the proposed merger (Seegal Dep., pp. 63-65). Indeed, Pearson, the junior associate of Lehman Brothers who was responsible for collecting public information concerning UOP, used the draft memorandum to gather statistical information (Pearson Dep., pp. 7, 45). The senior members of the Lehman Brothers team working on the UOP assignment never read the document (Schwarzman Dep., p. 22), or were unaware of its existence (Glanville Dep., p. 24).

Plaintiff's suggestion that the mere existence of the 1976 draft memorandum somehow created a conflict of interest for Lehman Brothers in connection with its work for UOP in 1978 simply does not withstand analysis. The controlling facts are uncontroverted--the draft memorandum was never completed and never became a product of Lehman Brothers; the draft memorandum never left the files of Lehman Brothers; the substance of the draft memorandum was never brought to the attention of any senior personnel of Lehman Brothers, and except for its limited statistical value, was not relied upon by anyone at Lehman Brothers in connection with its opinion as to the fairness of the proposed merger rendered to the UOP Board on March 6, 1978.

But the plaintiff is not satisfied just to parade the existence of the document itself; he also apparently feels it necessary to mischaracterize its contents. Plaintiff states:

> "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."

Plaintiff's Post Trial Liability Brief, p. 51.

What the draft memorandum actually says is:

> "This section, however, will set forth the considerations which, from a business and financial viewpoint, might support an offer to UOP shareholders within the $17-$21 range. We have not attempted to select a particular price which we think would be fair to the UOP shareholders. We have, instead, focused on this range within which a transaction might successfully be negotiated"

PX-LB-40, p. 6. The draft memorandum continues:

> "The key argument favoring a price below $21 can be divided into three segments: first, that conditions have changed since April 1975 and that UOP's present condition, from an earnings and balance sheet standpoint, is substantially less favorable today. * * * Second, since Signal had no plan last April to acquire these remaining shares, their acquisition in late 1976 should be viewed independently of the first step. Finally, therefore, viewed as an independent

> transaction, UOP's prospects today may not merit a market premium for its shares equal to last April's premium." (emphasis added).

Id. at p. 10. The draft memorandum further states:

> "As Table IV below indicates, for illustrative purposes only, that a $19 offer to current UOP shareholders provides approximately the same type of premiums in terms of market value, price, earnings multiples, and book value as did Signal's $21 offer in 1975." (emphasis added).

Id. at p. 12. In short, it is clear that the draft memorandum does not "show" that in 1976 it would have been in Signal's best interest to acquire the minority shares at $21 per share. To the contrary, the draft memorandum suggests a range of prices from $17-$21 per share at which such an acquisition might be accomplished. Moreover, the draft memorandum specifically suggests that a price lower than $21 per share might well have been a fair price in 1976.

The fact is that the draft memorandum is not relevant to the issue of Lehman Brothers' independence, nor is it otherwise material to the "total mix" of information provided in the Proxy Statement. The Proxy Statement made full disclosure of all relevant facts concerning Lehman Brothers and its fairness opinion (as well as all other facts and information) necessary for the stockholders to make an informed judgment.

b. Evaluation By Lehman Brothers

As indicated previously, part of the plaintiff's charges of fraud and misrepresentation involving Lehman Brothers is that Lehman Brothers made no evaluation of the transaction on which to base its opinion of fairness. The evidence is flatly to the contrary.

At the outset it should be noted that plaintiff has tried to misdirect the inquiry on this point by discussing Mr. Glanville's opinion, rather than Lehman Brothers' opinion as if it were Glanville's opinion on which UOP's Board relied and which was given to UOP's stockholders. In fact, it was the opinion of Lehman Brothers which was sought and received by UOP's Board, and it was the opinion of Lehman Brothers which was included as a part of the Proxy Statement. Did Lehman Brothers make an evaluation on which to give its opinion of fairness? According to the uncontradicted evidence, it did.

Lehman Brothers had served as UOP's investment banker since 1959 when the initial public offering of UOP common stock was made. Not only had Lehman Brothers acted as UOP's investment banker with respect to a number of financings and private placements, it also served in that capacity when Signal acquired 50.5% of UOP's outstanding common stock in 1975. On March 1, 1978, the day following his first knowledge of a possible merger, Crawford contacted Glanville and retained Lehman Brothers to review the proposed transaction and render an opinion. Lehman Brothers put three people to work on the project: Mr. Schwarzman, Mr. Seegal and Mr. Pearson.

Over the next several days, these three representatives of Lehman Brothers reviewed the relevant documents and financial information about UOP. See Statement of Facts, supra at pp. 35-37. They conducted a due diligence visit to the UOP headquarters in Des Plaines, Illinois to insure there was nothing of substance which was not reflected in the reports and financial documents which they had reviewed, or which was contrary to the knowledge which Lehman Brothers had gained during its long association with UOP. Id. at pp. 36-37. They put together a written report entitled "Summary Data Regarding An Offer by the Signal Companies...", (PX-LB-5), all of which was then reviewed by Glanville who, as a long-time UOP director, had an intimate knowledge of UOP and its history, past business activities and future prospects.

Lehman Brothers' opinion letter itelf sets forth the basis for its opinion (PX-U-7), and makes it very clear that Mr. Glanville's knowledge formed only a part of the total evaluation on which Lehman Brothers based its professional opinion. To suggest, as does the plaintiff, that what we are concerned with here is Mr. Glanville's personal opinion is pure sophistry.*

Finally, plaintiff's contention to the effect that UOP's stockholders were misled about Lehman Brothers' opinion is simply not supported by any of the evidence in this case. The Proxy Statement disclosed the relationship between UOP and Lehman Brothers, the fee that Lehman Brothers would receive for

* Of course Mr. Glanville had a personal opinion, one which he stated by voting as a director of UOP in favor of the proposed merger.

its work in rendering the fairness opinion, the fact that Glanville was a director of UOP and a Managing Director of Lehman Brothers, and the substance of Lehman Brother's opinion (PX-U-7, p. 10). In addition, Lehman Brothers' opinion letter was reproduced as appendix D to the Proxy Statement. As indicated above, the letter specifically forth the basis for Lehman Brothers' opinion.

Plaintiff's reliance upon Denison Mines Ltd. v. Fibreboard Corp., 388 F.Supp. 812 (D.Del. 1974), is entirely misplaced. That case involved the solicitation of proxies by Fibreboard in favor of a proposed merger. The proxy statement advised the shareholders that Fibreboard's management had considered the value of the transaction to Fibreboard, including the value to it of one of the merging company's (Yuba River Lumber Co.) timberlands, and that the transaction was fair to Fibreboard and its stockholders. The proxy statement also suggested that Lehman Brothers had made a similar evaluation and had reached the same conclusion. Lehman Brothers' opinion letter was not, however, referred to nor reproduced in the proxy statement. The Lehman Brothers' letter indicated that it had not made any independent evaluation of Yuba's timber assets, and that Lehman Brothers had relied upon information supplied by Fibreboard's management in forming its opinion. Judge Stapleton held:

> "I do not suggest that there was anything improper in this since Lehman's opinion letter reveals the basis for the opinion

expressed. 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." (emphasis added)

Id. at 388 F.Supp. 822.

In the present case, Lehman Brothers' opinion letter was attached to the Proxy Statement and it does state the basis for its opinion. It also states:

> "In the process of forming our opinion expressed herein, we did not make or obtain independent reports on or appraisals of any properties of 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."

PX-U-78, p. D-1.

It is apparent that the court's criticism of the proxy statement in Denison, supra, has no application in the present case. The Proxy Statement in this case made full disclosure of all relevant facts concerning Lehman Brothers and its opinion regarding the fairness of the proposed merger, including the bases for that opinion.

In summary, because of its long-term relationship with UOP, Lehman Brothers was particularly well qualified to opine as to the fairness of the proposed merger. There is absolutely no evidence which suggests that Lehman Brothers was not independent of Signal or that its opinion was somehow otherwise tainted. After study of the relevant information and financial data, and a due diligence visit to UOP's corporate headquarters, Lehman Brothers concluded that the proposed merger was "fair and equitable to the stockholders of UOP other than Signal." See generally, Statement of Facts, supra, at pp. 31-33, 39-40. While plaintiff may disagree with that conclusion, his attempts to disparage Lehman Brothers' competence and independence are groundless.

3. Evaluation of Merger by UOP's Board

The third prong of plaintiff's attack on the basis of misrepresentation is, as stated on page 13 of his Post Trial Liability Brief: "So far as the Board of UOP is concerned, to represent that they evaluated the merger is a gross misrepresentation."

As with a number of other "issues" in this case, at the outset it is helpful to try to understand plaintiff's approach both as to the language he uses and to the context in which he uses it. What does plaintiff mean by "evaluate," and what are his criteria for an evaluation? It would seem that any evaluation involves (or may involve) both a procedural as well as a mental, or subjective, step. For example, to evaluate a proposal, the evaluator must be told of the proposal, but then, what other procedural steps are necessary? Must he review written materials (or may he, or must he consider data provided orally), and what material/data must he review? How long must he take to read and/or reflect upon the information he receives, and what weight should he give to it? Must he ask questions, and what questions should he ask, and of whom? The list goes on, and the only answer that can realistically be given is: "It all depends." It depends on who is being asked to evaluate, and what he is asked to evaluate, and what information he already possesses, etc., etc. And then how long must he ponder before coming to his evaluation? Again, it all depends. So, in the present case, did the members of UOP's Board "evaluate" the merger before voting in favor of it on March 6, 1978? Defendants submit that the record shows that they did, and further that there is absolutely no evidence in the record which could reasonably support a contrary conclusion.

First, the evaluators. All of UOP's outside directors were experienced businessmen, all of whom had been on UOP's Board for a number of years prior to March, 1978. Indeed, several had been very closely associated with UOP's operating management for years: John Logan was then Chairman of the Board and a former President and Chief Operating Officer; Maynard Venema had been Chairman of the Board, and James Glanville had been the principal in the investment banking house which had taken UOP public nearly 19 years previously, and had been on UOP's Board since 1972.

Logan and Venema were large stockholders* of UOP with

* At the time of the merger, Venema owned 8,754 shares of UOP stock and Logan owned 7,200. Mrs. Logan also owned UOP stock. Crawford owned 6,500 shares as well as options to purchase an additional 20,000 shares. (PX-U7, pp. 5, 30-31).

obvious self-interest in the price and terms of any merger in which they would give up their shares. None of the outside directors had any ties to Signal and no other reasons not to evaluate fairly and thoroughly the merger proposal which Signal was presenting.

What did these evaluators have to evaluate? They had Signal's proposal; they had information about UOP's historical performance and its short (1 year) and long range (5 year) business projections; they were obviously aware of how UOP's stock was trading in the marketplace; they knew of the 1975 tender offer at $21 per share and of the then UOP stockholders' enthusiastic response thereto; they knew what UOP's assets were, and of what had been done and proposed with respect thereto. In other words, they already knew from their positions as directors, officers and stockholders of UOP a great deal about the company. They also had a collection of financial and other data which Crawford had directed be prepared for the March 6 Board meeting. See Statement of Facts, <u>supra</u> at 32-34, 41. These were not people who had to start from scratch and review annual reports, etc.; this is what they had been doing for years as a part of their regular duties. They had Lehman Brothers' opinion letter to help them come to their evaluation, and this opinion was presented to UOP's Board and considered before they voted (Clements Dep., p. 50)

Did these Board members then arrive at an evaluation? Of course they did. See Statement of Facts, <u>supra</u> at pp. 40-46, 51-53. And this evaluation was properly communicated to UOP's stockholders. There is nothing in Gimbel v. Signal Companies, Inc., Del.Ch., 316 A.2d 599 (1974), aff'd per curiam, Del.Supr., 316 A.2d 619 (1974), cited by plaintiff in his brief, which is of any assistance to the plaintiff on this issue. In Gimbel, the directors of Signal had accepted the offer of Burmah Oil Incorporated to purchase the outstanding capital stock of Signal Oil and Gas Company, a wholly-owned subsidiary of Signal, for approximately $480 million. The plaintiff, a stockholder of Signal, sought a preliminary injunction against the proposed sale, contending that the assets of Signal Oil were worth approximately $300 million more than the agreed sale price. In considering plaintiff's application for preliminary injunction, then Chancellor Quillen had before him the affidavit of Signal's expert which valued Signal Oil's assets at $438 million, and the affidavit of one of plaintiff's experts which valued the same assets at $761 million. Faced with this huge disparity in valuations, Chancellor Quillen agreed to grant the preliminary injunction upon condition that the plaintiff post a $25 million bond (which was never posted and therefore the injunction never issued), stating:

> "The dollars involved are at such variance as to suggest that someone may be dead wrong."

316 A.2d 617. Obviously, because of the tremendous differences between the asserted valuations of Signal Oil's oil and gas properties, Chancellor Quillen wanted a complete record, after a

plenary hearing, before attempting to decide the merits of the controversy.

