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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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

PLAINTIFF'S POST-TRIAL BRIEF IN REPLY TO:
A. SIGNAL AND UOP'S ANSWERING BRIEF
B. LEHMAN BROTHERS' ANSWERING BRIEF

Hand Served
10-1-80
on
M. Sayson
M. Balatti
M. Sparks

William Prickett
George H. Seitz, III
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1310 King Street
Wilmington, Delaware 19899
Attorney for Plaintiff

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STATUTES

TREATISES

1. NATURE AND STAGE OF THESE PROCEEDINGS (Note)

At the very outset of the trial, the plaintiff filed:

(a) "Plaintiff's Pre-Trial Memorandum on Liability" (hereafter referred to as "(PB PrT1 - Liab. p. 9)").

(b) Plaintiff also filed "Plaintiff's Pre-Trial Memorandum on Remedy" (hereafter referred to as "(PB PrT1 - Rem. p. 9)").

The defendants did not file any pre-trial briefs or memoranda of their own; they did not make any written reply to plaintiff's pre-trial submissions, nor did they furnish the Court with any writing in connection with their Rule 41 motion. Instead, they presented a lengthy speaking motion. The Court reserved decision on that speaking motion.

After the trial, the plaintiff filed the following three briefs:

(a) "Plaintiff's Brief in Support of His Motion That the Court Reconsider Its Order and Enlarge the

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

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

Class" (hereafter referred to as "(PB Class Enlargement p. 9)".

(b) "Plaintiff's Post-Trial Brief on Liability" (hereafter referred to as "(PB Post-Trial - Liab. p. 9)").

(c) "Plaintiff's Post-Trial Brief on Remedy" (hereafter referred to as "(PB Post-Trial - Rem. p. 9)").

Signal and UOP have filed a joint answering brief (hereafter referred to as "(DB 9)"). Lehman Brothers has filed a separate answering brief (which adopts and incorporates the Signal and UOP brief - hereafter referred to as "(Lehman p. 9)".) (Note 1) Thus, the Court now has for the first time in writing the complete position of all the defendants.

Now, the Court can see that the defendants have failed totally to factually or legally establish a defense as to either liability or damages. In addition, the defendants are seeking to postpone the Court's decision on the plaintiff's motion to enlarge the class, saying blandly (DB 6):

> "Defendants' arguments relating to the size and composition of the class will be reserved for a later time." (Note 2)

Note 1: The Lehman Brothers Memorandum does not merit a reply.

Note 2: The plaintiff was first apprised of this unilateral decision when the defendants filed their only brief. The plaintiff promptly gave notice of his objection to this high-handed procedure. The plaintiff's motion is at issue and should be considered and decided by the Court.

2. OUTLINE OF THIS BRIEF

As has been pointed out, the plaintiff had made his position clear even before the beginning of the trial in his pre-trial briefs on liability and damages. After the trial, the plaintiff filed additional briefs on liability and damages (as well as in support of his motion for an enlargement of the class). In spite of the fact that the plaintiff has thus twice set out his position on liability and remedy, Signal and UOP have deliberately chosen not to respond to either of the two sets of briefs. Instead, they have filed a joint brief (adopted by Lehman Brothers) in which they set out the best version they could of the case from the defendants' point of view. An examination of the defendants' brief quickly shows why they have taken this approach:

(a) They have not replied to many of the factual and legal points made in plaintiff's original briefs.

(b) They have abandoned theories and arguments that were previously espoused by them.

(c) They have adopted and presented totally new theories and arguments.

First, the plaintiff will show that the defendants' claim that an overview (or a review of the "total mix") does not help the defendants; the record of defendants' overall conduct as fiduciaries is at complete variance with both the spirit and the letter of the holdings of cases both before and after Singer. Even the defendants' selected restatement of the evidence from their point of view does not help; a step-by-step review reconfirms that the defendants violated specifically and repeatedly their fiduciary obligations to the plaintiff class. The record shows that the plaintiff has established that the vote of the majority of the minority should be set aside since it was so manifestly tainted by the defendants' frauds, misrepresentations, omissions and overreaching.

Next, the plaintiff will point out some important (but by no means all of the) instances that illustrate defendants' deliberately selective approach in their one and only written submission.

The plaintiff will then show that the defendants did not carry the heavy burden of proving (1) a proper business purpose or (2) intrinsic fairness.

As to damages, the plaintiff will show that the defendants had the burden of proving that the price of $21.00 was fair. The defendants at the time of the merger made no analysis of the value of the shares of the minority; what they did was to analyze the worth of the minority shares to Signal and note the similiarity of some of UOP's financial figures in 1975 with those of 1978. This was the approach of all of the defendants (except for Mr. Glanville whose off-the-cuff opinion was that the merger was fair simply because he thought that $21.00 represented a premium of about 50% over market).

The plaintiff will then point out that not only Mr. Glanville but Lehman Brothers itself was abandoned by all of the defendants at trial. Mr. Purcell of Dillon, Read was recruited in April in a belated attempt to present some 1980 financial justification for the defendants having cashed the minority out in 1978 at $21.00. Mr. Purcell did not carry the defendants' burden of proving $21.00 was fair: all he did was restate the facts in the record in elaborate fashion and then give his unexplained opinion that the price was fair. (Note)

Next, the plaintiff will show that the defendants, not having sustained their own burden of proving that the price of $21.00 was fair, have attempted to muddle the record by seeking to mount a selective attack on Mr. Bodenstein's many-pronged financial analysis that established without serious contradiction that a conservative minimal value for the minority shares was not less than $26.00.

The plaintiff will point out that, contrary to the defendants' assertions, the Courts of Delaware have held the defendants in a fairness case can not relegate the plaintiffs to appraisal.

Finally, the plaintiff will then ask that this Court (1) hold all of the defendants liable, (2) determine the damages, and (3) enlarge the class to include all the minority shareholders who were cashed out on May 26, 1978.

Note: Mr. Purcell's "opinion" that the record discloses that no facts were omitted will not be responded to: the very fact that the defendants retained Mr. Purcell as an "oath-taker" on the ultimate fact and the fact that he was willing to take on such an assignment shows the poverty of the defendants' defense.

QUESTIONS PRESENTED

I. IS IT NOT CLEAR THAT PLAINTIFF HAS PROVED THAT THE MAJORITY TO MINORITY VOTE WAS VITIATED BY DEFENDANTS' REPREHENSIBLE CONDUCT WHETHER THE DEFENDANTS' CONDUCT IS VIEWED IN ITS ENTIRETY OR DEFENDANTS' SEPARATE DERELICTIONS ARE EXAMINED?

II. DO NOT THE DEFENDANTS' SELECTIVE ANSWERING BRIEFS TOTALLY IGNORE POINTS MADE BY THE PLAINTIFF, ABANDON CERTAIN THEORIES AND ARGUMENT, AND ADVANCE TOTALLY NEW THEORIES AND ARGUMENTS?

III. HAVE NOT DEFENDANTS FAILED TO SUSTAIN THEIR BURDEN OF PROVING A PROPER BUSINESS PURPOSE FOR THE MERGER?

IV. IN FASHIONING AN EQUITABLE REMEDY IN A FAIRNESS HEARING, SHOULD NOT THE COURT ATTEMPT AS NEARLY AS POSSIBLE TO PUT THE PLAINTIFFS IN THE POSITION THEY WOULD HAVE BEEN IN BUT FOR THE ILLEGAL CASH-OUT MERGER?

ARGUMENT

I. WHETHER THE DEFENDANTS' CONDUCT IS VIEWED IN ITS ENTIRETY OR DEFENDANTS' SEPARATE DERELICTIONS ARE EXAMINED, IT IS CLEAR THAT THE PLAINTIFF HAS PROVED THAT THE MAJORITY TO MINORITY VOTE WAS VITIATED BY DEFENDANTS' REPREHENSIBLE CONDUCT

A. The Defendants' New "Total Mix" Argument Is Without Merit

In the section of their brief entitled "Preface", the defendants say (DB 1):

> "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." (Note)

Actually, when the record of this case is considered as a whole (i.e., the real "total mix"), and it is measured by the applicable legal standards, this case represents the very sort of situation in which, both before and since

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Note: The "total mix" phrase comes from Kaplan v. Goldsamt, Del.Ch., 380 A.2d 556, 565-566 (1977), cited on page 62 of the defendants' brief, in turn citing TSC Industries v. Northway, 426 U.S. 438, 96 S.Ct. 2126 (at 2133), 48 L.Ed. 757. An examination of both Kaplan and TSC indicates that the "total mix" concept refers to the total mix found in a proxy statement. The defendants, in an attempt to palliate their omissions and misrepresentations, transpose this concept to cover the total situation as opposed to the total proxy statement.

Singer, the Courts of Delaware have exercised their vigilance and power to protect minority shareholders. The Delaware Courts have looked behind formal appearances and corporate procedural regularity to see if in fact majority stockholders, seeking their own economic advantage, have used their dominant position, their control of the corporate machinery and their inside information to cash-out by merger unrepresented and leaderless minority stockholders. The Delaware Courts through Singer and its progeny have made it clear that not only must a dominant stockholder prove a bona fide proper business purpose in effecting a merger (other than its own economic advantage) but the dominant stockholder also must satisfy the Court that the transaction is fair to the minority when measured by the standard of intrinsic fairness. Further, the dominant stockholder must prove that, in dealing with the minority, it was completely candid.

In this case, Signal, the dominant stockholder, tried to fashion a plan that would insulate it from the salutary standards of the Singer doctrine by presenting the transaction as one that the minority was free to accept or reject. As this Court noted in its opinion, this newest gambit does not automatically insulate the merger from judicial review. Since the total record in this case shows that the majority stockholder was guilty of fraud, misrepresentation, manipulation and overreaching, the majority to minority vote does not insulate the defendants from having to prove that they adhered completely to the strict standards mandated by the Singer doctrine (i.e., a proper business purpose and intrinsic fairness).

The defendants now urge the Court for the first time to look at the "total mix", apparently seeking to palliate their specific derelictions by a claim that on balance the minority received enough of the whole truth. The defendants' "total mix" argument is as follows: the stockholders were indeed misled by a number of misrepresentions and untruths, but there was enough truth eventually presented in the Proxy so that the stockholders could and should have recognized the original misrepresentations and deceptions that had been practiced on them. The minority stockholders are entitled to far more than an eventual "total mix" of final truth in the Proxy after some initial omissions and deceptions. They are entitled to total truth from their fiduciaries from the very outset and throughout. ("Complete candor", Lynch v. Vickers, Del. Supr. 402 A.2d 5 (1977).

However, even when viewed from the perspective of "total mix", this case is the very sort of corporate power-play that the Courts of Delaware have been alert to arrest -- that is, a cash-out merger plan conceived of by a dominant stockholder and swiftly and zealously carried out by directors, officers, attorneys and investment bankers, all of whom are subservient to the dominant stockholder. Young v. Valhi, Inc., Del.Ch., 382 A.2d 1372 (1978). Furthermore, minority stockholders are entitled to far more than merely the pro forma carrying out of formal procedures by corporate fiduciaries; they are entitled to more than just the appearance of fairness.

When all is said and done, the cash-out merger of the minority shareholders of UOP was a carefully conceived plan by Signal's management, swiftly carried out by employees of all of the defendants, especially Mr. Crawford, one of Signal's own directors whom it had placed at the head of UOP. Some of the formalities were observed, but when "total mix" is reviewed, it is abundantly clear that neither in the formulation of the terms of the merger or in carrying out the plan were any of the minority's corporate fiduciaries concerned with affirmatively carrying out their fiduciary responsibilities to the minority. Specifically, there was not one single affirmative action by any Signal officer or director, any UOP officer or director, or Lehman Brothers, which the defendants can point to, in which those fiduciaries did anything positive to advance the interests of the outside shareholders of UOP. On the contrary, the record makes it clear (notwithstanding pious assertions to the contrary by one and all of the fiduciaries who cooperated with Signal in effecting this crass cash-out merger of the minority), that all concerned sought to carry out a plan that gave Signal a clear opportunity to profit at the expense of the minority shareholders of UOP.

B. The Defendants' Specific Derelictions Vitiate the Majority of the Minority Vote

The plaintiff has proved specific derelictions on the part of the defendants in connection with the apparent majority of the minority approval of the merger that vitiates the consent of the minority. As was shown in the plaintiff's original pre-trial and post-trial briefs (PB PrTl - Liab. p. 48, et seq.), meaningful ratification by stockholder vote is clearly dependent on the stockholders being furnished with full and complete information. In this connection, Lynch v. Vickers, supra, stands for the proposition that the standard is not partial truth but "complete candor" on the part of corporate fiduciaries.

When measured by the foregoing standards, it is clear that the vote of the minority stockholders is vitiated by the specific derelictions of the defendants in connection with that vote. Some of the most blatant violations by the defendants consist of the following:

(a) There were active, repeated and deliberate misrepresentations that the merger price was arrived at through negotiations between Signal and UOP management. The record shows the converse is true: there were no negotiations relating to the price nor indeed as to the other terms significant to the interests of the minority shareholders (i.e., a stock-for-stock deal, escalation to reflect the market rise, provision for a pro rata division of the second quarter dividend, etc.). Furthermore, the defendants have admitted that no negotiations took place, saying in justification that since both UOP and Signal were in a conflict of interest situation and wearing "two hats" no negotiation was possible (TR 998, et seq.). No disclosure of the "two-hat, pure heart" theory of negotiation was ever made to the minority who were entitled to and did rely on the representation that their corporate fiduciaries had fully carried out all of their fiduciary obligations to the minority shareholders.

(b) There was a misrepresentation by the defendants that there had been a careful evaluation of the merger and a finding that the terms, including the $21.00 price, were fair to the minority shareholders by an independent investment banker. Instead, Mr. Glanville, a managing partner of Lehman Brothers, gave an off-the-cuff opinion based not on a review of the transaction or the worth of the shares of the minority but based solely on the fact that the merger price, in his view, was 50% more than the market price. Further, there was no disclosure by Mr. Glanville or Lehman Brothers that this very same investment banking house had considered the acquisition of the minority shares by Signal in 1976 and had concluded that the acquisition by Signal at any price up to $21.00 would be advantageous to Signal.

(c) The requirement by Signal of a six-day timetable for the approval by the Board of UOP of Signal's merger proposal prevented competing offers, prevented a mature evaluation of the Signal proposal by UOP's Board and its stockholders, prevented an appraisal of defendant's non-income producing assets, and meant that

Signal's unfair merger price of $21.00 received what was represented to the minority as "unanimous" approval of UOP's Board as well as approval by UOP's "management".

(d) Signal's studies, based on Signal's information relating to UOP, indicated that the merger transaction was the most favorable economic opportunity to Signal and would be profitable to Signal at any price up to $24.00. This information, though known to UOP's "Signal" directors, was never revealed to UOP's minority stockholders.

(e) The effort of UOP's management to see that Signal's merger plan was successful and the retention of a professional stock solicitor to obtain votes in favor of the merger proposal of the dominant stockholder, all represent manipulation of corporate machinery that vitiates the vote of the majority of the minority.

The alleged ratification of the merger proposal by the majority of the minority is of no effect since there was not full disclosure to the minority stockholders and the defendants used their dominant power to manipulate the results of the vote. For all of these reasons, and the other reasons advanced in the plaintiff's briefs, the vote of the minority stockholders of UOP should be disregarded and the Court should address the question as to whether the defendants have sustained their burden of proving a proper business purpose for the merger and the intrinsic fairness of the terms of the merger, including the $21.00 price.

II. THE DEFENDANTS' SELECTIVE ANSWERING BRIEFS TOTALLY IGNORE SOME POINTS MADE BY THE PLAINTIFF, ABANDON CERTAIN THEORIES AND ARGUMENTS, AND ADVANCE TOTALLY NEW THEORIES AND ARGUMENTS

As has been indicated, the defendants have not replied to plaintiff's pre-trial briefs on liability and damages, nor have they responded to the plaintiff's post-trial opening briefs on liability and damages. Rather, defendants have attempted to restate the entire case to put forth the best possible case that the defendants can muster. In doing so, the defendants have ignored certain important facts and made no reply to points set out in plaintiff's briefs. The defendants have abandoned some of the theories and arguments previously advanced and vigorously argued, and, now at the eleventh hour, they have offered totally new explanations. Some, but by no means all, of defendants' obvious omissions, new theories and abandoned arguments are as follows:

(a) The defendants have made no comment on the federal case that holds that the defendants have a continuing duty to correct an original press release that misstates the facts (PB Pr-T1 - Liab. p. 69, citing Mitchell v. Texas Gulf Sulphur, 10th Cir., 446 F.2d 90 (1971), cert. denied, 404 US 1004, rehearing denied, 404 U.S. 1064, cert. denied, 405 US 918).

(b) The defendants have made no real response to the fact that the terms of the merger were intrinsically unfair in that Signal, the dominant stockholder, (1) never considered a provision for a stock-for-stock deal, (2) made no provision for a possible escalation of the price to reflect a rise of the market between the time of the merger proposal and the annual meeting, (3) made no provision for sharing of the second quarter dividend, (4) gave Signal the unilateral right to back out of the merger, and (5) made no provision for an update of the fairness letter from the investment banker (PB PrTl - Liab. p. 32-34; PB PrTl - Rem. p. 13).

(c) The defendants have made no response to the fact that the record shows that Signal, the dominant stockholder, had calculated that Signal's economic advantage would be served by any price up to $24.00 (PX 74) and that UOP's "Signal" directors were given this information but did not make it available to the minority shareholders of UOP (PX 36).

(d) The defendants made no response to the fundamental question as to why, if it was in Signal's interest, according to Lehman Brothers, to purchase the minority shares at any price up to $21.00 in 1976, a price of $26.00 was not the minimum fair price in 1978 in view of the rebound of UOP's individual economic fortunes, and its prospects, as well as the general rebound of the economy after the recession of 1975 (PB Post-Trial - Rem. p. 11).

(e) The defendants have made no response to the fact that Signal's timetable for UOP approval on March 6th effectively and deliberately (1) prevented an appraisal of UOP's non-income producing properties,

(2) prevented the possibility of competing offers, (3) prevented minority stockholder evaluation, (4) precluded adequate time for mature consideration by the UOP management and Board itself, and (5) precluded any time for the market itself to evaluate the worth of the Signal merger proposal to the minority (PB PrTl - Liab. p. 23).