The Chancellor did express some concern that at least some of the directors of Signal may not have had sufficient time to consider Burmah's offer. 316 A.2d 614. Although there had been preliminary communications between Signal and Burmah in October and November, 1973, Signal's management had not discussed those communications with some of the outside directors of Signal because of their sensitive nature and the fear of a "leak." Burmah's formal offer was received by Signal on December 18, 1973, and it required acceptance on or before December 21. A special meeting of Signal's Board was called on notice of only a day and one-half, and the outside directors were not advised as to the purpose of the meeting. The record showed that at least three of the outside directors first learned of Burmah's offer at the special meeting.

In the instant case, all of UOP's directors had almost a full week to consider and reflect upon the offer which might be forthcoming from Signal on March 6th. Indeed, all of the outside directors had spoken to Crawford about the proposal, and specifically about the possible price of \$20-\$21, by phone during the week prior to the meeting. They also knew that Lehman Brothers had been retained to review the transaction and render an opinion. As long-term directors of UOP, each of the outside directors (as well as the Signal directors) were well aware of the current market prices for UOP's common stock, the disaster which had befallen UOP in late 1975, UOP's historical and current earnings and other relevant financial data, as well as UOP's business and prospects. In light of the directors' respective experience and knowledge of UOP, coupled with the presentations made to UOP's Board on March 6, 1978, including Lehman Brothers' opinion as to the fairness of the proposed merger, there is simply no basis (much less support in the record) for plaintiff's contention that the directors of UOP did not have sufficient time or information upon which to make an informed evaluation. The facts are that the directors of UOP had ample notice of the meeting and its purpose, that they had all relevant information necessary to make an informed judgment, and that they approved the proposed merger, subject to final approval of the minority shareholders.

a. Control of UOP's Board

Included in plaintiff's allegations is the wholly unsupported assertion that Signal controlled UOP's Board, which assertion plaintiff then somehow (but unclearly) seeks to tie into his general charge that it was a misrepresentation to say that UOP's Board had evaluated Signal's merger proposal.

If plaintiff means to suggest that because (according to plaintiff) Signal "controlled" UOP's Board, the individual members of that Board made no evaluation of the proposal, the facts are to the contrary as shown in the preceding subsection.

If plaintiff means to suggest that even though the members of the Board did evaluate the proposal, they arrived only at the conclusion Signal dictated, the suggestion is preposterous in light of the evidence presented in this case. First, plaintiff does not even try to assert that any member of UOP's Board was going to receive from Signal any consideration for a favorable vote, a charge which could not possibly stand up if he did make it. Second, at least several members of UOP's Board would have suffered substantial personal detriment from too low a merger price, or perhaps even from a merger at all. Messrs. Venema, Logan and Crawford owned 8,754 shares, 7,200 shares, and 6,500 shares, respectively, of UOP, and Crawford also owned options to purchase an additional 20,000 shares. If in their own minds these shares were worth $5 or more each over the $21 offer price, they stood to lose on the shares they owned $30,000 to $40,000 apiece if the UOP stockholders approved the merger, and Crawford stood to lose an additional $100,000 with respect to his options. Why on earth should they have recommended an affirmative vote by the minority shareholders, and why did they vote their own shares in favor of the merger, if they really had not independently concluded that $21 was a fair price?* Mr. Glanville stood to lose his seat on UOP's

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* As this Court noted in <u>Gropper v. North Central Texas Oil Co.</u>, Del.Ch., 114 A.2d 231, 235 (1955):

> "There has been no showing of any plausible motive which would cause such officers and principal stockholder to commit acts of self-injury."

In this case there has been no showing of <u>any</u> motive, much less a plausible one.

Board, and his employer, Lehman Brothers, stood to lose a long-standing, well paying client. For what? As previously stated, there is simply no evidence in this case from which it can reasonably be concluded that the members of UOP's Board would have had any reason to act other than independently and on the basis of their own evaluations.

Further, if Signal was so interested in compelling an unfair merger, why should it have gone to all the trouble of predicating the success of the merger on the vote of the minority. Only by some kind of convoluted reasoning can anyone believe (as plaintiff asserts) that Signal "controlled" UOP's Board to affect the decision of the minority stockholders to whom the decision never had to be given in the first place.

Finally, it is well-established that

> "[a] plaintiff who alleges domination of a board of directors and/or control of its affairs must prove it. Blish v. Thompson Automatic Arms Corporation, 30 Del.Ch. 538, 64 A.2d 581 (1948)"
>
> * * *
>
> "'Control' and 'domination' are here used in the ordinary meaning of the words and they may be exercised directly or through nominees. But, at minimum, the words imply (in actual exercise) a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling."

Kaplan v. Centex Corp., Del.Ch., 284 A.2d 119, 122-23 (1971). See also, Greene v. Allen, Del.Ch., 114 A.2d 916, 920 (1955), rev'd on other grounds, Del.Supr., 121 A.2d 919 (1956) ("I use 'dominate and control' in the sense that, criminality aside, his wishes were their commands").

Plaintiff has failed to prove that Signal controlled UOP's Board of Directors.

b. Independent Group of Directors

Plaintiff's suggestion that the Proxy Statement should have stated that the proposed merger was not referred for consideration to an independent group of directors is ludicrous. Plaintiff cites no authority for his suggestion and the reason is obvious--there is no such authority. There was no legal requirement that the proposed merger be referred to an independent committee, and there was no reason for the Proxy Statement to state that such a referral had not been made. The Proxy Statement disclosed what did occur, not what did not occur, and that is all that can be required.

c. Press Release of March 6, 1978

The extent to which plaintiff has strained to find some omission or misrepresentation in this case is typified by his argument concerning PX-U-49-099.* That exhibit is a UOP press release dated March 6, 1978, which was issued after the UOP Board meeting and which stated, *inter alia*:

* Incorrectly cited by plaintiff at page 60 of his Post Trial Liability Brief as PX-U-69-099.

> "that the UOP Board of Directors has come to a unanimous decision to recommend to shareholders that they accept an offer from The Signal Companies, Inc. to acquire the outstanding 49.5% minority interest in UOP for $21 per common share."

The record shows that the non-Signal directors and Crawford all voted in favor of the proposed merger. The directors of UOP who were affiliated with Signal (other than Crawford) abstained from voting, on the advice of counsel, but indicated that if they had voted they would have voted in favor of the transaction. Thus, while there were not fourteen votes in favor of the merger, all fourteen members of the Board favored the merger, and it is clear that there was unanimity on the subject. In any event, even if for the sake of argument the press release was not entirely accurate, any infirmity was cured in the Proxy Statement which described the exact voting by the UOP directors at the March 6, 1978 Board meeting (PX-U-7, pp. 3, 9).

4. Miscellaneous

Throughout his briefs the plaintiff raises what appear to be additional charges of misrepresentation, although they are not clearly labeled as such. In any event, several such apparent charges are discussed immediately below.

a. Disclosure as to Lehman Brothers' Independence

In paragraph 14 of his amended complaint, plaintiff charges that the Proxy Statement should have disclosed that there had been no inquiry as to the independence of Lehman

Brothers or the basis for Lehman Brothers' fairness opinion. The evidence, however, shows that Crawford did specifically inquire of Glanville as to whether there was any conflict of interest (or any other reason) which would preclude Lehman Brothers from rendering a fairness opinion, and he was advised that there was none. The record also shows that the basis for Lehman Brothers' opinion was set forth in detail in its written opinion (which was reproduced in the Proxy Statement--PX-U-7, Appendix D), and in Glanville's oral presentation to UOP's Board on March 6, 1978. Thus, it would have been incorrect for the Proxy Statement to reflect what plaintiff contends it should have.

b. Retention of Georgeson & Co.

In the final allegation of paragraph 15 of his amended complaint the plaintiff assets what is perhaps his most ridiculous and trivial charge of all. Plaintiff contends that the Proxy Statement should have revealed that UOP's Board did not authorize the retention of Georgeson & Co. to solicit proxies in favor of the merger. The Proxy Statement says:

> "The cost of preparing, assembling and mailing the proxy material will be borne by the Company. In addition to solicitation by mail, solicitations will also be made by employees of the Company not specifically engaged for that purpose, in person, by telephone or telegraph. The Company has also retained Georgeson & Co. to assist in the solicitation of proxies by the methods above referred to at an estimated expense of $6,000."

PX-U-7, p. 41. Ten lines later appears:

"By Order of the Board of Directors

"M. G. PEEK, Secretary"

Thus, the Proxy Statement disclosed that UOP had retained Georgeson & Co. to solicit proxies at an estimated expense of $6,000,00. Whether or not the Board formally approved that retention is of no moment.* The Proxy Statement disclosed what UOP did and that is all that is required.

At pages 66-67 of his Post Trial Liability Brief, plaintiff refers to this part of his complaint in a way which makes no sense whatever in the context of this case. Assuming for purposes of argument that the use of UOP's funds to pay for a proxy solicitor was " to effectuate the purposes of the dominant stockholder," there clearly was no misrepresentation--the minority stockholders were specifically told in the Proxy Statement what was being done. Also, it has nothing to do with a "fairness case." There is simply no reason for this "issue" to be considered as a part of this case.

c. Management of UOP Made No Studies

At pages 63-64 of his Post Trial Liability Brief plaintiff states:

> "There is no indication that the management of UOP was ever consulted in connection with the cash-out merger."

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* In fact, UOP's Board specifically approved the Proxy Statement, including the paragraph relating to the retention of Georgeson & Co., at its meeting held on April 14, 1978 (PX-U-224, pp. 1-2).

The purported relevance of this assertion appears at page 65 of Plaintiff's Post Trial Liability Brief, to wit: "...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.'"

This is another one of those "issues" which require a definition of terms in order to try and follow plaintiff's argument. Here, plaintiff starts with the proposition that the word "management," as used in the sentence quoted above, (which appears on page 10 of the Proxy Statement) refers to some person or persons (undefined) other than UOP's Board of Directors. See Plaintiff's Post Trial Liability Brief, p. 66: "...management, as contrasted to the board, made no studies...."

Plaintiff cites no authority whatever for the proposition that "management" must mean something, or someone, other than the Board of Directors. In fact, 8 Del.C. §141(a) directs that the "business and affairs of every [Delaware] corporation...shall be managed by or under the direction of a board of directors" (emphasis added). Black's Law Dictionary (4th Ed.) defines "manager" as "One who has charge of [a] corporation and control of its business." Webster's Seventh New Collegiate Dictionary gives as synonyms for "management" the words, "control" and "direction."

Defendants submit that in general usage, the "management" of a corporation is just as likely to mean the

Board of Directors (who certainly control and direct the corporation) as any other meaning which might be given to the term, and, in this particular case, it is very clear that as used in the sentence quoted on page 10 of the Proxy Statement, it can reasonably mean nothing <u>but</u> the UOP Board of Directors.

The sentence, "Management recommends...." is preceded by a lengthy paragraph beginning, "The Board of Directors believes that the business of UOP will benefit from the Merger....," which then goes on to recite various specific reasons why the Board believes UOP will benefit. Then comes, "Management recommends..." Also, on the President's letter to the stockholders, the first page of the Proxy Statement, it says: "The Board of Directors recommends your approval..." Who else, then but the Board can the word "Management" refer to in this context? It is unrealistic to believe that any reader of the Proxy Statement, other than a lawyer trying to make a case, would believe otherwise!

In any event, even accepting plaintiff's premise for purposes of argument, it was <u>plaintiff's burden</u> to show, if he chose to try, that UOP's "management" was without the requisite knowledge to give a recommendation, not defendants' burden to show that they did. Since plaintiff offered no proof on this point, and since there is otherwise nothing in the record to show that UOP's "management" was not consulted (or informed), plaintiff has failed to carry his burden on this point.

d. Crawford's Immediate Agreement

Among plaintiff's charges is one which says that Crawford "immediately agreed" to the Signal merger, and that as part of a conspiracy he did not reveal this "immediate agreement" to the UOP stockholders (Amended Complaint, ¶11; Plaintiff's Post Trial Liability Brief, pp. 23-24). The only possible basis for this allegation is plaintiff's own mischaracterization of the evidence.

On February 28, 1978, Crawford attended two meetings at Signal: first, a short meeting with Shumway and Walkup, and then the Signal Executive Committee meeting to which he was invited. With regard to the first of these meetings, all participants were deposed by plaintiff's counsel, the deposition transcripts are part of the record of the trial, and Messrs. Crawford and Walkup were also present and testified at the trial. None of the testimony supports plaintiff's allegations that Crawford "immediately agreed" to Signal's proposal. With regard to the Executive Committee meeting, in addition to the testimony of Walkup, Crawford and Shumway, there are written minutes and also the deposition testimony of Charles Arledge who was also present at that meeting. <u>None</u> of that evidence supports plaintiff's assertions. It is indeed significant that plaintiff is unable to cite specifically to anything in the minutes, or to cite to any specific testimony given by anyone, to support his assertions; instead, plaintiff resorts to sweeping generalities* and broadside references to portions of the record.

What actually happened on February 28, 1978 is set forth in the Statement of Facts, supra at pages 21-28, and therefore will not be repeated here, except that one of Mr. Crawford's answers given from the witness stand perhaps deserves restating:

> "Q. Now, at the morning meeting on February 28th did you purport to make any commitment on behalf of UOP with respect to the price range of $20 to $21 a share favored by Mr. Shumway?
>
> "A. No. It would have been inappropriate for me to make a commitment. I wouldn't have had the authority to do so in any event, and I made none." (TR 1428-29)

Crawford also testified that he would not have recommended the proposed merger to UOP's Board and its stockholders if Lehman Brothers had not opined that the price was fair (TR 1453).

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* Throughout his briefs, plaintiff uses argumentative words and phrases which are devoid of any record support and which have no legitimate purpose. For example, in the footnote on page 29 of his Post Trial Liability Brief, plaintiff states that Crawford "was summoned" by Shumway to the preliminary meeting in Los Angeles, thereby attempting to convey some dictatorial power of Shumway over Crawford. The fact is, of course, that Shumway extended a "common courtesy" to Crawford as the President and Chief Executive Officer of UOP. Shumway and Walkup did not purport to tell Crawford what was going to happen, or what he was supposed to do; rather, they wanted Crawford's "input and his reaction" to what Signal Management planned to propose to the Executive Committee. See Statement of Facts, supra at p. 22.

5. <u>The Alleged Conspiracy</u>

The plaintiff continues to assert a conspiracy among the defendants. Paragraph 16 of the amended complaint states:

> "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."

Although there appears to be no Delaware case which defines a civil conspiracy, it is generally recognized that

> "[a] civil conspiracy is a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means, to the injury of another. While the essence of the crime of conspiracy is the agreement, the essence of civil conspiracy is damages. It has been said that there is no such thing as a civil action for conspiracy; the action is one for damages arising out of the acts committed pursuant to the conspiracy." (Footnotes omitted).

16 Am.Jur.2d, <u>Conspiracy</u> §49

The very concept that there was a conspiracy between the several defendants in this case is so lacking in common sense that it is difficult to fashion a reasonable response. Not only does it make no sense whatever to believe that any conspiracy existed, but there is absolutely no evidence to support such a theory. There is absolutely no evidence of any agreement among the corporate defendants. Signal made an offer which was accepted by the Board of UOP, subject to the approval of the minority shareholders. UOP retained Lehman Brothers to render an opinion as to whether the proposed merger was fair to UOP's minority shareholders. Except for the negotiations and discussions between representatives of UOP and Signal, there is no evidence of any agreement to do anything (except of course, the Merger Agreement and the Agreement Regarding Merger). Similarly, the record is devoid of any communication between any representative of Signal and Lehman Brothers. In this respect, it is clear that Crawford was acting on behalf of UOP in his discussions with Lehman Brothers. In short, there is not the slightest indication of any wrongful act by any of the defendants, nor is there any evidence whatsoever that any of the defendants conspired with anyone to commit a wrongful act.

6. Conclusion

As stated earlier in this brief, it was and is the plaintiff's burden in this case to prove, by the evidence, that the vote of the minority shareholders of UOP approving the merger with Signal should be set aside by this Court because of the alleged fraud and misrepresentation practiced upon those minority shareholders.

In reviewing the evidence and the arguments, several general propositions should be kept in mind. First, as stated in Porges v. Vadsco Sales Corp., Del.Ch., 32 A.2d 148, 151 (1943):

"The evaluation of the benefits and detriments of a plan of this character [merger], by the persons whose rights and interests will be affected...is properly entitled to great weight."

Here, the overwhelming majority of UOP's minority shareholders who cared enough to vote voted in favor of the merger and have accepted for their shares the $21 price offered by Signal. Indeed, as of the spring of 1980, only about 2% of all of the former minority shares (about 100,000) had not been turned in and paid for. Therefore, great weight should be given to this expressed desire of these stockholders, and their vote should be overturned only on a very strong and convincing showing that they would not have voted in favor of the merger but for the alleged wrongful acts of the defendants.

Second, as stated in Kaplan v. Goldsamt, Del.Ch., 380 A.2d 556, 565 (1977):

"Provided that the proxy statement viewed in its entirety sufficiently discloses the matter to be voted upon, the omission or inclusion of a particular item is within the area of management judgment."

In the present case, when viewed in the entirety of the information supplied to UOP's stockholders, plaintiff's alleged omissions and misstatements can clearly be seen for the trivia which they are. It is very easy to be seduced into blowing out of proportion little bits and pieces of any document or transaction, especially when urged to do so by someone exhibiting a state of high indignation and casting out pejoratives like "fraud," and "misrepresentation." However, when considering the entire mix of information given to the stockholders, can one really take seriously the charge that their vote should be set aside even if there was no formal vote of the Board of Directors approving retention of a proxy solicitor? Does it really make sense to believe that if UOP and Signal had used the word "discuss" rather than the word "negotiate" in two press releases issued nearly three months before the stockholders' meeting the vote would have been different? Where in the totality of the information given to the stockholders about such things as actual and projected earnings, dividends, assets, product lines and the like would any information about a two-year old draft memorandum prepared by Lehman Brothers have fit, and what weight in the mix of things would the stockholders really have given to its inconclusive and undisseminated contents?

As pointed out above, there is simply no credible evidence in this case to support plaintiff's various allegations of fraud, misrepresentation, conspiracy or the like, and neither the evidence nor plaintiff's arguments nor common sense support his conclusory statements that the UOP stockholders would have considered any of these matters relevant in reaching their decisions to vote in favor of the merger. In summary, the plaintiff has failed to prove his case, and the wishes of the former minority stockholders of UOP should remain undisturbed.

B. All Aspects Of The Merger Were Entirely Fair To The Minority Shareholders Of UOP

This portion of the brief is directed to those elements of the merger transaction which, defendants submit, become relevant only if the Court first concludes that plaintiff has met his burden and has carried the day in his charges of fraud and misrepresentation. As the plaintiff himself obviously recognizes, then and only then do we have to address the issues of a "fairness" case.* Defendants submit that plaintiff has not met that burden, and defendants' arguments on that subject which appear supra will not be repeated here. We proceed, however, on the assumption (for purposes of argument only) that the Court wishes to consider "the entire fairness" of the transaction between UOP's minority stockholders and Signal.

In 1977, the Delaware Supreme Court, in Tanzer v. International General Industries, Inc., Del.Supr., 379 A.2d 1121 (1977) (Tanzer I) stated the general rule that a fairness hearing "involves judicial scrutiny for 'entire fairness' as to all aspects of the transaction." Id. at 1125. In Tanzer I, the defendant IGI owned 81% of Kliklok Corporation's outstanding common stock and it caused Kliklok to be merged into a wholly-owned subsidiary, thereby freezing-out the minority shareholders of Kliklok. The merger was not subject to the approval of the minority shareholders and because IGI had voting control, the consummation of the transaction was assurred. The

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* See Plaintiff's Post Trial Liability Brief, p.6.

only reason advanced for the merger was that it would facilitate IGI's long-term debt financing. The Supreme Court held, as a matter of law, that IGI had established a bona fide business purpose for the merger. Id. at pp. 1124-25. The Supreme Court went on:

> "This ruling, however, does not terminate the litigaton because, given the fiduciary duty owed in any event by IGI to the minority stockholders of Kliklok, the latter are entitled to a fairness hearing under Singer.[*] The Chancellor's opinion, announced at the preliminary injuction stage of this proceeding, discussed fairness only in terms of the price offered for the stock, but that was too restrictive. The test required by Singer, which applied the rule of Sterling[**], involves judicial scrutiny for "entire fairness" as to all aspects of the transaction.
>
> * * *
>
> "The order of the Court of Chancery denying injuctive relief is affirmed and the case is remanded for further proceedings consistent herewith."

Id. at p. 1125.

On remand, this Court, after considering eight criteria of fairness, held that the merger was entirely fair to the minority shareholers of Kliklok as to all aspects of the transaction, and granted the defendants' motion for summary judgment. Tanzer v. International General Industries, Inc., Del.Ch., 402 A.2d 382 (1979) ("Tanzer II"). We will discuss

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* Singer v. Magnavox Co., Del.Supr., 380 A.2d 969 (1977).

** Sterling v. Mayflower Hotel Corp., Del.Supr., 93 A.2d 107 (1952).

each of the criteria applied in Tanzer II, as well as other considerations, to show that the record in this case clearly establishes that the subject merger was entirely fair to the minority shareholders of UOP as to all aspects of the transaction.

1. The Purpose of the Merger

As shown earlier in this brief, Signal had bona fide business purposes for the merger, and there is absolutely no contrary evidence nor any other proof that the merger was accomplished solely to freeze-out the minority shareholders of UOP, as plaintiff has alleged. In fact, plaintiff's argument concerning the propriety of one of the purposes for the merger contained in his amended complaint, and at pages 8-9 of his Post Trial Liability Brief, concedes the issue. Thus, plaintiff states:

> "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 shareholder." (emphasis added).

Amended Complaint, ¶10.

It is difficult to understand how "the best economic opportunity for Signal at the time" does not support the bona fides of Signal's business purposes for the merger. In Tanzer I, supra, the only reason advanced for the merger was that it would facilitate the majority stockholder's long-term debt financing. This was obviously an economic opportunity for the majority stockholder alone, and could be accomplished only by freezing-out the minority stockholders. The Supreme Court held:

> "Plaintiffs tacitly concede that there is record support for the Chancellor's finding [that the purpose of the merger was to facilitate the majority stockholder's long-term financing and not just to freeze-out the minority shareholders]. Indeed, it is not even contested because plaintiffs made essentially the same allegation in the complaint, and their argument here is bottomed on the premise that a freeze-out merger between parent and subsidiary corporations designed solely for the purpose of benefiting the parent is impermissible under Delaware law.
>
> "It follows, therefore, that no violation of the rule of Singer has been shown, and that IGI has established a *bona fide* purpose for the Kliklok merger.
>
> "Since IGI's purpose in causing the Kliklok merger was a proper exercise of its voting power under the rule announced herein, we affirm the order of the Trial Court denying plaintiffs' motion for a preliminary injunction."

Tanzer I, *supra*, at 379 A.2d 1125.

In addition to the fact that, in this case, the proposed merger provided Signal with its best investment opportunity at the time, Signal's business purposes for the merger also included: (1) it would eliminate distorted financial statements caused by certain accounting rules; (2) it would eliminate potential conflicts between Signal and its wholly-owned subsidiaries on the one hand, and UOP on the other; and (3) it would permit significant tax, accounting, insurance, and advertising economies. See Statement of Facts, *supra* at pp.

16-20. Plaintiff has offered no evidence to the contrary, and has offered absolutely no evidence for his bald assertion that the sole purpose of the merger was to freeze-out the minority shareholders of UOP. In short, the record shows beyond question that in early 1978, Signal had compelling and legitimate business purposes for considering the acquisition of, and later acquiring, the shares owned by UOP's minority stockholders. Signal's Executive Committee considered those purposes in recommending the acquisition to Signal's Board and Signal's Board considered those purposes before making the merger proposal to UOP.* See Statement of Facts, supra at pp. 25, 39-40. Signal's business purposes were also spelled out in the Proxy Statement (PX-U-7, p. 7).

2. The Price of $21.00 Per Share Was Fair

a. The Plaintiff's "Proof"

The testimony of plaintiff's expert, Kenneth Bodenstein, is simply incredible. In the first place, his "Special Report" (PX-3) which concluded "that an appropriate fair value price for merger puposes [sic--purposes] was not less than $26 per share" (id. at p. 23) contains not one word about the methodology which he used in arriving at that conclusion (TR 579). Similarly, the "loss" during his deposition of $30

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* Whether relevant or not to the issues in this litigation, UOP also had valid business reasons to support the merger, and those reasons were disclosed in the Proxy Statement (PX-U-7, p. 4).

million, ostensibly caused by a ray of sunshine which focused on his digital calculator, and which he subsequently "found" overnight, defies belief (TR 577-78).

The principal basis for Bodenstein's evaluation was his discounted cash flow analysis, the methodology which was not mentioned in his report. This Court has held that the discounted cash flow method is not an acceptable valuation technique in an appraisal case.* In Frick v. American President Lines, Ltd., Del.Ch., C.A. 3766 (Letter Opinion dated June 18, 1975), a copy of which is attached hereto as Annex D, an appraisal case, Chancellor Marvel was asked to review certain evidentiary rulings made by the Court-appointed appraiser. One of the petitioner's experts had determined the value of stock there in issue by using a discounted cash flow analysis. The defendant objected to that testimony and related exhibit on the grounds that "...(1) the discounted cash flow valuation is not relevant or material to valuation in an appraisal proceeding and (2) such projections of cash flow were too conjectural and speculative." Letter Opinion, p. 7. The appraiser sustained the objection and Chancellor Marvel agreed, stating:

> "Petitioners contend that the discounted cash flow is relevant and material to the extent that it represents a "factor" or "element" that may "reasonably...enter into" the appraiser's determination of the "true or intrinsic value of [petitioners'] stock."

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* We show at page 129, infra, that the standards applied in appraisal cases should be used in determining the value of the shares formerly owned by UOP's minority stockholders.