(f) The defendants now say "Crawford never was an employee of Signal ..." (DB 13). Technically, the defendants are correct, but Mr. Crawford was an employee of a wholly-owned subsidiary of Signal before he was promoted and transferred to become the head of UOP after Signal acquired control. Most important, he was made a Signal director for the first time when he became the head of UOP. To imply that Mr. Crawford was not a career Signal executive is to impose on the Court. (Note)

(g) No explanation has been given as to why not only Mr. Glanville but Lehman Brothers itself were abandoned for trial purposes by Signal and UOP, especially as the defendants had assured the minority

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Note: Indeed, Mr. Crawford signed a response to a congratulatory letter from a fellow executive in Garrett, another Signal subsidiary, after the successful merge-out of the minority stockholders by closing "Sincerely, Your blood brother" (EX U-49-4). It would have taken courage and integrity on Mr. Crawford's part affirmatively to carry out his fiduciary responsibilities to the minority stockholders rather than acquiesce and carry out the plans of Signal, the hand that had fed him and continues to feed him.

stockholders that they could rely on Lehman Brothers' fairness opinion as presented by Mr. Glanville (himself a UOP director) as a solid basis for voting to approve the terms of the Signal merger proposal, including the $21.00 price. (Note)

(h) There is no explanation whatsoever by the defendants as to why Mr. Daum and Mr. Reed of Dillon, Read mechanically used the day before the official announcement of any merger as the date for calculating the percent of premium (DX 40; EX 6 and 7). This failure is especially glaring since there was (1) a detailed analysis already in the record as of the time of Mr. Purcell's testimony that showed that the use of such a date for all mergers distorts the determination of the percentage of premium for comparative purposes (PX 6), (2) detailed testimony by Mr. Bodenstein pointing out the correct method to determine the percentage premium by screening out leaks or rumors of impending mergers (TR 348-354), and (3) the plaintiff's opening post-trial brief specifically pointed out that Mr. Purcell's entire opinion on the value of the minority shares of UOP was mistaken since it was entirely

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Note: Even Mr. Schwarzman of Lehman Brothers, the person who headed Lehman Brothers' research effort, was not called. In this connection, Mr. Glanville wrote to Mr. Schwarzman after the inception of the lawsuit (LB-48),"It looks as if you will earn your fee." The defendants' brief recites that Mr. Schwarzman, then a Vice President of Lehman Brothers, has been a managing director of Lehman Brothers since September 30, 1978 (DB 36).

based on this miscalculation (PB Post-Trial - Liab. p. 43-45).

(i) In their brief, the defendants have blatantly ignored Mr. Bodenstein's comparative analysis as set out in the Duff & Phelps Special Report (DX 3), and testified to by Mr. Bodenstein (TR 148, et seq.). This comparative analysis itself established that a price of between \$24.65 and \$27.30 per share was fair for the minority shares of UOP (TR 361). In fact, this comparative analysis by Mr. Bodenstein was made in addition to his calculations made by the discounted cash flow method. Defendants have chosen to attack only the discounted cash flow method. The conclusion must be made that they are in agreement with Mr. Bodenstein's analysis under the comparative approach.

(j) The defendants have no explanation for not having had an appraisal made of UOP's non-income producing assets in connection with the evaluation of the worth of the minority shares. (E.g.: UOP's vast timber holdings carried at \$40. an acre on the books; TR 264-1179; EX U-7-29). Mr. Purcell relied solely on Mr. Crawford, who assured him that there were no undervalued assets on UOP's books (TR 1173, 1181, 1207).

(k) The defendants offer the Court no explanation why their novel "two-hat, pure heart" theory of conflicting fiduciary obligations so vigorously and sincerely advanced in support of the defendants' Rule 41 speaking motion (TR 988, et seq.) was totally abandoned in the defendants' post-trial brief.

(l) No explanation is given by the defendants as to why the defendants readily agreed to excise the claim from the Proxy Statement that there had been "negotiations" between Signal and UOP relating to the price when this language was challenged by the SEC and a demand for the details was made (PX U-49-117; PX U-123-1; PX U-81; PX U-82).

(m) The defendants offered no explanation how Mr. Glanville could tell Mr. Crawford on March 3, 1978, "No problem with $21 - no negotiation" (PX U-49-23) since allegedly the price of $21.00 was not determined or known by anyone until the meeting of the Board of Signal on March 6, 1978 (Crawford 119-120; PB PrTl - Liab. p. 17).

(n) No reasons were presented by the defendants as to why, in view of the obvious conflicts of interest that their counsel pointed up for them (PX 278; PX 298) no separate committee (or "Chinese Wall") was formed by those who found themselves with conflicting fiduciary obligations. The defendants claim (DB 86), "There was no legal requirement that the proposed merger be referred to an independent committee ...", thus ignoring Harriman v. E. I. DuPont de Nemours, D.Del., 411 F.Supp. 133, 152,3 (1975), and Casella v. GDV, Del.Ch., No. 5899 (Sept. 13, 1979), a copy of which is attached to PB Post-Trial - Liab.

(o) The defendants offered no explanation of why, if other "Signal" directors of UOP were precluded by conflict from voting, Mr. Crawford (and Mr. Pizzitola) was not (EX-U-7; PB Post-Trial - Liab. p. 29).

(p) The defendants claim that the plaintiff is just plain wrong in asserting that when UOP "management" is referred to in the Proxy Statement, the group in question is the UOP Board of Directors, not the "management" (DB 89-91). However, in the very same brief, the defendants refer repeatedly to Signal's "management" in contrast to Signal's Board of Directors (DB 22, 25, 26, etc.). Mr. Walkup also defined Signal's "management" as a group different from the Signal Board (TR 1676-1677).

(q) Mr. Shumway asserted that a price of $20.00 to $21.00 was fair because this range represents a premium in the 40% range (Shumway 76). Mr. Glanville said $20.00 to $21.00 represented a premium in the 50% range (Glanville 117-118). Both of them thought that these percentages were equal to what was being paid in comparable merger situations. Actually, as Mr. Bodenstein demonstrated, the percentage of premium paid in comparable mergers at the time was in the 70% to 80% range (when noise in the form of leaks and rumors was screened out) (PX 3, p. 16; TR 360, PX 6).

(r) The defendants have pointedly ignored the stark contrast between the amiable "discussions" between UOP and Signal executives on the cash-out merger price and intense arm's length bargaining between Mr. Crawford and Mr. Glanville on the price to be paid for Lehman Brothers' fairness opinion (PB PrTl - p. 19).

(s) The defendants' brief does not respond to the fact that Signal's tax counsel stated to the Commissioner of Internal Revenue that the following was "the business purpose" of the merger to eliminate outside stockholders (PX 295):

> "2. Business Purpose for Form of Transaction.
>
> "Signal desires to preserve the UOP corporate entity and insure that it will acquire complete ownership of UOP. The use of a 'cash merger' will accomplish these objectives. Contracts and leases to which UOP and its subsidiaries are parties will not be adversely affected by the form of the transaction and there will be no minority shareholders after the merger."

(t) The defendants' brief claims that Mr. Glanville should have opposed the merger because it would eliminate UOP as a client, skipping over the fact that Mr. Crawford, in his negotiations with Mr. Glanville, as an inducement to Mr. Glanville to lower the price for a fairness opinion, reminded Mr. Glanville of future Signal business (PX U-49-25).

(u) The defendants' brief attempts to circumvent (DB 70) the fact that the record discloses that it was Mr. Glanville himself who directed the preparation of the 1976 Memorandum to Signal suggesting the takeover by cash-out merger of the equity position of the minority shareholders be prepared (Seegal 63).

(v) The defendants' brief does not attempt to explain how Lehman Brothers could recommend that a price of $21.00 for the cash-out merger was fair to the minority stockholders in 1978 when, in 1976, it had researched the same question and concluded that at any price up to $21.00 it would be to Signal's advantage to cash out the minority (DB 72).

(w) Finally, the defendants have advanced an incongruous new argument in their brief (DB 96) -- that is, that the vote of the majority of the minority should not be overturned because it is the will of the minority, even though the facts clearly show that setting aside that vote would be to the distinct economic advantage of all of the minority stockholders who were cashed out at an unfair price.

* * *

The defendants, obviously seeking to put the best face on things, have chosen not to answer the plaintiff's briefs. Instead, they have selectively picked over the record and chosen only the aspects of the record favorable to them: the unfavorable is ignored or glossed over. In addition, they have jettisoned arguments that they previously assured the Court had merit and they have unveiled brand new theories and arguments. However, when all is said and done, the record stands: Signal, the majority stockholder, cashed out the minority without any proper business purpose and at their own fixed price. Further, by deception and the impermissible manipulation of corporate machinery, they have staged the merger in such a way as to cozen the majority of the minority into voting for the merger.

III. THE DEFENDANTS HAVE NOT SUSTAINED THE BURDEN OF PROVING A PROPER BUSINESS PURPOSE FOR THE MERGER

As a part of carrying the burden of establishing the "entire fairness" of a cash-out merger of minority shareholders, a majority shareholder standing on both sides of the transaction must show a valid corporate purpose. When it is alleged that such a merger has the sole purpose of freezing out the minority stockholders, the Courts of Delaware have undertaken to examine closely the factual situation even when all the relevant statutory formalities have been satisfied. Sterling v. Mayflower Hotel Corp., Del. Supr., 93 A.2d 107 (1952); Singer v. Magnavox Co., Del. Supr., 380 A.2d 969 (1977).

In Singer, the Court concluded that if the merger did not serve any business purpose other than the forced removal of public minority shareholders from an equity position in Magnavox, to enable North American through Development to obtain sole ownership of Magnavox, such a merger, made for the sole purpose of freezing out minority stockholders would be an abuse of the corporate process.

After Singer, obviously few corporations would be foolhardy enough to state that their sole purpose was to cash out the minority, but lest it appear that all one need do is allege a few comestic "corporate purposes" the following portion of the Singer decision should be noted:

> "This is not to say, however, that merely because the Court finds that a cash out merger was not made for the sole purpose of freezing out

> minority stockholders, all relief must be denied to the minority stockholders in a §251 merger. On the contrary, the fiduciary obligation of the majority to the minority stockholder remains and proof of a purpose, other than such freeze-out, without more, will not necessarily discharge it. In such a case the Court will scrutinize the circumstances for compliance with the Sterling rule of 'entire fairness' and, if it finds a violation thereof, will grant such relief as equity may require." Singer v. Magnavox, supra at 980.

In the course of its decision, the Court found that the statute was silent on the question of whether a merger may be accomplished only for a valid business purpose, but two previous cases suggested such a showing. In Pennsylvania Mutual Fund, Inc. v. Todhunter International, Inc., Del.Ch., No. 4845 (August 5, 1975), the Chancery Court issued an order temporarily restraining a merger in which the plaintiff alleged an unlawful freeze-out of its minority interest. The Chancery Court stated that because there was to be no change in the business but merely an elimination of unwanted minority stockholders there was reason to suspect that there was possible manipulation of corporate control for private purposes with no other proper business purpose in mind. In Tanzer v. International General Industries, Inc., Del.Ch., No. 4945 (December 23, 1975), the plaintiff moved for a preliminary injunction preventing the merger of two related corporations. Because the Court found that there was a proper business purpose for the merger, the defendant was not enjoined. It was noted that the majority had a legitimate and present and compelling business reason to become the sole owner of the corporation. It was not freezing out the minority for the purpose of eliminating an unwanted minority.

The question of "whose purpose" or "whose business" was left unresolved in Singer, but the decision firmly re-established the requirement for "a valid business purpose" in cash-out mergers. The Supreme Court had the opportunity to deal with the issue of "whose purpose" in the Tanzer appeal. The Court found that while a majority shareholder has the right to vote his shares in his own interest and cause a merger, he is limited by the duty he owes to the other stockholders. Although it was reluctant to analyze the problem in terms of "business purpose" because that stated a result and not a right or a duty, the Court did find that IGI had a *bona fide* purpose for the merger in its need to facilitate long term debt financing. But, in addition to this proper business purpose, IGI also had to be prepared to show that it had met the burden of "entire fairness". The Court stated:

> "Although we have stated that IGI is entitled as majority stockholder to vote its own corporate concerns, it should be clearly noted that IGI's purpose in causing the Kliklok merger must be *bona fide*. As a stockholder, IGI need not sacrifice its own interest in dealing with a subsidiary; but that interest must not be suspect as a subterfuge, the real purpose of which is to rid itself of unwanted minority shareholders in the subsidiary. That would be a violation of Singer and any subterfuge or effort to escape its mandate must be scrutinized with care and dealt with by the trial court. And, of course, in any event, a *bona fide* purpose notwithstanding, IGI must be prepared to show that it has met its duty, imposed by Singer and Sterling v. Mayflower Hotel Corporation, Del. Supr., 33 Del.Ch. 293, 92 A.2d 107 (1952), of 'entire fairness' to the minority." Tanzer v. International General Industries, Inc., 379 A.2d 1121, 1124 (1977).

In Young v. Valhi, Inc., Del.Ch., 382 A.2d 1372 (1978), this Court met the challenge of balancing the "entire fairness" imposed by Sterling and Singer against the basic right of a majority stockholder to vote his stock as he pleases and effectuate a merger eliminating minority stockholders, if such merger also serves a valid business purpose of the subsidiary, as found in Tanzer. In Young, the parent corporation alleged that there were two beneficial purposes to the merger, namely, to bring about tax savings and to avoid future conflicts of interest. This Court found those two alleged purposes without merit. Chancellor Marvel was satisfied that the tax savings alleged could be achieved by other means. He also found that conflicts of interest had been minimal, and that reliance on such an argument to show lost opportunities, was "somewhat contrived". Young v. Valhi, supra at 1377. The Chancellor held that the basic difference between the parties as to the entire fairness of the merger lay in the amount of cash proposed to be paid to the minority stockholders. Nevertheless, he came to the following result:

> "I conclude, however, that it is unnecessary to pass on the overall fairness of the price per share offered to minority stockholders of Valhi or whether or not reasons given for the proposed merger, namely tax savings and avoidance of future conflicts of interest, were largely contrived because having tried the case, examined the exhibits as well as the testimony of the witnesses and considered their demeanor on the stand, I am of the opinion that the basic purpose behind the merger now before the court is the effectuation of a long standing decision on the part of Contran to eliminate the minority shares of Valhi by whatever means as might be found to be workable." Young v. Valhi, supra at 1378.

In fact, the Chancellor found that the merger was "the prototype of the kind which the Supreme Court now seeks to prevent by its application of strict standard of fiduciary behavior to the conduct of majority stockholders in their dealings with the minority..." (Id.) He concluded that the majority used a technically correct but devious corporate action to accomplish the merger designed to eliminate all minority stockholders by circumventing charter provisions. By such an action, the parent company had undertaken to manipulate corporate machinery to accomplish an inequitable result in cashing out the minority shareholders.

The Supreme Court used similar reasoning in a case involving the interplay of Singer and Tanzer. In Roland International Corporation v. Najjar, 407 A.2d 1032 (1979), a complaint attacking a short form corporate merger was challenged by a motion to dismiss. This Court had denied that motion. On appeal, the decision was affirmed. The Supreme Court held that, while the short form corporate merger, permitted by statute in 8 Del.C. §253, does simplify steps necessary to effect merger and gives the parent corporations some certainty as to the results, and in control as to timing, it does not eliminate the fiduciary duty owed by the majority to the minority, as established under §251 mergers. Such a statutory short cut to merger may not be used to short cut the law of fiduciary duty. The Court stated:

> "The unmistakable focus in Singer was on the law of fiduciary duty. See 380 A.2d at 976. Such a duty is owed by the majority stockholders (who have the power to control corporate property and, indeed, corporate destiny) to the minority stockholders of the corporation when dealing with the latters' property. It may not be circumvented by full compliance with the procedures permitted under and required by the corporation statutes, nor is it discharged by remitting minority shareholders to a statutory appraisal remedy (often based upon the status of the market and the elements of an appraisal), the timing of which is entirely within the control of the majority. The fiduciary duty is violated when those who control a corporation's voting machinery used that power to 'cash out' minority shareholders, that is, to exclude them from continued participation in the corporate life, for no reason other than to eliminate them.
>
> "In Tanzer we held that even when a parent corporation has a bona fide purpose for merging with its subsidiary, the minority shareholders of the subsidiary are entitled to a judicial review for 'entire fairness' as to all aspects of the transaction. 379 A.2d at 1125. In other words the fiduciary duty exists even if the majority has a bona fide purpose for eliminating the minority: in that case, the duty of the majority is to treat the minority fairly." Roland International Corp. v. Najjar, supra at 1034.

The defendants argued that under Singer a parent corporation must show a bona fide purpose for effecting a long form merger with a subsidiary, but that a §253 short form merger conclusively presumes a proper purpose. The Court found that the law of fiduciary duty, on which Singer was based, rose not from the operation of §251 but independent of it.

In Najjar, the Court was presented with a classic "going private" transaction, with the majority having complete control over the timing of the "squeeze play" run on the public stockholders. According to the complaint, the merger was simply the means chosen to eliminate the comparatively few public shareholders of Roland. Such a merger called for the strictest observance of the law of fiduciary duty, the Supreme Court held in finding that the Vice Chancellor properly denied the defendants' motion to dismiss. The Court stated:

> "The majority shareholders must, under our holding establish a proper purpose for the short-form merger as a threshold requirement. But, the complaint also alleges that the terms of the merger were 'grossly inadequate and unfair' to the public shareholders of Roland. It is clear from both Singer and Tanzer that the law of fiduciary duty requires 'entire fairness as to all aspects' of a merger effected by majority shareholders and, in this respect, the complaint also states a cause of action." Roland International Corp. v. Najjar, supra at 1037.

If Tanzer is read broadly, the protection afforded to minority shareholders by Singer is illusory. However, the facts in Tanzer militate against the conclusion that the test of "valid business purpose" is easily satisfied. First, in Tanzer, the parent/majority stockholder had experienced and demonstrated difficulty in placing its long-term debt. It was in regard to facilitating that debt program that the recommendation for 100% ownership was acted upon. Importantly, this necessity for complete ownership was independent of the economic profitability of the subsidiary. Accordingly, there was no evidence that the purpose or motivation of the defendant was to exploit or appropriate the subsidiaries' profitability to the detriment of the minority. Second, in considering the nature of the parent's professed interest in effectuating the merger, the lower court explicitly characterized the parent's business reason as "legitimate", "present" and "compelling".

In Young v. Valhi, Inc., supra, no such "legitimate", "present", or "compelling" circumstances were presented. Chancellor Marvel found that the tax savings proposed could be achieved by other means and that the possibility of future conflicts of interest was "contrived". He concluded that the basic purpose was to eliminate minority by whatever means as might be found to be workable.

In this case, the defendants have not met the burden of showing that there were any "legitimate", "present", or "compelling" purposes for this merger. In fact, it is apparent that Signal had only its own economic advantage in mind.

In the Winter of 1978, Signal had a large amount of unused cash which it needed to invest (TR 1672, 1688). Signal investigated other corporate opportunities; it found that its only two other serious possibilities were not "doable" (TR 1670). Signal therefore turned to a cash-out merger of its fellow stockholders in UOP (TR 1677). First, it had studies made based, in part, on the information available to Signal as controlling stockholder of UOP. These confidential studies showed that a cash-out merger of UOP minority shareholders would be profitable to Signal at any price up to $24.00 (PX 36; TR 1679). Armed with this information, Signal's management decided that it would suit Signal's purpose to achieve a cash-out merger of UOP's minority shareholders at $20-21. Mr. Shumway candidly described this as the purpose of the merger in his deposition taken at the very outset of this case (Shumway 43):

> "What I meant was that we had the financial resources to make this acquisition and it was the most viable alternative of other potential uses of that cash in my opinion."