[Tri-Continental Corp. v. Battye, Del. Supr.,] 74 A.2d at 71, 72 [(1950)]. And there is no doubt but that cash flow, that is, net profits after taxes plus non-cash charges, such as depreciation, depletion, and amortization, have become important factors in the valuation of a going concern for the purpose of acquisition. This is not to say, however, that the technique is appropriate for the purposes of appraisal.

"Petitioners contend that the value of their stock at the date of the merger was necessarily tied in with the future prospects of AML, and certain Delaware decisions have held that future prospects are indeed of vital concern in an appraisal proceeding. See Universal City Studios, Inc. v. Francis I. duPont & CO., Del. Supr.Ct., 334 A.2d 216 (1975); In re Olivetti Underwood Corp., Del. Ch., 246 A.2d 800 (1968); Sporborg v. City Specialty Stores, Del. Ch., 123 A.2d 121 (1956); Application of Delaware Racing, Del. Supr. 213 A.2d 203 (1965).

"However, the fact that the courts have sought to take into consideration the future prospects of a corporation does not give validity to all means designed to forecaset such prospects. The accounting technique known as cash flow analysis seeks to utilize presently available information so as to project furture income flow to the corporation. However, mere projections of future earnings have been looked upon with disfavor in Delaware as speculative. See Levin v. Midland-Ross Corp., Del. Ch., 194 A.2d 50, 57 (1963), Cottrell v. Pawcatuck, Del. Supr., Ct., 128 A.2d 225, 231 (1956) and David J. Green & Co. v. Dunhill International, Inc. Del. Ch. 249 A.2d 427, 433 (1968).

"Thus, the cash flow technique sought to be invoked here is, in my opinion, overly speculative for the same reasons, i.e. that it rests upon events which have not been shown to be reasonably probable of happening. See Olson v. United States, 292 U.S. 246, 257 (1934). Compare Korf v. Fleming, Iowa Supr. Ct., 32 N.W. 2d 85, 96 (1948), and Brooklyn Eastern Dist. Terminal v. City of New York, 139 F.2d 1007, 1013 (2d Cir) (1944) cert. den., 322 U.S. 747.

"Furthermore, it is apparent that the cash flow analysis is limited in its usefulness as a projection by the very fact that its validity rests upon the financial techniques of a few experts. Accordingly, when the Delaware courts have been confronted with the task of ascertaining the effect of future prospects on the present value of a stock in the absence of an open market, they have turned their attention to aggregate figures. Thus, the capitalization rate for a company is often determined by compiling a weighted price-earnings ratio from a study of the open market price of shares by comparable businesses in the same or similar industry. This figure, which is, in effect, an open market estimation of the future prospects of such business, negatives the factor of individual speculation. This ratio is then applied to the past earnings record of the subject company to determine the market price that the company could reasonably expect to obtain.

"I am of the opinion that the appraiser's decision rejecting the admission of petitioner's exhibit 39 and the accompanying testimony was correct and in accord with the law of this state."

Letter Opinion at pp. 8-10.

In general, the discounted cash flow analysis is designed to reduce to present value a projected cash flow expected to be received in the future. In practice, such an analysis, especially when applied to a large publicly-held company, disregards the perception of the market place as to value and risk, and is subject to a fortuitous choice of discount factor unanchored by any objective standard. Thus, while the discounted cash flow analysis might have some reasonable applications with respect to a closely-held or wholly-owned company for which there is no reliable market data, it is not an appropriate method to value a widely-traded stock which has already been evaluated by the market. To hold otherwise would be to permit the evaluation of the market place, unaffected by litigation or positions of advocacy, to be replaced by a trial expert's choice of a discount factor.

For example, during the first two months of 1978 (prior to the first announcement of the merger negotiations) UOP's common stock had sold at an average price of slightly less than \$15 per share (DX-40, Ex. 1). UOP's 1977 earnings per share from continuing operations was \$2.12, and UOP's price/earnings ratio was therefore approximately 7:1 (\$2.12 x 7 = \$14.84). This price/earnings ratio reflects a return of about 14%, i.e., the market place was willing to pay about \$15 to receive a return (including dividends and retained earnings) of \$2.12 (TR 841-42). This expected (or desired) rate of return reflects the market's perception of the risk factor inherent in the investment, and indicates that the market was, in effect, using a discount factor of 14% in valuing UOP's shares (TR 1150-52). Bodenstein, however, in applying his discounted cash flow analysis to UOP's 1977 cash flow used discount factors of 7.5% and 8.5%, thus coming up with per share "values" of \$28.09 and \$25.21, respectively (PX-4). Even assuming that Bodenstein then properly added excess liquidity and extraordinary items as part of his calculation, if a discount factor as low as 10% is used (as opposed to the higher 14% factor perceived by the market), the per share "value" would be \$21.95. If a 14% factor is used, the per share "value" becomes $16.81.* Thus, assuming net free cash from operations of $20.8 million and the correctness of Bodenstein's "add-ons" for excess liquidity and extraordinary items (PX-4), the per share "values", using the discount rates just mentioned are as follows:

Discount factor	7.5%	8.5%	10%	14%
Present value of net free cash	$277.3	$244.6	$208.3	$148.5
Excess liquidity	37.0	37.0	37.0	37.0
Extraordinary items	7.0	7.0	7.0	7.0
	$321.3	$288.6	$252.0	$192.5
Per share "value"	$ 28.09	$ 25.21	$ 22.01	$ 16.81**

With this graphic example of how, with just the choice of the discount factor, because of its compounding effect, one can so drastically change an evaluation (all other things being equal), we turn to the plaintiff's arguments based on Bodenstein's testimony.

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* Mr. Purcell testified that although he did not believe that the discounted cash flow analysis was a proper tool to be used in valuing UOP or its shares, if he had used such an approach, the appropriate discount factor would have been no less than 15% (TR 1152).

** The first two columns are taken from PX-4. The discount factors used in the second two columns are taken from Financial Compound Interest and Annuity Tables (4th Ed. 1968). Copies of the relevant pages from those tables are attached hereto as Annexes A and B.

i. The Discounted Cash Flow Analysis Applied to UOP's 1977 Figures

At pages 26-33 of his Post Trial Remedy Brief, plaintiff discusses Bodenstein's analysis based on UOP's 1977 operating figures (PX-4). We have already shown how readily Bodenstein's totals can be affected radically simply by the choice of a discount factor, and that Bodenstein, in choosing his discount factor, totally ignored the market's perception of an appropriate factor. Similarly, in arbitrarily adding $37 million in "excess liquidity" to his calculations as to the present value of the net cash flow, Bodenstein ignored the actual business decision of UOP's management to maintain certain cash and cash equivalent positions. As Crawford testified:

> "There are several reasons why it would be inappropriate to withdraw the cash balance from UOP at that or any other period of time. One is that the money would not be available to meet capital expansion needs. Another is that the very fluctuation that we have just discussed in accounts receivable could continue, that cash would be required to finance receivables or other items of working capital. Depending upon the future business in subsequent months, additional investment could be required in inventories. And if that cash were not available, such business expansion could not take place.
>
> "Another very important reason why that money was not available to be withdrawn and could not be withdrawn is that it would put UOP in violation of certain of its contracts. If you will notice, under the liabilities side of the balance sheet, it indicates billings on uncompleted contracts in excess of related costs of some $37.9 million. This represents a sum that has been advanced to UOP by its customers as advance payments on certain contracts. The title to

> that money rests in the hands of UOP's customers. And while UOP has custody of the cash, it has a fiduciary and legal responsibility to manage that cash only in accordance with the restrictions that are imposed upon it by contract.
>
> "A great deal of the money that is so advanced has been advanced in UOP's foreign units, and there are two additional reasons why that money could not be extracted from the foreign units and brought back to the United States and divested. One is exchange control restrictions of foreign governments, such as existed in England at that particular time. And the second, again, is that that money was prescribed by the contracts under which it was advanced to be spent only in pursuit of construction work for those companies. So it would have been illegal on two counts to use the money for any purpose other than that for which it was advanced or to return it to the United States."

TR 1462-63.

Thus, just as he was able to "find" $30 million during an overnight recess in his deposition, Bodenstein was able to "find" an excess of $37 million which the evidence shows UOP clearly required for its business. It is totally unreasonable to accept Bodenstein's manipulations in the face of the unrebutted business reasons which required the continued maintenance of UOP's cash and cash equivalent positions.

ii. Plaintiff's Discounted Cash Flow Analysis Based On UOP's 1978 Budget

Based on UOP's projected net income for 1978 (which was disclosed in the Proxy Statement, PX-U-7, p. 9), and using estimates based on UOP's 1976 and 1977 balance sheets and sources and applications of funds statements (also disclosed in the Proxy Statement, PX-U-7, pp. 44-48), Bodenstein predicted that UOP would have net free cash from operations in 1978 of $24.9 million (PX-5, TR 234). Bodenstein predicted UOP's gross cash flow from operations in 1978 as follows (PX-5):

	(In Millions)
Income before extraordinary items (based on UOP's 1978 budgeted income)	$30.0
Depreciation (as predicted by Bodenstein)	16.5
Deferred income taxes (as predicted by Bodenstein)	3.0
	$49.5

Bodenstein also predicted UOP's cash requirements for 1978 as follows (PX-5):

	(In Millions)
Additions for plant and equipment (as predicted by Bodenstein)	$17.5
Long-term debt payment (net)	7.1
	$24.6

Thus, according to Bodenstein's predictions, UOP's net free cash from operations in 1978 would be $24.9 million ($49.5 million less $24.6 million). He then projected that prediction into infinity when he assumed that UOP would have the identical free cash flow every year in the future to which he then applied a 10% discount factor and thus arrived at a present "value" (as of Spring, 1978) of that cash flow of $250 million (PX-5).

In making his prediction of net free cash in 1978, Bodenstein assumed that UOP would require $17.5 million in 1978 (and each and every year thereafter) in order to maintain its plant and equipment in order to generate a gross cash flow of $49.5 million in 1978 (and each and every year thereafter) (PX-5; TR 245-46). Bodenstein made this assumption despite the fact that UOP's capital expenditures for the years 1973 through 1977 were $19.7 million, $40.6 million, $29.6 million, $13.4 million, and $16.3 million, respectively (an average of $23.9 million). During the same years, UOP had income (loss) from continuing operations of $15.6 million, $24.6 million, ($31.4 million), $15.4 million, and $24.3 million (PX-U-7), p. 15). Thus, there was absolutely no historical correlation between UOP's capital expenditures and the maintenance of its income flow, nor was there any evidence at trial to support this assumption by Bodenstein. In fact, UOP's largest capital expenditure of $40.6 million was made in 1974, just one year prior to its loss of over $31 million. In short, there was no basis for Bodenstein's "guestimate" that it would require only $17.5 million per year in order for UOP to maintain its plant and equipment so as to provide the same revenues forever.

If Bodenstein had used the five year historical average figure for capital expenditures of $23.9 million, his net free cash flow for 1978 (and each year thereafter) would have been $18.5 million. The present value of that cash flow, using a 10% discount factor projected into infinity, is $185 million, or a per share value of $16.16. If the more realistic discount factor of 14% is used in Bodenstein's equation, and assuming a net cash flow of $18.5 million, the figure of $132.1 million, or

$11.54 per share becomes the present value of those shares at the time of the merger.

Apparently not satisfied with a $250 million present value (based on his predicted $24.9 million net free cash from operations), Bodenstein made another "find." PX-5 shows a $50 million add-on for "excess liquidity and timberland cushion." As discussed in the preceding subsection of this brief, UOP had responsible business reasons for maintaining its cash and cash equivalents positions, and Bodenstein should not be permitted to second-guess the business judgment of UOP's management in that respect, especially when no evidence was presented in support of his assumption. We turn then to Bodenstein's analysis of UOP's timberlands.

The Proxy Statement disclosed:

> "UOP owns approximately 220,000 acres of land in Houghton, Keweenaw and Ontonagon Counties in the Upper Peninsula of Michigan. Approximately 204,000 acres of this area are forested with hardwood and softwood timber and pulpwood. UOP owns an additional hardwood and pulpwood forest of approximately 70,000 acres in Wisconsin. These forests have been leased to Louisiana-Pacific Corporation for a term of 15 years for timber cutting and removal in connection with the divestment of the Goodman operations in 1974."

PX-U-7, p. 29. The Proxy Statement also disclosed that UOP's land and timber holdings were carried on its balance sheet as of December 31, 1977 at $11,157,000 (PX-U-7, p. 58), or about $38 per acre (TR 1179). Plaintiff states:

> "Mr. Bodenstein conservatively valued these vast timberlands. $100.00 to $200.00 an acre was in itself a conservative range of

> value to place on these timberlands based on his experience (TR 284-285). However, again to err on the side of caution, he included the timberlands at only $70.00 per acre for valuation purposes. Mr. Bodenstein concluded that a conservative but realistic range for the actual value of UOP's timberlands was between $30 million and $50 million."

Plaintiff's Post Trial Remedy Brief, p. 32. If, indeed, Bodenstein did value the timberlands "at only $70.00 per acre," it is difficult to understand the conclusion that a conservative range for the actual value of the timberlands was between $30-$50 million, because 274,000 acres times $70.00 per acre equals only $19.2 million. In any event, Bodenstein's speculation as to the value of the timberlands should be totally disregarded by this Court. First, Bodenstein had had absolutely no prior experience in evaluating such properties. As he admitted on direct examination, Bodenstein had never had occasion to make financial analyses of companies whose assets were in timberlands, both hard and soft, in the upper Middle West section of the United States (TR 271). Also, on voir dire, Bodenstein admitted that he did not look at the subject timberlands, did not determine what type of timber was involved, did not determine the quality of the timber, and did not even determine if the timber was harvestable (TR 277). In fact, Bodenstein did not even know the terms of the lease which covered part of the timberlands, the existence of which was disclosed in the Proxy Statement (TR 281-82). Bodenstein's only knowledge of the timberlands was his own unsupported speculation as to the value of the timberlands, and should be given no credence.

When PX-5 is restated to reflect historical averages and to eliminate mere speculation, the following results are obtained:

	(In Millions) Bodenstein	Restated
Sources:		
Income before extraordinary items	$ 30.0	$ 30.0
Depreciation	16.5	16.5
Deferred income taxes	3.0	3.0
Cash flow from operations	$ 49.5	$ 49.5
Uses:		
Additions for plant and equipment	17.5	23.9
Long-term debt payment (net)	7.1	7.1
Cash requirements	$ 24.6	$ 31.0
Net free cash from operations	$ 24.9	$ 18.5
Present value of net free cash streams discounted at 10%	$250.0	$185.0
Excess liquidity and timber-land cushion	50.0	-0-
	$300.0	$185.0
Per share basis	$26.20*	$16.16

This comparison is not made to suggest a fair value for UOP's minority shares, but to show with the discounted cash flow method the ease with which the "bottom line" can be so substantially affected by the inclusion or deletion of a single figure. If, for example, one uses all of the assumptions and speculations contained in PX-5, and changes only the discount

* Bodenstein found an additional 96¢ add-on in PX-5 by including a non-operating cash flow which consisted of a $6.0 million tax loss carryforward and a $5.0 million "other" (PX-5).

factor from 10% to 14%, the "per share basis," even including the 96¢ add-on becomes $20.85. Thus:

	(In millions)
Present value of net free cash streams of $24.9 million discounted at 14%	$177.8
Excess liquidity and timberland cushion	50.0
	$227.8
Per share basis	$ 19.90
Non-operating cash flow	$ .96
	$ 20.86

The point is clear.

iii. The Discounted Cash Flow Analysis Based On UOP's 1978-1982 Five-Year Business Plans

Only after Bodenstein's deposition was taken in April, 1980, was he provided with a copy of PX-U-400, the Five-Year Business Plans Of UOP Inc. (1978-1982) (TR 458), although that document had been produced to plaintiff's counsel much earlier in the proceedings. Using the financial data set forth in the "basic" portion of that Plan, Bodenstein calculated the present value of UOP's "free cash throw-off" to be $298 million, or $25.94 per share (PX-7). In making this calculation, Bodenstein first assumed that the dividends projected by management would, in fact, be paid, i.e., $9.1 million in 1978; $9.1 million in 1979; $11.3 million in 1980; $13.7 million in 1981; and $16.7 million in 1982 (ibid.), notwithstanding the very speculative nature of this assumption and notwithstanding the fact that this assumption is inconsistent with UOP's dividend history.* Thus, for the years 1973 through 1977, UOP paid dividends of $2,495,000, $6,986,000, $7,411,000, $2,583,000, and $7,174,000, respectively (PX-U-7; p. 15). That history hardly justifies Bodenstein's assumption, whether or not based on management's projections,** that UOP's dividends for the years 1978 through 1982 would not only be substantial, but would also increase regularly and significantly.

Having thus speculated as to the actual future dividends, Bodenstein then added to these assumed dividends for the years 1980 through 1982, the sums of $6.5 million, $9.1 million, and $28.6 million, respectively, labelling those sums "Increase In Cash" (PX-7). It is not at all clear as to how Bodenstein came up with these numbers (TR 472-474). Apparently, however, Bodenstein simply removed from UOP's projected working capital all cash and short-term investments for the years 1980, 1981, and 1982 (PX-U-400, chart entitled "Basic," the first line of which reads "FUNDS PROVIDED (REQUIRED)") and added those amounts to his projected dividends. How Bodenstein can, in

* As noted in the Dillon Read Report, UOP's historical dividend payments had been erratic, and the projected 1978 payments were no greater than the dividends paid in 1970.

** Obviously, in 1974, UOP's management did not project that UOP would lose almost $35 million in the following year. But it did.

effect, assume that any rational business man would strip all current working funds from an ongoing industrial concern defies imagination.

Having piled nonsense on speculation, Bodenstein then assumed that the $45.3 million "free cash throw-off" reached in 1982 would continue indefinitely, thereby giving a 1983 "Residual Value" of $453 million (present value of $45.3 million per year projected into infinity, discounted at 10%) (PX-7).

Once again, Bodenstein's unsupported choice of a 10% discount factor ignores the actual perception of the market and disregards the risks inherent in UOP's business as reflected in its financial history (DX-40, pp. 10-13). If, instead of 10%, a 14% discount factor is applied to the 1982 free cash throw-off figure of $45.3 million, the result is a 1983 Residual Value of $323.4 million (i.e., the present value of $45.3 million per year projected into infinity, discounted at 14%), a difference of almost $130 million from that which results from the use of Bodenstein's 10% figure.

After he determined the free cash throw-off for the years 1978 through 1982, and the 1983 residual value, Bodenstein next calculated the present value of each of those figures by applying a discount factor of 12% (PX-7). Thus, PX-7 shows:

"Year	Free Cash Throw-Off	Discounted at 12%
1978	$ 9.1	$ 8.1
1979	9.1	7.3
1980	17.8	12.7
1981	22.8	14.5
1982	45.3	25.7
1983	453.0*	229.7
	TOTAL PRESENT VALUE ---	$298.0 or
		$25.94 per share

"*Residual Value in 1983"

If the 1983 Residual Value of $453.0 million (calculated by Bodenstein using a 10% discount factor) is replaced with the figue of $323.4 million (calculated by applying the more reasonable discount factor of 14%), the last line of PX-7 changes as follows:

Year	Free Cash Throw-Off	Discounted at 12%
1983	$323.4	$163.8

The totals then change to $232.1 million or $20.27 per share. Even if all of Bodenstein's calculations are accepted, including the 1983 Residual Value of $453.0 million (calculated by Bodenstein using a 10% discount factor), but a 14% rather than a 12% discount factor is applied to reduce to present worth the free cash throw-off for the years 1978 through 1982 and the 1983 Residual Value, the following results:

Year	Free Cash Throw-Off	Discounted at 14% (instead of Bodenstein's 12%)
1978	$ 9.1	$ 8.0
1979	9.1	7.0
1980	17.8	12.0
1981	22.8	13.5
1982	45.3	23.5
1983	453.0*	206.4
	TOTAL PRESENT VALUE ---	$237.1 or $20.70 per share

*Residual Value in 1983

Once again, the point is clear.

Obviously, anticipating criticism of Bodenstein's use of UOP's 1978-1982 budget (i.e., projected) figures, plaintiff states:

> "Mr. Bodenstein found that UOP's management had always done an excellent job at making up a budget (TR 239)--they were within plus or minus 10% of their estimate (TR 240)." (emphasis added).

Plaintiff's Post Trial Remedy Brief, p. 35. What does the actual record reflect? For the years 1973 through 1977, UOP's budgeted net income and actual net income was as follows (PX-U-7, p. 10):

	Budgeted Net Income	Actual Net Income	Percentage Difference
1973	$18,242	$20,906	14.6%
1974	23,669	27,752	17.3%
1975	26,407	(34,868)	-232.0%
1976	18,631	23,591	+26.6%
1977	32,700	31,438	-3.9%

Historically, then, and excluding 1975, UOP's management was off the mark by an average of 15.6%. Including 1975, the average differential is 58.9%. Obviously, Bodenstein did not do his homework, nor did UOP's track record come close to supporting Bodenstein's predictions regarding the future.

iv. Bodenstein's Testimony--Some General Observations

Defendants have no quarrel with plaintiff's observation that UOP's financial condition improved after 1976 (Plaintiff's Post-Trial Remedy Brief, p. 7). In fact, UOP's financial condition improved substantially from 1975 to 1976, net income (loss) from continuing operations having gone from ($31,360,000) in 1975 to $15,441,000 in 1976. But what is plaintiff's point? The fact is that UOP's performance in 1977 was almost the same as it had been in 1974. Thus, the Proxy Statement disclosed, *inter alia* (PX-U-7, p. 15):

	1974*	1977*
Total Revenues	$781,003	$729,878
Income from continuing operations before extraordinary items	$ 24,603	$ 24,328
Retained earnings	$ 84,088	$ 87,081
Earnings per share from continuing operations before extraordinary items	$2.46	$2.12
Net income per share	$2.78	$2.74
Dividends paid per share	$ .70	$ .625

In light of these striking similarities, Bodenstein's testimony that the 1975 tender offer/direct purchase had nothing to do with the value of the minority shares in 1978 (TR 321) makes no sense. Obviously, although the transactions were different, the free market provides one of the very best indications of "value," however tenuous that word may be. The tremendous oversubscription of the tender offer in 1975 reflected the market's belief that $21.00 per share was a fair price, based on UOP's performance in 1974. Because UOP's performances in 1974 and 1977 were almost identical, the 1975 market reaction to the $21.00 per share tender offer provided an important benchmark with which to test the fairness of the 1978 merger price.

Bodenstein's calculation of "prior market value" used to determine the premium over market (TR 350, et seq.) may be

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* Figures in thousands except for per share figures.

interesting, but it is without precedent or practical value since the investment community determines the premium over market in a merger situation by looking at the market price just prior to the first public announcement concerning the merger. This is the keystone used by the investment and financial community in determining the "premium" (TR 1136) As this Court recently held:

> "the appropiate market value is $3.125 per share, the closing price for the stock on the day before the announcement of the proposed merger and not a thirty day pre-announcement average of $2.77 per share." (emphasis added).

Tannetics, Inc. v. A. J. Industries, Inc., Del.Ch., C.A. No. 5306, Letter Opinion, pp. 14-15 (July 17, 1979) (a copy of which is attached hereto as Annex C). See also, Gibbons v. Schenley Industries, Inc., Del.Ch., 339 A.2d 460, 468 (1975).

Interestingly, Bodenstein determined the premium over market in the International General Industries, Inc./Kliklok merger to be 47%, using a "market value" of $7.50 per share instead of the $8.50 per share closing price immediately prior to the announcement of the proposed merger (PX-6, item 2 of that part of the exhibit entitled "Analysis of Certain Merger Transactions by Duff & Phelps"). Dillon Read had calculated the premium to be 29% (DX-40, Ex. 7). We assume that Bodenstein and plaintiff in this case were unaware of this Court's holding in Tanzer II that

> "the price of $11.00 per share recommended in the Dillon Read report represented a premium of 29% over the closing market price of Kliklok common stock on September 24, 1975, the day prior to the merger study announcement."

402 A.2d 389.

In summary, Bodenstein disregarded the risks inherent in UOP's business as reflected by its financial history. His analyses are all based on future speculation as opposed to historical earnings, market prices, dividends and the like. As this Court held in Levin v. Midland-Ross Corp., Del.Ch., 194 A.2d 50, 57 (1963), an appraisal case:

> "[petitioner's expert's] estimate was based principally on long-range projections, a technique which has not met with approval in Delaware in proceedings having to do with the determination of the present value of assets."

Finally, this Court had the opportunity to observe Bodenstein's demeanor and to hear him testify. He had no personal contact with anyone from UOP or Signal, nor did he inspect any of UOP's assets. His analyses were based solely on the information contained in the Proxy Statement and PX-U-400, the latter of which he did not have until after his deposition. All things considered, this Court should reject Bodenstein's testimony as being without probative value.

b. The Opinion Of Dillon Read/Purcell's Testimony

Signal called as its expert, William H. Purcell, a Senior Vice President of Dillon, Read & Co., Inc. ("Dillon

Read"). During the course of Mr. Purcell's testimony, the Dillon Read Report was introduced into evidence (DX-40). As pointed out in that Report, "There are different ways to arrive at the concept of fair value in any transaction." Id. at p. 3. The analysis used by Dillon Read included the examination of various aspects of UOP, its past history and future prospects, and the formulation of an opinion on the fairness of the price. This is the method, defendants submit, which is appropriate in this case. See pages 129-141, infra.

Prior to coming to their opinion on the fairness of the $21 merger price, a substantial amount of work was done by Mr. Purcell and others at Dillon Read. They reviewed the Proxy Statement, the UOP annual reports for 1973 through 1977, SEC filings, including UOP's 10-K reports and 10-Q reports, Signal's annual reports and other publicly available information and reports concerning UOP which Dillon Read had in its files. They reviewed the historical market prices and trading values of UOP's stock, together with the general nature of UOP's business and the industries in which it operated (TR 1057). They reviewed the premium offered in relation to the market price prior to the first announcement concerning the proposed merger, and they reviewed historical market prices for securities of selected companies deemed somewhat comparable to UOP (TR 1057).