This Court should recognize (as the Court in Valhi did) that the only real purpose for this cash-out merger was because the majority shareholder sought its own economic advantage by taking over the equity interest of the minority through a cash-out merger. Clearly, this is not a proper business purpose.

Once Signal had adopted a plan to acquire all of the stock of UOP, Signal (with its attorneys) began to conjure up defensible purposes for the cash-out merger. For example, at the February 28, 1978 meeting of the Executive Committee of Signal, some other reasons justifying the merger were advanced (U-176-1,2):

> "- 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 forth-coming; and

> "- there is an increasing prospect of difficulty in effecting any corporate acquisition because of growing unwarranted governmental interference."

These alternative reasons were enlarged at the meeting of the full Board of Signal (PX 298). They appeared in "full flower" in the 1978 Proxy Statement, as follows (EX U-77):

> "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."

Signal tries desperately in its post-trial brief to make these afterthoughts into "compelling" reasons (DB 15-19, 100, 101). However, when all is said and done, the most telling part in defendants' post-trial brief is their frank admission that the merger was "the best economic opportunity for Signal at the time" (DB 100).

The defendants have also elsewhere in their brief admitted that Signal's real business purpose was to take over the equity position of the minority. For example, the defendants' brief speaks of the acquisition of the minority interest of UOP being a "reasonable investment" (DB 19) or "the best economic opportunity for Signal at the time" (DB 19).

There is no doubt that "a further investment in UOP represented a better opportunity for Signal than any other alternative that had been presented to them" is true (DB 23; see also pp. 15 and 20). The reason is basic. Signal could not have purchased, through negotiations or a tender offer, another company as cheaply as UOP, since the price paid for the minority's shares was so undervalued. Nor could it have found an opportunity where it could maintain control over the timing, terms and mechanism of the merger.

Further, although the increasing prospect of difficulty in effecting any corporate acquisition because of growing unwarranted governmental interference may be of concern to a corporation, it certainly is not a business purpose for a merger (PX U-176-2; TR 1683).

Thus, Signal's only real purpose --i.e., the acquisition of the minority shares for its own gain -- is apparent from the record and is admitted. The Court therefore need go no further. However, Signal has presented alternative reasons. Under Tanzer, the Court must scrutinize these reasons to see if they are actually "a subterfuge, the real purpose of which is to rid itself of unwanted minority shareholders..." (Tanzer, supra at 1124).

The defendants' reasons break down into two categories: those that reveal Signal's desire to "cash-out" the minority UOP shareholders so that it could "cash-in" on UOP's high technology businesses, and those that are merely ancillary to any parent/subsidiary situation and potential merger.

The problem Signal claims existed as a result of "investors understanding", "conflict of interests", and "tax/accounting" were all problems that existed when Signal decided to purchase only 50.5% of the stock of UOP (TR 1662, et seq.). They were all problems in any acquisition of a majority stockholder or in a merger. Furthermore, as Mr. Walkup specifically admitted, all of the foregoing "problems" were situations that Signal could foresee as it deliberately elected in 1975 to only purchase a 50.5% interest in UOP (TR 1662). None of these problems has come into existence since Signal's original acquisition. Thus Signal should not be allowed to utilize "problems" which were foreseeable when it bought into UOP as justification for a cash-out merger of UOP minority stockholders simply because UOP in 1978 had become enormously attractive to Signal. Further, all three of these problems inhere in any parent/subsidiary relationship. Certainly, none of them standing by itself could be held to state a proper purpose for this merger.

More than seventy years ago, the precarious position of the minority shareholder and the inequities attendant a cash freeze-out were judicially recognized in Theis v. Spokane Falls Gaslight Co., Wash. Supr., 74 P. 1004, 1007 (1904):

> "The result of a successful practice such as is attempted here [forced liquidation] will be that minority shareholders will always be at the mercy of the majority. If the enterprise fails, they bear their proportion of the losses. If, on the other hand, it succeeds, as soon as it passes the experimental stage, and the opportunity is presented to finally reap the rewards of a judicious investment, they are cooly ejected from the

> corporation by the majority of stockholders, who appropriate to themselves the accruing profits. In other words, they might be termed experimental dupes, who are subjected to the necessity of contributing to the losses, but denied the privilege of sharing the profits."

* * *

In short, none of the reasons given by the defendants for this merger rise to the level of a "proper business purpose", as required by _Singer_, _Tanzer_, _Young_ and _Najjar_. None can be considered "compelling" or _bona fide_. What is apparent is that Signal's true purpose was to cash-out UOP's minority shareholders solely for its own economic benefit.

IV. THE DEFENDANTS' ATTEMPT TO REBUT THE PLAINTIFF'S PROOF THAT THE MINORITY SHARES WERE WORTH NOT LESS THAN $26.00 HAS FAILED

The defendants actually had the burden of proving the intrinsic fairness of the transaction, including the terms and particularly the price that they set in connection with the cash-out merger. Singer v. Magnavox, supra. However, the defendants' expert, William Purcell of Dillon, Read, who, at the last moment, was called upon in an attempt to supply what the defendants recognized that Mr. Glanville and Lehman Brothers had not and could not supply -- that is, financial justification for Signal's price of $21.00, failed. All that Mr. Purcell was able to do was to recite at great length a plethora of undisputed financial facts and then make an "ipse dixit" statement without any analysis that in his opinion the $21.00 price was fair. The defendants have not carried their burden of proof on intrinsic fairness (i.e., that the merger price of $21.00 was fair). The plaintiff's evidence should be accepted that the minimum fair price was not less than $26.00 per share.

Having failed to sustain their burden of proof of showing the intrinsic fairness of their cash-out merger, the defendants attempt in their brief to rebut in some way the testimony of the plaintiff's expert, Mr. Bodenstein, since his several methods of analysis proved that the value of the minority share was not less than $26.00 per share.

A. The Defendants Do Not Comment on Mr. Bodenstein's Comparative Analysis Which Showed That the Fair Value of the Stock Was Between $26.65 and $27.30

As elsewhere, the defendants are selective in their brief when it comes to the plaintiff's expert, Mr. Kenneth Bodenstein. A reading of the defendants' brief would leave one with the clear impression that Mr. Bodenstein's only method of calculating what the fair value of the minority shares was was through the discounted cash flow method. (Note) Mr. Bodenstein used a number of techniques of financial analysis: he did not rely solely on the discounted cash flow method. As his report shows, he made a careful review of UOP, its operations and results. Mr. Bodenstein then did a detailed comparative analysis (PX 3, p. 9; TR 326-360). This comparative analysis showed in itself that the fair value of the shares of UOP was between $26.65 and $27.30 (TR 361).

Note: In addition, the defendants attempt to give the deliberate misimpression that Mr. Bodenstein's work was based solely on information contained in the Proxy Statement and PX U-400. That is not correct: The Duff & Phelps Special Report (PX No. 3) as well as Mr. Bodenstein's testimony (TR 168, et seq.) makes it clear that Mr. Bodenstein reviewed precisely the same information that Dillon, Read used. The only thing that Mr. Purcell was able to do that Mr. Bodenstein was not able to do was to interview UOP's personnel. As to Mr. Purcell's due diligence visit, several comments are germane. First, Mr. Bodenstein did not, for obvious reasons, have access to UOP's management. Second, Mr. Purcell did not interview UOP's chief financial officer, Mr. Shuman. Third, Mr. Purcell never made or had made an appraisal of the 1978 true value of UOP's non-income producing assets (i.e., UOP's vast timberlands and patent royalty package). In justification, he said that he relied on Mr. Crawford's statement that there were no undervalued assets on UOP's balance sheet.

B. The Cases Hold That Statutory Appraisal Is Not the Appropriate Remedy Where There Has Been an Unfair Cash-Out Merger

In _Singer_ _v._ _Magnavox_, _supra_, the Supreme Court held:

> "Defendants concede that they owe plaintiffs a fiduciary duty, but contend that, in the context of the present transaction, they have met that obligation by offering fair value for the Magnavox shares. And, say defendants, plaintiffs' exclusive remedy for dissatisfaction with the merger is to seek an appraisal under §262. We disagree. _In our view, defendants cannot meet their fiduciary obligations to plaintiffs simply by relegating them to a statutory appraisal proceeding_." 380 A.2d at 977.

In _Roland_ _v._ _Najjar_, the Supreme Court reaffirmed that ousted stockholders may not be relegated to appraisal, pointing out, _inter alia_, that the critical element of timing (as in this case) can be manipulated by the controlling party. The Court said:

> "The unmistakable focus in _Singer_ was on the law of fiduciary duty. See 380 _A.2d_ at 976. Such a duty is owed by the majority stockholders (who have the power to control corporate property and, indeed, corporate destiny) to the minority stockholders of the corporation when dealing with the latter's property. It may not be circumvented by full compliance with the procedures permitted under and required by the corporation statutes, _nor is it discharged by remitting minority shareholders to a statutory appraisal remedy (often based upon the status of the market and the elements of an appraisal), the timing of which is entirely within the control of the majority_. The fiduciary duty is violated when those who control a corporation's voting machinery use that power to 'cash out' minority shareholders, that is, to exclude them from continued participation in the corporate life, for no reason other than to eliminate them." 407 A.2d at 1034.

The Court also said:

> "The merger described in the case at bar, however, presents a classic 'going private' transaction, with the majority having complete control over the timing of the 'squeeze play' on the public stockholders - a timing conceivably selected to favor the majority only, based upon the status of the market and the elements of an appraisal. According to the complaint, the merger was simply the means chosen to eliminate the comparatively few public stockholders of Roland. It has been argued with persuasion that this type of merger calls for the strictest observance of the law of fiduciary duty. 89 Yale L.J. at 1365. We agree." 407 A.2d at 1037.

In spite of the foregoing recent rulings, the defendants attempt in this case to do the very thing the rulings said defendants could not do -- i.e., "relegate" the plaintiffs to their statutory appraisal rights. Obviously, the equitable remedy that this Court must now fashion is one that will, as nearly as possible under all the circumstances, put the plaintiffs in the position they would have been in but for the illegal cash-out merger.

In Altscluler v. Cohen, 471 F.Supp. 1372 at 1383 (D.C. Texas 1979), the Court said of Mitchell v. Texas Gulf Sulphur Co., 466 F.2d 90 (10th Cir. 1971):

> "The case does, however, attempt to apply the basic rule that the objective is to place the party back in the same situation which he would have enjoyed had it not been for the fraudulent inducement."

C. The Frick Case is Not Applicable

In a post-trial attempt to counter Mr. Bodenstein's clear, careful and obviously damaging testimony and explanatory diagrams (Note) at trial, the defendants now claim that all financial analysis that is denominated as the discounted cash flow method is never an acceptable method of determining the value of minority shares. The defendants are really making a post-trial objection and motion to strike. The defendants, having made no timely objection, are precluded from now objecting. McCormick on Evidence, pg. 15. Remington Machine Co. v. Wilmington Candy Co., Del. Supr., 66 A.465 (1907); Yates v. Philadelphia B. & W. R.R. Co., Del. Super., 82 A.27 (1906).

The defendants rely on one unreported appraisal case as support for this extreme position, Frick v. American President Lines, Ltd., Del.Ch., C.A. No. 3766 (Letter Opinion dated June 18, 1975). There are several answers to defendants' broad assertion. First, Frick was an appraisal case: what was held to be unacceptable as an evaluation method in a statutory appraisal is quite different from what is an acceptable method of analysis in a fairness case. (Singer v. Magnavox, supra; Roland v. Najjar, supra.) Second, as

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Note: It is respectfully suggested that the Court specifically review Mr. Bodenstein's testimony (including the defendants' cross-examination) and his diagrams in evaluating the defendants' post-trial objection to Mr. Bodenstein's testimony based on his three analyses using the discounted cash flow method.

the opinion in Frick shows, the Court did not issue a blanket ruling prohibiting use of the method based on proper evidence. The opinion is quite to the contrary. Third, the bases of three analyses presented by Mr. Bodenstein in this case were totally different from the speculative projections used by the expert in the Frick case. About the only factual similarity between Frick and this case lies in the fact that the method of analysis used in each case was denominated as discounted cash flow method. Specifically, in Frick, the Court rejected the only calculations that had been made by the plaintiff's expert since his calculations were based entirely on projected income. Projections of this sort have been traditionally eliminated, or were very limited in appraisal cases. The expert in Frick made calculations by adding up cash flows projected for the company for fifteen years following the merger (that is, the years from 1972 through 1986). For the years from 1972 and 1975, the projections were based on figures appearing in the company's own five-year plan. However, for the years thereafter through 1986, the expert's projections were based entirely on extrapolations. Thus, the expert in Frick combined the company's own projections with his extrapolation of these figures for the balance of the fifteen-year period in order to arrive at a present value for the stock. Nothing even resembling the projections and extrapolations presented in Frick are found in any of Mr. Bodenstein's analyses. On the contrary, Mr. Bodenstein's first analysis of 1977 was totally retrospective: he did a discounted cash flow analysis based entirely on what had in fact already happened in the year 1977 to UOP (TR 201-207; PX 4). Thus, the figures were not projections or extrapolations: they were UOP's own report of what had already happened financially to UOP in 1977. The conservative discount factors (7.5% and 8.5%) were not arbitrarily selected: they were, as Mr. Bodenstein explained, based on what the market had actually paid for such streams of income (TR 208). Clearly, the speculations that led to the elimination of the expert's analysis in Frick are not applicable to the discounted cash flow analysis that Mr. Bodenstein made on a retrospective basis for UOP for the year 1977. Based on this historical or retrospective discounted cash flow analysis, Mr. Bodenstein showed that the value of the minority shares was between \$25.21 and \$28.09.

Similarly, Mr. Bodenstein's discounted cash flow analysis for the year 1978 was not based on speculation. Nor did it rest on extrapolations or projections of future income. Rather, as Mr. Bodenstein explained and showed in his diagram (PX 5), the analysis was based in part on what in fact had already happened during the first half of the year 1978. As to the balance of 1978, the analysis was based not on Mr. Bodenstein's projections of what might happen in the balance of 1978: it was based on UOP's own in-house forecast of what the final six months of 1978 would hold for UOP. Mr. Bodenstein did not speculate or extrapolate: he took UOP's own figures. The accuracy of this forecast was re-enforced by the fact that Mr. Crawford told the stockholders at the annual meeting that he believed that UOP was on target (TR 242). Mr. Bodenstein explained that his discount factor was not a random selection: it was based on what the market <u>had</u> paid for such income streams in 1977 plus an additional 2% to cover the possible risk of partial non-performance in the last six months of 1978. Mr. Bodenstein's discounted cash flow analysis showed that, when applied to 1978, the stock was worth not less than $27.16.

The last of Mr. Bodenstein's three analyses using the discounted cash flow method was triggered by the defendants' pointed questioning at Mr. Bodenstein's pre-trial deposition (Bodenstein 275). (Mr. Bodenstein had not been shown PX 400 since the plaintiff's counsel did not want to have Mr. Bodenstein open to the charge that he had based his other analysis on future projections.) Mr. Bodenstein, after his deposition and in preparation for trial, made an analysis using the discounted cash flow method using "UOP's Cash Flow Analysis, 1978 Five-year Business Plan (Basic) in Millions". Thus, Mr. Bodenstein did not extrapolate or use his own projections in making a discounted cash flow analysis: he utilized UOP's own figures. (Incidentally, these were some of the very figures that were used by Signal in determining that it would take over the minority's position by a cash-out merger.) Further, in connection with the five-year projections, there were three forcasts made by UOP management: optimistic, pessimistic and basic. Mr. Bodenstein used only the projection that the defendant had designated as "basic".

In summary, in contrast to the _Frick_ case, the analysis based on the discounted cash flow method by Mr. Bodenstein was not based on subjective projections or extrapolations. Rather, the calculations or the analysis was made based either on figures that were historical or retrospective (or were partially so) and on figures which came entirely from the defendant UOP. In addition, if any further reason were needed to show why the _Frick_ case is not applicable, Mr. Bodenstein took the most conservative approach in all of his calculations. Thus, the subjective and speculative elements that led the Court in the _Frick_ appraisal case to eliminate this method of analysis are not found in Mr. Bodenstein's discounted cash flow analysis.

The defendants' belated motion to strike should be denied. The defendants' motion is simply based on the fact that one of the methods of analysis used by Mr. Bodenstein was denominated by the same general name (i.e., the discounted cash flow method) as the method used by the expert though the basis of the analysis is totally different from the factual basis of the projections and speculations found in _Frick_. There is no valid reason for eliminating, as the defendants are now trying strenuously to do, Mr. Bodenstein's evaluation using the discounted cash flow method for 1977, 1978 and based on the five-year forecast by UOP.

D. The Defendants Have Not Introduced the Factual Basis on Which to Apply Delaware Appraisal Standards

The factual basis for the application of appraisal standards erroneously urged by the defendants were not supplied by Signal's expert. (Note 1)

The plaintiff does not dispute that in appraisal cases earnings value was often computed by the use of an average of past earnings. (Note 2) Now for the first time, however, the defendants contend that, based on Delaware appraisal cases, the appropriate method to compute value is to multiply a five-year average of past earnings by the "appropriate multiplier". UOP's average five-year earnings can be determined from the exhibits. Taking these figures, defendants make the bald assertion that their expert opined that the appropriate multiplier was in the range of 6.5 to 7 (TR 1121-24; DX 40, pp. 13-15 and EXs. 5A and 5B). Nowhere in the record is there any testimony from defendants' expert that 6.5 to 7 was the appropriate multiplier to use for purposes of determining earnings value under Delaware appraisal law. It is true that Mr. Purcell discussed the price earnings ratio of 6.5 to 7, but those ratios do not represent appraisal

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Note 1: Plaintiff need not repeat here the arguments discussing why Dillon, Read's analysis does not follow Delaware appraisal standards (PB PrT1 - Rem. pp. 48-54).

Note 2: The plaintiff has previously pointed out that, for a number of reasons, that retrospective approach to earnings value should not be applied in this case (PB PrT1 - Rem. pp. 30-37).

"multipliers". Mr. Purcell was discussing price earnings ratios as those figures relate to market value - not the per share value an acquiror would be willing to pay for 100% ownership of the company. The multiplier to which defendants refer was the multiplier used by Mr. Purcell in computing "investment value". His own report reveals that this value was substantially different than fair value for UOP shares. The value Mr. Purcell computed based on that multiplier was $15.35, not the $21.00 Signal paid. There is no testimony relating investment value to "earnings value" as the latter is defined under Delaware law. Thus, this Court has no factual basis on which to determine that a multiplier used for Dillon, Read's investment value determination has any relevance at all to the multipliers used to determine earnings value under appraisal law.