Dillon Read and Mr. Purcell then did something else--they spoke to people at both Signal and UOP and, in fact, Mr. Purcell made a personal visit to UOP's headquarters in Des

Plaines, Illinois, where he met and spoke with Mr. Crawford, UOP's President, and asked questions, among other things, about earnings contributions and competing companies as to each of UOP's different lines of business (TR 1063). He also spoke to Crawford about the 1978 budget, as well as UOP's five year plan, and the accuracy of the projections, etc. (TR 1068).

In his conversation with Mr. Arledge of Signal, Mr. Purcell asked and was told that Signal had had no intention to liquidate UOP or to dispose of any of UOP's major assets. He also asked and was told that Signal had had no intention of transferring control of UOP, and he obtained Signal's impressions of UOP and its future prospects as of the time of the merger (TR 1069-1071). Purcell also reviewed nearly "two crates" of documents relating to the litigation, including the pleadings and deposition transcripts (TR 1072-1073).

After receiving and reviewing these various materials, and after conducting their interviews, Dillon Read (including Purcell) analyzed the data, prepared their report, and arrived at their opinion as stated therein. This opinion is that the $21 per share price was fair and equitable from a financial point of view to UOP's stockholders other than Signal (DX 40, pp. 2-3). They also observed that:

> "...nothing came to our attention which caused us to believe that the Proxy Statement as of its date contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or failed to provide holders

of common stock of UOP with sufficient information to make an informed decision with respect to the proposed Merger." (DX-40 p. 3)

i. Method of Evaluation

The specifics of how, and why Dillon Read reached its opinion as to the fairness of the $21 price is set forth in detail in the Dillon Read report and in Mr. Purcell's testimony, and there is therefore not much to be gained by repeating it all here. However, a brief review seems appropriate. They considered and analyzed "Market Value," which involved, among other things, reviewing the prices at which UOP's stock had traded during the period January 1, 1974 through May 26, 1978 (DX-40 pp. 3-4). This analysis showed that the highest price at which the stock had ever traded during this five year period was $18.625, and it had not traded in 1978 above $15.875 prior to Signal's merger offer. This analysis of market value was quite properly a part of an evaluation of the shares. See e.g., Chicago Corp. v. Munds, Del.Ch., 172 A. 452 (1934).

They next considered the "Structure of the Transaction," meaning the mechanisms set up to give the minority stockholders the opportunity to vote (DX-40 pp. 5-7). Then "Investment Value" was analyzed, including such matters as UOP's financial position, its earnings and dividend growth and the consistency of that growth, the nature of UOP's business, and its future prospects (DX-40 pp. 7-15). Dillon Read noted, among other things, wide swings in the percentage of earnings contributions from the several lines of UOP's business; they noted the qualification to UOP's audited financial statements placed there by the outside auditing firm, Arthur Andersen & Co.; they noted UOP's "erratic and not overly impressive operating record for the five year period 1973-1977;" and that UOP's earnings per share were not only volatile, but included in many years items from discontinued operations, and/or extraordinary items. With respect to UOP's dividends, they noted that the growth and consistency of quarterly and annual dividends is one of the most important investment criteria and, on this score, UOP's history of dividends was very erratic. Indeed, as they point out, the annualized rate for the first quarterly dividend of $.80 in 1978 was still only equal to the annual dividend paid in <u>1970</u>!

Dillon Read then considered "Net Asset Value," or book value, but determined that since there was no intent to liquidate or to dispose of any substantial assets, little weight should be given to this particular item in arriving at their opinion of fairness of the $21 price (DX-40, pp. 15-16). They did note, however, that the net asset value was $19.86 per share as of the end of 1977, and $20.69 as of March 31, 1978. They also considered the matter of a premium over market, and compared the premium in this transaction with those paid in other merger transactions.

It was on the basis of such work and analysis that Dillon Read concluded:

"In summary, on the basis of all the information set forth herein and considering factors we deemed relevant, it is our opinion that the offer of $21 in cash per share was fair and equitable from a financial point of view to the holders of common stock of UOP other than Signal." (DX-40 p. 17)

ii. Statement Regarding Omissions and Misstatements

Plaintiff's intemperate statements on the subject notwithstanding, defendants submit that that portion of the Dillon Read report which states:

"[I]n the course of our review of the Proxy Statement and other materials supplied to us by UOP and Signal for the purpose of rendering the foregoing opinon, nothing came to our attention which caused us to believe that the Proxy Statement as of its date contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or failed to provide holders of common stock of UOP with sufficient information to make an informed decision with respect to the proposed Merger." (DX-40 p. 3)

is both relevant and helpful to the inquiry in this case. Dillon Read and Mr. Purcell conducted a thorough investigation, including their review of documents and conversations with UOP and Signal representatives. They were also thoroughly familiar with the contents of the Proxy Statement. It certainly seems relevant to know whether they, as experienced investment bankers who deal regularly with proxy statements (TR 1147), had come across anything about the transactions or about UOP which was not in the Proxy Statement and which they thought would have been material to make an informed decision on the merger.* Also, who would be better qualified to know whether, based on the information they had gathered from other sources, that which was contained in the Proxy Statement was complete and accurate.

Defendants did not ask for, nor did Dillon Read offer a legal opinion on whether there was "fraud" or "misrepresentation": they provided the results of their work, observations and knowledge of the investment community. For example, on page 33 of his Post Trial Liability Brief plaintiff states: "The representations made as to how the terms were arrived at were of critical interest to the minority stockholders." Does the plaintiff offer this postulate as a matter of law? Certainly he offered no evidence to support it. Which is more helpful, this gratuitous statement in plaintiff's brief or the testimony of an experienced investment banker that that kind of information is not critical or even necessary to the stockholders making an informed decision? To state the question is to answer it.

Defendants never intended to have Dillon Read decide this case; had we wished to do so we would have sought an arbitration with Mr. Purcell as the arbitrator. What we did intend, and what we submit we did, was to provide through Dillon Read additional factual evidence which would, together with the "total mix" of information in this case, assist this Court in deciding the issues which are now before it.

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* Indeed, all of the source material for the opinion in Mr. Bodenstein's report came from the Proxy Statement, an opinion which, one would suppose, the plaintiff believes is "informed."

c. The Criteria To Be Considered In Determining The "Value" Of The Shares Formerly Owned By The Minority Shareholders Of UOP

In Poole v. N.V. Deli Maatschappij, Del.Supr., 243 A.2d 67 (1968), certain former minority shareholders in a tobacco company sued the defendant majority stockholder, Deli, and others, alleging that plaintiffs had been fraudulently induced to sell their shares to Deli in response to an allegedly false and misleading tender offer. The Chancery Court rendered judgment for the defendants, holding that the plaintiffs had failed to establish that the "true value" of the stock exceeded the price paid by Deli. See 224 A.2d at 262. On appeal, the Delaware Supreme Court rejected plaintiffs' argument that the stock should have been valued on a liquidation basis rather than on a "going concern" basis, which the Chancery Court had used, and affirmed:

> "that the actual or true value of the stock is to be determined by considering the various factors of value including earnings, dividends, market price, assets, and the other factors deemed relevant in a stock evaluation problem arising under the Delaware Corportion Merger Statute, 8 Del.C. §262."

Id., at p. 69. Thus, defendants submit the "value" of the UOP minority shares for purposes of testing the fairness of the $21.00 per share merger price is the same as that were this an appraisal case under 8 Del.C. § 262. Accordingly, we will review those elements which the Delaware courts have considered in determining the "fair value" of stock in appraisal proceedings.

The most frequently cited description of value for appraisal purposes is contained in the Delaware Supreme Court's opinion in Tri-Continental Corp. v. Battye, Del.Supr., 74 A.2d 71, 72 (1950):

> "The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern. By value of the stockholder's proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock which has been taken by the merger. In determining what figure represents this true or intrinsic value, the appraiser and the courts must take into consideration all factors and elements which reasonably might enter into the fixing of value. Thus, market value, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of merger and which throw any light on future prospects of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholders' interest, but must be considered by the agency fixing the value."

In practice, three factors are usually taken into account in appraisal cases: (1) earnings value; (2) market value; and (3) net asset value. Sometimes a fourth factor, dividend value, is separately considered.

i. Earnings Value

As accurately summarized in a recent unreported appraisal decision by Chancellor Marvel:

> "The law in Delaware regarding the procedure to be followed to reach an earnings evaluation is well settled. The earnings for appraisal proposes are to be determined by averaging the corporation's earnings over a reasonable period of time. This

determination is based upon historical earnings rather than prospective earnings, and the customary period of time over which to compute such average is ordinarily fixed at the five-year period immediately preceding the merger, Francis I. duPont & Co. v. Universal City Studios, Inc., Del.Ch., 312 A.2d 344 (1973), aff'd, Universal City Studios, Inc. v. Francis I. duPont & Co., Del.Supr., 334 A.2d 216 91975). The number of years over which the average is taken, however, may be shortened or expanded when appropriate but only in the most unusual situation, Adams v. R. C. Williams & Company, Del.Ch., 158 A.2d 797 (1960)." Tannetics, Inc. v. A.J. Industries, Inc., Del.Ch., C.A. No. 5306, pp. 11-12 (July 17, 1979)(Annex C).

It is absolutely clear that historical rather than prospective earnings must be used in determining the earnings value for appraisal purposes. Estimating earnings principally on the basis of long-range projections is "a technique which has not met with approval in Delaware in proceedings having to do with the determination of present value of assets." Levin v. Midland-Ross Corp., Del.Ch., 194 A.2d 50, 57 (1963).

A five year historical earnings history is used in virtually all of the cases.* One of the reasons a five year average is used is "to balance extraordinary profits and/or losses which might distort the earnings data if a period of only one or two years was used." Francis I. duPont & Co., v. Universal City Studios, Inc., Del.Ch. 312 A.2d 344, 349 (1973),

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* See, e.g., Application of Delaware Racing Association, Del.Supr., 213 A.2d 203 (1965); Bell v. Kirby Lumber Corp., Del.Ch., 395 A.2d 730 (1978); Gibbons v. Schenley Industries, Inc., Del.Ch., 339 A.2d 460 (1975); In re Olivetti Underwood Corp., Del.Ch., 246 A.2d 800 (1968).

aff'd., Del.Supr., 334 A.2d 216 (1975). Thus, a shorter period of earnings history is generally not permitted (id.), even where there has been an upward trend in earnings. Id., Sporborg v. City Specialty Stores, Del.Ch., 123 A.2d 121, 125 (1956):

> "[T]he upward trend of this Corporation in the last fiscal year may suggest that future earnings may be even greater than those of preceding years. But this does not justify the use of only a single year's earnings."

This Court recently specifically rejected the argument of dissenting stockholders that only the year prior to the merger should be considered as opposed to the traditional five year earnings history. Bell v. Kirby Lumber Corp., Del.Ch., 395 A.2d 730 (1978), aff'd. in part and rev'd. on other grounds in part, Del.Supr., 413 A.2d 137 (1980). There, the dissenting shareholders argued unsuccessfully that the completion, just prior to the merger, of major new operating facilities and the corporation's projections of "phenomenal" increases in future earnings warranted use of only the prior year's results. In this present case, then, the analysis of Bodenstein in which he uses only 1977 earnings (PX-4) seems clearly at odds with previously established standards.

Just as a period of less than five years is not favored, years of unusual profit or loss generally may not be excluded in an appraisal case, nor may the historical period be extended so as to minimize their impact. Francis I. duPont & Co. v. Universal City Studios, Inc., Del.Ch., 312 A.2d 344, 349 (1973), aff'd., Del.Supr., 334 A.2d 216 (1975). Indeed, in one case where the five year historical period included a loss year attributable to a drought, then Chancellor Seitz rejected arguments by the dissenting shareholders that the loss year should be excluded in arriving at an earnings value. Felder v. Anderson, Clayton & Co., Del.Ch., 159 A.2d 278, 284 (1960).

Once an average earnings figures is derived, that figure is capitalized by use of an earnings multiplier. In appraisal proceedings, "the application of a multiplier to average earnings in order to capitalize them lies within the realm of judgment. There is no hard and fast rule to govern the selection." Application of Delaware Racing Association, supra, 213 A.2d at 213. Accord, Bell v. Kirby Lumber Corp., supra, 395 A.2d at 740. Addressing general considerations to be applied in a choosing an appropriate multiplier, the Delaware Supreme Court has stated:

> "It is well settled that in an appraisal proceeding under 8 Del.C. §262, the shares must be valued on a going concern basis. Sporborg v. City Specialty Stores, 35 Del.Ch. 160, 123 A.2d 121, 123 (1956). This approach necessitates not only the Court's examination of historical earnings but also a perusal of the corporation's stability and future prospects as of the date of merger. The prospective financial condition of the subject corporation and the risk factor inherent in the corporation and the industry within which it operates are vital factors to be considered in arriving at a realistic present earnings value. These considerations are manifested in the valuation process through the choice of a capitalization factor, or multiplier. The multiplier will be low if the financial outlook for a corporation is poor, or high if prospects are encouraging." Universal City Studios, Inc. v. Francis I. duPont & Co., Inc., supra, 334 A.2d at 218.