Another reason Dillon, Read's multiplier may not simply be lifted and used in the earnings approach is that factors not considered by Dillon, Read go into a Court's determination of determining the proper multiplier. For example, in Swanton v. State Guarantee Corp., Del.Ch., 215 A.2d 242 (1965), the plaintiff argued that the company owned certain assets as investments made for capital appreciation rather than to produce earnings (as in UOP excess cash and the undervalued timberlands). The plaintiff argued these investments had an independent element of value which did not appear on the income statement. To compensate for this, Chancellor Seitz held that the use of a higher than normal multiplier in order to give recognition to the asset value was justified. (215 A.2d 245) This element was not considered at all by the defendants or their expert.

In short, the defendants' suggested multipliers are taken out of context and have no bearing on the appropriate multiplier for determining earnings value. Such multipliers should be in the range of 15 to 20 rather than the 6 to 7 now suggested by the defendants. (See Gibbons v. Schenley, supra, multiplier of 16.72; Swanton v. State Guarantee Corp., supra, multiplier of 14.)

E. Defendants' Net Asset Value Does Not Reflect the Current Worth of UOP Assets

The asset valuation of UOP by defendants' expert, Mr. Purcell, has been specifically rejected by the Delaware cases which hold that the asset value in appraisal cases should reflect current value of assets, not their historic cost or accountant's "book value". The plaintiff's pretrial memorandum on remedy made this fundamental principle clear by citing the applicable cases (PB PrTl - Rem. pp. 48-54).

The defendants' expert made no attempt to compute the current value of the assets. In fact, the defendants apparently conceded this when offering Mr. Purcell's testimony in response to plaintiff's objection at trial.

In computing asset value, the defendants do not cite any figure from their own expert which forms the basis for their calculation. In fact, they cite the very case, Gibbons v. Schenley Industries, Inc., supra, which rejects the approach followed by Dillon, Read as a method for determining asset value for appraisal cases. As plaintiff pointed out in his pre-trial memorandum on remedy (PB PrTl - Rem. p. 49), in Gibbons, the Court rejected "asset value" computed by adding to book value an average premium over book which stock market investors would reasonably pay for stock. This is precisely what Dillon, Read did and which was rejected in the Gibbons case.

Recognizing, therefore, the inadmissibility of their own expert's book value or net asset calculation, the defendants proffer an "asset value" that is unsupported by evidence (DB 140). Their calculation of $25.04 is based upon book value per share, plus Mr. Bodenstein's evaluation of the value of the timberlands on a per share basis. But no recognition is given to the current worth of UOP's plant and equipment or other significant assets, such as patents. The defendants have simply selected a figure that suits their present purposes unsupported by the testimony of their expert.

Moreover, the defendants' approach totally disregards other factors which have been given weight in considering the asset value for a corporation. For example, in Levin v. Midland Ross, 194 A.2d 50 (1963), the shareholders argued that the corporation possessed substantial assets which produce very little income. The Court refused to include such assets in the "earnings value" calculation. These assets produced little income in relation to their true value. They were investments and because the investment policy of the company would not change, they were not valued separately.

But, the Court did overcome this by using a higher than normal net assets weight in determining the fair value of the company. Valuing the net assets at a higher percentage than normal in appraisal cases, therefore, overcame the problem of refusing to give it effect in the earnings value aspect of the case. Rather than recognize that UOP owned significant undervalued assets, the defendants hope this Court will ignore them. The appraisal cases hold that undervalued assets or non-income producing assets must in all fairness be given financial recognition even in an appraisal hearing. Of course, in a fairness hearing, where the judicial objective is not merely a remedy that complies with the ancient statutory appraisal remedy but rather has as its objective putting the plaintiffs back in the position they would have been in but for the illegal merger, the actual value of the non-income producing assets or undervalued assets is clearly germane.

F. The Discount Factors Used by Mr. Bodenstein Were Based on Objective Analysis

The principal attack which the defendants mount on Mr. Bodenstein's discounted cash flow analysis is repeated over and over again in different forms. It consists of claims that Mr. Bodenstein's discount factors were subjective. In fact, as Mr. Bodenstein testified and as the record shows, in each case, the discount factors were based on objective analysis and were realistic in terms of what the acquisition marketplace was paying for levels of free cash flow. For example, for the 1977 discounted cash flow calculation, Mr. Bodenstein analyzed what the acquisition marketplace was paying for inherent free cash flow. The analysis indicated that buyers were accepting discount rates on available cash flow at levels as low as 3% to 4% and ranging to highs of 6% to 7% (TR 208). However, in making the analysis, Mr. Bodenstein was conservative in his discount factors as elsewhere. He took two approaches on the proper discount factor. The first was 7.5% which was, as PX 4 indicates, the "High side of discount range found in the same of 1977-1978 acquisitions". But Mr. Bodenstein did not rest on that alone: he also used an 8.5% discount and indicated that this was based on "Average Moody's Industrial Bond Yield Average, February 1978" (PX 4).

In connection with the discounted cash flow analysis for 1978, Mr. Bodenstein used a discount figure of 10%. The 10% discount rate was developed through analysis of long term treasury bond yields and medium rate industrial bond yields during February 1978.

The 12% discount rate used in the discounted cash flow calculation based on UOP's long term plan used the data developed by the 1978 analysis but increased the rate by 200 basis points to provide for the inherent risk involved in using projections (even though these projections were UOP's own projections and were on the "basic" forecast rather than the optimistic forecast (TR 465)).

In contrast to this, Mr. Purcell (who had the advantage of having Mr. Bodenstein's testimony in the record because of the daily copy, including Mr. Bodenstein's diagrams and calculations PB Post-Trial - Rem. 39) was not asked and did not make any discounted cash flow analysis though he admitted that he recognized it as a method of analysis of long standing. He claimed that it was not a feasible method of analyzing UOP because UOP was not a privately owned or 100% held company. The point was that Signal, in acquiring 100% interest, was making UOP a 100% held company and, thus, the analysis of its worth could be made by the discounted cash flow method even under Mr. Purcell's standards (TR 1154-1158). Mr. Purcell, in one solitary question that was not elaborated upon, said simply (again "ipse dixit") that a rate of 15% would have to be used in the valuation technique. For example, Mr. Bodenstein's analysis for 1977 and 1978, assumed no growth, while Mr. Purcell's testimony did not address that factor. The Court was not given any analysis or reasons why Mr. Purcell simply took 15% as the factor without applying it to the different situations as disclosed by Mr. Bodenstein's retrospective analysis of 1977, his analysis of 1978 and his analysis using UOP's future projections.

G. Defendants' Creation of a 14% Discount Factor Is an Erroneous Calculation Unsupported By Any Expert Testimony

The defendants' brief does not rely on Mr. Purcell's vague and general statements of the discount factor. The defendants postulate the use of 14% (DB 106). Attempting to attack the Duff & Phelps choice of a discount factor, the defendants' brief goes through a series of calculations which shows their total misunderstanding of the discounted cash flow method (DB 106-107). Their argument is based upon a comparison of "apples and oranges". Defendants compare reported earnings to market price in attempting to find a 14% "discount" or risk factor, perceived by the market. This analysis is unsupported by any expert opinion. The few brief lines of their expert devoted to this topic (TR 1148-1152) nowhere indicates that comparing <u>current earnings</u> to market value produces a discount factor. In fact, what the market established at the time of the merger was that $14.75 was what an investor was willing to pay for UOP's 80¢ yearly dividend, growth potential and other limited rights attaching to a <u>minority interest</u> in the company. The return to an investor who owns a minority share of the corporation is not the $2.12, the net earning of the corporation. The return to the investor is the free cash throw-off (i.e., the 80¢ dividend). The dominant factor in determining that price is the dividend paid, not reported net earnings of the corporation.

In discussing the dividend factor as it relates to evaluation of common stocks, Graham, Dodd & Cottle state:

> "For the vast majority of common stocks, the dividend record and prospects have always been the most important factor controlling investment quality and value. The success of the typical

> concern has been measured by its ability to pay liberal and steadily increasing dividends on its capital. In the majority of cases, the price of common stocks has been influenced more markedly by the dividend rate than by the reported earnings. In other words, distributed earnings have had a greater weight in determining market prices than have retained and reinvested earnings. The 'outside', or non-controlling stockholders of any company can reap benefits from their investment in only two ways - through dividends and through an increase in the market value of their shares. Since the market value in most cases has depended primarily upon the dividend rate, the latter could be held responsible for nearly all the gains ultimately realized by investors.
>
> "The predominant role of dividends has found full recognition in a generally accepted theory of investment value which states that a common stock is worth the sum of all dividends expected to be paid on it in the future, each discounted to its present worth."

Graham, Dodd, Cottle & Tatham, Security Analysis, pp. 480-481, McGraw Hill Book Co. (4th Ed., 1962).

If any factor is to be compared with minority interest market value to find a rate of return, it should be the dividend paid, 80¢ per share -- not the reported earnings. To compute a rate of return based upon reported earnings, produces a meaningless percentage. If reported earnings are to be compared with some value to compute a rate of return, it should not be minority interests value, but rather, what a willing buyer would pay for the right to control and own 100% of those reported earnings. That is precisely the figure that this Court will need in assessing damages. The plaintiff has proved by a variety of different analysis methods that the true value of the UOP shares in 1978 was not less than $26.00 per share. In any event, the price to be compared is not minority interest market price, but rather, the acquisition price which includes a premium over the minority interest market value.

The final flaw in defendants' analysis is their attempt to compute a discount rate based upon reported earnings rather than free cash flow. Plaintiff's expert distinguished earnings reported and free cash flow throw-off, yet the defendants' computations have no relation to cash flow. The defendants' attempt, therefore, to apply a 14% discount rate to 1977 figures computed by Duff & Phelps is ludicrous. Furthermore, their attempt after the trial to suggest a discount factor of 14% to this Court postulates an alternative means of evaluation not based on evidence or any expert's analysis. Defendants' attempts to twist the facts and mislead the Court are based upon lawyers' conjecture, rather than expert analysis. It should be rejected out of hand. The only discount factors substantiated by testimony are those presented by Mr. Bodenstein based on demonstrated financial analysis. The meaningless percentages pulled out of thin air by defendants' counsel after the trial record was closed are of no service to the Court in determining the true value of the minority equity interest in UOP before Signal's cash-out merger.