There appears to be no Delaware appraisal case involving the determination of an appropriate multiplier for a company closely analogous to UOP in terms of its business and history. However, several Delaware appraisal decisions have relied upon Dewing, Financial Policy of Corporations (5th Ed. 1953),* which ascribes multipliers to various generic classes of companies. One such class, to which Dewing ascribes a multiplier of seven times earnings, might be said to describe UOP:

> "3. Businesses, well established, but involving possible loss in consequence of shifts of general economic conditions. They are strong, well established businesses, but they produce a type of commodity which makes them vulnerable to depressions. They require considerable managerial ability, but little special knowledge on the part of the executives . . . ." Dewing, supra at 390.

Purcell suggested, based on his analysis of UOP's financial history and reasonable prospects, and a review of selected companies, that an appropriate multiplier would be in the range of 6.5 to 7.0 (TR 1121-1125; DX-40, pp. 13-15 and Exs. 5A and 5B). That range is, of course, supported by the market's perception (see page 106, supra). Bodenstein pointed out, without suggesting a specific multiplier or range, that various companies which he had selected had price/earnings ratios as of February 28, 1978, ranging from 5.7 to 10.5, with

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* See e.g., Levin v. Midland-Ross Corp., Del.Ch., 194 A.2d 50 (1963); Sporborg v. City Specialty Stores, Del.Ch., 123 A.2d 121 (1956).

UOP's ratio at 7 (PX-3, p. 13). His report also indicates that as of May 5, 1978, the price/earnings ratios for the same companies ranged from 6.7 to 11.4 (Id. at p. 14).

For the years 1973 through 1977, UOP's average earnings from continuing operations, even if 1975 is included as an assumed break-even rather than a loss year, are $1.50 per share. If 1975 is eliminated entirely, the average earnings from continuing operations for the remaining four years are $1.87 per share. If 1975's actual loss is included in the five year period (as generally required by the Delaware cases), the average earnings per share from continuing operations are $.924. Even applying Bodenstein's highest multiplier (as of February 28, 1978) to the highest earnings average, the resulting figure is only $19.64 per share ($1.87 x 10.5).

ii. Market Value

Although it has long been held that value for appraisal purposes is not synonymous with "market value" (Chicago Corp. v. Munds, Del. Ch., 172 A.452 (1934)), market value is recognized as a factor "worthy of high weight" in an appraisal proceeding. In re Olivetti, supra, 246 A.2d at 809; accord, Gibbons v Schenley Industries Inc., supra, 339 A.2d at 467. In the instant case, it is undisputed that the trading in UOP stock on the New York Stock Exchange was sufficient to establish a reliable market value (TR 330-31; 1077; DX-40, pp. 3-4 and Ex. 1).

As for the appropriate date to use, the market price for appraisal purposes is "that which existed immediately prior to the formal announcement of an intention to merge." Tannetics, Inc. v. A.J. Industries, Inc., supra at 14; accord, Gibbon v. Schenley Industries, Inc., supra, 339 A.2d at 468. The closing price on the day preceeding the announcement of the proposed merger may be used (see Tannetics, Inc. v. A.J. Industries, Inc., supra, at 14) or the average of trading prices on such day may be used (see Levin v. Midland-Ross Corp., supra, 194 A.2d at 53-54). The closing price of UOP stock on February 28, 1978, the last trading day prior to the announcement of the UOP and Signal merger negotiations was $14.50 (TR 1080). This is slightly higher than the $14 figure used by Purcell as the "fair market value" for UOP shares, which was based on a modified five year average (id.; DX 40, p. 12), and slightly lower than the $14.75 figure used by Bodenstein which was apparently the high trading price for UOP on February 28, 1978.*

iii. Assets

The third factor usually considered in appraisal cases is the net asset value of the corporation. This has been equated to "a mathmatical figure representing the total value of [the corporation] less the prior claims" and the "theoretical liquidating value to which the shares would be entitled upon the company going out of business." Tri-Continental v. Battye, supra, 74 A.2d at 74. It is now settled, notwithstanding some

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* Purcell used $14.50 as the price for calculating the "premium" represented by the merger price of $21 per share (TR 1135), whereas Bodenstein used the $14.75 figure (PX 3, p. 16).

contrary authority in the earlier cases, that net asset value should be determined by assessing the "fair market value" of the assets upon theoretical liquidation rather than by determining the "going concern" value of those assets. Poole, supra, 243 A.2d at 67 70-72 (1968).* Fair market value for purposes of valuing assets in appraisal proceedings has been defined as

> "the price which would be agreed upon by a willing seller and a willing buyer under usual and ordinary circumstances, after consideration of all available uses and purposes, without any compulsion upon the seller to sell or upon the buyer to buy." Id. at 70 n. 1.

Appraisal cases often rely on physical appraisals of corporate assets made by experts to determine the fair market value of those assets for purposes of deriving an asset value. See, e.g. Bell v. Kirby Lumber Corp., supra, 395 A.2d 730; Tannetics, Inc. v. A.J. Industries, supra at 7; Adams v. R. C. Williams & Co., Del.Ch., 158 A.2d 797, 802 (1960); In re General Realty & Utilities Corp., Del. Ch., 52 A.2d 6, 11 (1947). Obviously, it would have been physically and economically impractical (if not impossible) to have fair market appraisals in this case because of UOP's extensive holdings throughout the

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* As the Delaware Supreme Court held:

> "Any allowance for earning power of the assets or value of the business, deemed necessary under the circumstances of a given case, is best left to the court's consideration of earnings as an independent element of stock value and to the court's exercise of the weighting function." Poole, supra, 243 A.2d at 72.

world (PX-U-7, pp. 27-29). Because UOP was an ongoing industrial concern with no plans to liquidate or to dispose of any material assets, and because the great majority of UOP's assets were used to generate earnings (as opposed to being held for appreciation), defendants submit that it would be appropriate for this Court to ignore or, at best, give only minimal weight to, UOP's asset value in determining the fair value of UOP's minority shares. See e.g., Gibbons v. Schenley Industries, Inc., Del.Ch., 339 A.2d 460 (1975). As stated in Graham, Dodd, Cottle and Tatham, Security Analysis (4th Ed. 1962) at p. 217:

> "There is good reason for not taking the asset-value factor seriously. The average market price of a common stock over the years depends chiefly on the earning power and the dividend payments. These, in turn, usually do not bear any close or reasonably consistent relation to the asset value. (While such a relation may possibly be traced for corporations as a whole, the range in the case of individual companies is virtually unlimited.) Investors and speculators have found that the asset value is typically no guide at all to earning-power value or average market price. Hence they have gradually come to give the asset-value factor practically no weight."

iv. Weighting

Once the values for the various factors have been assigned, each must be weighted relative to the others so that a weighted average value can be derived. There is no fixed formula for this process:

"The question of what weight to give the various elements of value lies always within the realm of judgment. There is no precise criterion to apply to determine the question. It is a matter of discretion with the valuator." Application of Delaware Racing Association, supra, 213 A.2d at 214.

Because of the extent of the trading market in UOP common stock, defendants submit that market value should be given the most weight. It is obviously a factor "worthy of high weight." In re Olivetti, supra at 339 A.2d 467. Chancellor Marvel has stated, in a case where an injunction against a merger was sought, that:

> [M]arket price, when it can be established by free trading in an open forum, is, in my opinion, the most significant element to be taken into consideration in reaching a judgment on the overall fairness of a corporate merger. David J. Greene & Co. v. Schenley Industries, Inc., Del. Ch., 281 A.2d 30 (1971).*

Because UOP was an ongoing industrial concern at the time of the merger (and now) and was using substantially all of its assets in the generation of earnings, UOP's average earnings should be given relatively high weight. See Sporborg v. City Specialty Stores, supra, 123 A.2d 127. For the same reason, and

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* See also Mills v. Electric Auto-Lite Co., 552 F.2d 1239, 1247 (7th Cir.), cert. denied, 434 U.S. 922 (1977), quoted with approval in Lynch v. Vickers Energy Corp., Del.Ch., 402 A.2d 5, 12 (1979):

> "We hold that when market value is available and reliable, other factors should not be utilized in determining whether the terms of a merger were fair. Although criteria such as earnings and book value are an indication of actual worth, they are only secondary indicia. In a market economy, market value will always be the primary gauge of an enterprise's worth."

because there was no prospect of total or material liquidation of UOP's assets, its asset value should be given little, if any, weight. See pages 137-138, supra.

The following tables show the various factors and weights which could be used to ascertain the "fair value" of the UOP minority shares as of the date of the merger:

		Weight	Weighted Value
Market Value	$14.75*	50%	$ 7.38
Earnings ($1.87 x 10.5)	19.64	30%	5.89
Asset Value	25.04**	20%	5.01
		"Fair Value"	$18.28

		Weight	Weighted Value
Market Value	$14.50***	40%	$ 5.80
Earnings ($1.50 x 10.5)	15.75	40%	6.30
Asset Value	25.04**	20%	5.01
		"Fair Value"	$17.11

		Weight	Weighted Value
Market Value	$14.75*	30%	$ 4.43
Earnings ($1.87 x 10.5)	19.64	45%	8.84
Asset Value	25.04**	25%	6.26
		"Fair Value"	$19.53

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* Bodenstein's calculation

** Book value per share ($20.69) plus Bodenstein's "evaluation" of the timberlands on a per share basis ($50 million divided by 11,488,302 shares).

*** Closing price of UOP stock on day prior to announcement of merger negotiations.

Similar calculations could be made, but the record is clear. The merger price of $21.00 per share represented the "fair value" (if not more) of the shares formerly owned by the minority stockholders of UOP.

3. Alternative to a Cash Out Merger

Continuing with the criteria considered in Tanzer II, another element which may be relevant in reviewing the fairness of a cash-out merger is the possibility and desirability of giving to the cashed-out minority stockholders shares in the surviving company, or a combination of such shares and cash. 402 A.2d 390-391. In theory, at least, such an alternative may give the cashed-out stockholder the opportunity to continue his investment in the ongoing, albeit changed, entity, and may also postpone immediate responsibility for a gain or loss for tax purposes.

a. Participation in OnGoing Entity

The ongoing entity in the present case is Signal, an entity whose stock was in 1978 and still is publicly traded on several exchanges, and in which the number of shares outstanding is more than adequate to assure a regular and available source for anyone wanting to acquire an equity interest. Any stockholder of UOP who was being cashed out, and who wanted to "stay aboard," had only to buy as many shares of Signal as his desires (and wallet) dictated. This is not the case where the surviving corporation (i.e., Signal) is not publicly held, or where an equity interest is otherwise difficult or impossible to obtain; here, anyone could at any time have become a stockholder of Signal (and, for all we know, many former UOP stockholders may have done just that).

b. Deferral of Tax Consequences

The minority stockholders of UOP received $21 cash for shares of stock then trading in the market for approximately $20 per share (at the time the possible merger was first announced, UOP's stock was trading at $14.50 per share). Whether some or all of the minority stockholders received a gain or a loss for tax purposes, and whether or not because of other gains, losses or offsets during the year 1978, such gains or losses imposed a tax benefit or detriment on those stockholders, we can only speculate.

As Vice Chancellor Hartnett said in Tanzer II:

> "To force a stockholder to accept an investment which he does not want may be just as unfair as it is to force him to divest himself of an investment he is happy with by requiring him to turn in his shares in a cash-out merger. Fairness is relative."

Tanzer II, 402 A.2d 391.

Since in this case the great majority of the minority who voted for the merger elected to take the full cash-out compensation for their shares, it seems reasonable to assume that the tax consequences of the transaction, when viewed in the context of the cash benefit received in the merger, were not deemed to be unfair by UOP's stockholders.

c. Loss of Appraisal Rights

If something other than a cash-out merger had been accomplished, the minority shareholders would have been deprived of their appraisal rights, since both Signal and UOP were listed on the New York Stock Exchange. See 8 Del.C. §262(1). See also, Tanzer II, pp. 390-391. The loss of appraisal rights is relevant to whether a cash-out merger, rather than a stock-for-stock merger, is fair. Here, UOP's stockholders would have lost that right.

d. Feasibility

In his Tanzer II opinion, Vice Chancellor Hartnett suggested that stock of the surviving corporation, rather than cash, might be considered as the medium of exchange in a merger, "...if feasible under all the circumstances." 402 A.2d 391. In the present case, it would not have been feasible for Signal to have used its own shares to acquire the UOP minority shares. One of the primary purposes for Signal proposing the merger was to find a good investment for the cash which it had on hand and needed to put to use. To have kept the cash and used its stock would not have served its purpose. Also, Signal had been engaged on a program of buying its own shares in the market. To have then turned around and distributed its stock back into the marketplace would have been counterproductive. Although Signal had an obligation to treat the minority shareholders of UOP fairly, it did not have to sacrifice its own self-interest.