H. Contrary to Defendants' Assertions, Neither Tanzer II Nor Lynch II Define the Scope of the Remedy Applicable In a Fairness Hearing

Although defendants would have this Court believe otherwise, the two Delaware cases, Lynch v. Vickers Energy

Corp., Del.Ch., supra (Lynch II), and Tanzer v. International General Industries, Inc., Del.Ch., supra (Tanzer II), which have been decided at the fairness hearing stage, are not of any real assistance to the Court in fashioning a remedy. Tanzer II is cited extensively by the defendants (DB 98, et seq.). Tanzer II arose following a remand from the Delaware Supreme Court which ordered a fairness hearing. No fairness hearing was held. The defendants made a motion for summary judgment. In ruling on this motion for summary judgment, the question of how to fashion a remedy in a fairness case was not before the Court. The Court does discuss elements relevant to damage, for example, "premium" and "fair value", but only with respect to the relationship those terms have to the liability aspect of the fairness question. It does not discuss the scope of review in fashioning a remedy.

In Tanzer II, the defendants' evidence was accepted because specifically the plaintiff offered no evidence as to the unfairness of the merger price. (402 A.2d at 391) Thus, the defendants' expert's report was uncontroverted. (402 A.2d at 385) The Court's decision was based on plaintiff's failure to refute the factual accuracy of the evidence in the record relied upon by the defendants. (402 A.2d at 386) Clearly the decision in Tanzer II is solely based upon a factual situation totally different from the situation presented by the record in this case. The particular evidentary situation did not require the Court to ever reach the remedy phase of the proceeding. Here, the plaintiff has done more than to rebut and refute the slight amount of evidence that the defendants did offer that the terms and conditions of the merger were fair: the plaintiff has proved that the minimum fair value of the shares was not less than $26.00 per share. In summary, although certain of the Tanzer II Court's comments regarding alternatives to cash-out merger may be relevant to the remedy phase, the case actually dealt only with the question as to whether liability could be predicated on the facts of that transaction. Remedy was not an issue.

Lynch II, the other fairness case previously decided in this Court, did reach the damage phase. Due solely to the manner in which that case was presented by the plaintiff, the Court dealt with value as it would in an appraisal case. The rationale found in Lynch II is not applicable here for several reasons. Responding to plaintiff's contentions regarding the appropriate measure of damages, the Chancellor noted that ten trial days during May, June and July of 1978 were:

> "... devoted to the re-trial of the case on remand. During the second trial, plaintiff was afforded a full opportunity to address the issue of fairness and to introduce all appropriate evidence. Nevertheless, at trial, each side chose to concentrate almost exclusively on the issue of value of plaintiff's tendered shares, as opposed to the possible right of plaintiff or members of the class to be restored to the status of public shareholders." 402 A.2d at 10.

Thus, the Court decided the value issue based upon the evidence presented to it. The plaintiff contended that value should be determined exclusively on the appraisal concept of net asset value. Defendants argued for the application of traditional appraisal approach. However, neither plaintiff's nor the defendants' expert's analysis follows the traditional appraisal analysis. (402 A.2d at 10-11) For this reason alone, the Lynch case is unlike our own. Value in this case should be determined by finding the price which would have resulted if there had been fair dealing in connection with the Signal cash-out merger.

Moreover, Lynch II involved judicial scrutiny of a tender offer to buy all publicly held stock of a corporation. Thus, even though the target corporation was already a subsidiary of the purchaser, it was the prerogative of each shareholder to decline to sell. Unlike the present case, the stockholders were not subject to forcible ejection. Finally, the Court's ruling in Lynch II was carefully limited to that factual context. In fact, the Chancellor held that the fiduciary duty owed by a majority stockholder to a minority is not as compelling as in a situation such as that found in "... a merger which the interests of a minority stockholder are transmuted into something different without such stockholder's consent." (402 A.2d at 11) The Lynch case too, therefore, was decided in a factual and legal context different than that presented here.

In summary, although the previous Delaware fairness cases serve as a starting point for this Court's analysis, they do not contain a formula for fashioning a remedy and assessing damages.

*   *   *

The defendants had the burden of proving that the terms of the merger, including the price, were intrinsically fair. The defendants' only witness was Mr. Purcell: he did nothing more than recite the financial facts without any real explanation or analysis and then gave his conclusion that the price was fair. The defendants have failed to sustain their burden of proof.

The plaintiff proved through the various different analyses of Mr. Bodenstein that the true value of the minority shares on a conservative basis was not less than $26.00 per share. The defendants were forced by the poverty of their evidence not only to fire a fusillade at Mr. Bodenstein, his methods of analysis, his analyses, his use of UOP's own forecasts, etc., but also to suggest seriously that, in spite of the holdings in Singer and Najjar, the Court apply statutory appraisal standards in this case. Actually, the Court must fashion an equitable remedy to put the plaintiffs in the position they would have been in but for the illegal merger.

CONCLUSION

The briefing in this case points out the fact that there is a series of unresolvable disagreements between the plaintiff and the defendants in their view of the factual situation as well as the applicable law.

The plaintiffs start from the premise that the Singer doctrine mandates that a majority stockholder deal fairly with a minority in a situation where the majority is eliminating the minority from further equity participation in the enterprise that had been jointly owned by them until that time. In the plaintiff's view, the fiduciary obligations that govern the conduct of the majority shareholder and those who work in concert with him require more than simply a passive observance of the formalities and the appearance of fairness: what the Courts of Delaware have required is the application of fiduciary standards in this situation - that is, the affirmative action of the corporate fiduciary to do what a fiduciary in a trust situation would be required to do. In the plaintiff's view, there is not a single indication that such a standard was met or indeed even considered by the defendants. Specifically, there is not one action that the defendants can or do point to in the whole merger transaction that suggests that collectively or individually any one of them took any steps that would actively advance the interests of the minority. On the contrary, the record is replete with evidence that shows activity on behalf of the minority's corporate fiduciaries in aid of Signal's plan to cash-out the minority so that Signal could advance its own economic interests. The defendants disagree: they seem to believe that, if viewed in the context of a "total mix", the adherence to corporate formalities insulates the transaction from the intense glare that the Courts of Delaware bring to bear on such a suspect transaction. The Court must decide this question.

The plaintiff also takes the position that the defendants built into the very plan itself a device which they hoped would insulate them from the necessity of living up to the corporate fiduciary standards imposed by Singer and its progeny. However, the device of a majority to minority ratification of the merger was vitiated by the conduct of the defendants themselves. Instead of presenting the matter with complete candor as they were required to, the defendants not only practiced deception on the stockholders that led the stockholders to believe that their interests had been protected by their corporate fiduciaries but they manipulated the corporate machinery to achieve the majority's end. The defendants again disagree: they say that the majority to minority vote is a complete justification and ratification of the merger and insulates the defendants from the judicial inquiry that was instituted by Singer to scrutinize just such transactions. The Court must decide this question.

There is a fundamental disagreement as to whether or not Signal had the requisite proper business purpose for the merger. Leaving aside the reasons or justifications for the merger that were gradually accumulated and summarized in the Proxy Statement, it seems clear from the testimony of the

President of Signal, Mr. Shumway, that the real purpose of the merger was because it was in Signal's best interest. The plaintiff does not believe that simply advancing the best interests of the majority is in and of itself a proper business purpose. (If it were, then the safeguards of Signal are at an end because it would always be in the best interests of the majority to cash-out the minority. If it were otherwise, the merger would not take place.) In point of fact, in Singer, the merger was in the defendants' best interest: it was held in that case that there was no proper business purpose and hence the merger was illegal. The defendants disagree: they take the position that Signal's own economic benefit is a sufficient business purpose. Here again, a decision by the Court is necessary.

The plaintiff has established that the price of \$21.00 was unilaterally set by Signal, that none of the corporate fiduciaries ever attempted to obtain even as little as a nickel more for the minority. The price was set not based on the value of the UOP shares but on a comparison between the 1978 and 1975 UOP figures, and also was set because Signal determined that the price would be advantageous to it at any price up to \$24.00.

The plaintiff proved, through Mr. Bodenstein and his various forms of financial analysis, that the shares were worth not less than \$26.00 per share. The defendants disagree. They retained Mr. Purcell who, after reciting the facts, made an assertion in his opinion without any analysis or explanation that the $21.00 price was fair. Here again, the Court must make a determination.

Finally, the plaintiff has shown that the task of the Court in connection with the remedy is to put the plaintiffs, insofar as it can, in the position they would have been in but for the illegal merger. Singer and Najjar hold that the relegation of the shareholders to appraisal is not appropriate. The defendants disagree: they seek to get the Court, despite Singer and Najjar, to determine the remedy based on statutory appraisal standards. Here again, a Court decision is required.

The Court should decide the issue of liability against all three of the defendants. The Court should then fashion an appropriate equitable remedy: it seems likely that the only appropriate remedy is to give to the minority stockholders a price that represents the fair worth of their shares when they were cashed out in 1978. The evidence on this point indicates that the value was not less than $26.00 per share. Finally, the Court should pass on the plaintiff's motion for the enlargement of the class. In view of the uncontradicted brief of the plaintiff, the Court should enlarge the class to include all those minority stockholders who held stock in UOP on May 26, 1978.

Respectfully submitted,

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