Tanzer I, 379 A.2d 1124. Signal proposed a merger, including a cash price of $21 per share which its directors believed to be fair to all concerned.

In conclusion, there is nothing in this case to suggest any unfairness to the UOP minority stockholders because they received only cash, rather than other securities, for the shares which they relinquished in the merger.

4. Independent Recommendations as to Fairness of Price

In Tanzer II, plaintiffs argued that the expert retained by the subsidiary to opine on the fairness of the proposed merger was not independent because it had a substantial fee at stake for assisting the parent in a financing program which was dependent on the outcome of the merger. This Court held:

> "The Tanzers also note that Dillon Read's "independence" from I.G.I. was questoned by the Securities and Exchange Commission, and that Dillon Read had a $200,000 fee at stake for assisiting I.G.I. in its long-term debt financing program which depended upon the outcome of the merger. The Tanzers also call attention to the fact that there was not a single person speaking for the minority Kliklok stockholders. It cannot be said, however, as a matter of law, that this lack of independent representation of the Kliklok minority, or the failure of defendants to act on the S.E.C's suggestion to obtain a second appraisal, necessarily caused the minority to not be treated fairly."

Tanzer II, 402 A.2dd 391.

In the instant case, Lehman Brothers was entirely independent of Signal. Moreover, not only were the directors of UOP representing the minority shareholders, the decision to approve the merger was given to those shareholders.*

5. Adequate Notice to the Minority Shareholders

The standards applicable in determining whether a Proxy Statement adequately provides minority shareholders with sufficient information and facts upon which to make an informed judgment are set forth at pages 61-62, supra. We have shown in earlier sections of this brief that the Proxy Statement made full and complete disclosure of all relevant facts. Nothing material was omitted from the Proxy Statement, and the Proxy Statement set forth all information and facts upon which a reasonable shareholder could make an informed judgment concerning the proposed merger.

6. Possibility of Public Issue at a High Price Followed By a Merger at a Low Price

One of the criticisms which has been leveled at a "going private" merger is that it may permit a majority stockholder to sell shares through a public offering at a high price, and, following a decrease in the market value of the stock, to repurchase those shares at a much lower price than was

* In Tanzer II, the parent company had advised that it would vote its shares of the subsidiary (81%) in favor of the merger. Thus approval of the transaction was assured regardless of the vote of the minority shareholders.

paid by the minority stockholders through the public offering. Tanzer II, 402 A.2d 392. In the instant case, Signal never did sell shares in UOP, and the merger was not a "repurchase" of shares. Indeed, Signal purchased its 50.5% interest in UOP in 1975 through a combined tender offer and direct purchase from UOP's treasury at $21 per share, the same price which it also offered in the 1978 merger. In short, Signal did not go "high public--low private," and that potential abuse of going private is not present in this case.

7. Use of the Subsidiary's Funds to Finance the Merger

As Vice-Chancellor Hartnett noted in Tanzer II,

> "Mergers have also been criticized where funds of the publicly held company are used to finance the merger"

Id., at 402 A.2d 393. In the instant case, UOP's funds were not used and Signal itself provided all funds necessary to consummate the merger. See PX-U-7, p. 7.

8. Existence of Appraisal Rights Available to Minority Shareholders

Pursuant to 8 Del.C., §262, any minority shareholder of UOP who was dissatisfied with the merger price could have sought the fair value of his shares in an appraisal proceeding in this Court. Although this right was spelled out in the Proxy Statement, no minority shareholder of UOP instituted such a proceeding. As Vice Chancerllor Hartnett held in Tanzer II:

> "The availablitiy of appraisal rights should be taken into account, however, as one factor in assessing whether a transaction between a parent corporation and its subsidiary's minority stockholders is entirely fair, even though its existence alone is insufficient to establish that the transaction was fair."

Id., at 402 A.2d 393.

9. The Parent's Appropriation of the Benefits From the Merger

In Tanzer II, the plaintiffs challenged the fairness of the merger on the ground that none of the benefits flowing from the merger to the parent company were taken into account in setting the price to be paid to the minority shareholders of the subsidiary. The plaintiff in this case has not made that argument, nor did he offer any proof as to the value, if any, of any "synergistic" effect of the merger to Signal. In any event, the record shows that Signal paid a premium of almost 45% over the market value of UOP's common stock. As Vice Chancellor Hartnett ruled in Tanzer II:

> "The failure of a dominant stockholder to recognize the possible synergistic effect of a merger in arriving at a price to be offered for the shares of the stockholders being frozen out, is not therefore valid grounds to challenge the merger.
>
> "Even if a possible synergistic effect should have been recognized and given value in this case, the Tanzers have introduced no evidence that the 29% premium offered by I.G.I. for the Kliklok stock owned by the minority stockholders does not adequately compensate the minority stockholders for such possible synergistic effect."

Id., at 402 A.2d 395. The same rationale should apply in this case.

10. The Structure of the Transaction

Unlike the freeze-out mergers involved in Singer and Tanzer, the merger in this case could not have been consummated without the approval of the minority shareholders. This Court has already held that the structure of the merger removes the transaction from the standards of review required by Singer. In any event, the fact that the merger was contingent upon the approval of the minority shareholders is clear evidence as to the entire fairness of the transaction.

In summary, although we do not believe this Court need face the issue, defendants have shown that all aspects of the merger were entirely fair to the former minority shareholders of UOP.

C. The Plaintiff Has Failed To Prove Any Damages, Including Money Damages, The Only Realistic Remedy In This Case

In his Post Trial Remedy Brief, plaintiff suggests three possible ways of "compensating" the former minority shareholders of UOP should the Court find for the plaintiff on liability: (1) the award of monetary damages; (2) rescission of the entire transaction; or (3) the issuance of Signal stock. Id. at pp. 4-6.

Defendants do not challenge, in the abstract, the power of this Court to fashion a remedy which would fairly and properly compensate a party found to have been damaged by improper acts, if any, of these defendants. Such power could encompass, in the appropriate case, any one or more of the above-cited three remedies suggested by the plaintiff. Defendants, do, however, urge that under the facts of this case, even if the Court were to find liability in favor of the plaintiff (and defendants are confident it will not), it would be an abuse of discretion to order either of the last two mentioned remedies, i.e., rescission or the issuance of Signal stock.*

1. Monetary Damages

As a practical matter, the only feasible remedy in this case would be money damages, measured by the difference between the $21 per share paid by Signal and some greater per share amount. The only evidence presented by the plaintiff on the subject of possible money damages is the testimony of Mr. Bodenstein, namely, his opinion that the fair value of the UOP shares was not less than $26. In view of this evidence, presumably the amount of money damages which might theoretically be awarded in this case is $5 per share ($26 less $21) times the

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* Indeed, plaintiff does not pursue with any conviction the rescission remedy (see Plaintiff's Post Trial Remedy Brief, pp. 3-6). In fact, Weinberger himself, when asked what he expected to obtain in this litigation, testified: "Nothing but an adequate price" (Weinberger Dep., pp. 61-62).

number of shares found to be entitled to additional payment. Since the total number of minority shares of UOP at the time of the merger was about 5.7 million, the total amount of potential money damages exceeds $28 million. In the unlikely event that liability should be found, and in the equally unlikely event that this Court should find that plaintiff has shown <u>any</u> damages, the actual damages for which the defendants might be liable would depend on the total number of shares included in the plaintiff class, and that number will depend on this Court's ruling (if needed) on plaintiff's pending motion to enlarge the class. Defendants submit, however, that this Court will not have to reach that point because plaintiff has shown no damages, either to himself or to any class.

2. <u>Rescission</u>

At the time of the merger in May, 1978 there were approximately 5.7 million shares of UOP owned by thousands of minority stockholders. All but about 100,000 of these shares (less than 2%) had been turned in and paid for in cash by the Spring of 1980. Were rescission to be ordered, all of the money paid out, over $117 million, would have to be collected and the UOP shares reissued. Many former stockholders might not have the cash available to return to Signal, and the tax consequences (good or bad) to many former stockholders would be difficult or impossible to assess. In addition, since the merger, there may have been deaths of former minority shareholders, with probate estates opened, and a whole panoply of other problems on the part of the stockholders may surface. Whether it would be "fair" to order rescission would also depend on an analysis of what has happened to UOP during the last two and one-half years, the status of its business, its "value," etc., and whether rescission would be appropriate for the former UOP stockholders as well as for Signal (and its thousands of stockholders).

Plaintiff's own conduct also makes rescission improper in this case. Although he knew well in advance of the May 26, 1978 shareholders' meeting that the merger was to be considered, and although he had concluded prior to the meeting that the contemplated merger was unfair to UOP's minority stockholders (or, at least, to him), plaintiff did nothing whatsoever to attempt to stop the merger itself (see generally, Weinberger Dep., pp. 21-50). No notice was given, no action was filed and no injunction was sought prior to the filing of this action several weeks after the meeting and the consummation of the merger. Id. Even then the plaintiff sought no type of preliminary relief, and since that date millions of UOP's former minority shares have been exchanged by the former owners for $21 in cash.

In short, rescission in this case would be no less impractical a remedy than it was in Mills v. Electric Auto-Lite Co., N.D.Ill., CCH Fed.Sec.Rptr. ¶93,354 at p. 91,900 (1972) where the Federal District Court, after reviewing the numerous impracticalities of unscrambling the merger there, held as follows:

"3. It would not be practicable to attempt to trace the stock transactions involving Eltra shares which have been traded on the New York Stock Exchange and over-the-counter.

4. In addition to the impracticality of reconstituting the old Auto-Lite company, the Court has also considered the hardship which would be inflicted upon innocent third parties, such as employees, customers and persons who purchased Eltra stock since the merger.

5. If it can be shown that plaintiffs suffered an injury by reason of the merger, they may be adequately compensated by money damages.

6. Defendants are entitled to the entry of a partial summary judgment order decreeing that it is not practicable as a matter of law to rescind the 1963 Auto-Lite-Mergenthaler merger...."

3. Issuance of Signal Stock

This suggested remedy is also inappropriate in this case. The only argument made in its favor by plaintiff is that it is a way to allow the former UOP stockholders to have an equity position "in what they were deprived of." Plaintiff's Post Trial Remedy Brief, pp. 4-5. As pointed out earlier in this brief in another context, pages 141-142, supra, anyone who wants (or wanted) to participate in the future of Signal can do (or could have done) so readily by purchasing shares in the open market. It is not necessary to compel Signal to make its shares available: some 38 million Signal shares are already outstanding, obviously an adequate supply for those who want to buy in.

In addition, if Signal were ordered to issue some number of its shares to "compensate" UOP's former stockholders, several very difficult legal and factual questions would be presented. For example, as of what date (May 26, 1978, now, or some other date) and how would the appropriate value of the "new" Signal shares be determined? Would not the award require the issuance of fractional shares and/or cash in lieu thereof, introducing yet another complicated valuation question into this proceeding? Would sufficient Signal shares be authorized or available as treasury shares to satisfy the award? Would these shares be issued in lieu of any other remedy, or in conjunction with other or alternative remedies, and should UOP's former minority stockholders be given a choice?

In short, the issuance of new shares of Signal (a) would be unnecessary since recipients of a monetary award could easily purchase Signal shares in the market if they chose to do so, (b) would be very difficult to manage, and (c) might well not be "fair" either to UOP's former stockholders or to Signal and its shareholders.

D. The Motion To Enlarge The Class

On April 26, 1979, this Court entered an order which, *inter alia*: (a) certified this action as a class action pursuant to Chancery Court Rule 23(b)(3); (b) certified the named plaintiff, William B. Weinberger, as the class representative; and (c) included as members of the class those former UOP shareholders who voted against the merger and/or who have not turned in their UOP shares for the merger price.* On May 21, 1980 (the third day of trial), plaintiff filed a motion to enlarge the class to include all UOP minority shareholders as of May 26, 1978, the date the subject merger was consummated. On August 18, 1980, plaintiff filed a brief in support of that motion.

We respectfully suggest that the Court defer a determination on plaintiff's motion until after the merits of the case have been decided. If defendants prevail, the motion will have become moot; if plaintiff prevails his motion to enlarge the class can then be considered.

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* For purposes of notice to the class, the parties agreed that the class consisted of those shareholders of UOP as of May 26, 1978, who have not exchanged their shares for the merger price (Order dated March 11, 1980, p. 2, fn.).

VI

CONCLUSION

The record is clear. Plaintiff has failed to show any misconduct on the part of any defendant. The Proxy Statement made full and complete disclosure of all relevant facts concerning the proposed merger, and an overwhelming percentage of the minority shareholders who voted on the proposal approved it. There is simply nothing in the record which would justify setting aside the express wishes of the minority stockholders of UOP, upon whom the approval of the merger was contingent. In addition to plaintiff's utter failure to substantiate his bald assertions of wrongdoing, defendants have shown that all aspects of the merger were entirely fair to the former minority stockholders of UOP. Judgment, including appropriate costs, should be entered in favor of the defendants.

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