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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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WILLIAM B. WEINBERGER, Plaintiff, vs. 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

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Courtroom No. 2
Public Building
Wilmington, Delaware
Monday, October 6, 1980
10:03 a.m.

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BEFORE: HON. GROVER C. BROWN, Vice Chancellor.

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HENRY D. SKOGMO - LORRAINE B. MARINO
Official Reporters, Chancery Court
135 Public Bldg., Wilmington, Del. 19801

APPEARANCES: WILLIAM PRICKETT, ESQUIRE, and
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for Plaintiff

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for Defendant UOP, Inc.

ROBERT K. PAYSON, ESQUIRE
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-and-
ALAN H. HALKETT, ESQUIRE,
of the California Bar
Latham & Watkins
for Defendant Signal Companies, Inc.

R. FRANKLIN BALOTTI, ESQUIRE
Richards, Layton & Finger
for Defendant Lehman Brothers Kuhn
Loeb, Inc.

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MR. PRICKETT: Good morning, Your Honor.

THE COURT: Good morning. Off the record.

(Discussion off the record.)

THE COURT: Mr. Prickett.

MR. PRICKETT: Your Honor, the matter that brings us before the Court is the post-trial situation of Weinberger versus UOP. The briefs are all in and the record is before the Court, and it is now the Court's inning, so to speak, and the Court must decide the case.

In coming before Your Honor to make a post-trial argument, it is obvious that neither I nor my opponents can argue all of the points that came up in the trial or, indeed, were raised in the briefs. Otherwise, we would be here for days and days and days. And therefore, I have got to be selective in what I talk to the Court about.

Before talking about the three matters that I want to bring out, there are two ancillary matters that I would like to touch on. First of all, one of the post-trial matters that is before the Court is the plaintiff's motion to enlarge the class. We filed a brief in support of our motion and found that the defendants decided unilaterally not to answer that, saying kind of blandly that they would answer it at some future time. So far as we are concerned, that matter is at issue. The defendants have had since the time of the filing of their own brief and our objection to file whatever they wanted so that they could make their position clear to the Court, but they have not done so. And therefore, I don't propose to take what-ever time I have to argue the matter. I simply stand on our brief and ask the Court to decide that motion, since it is clearly germane to the situation now that we are in the post-trial stage.

Secondly, the second preliminary matter

is the citation of the Kempner case. I apologize for not having cited that at the time of our original brief and our reply brief. Clearly, I would have done it if I had focused on this unreported case. It was only as I got ready to prepare for this argument that I ran across the case and cited it in a letter to the Court. I did so not because it was simply interesting but because I think it has an important bearing on at least two of the issues in this case.

First of all, that case bears on the standard that is applicable to the conduct of all of the defendants in relation to their fiduciary duties, because the Court delineates at least a part of the standard. The Court said, "Furthermore, in addition to the evidence of an agency relationship, there also exists record support for the further contention that movant may have committed a breach of a fiduciary duty in that the persons conducting negotiations on behalf of Sugarland, including movant, allegedly failed to take actions which a reasonably prudent businessman would have taken in order to obtain the best available price for the assets which Sugarland sought to sell."

Then it says, "In this regard, Harris Kempner, father of movant, conceded in a deposition that no effort was made to negotiate with other prospective buyers for the purpose of determining whether or not a more advantageous arrangement than that made with Hines could be made, there being an indication that prior to consummation of the renegotiated agreement with Hines that at least two other offers were received by Sugarland to purchase the properties for amounts substantially in excess of that eventually received from Hines."

Now, this was simply a motion for summary judgment, but it does give some indication and guidance to the Court of what is expected of a corporate fiduciary in a situation where there is an opportunity for negotiation. He has got to take the actions that a reasonably prudent businessman would, and this means negotiating, looking at better offers. That is one reason why I cited Thomas versus Kempner in the letter to the Court.

The second reason is, of course, it is germane to Lehman's position that it should not be a defendant in this case. The case stands for the proposition that one who collaborates with corporate officials is liable just as the corporate officials are. The Court says, "In general, anyone, including corporate officials, who knowingly collaborates in a breach of his obligation is liable to the trust beneficiaries. Furthermore, the law imposes a duty that due care be exercised by anyone who unilaterally assumes to act for another even though gratuitously."

Now, we think that Lehman Brothers is liable along with the other defendants if for no other reason than Mr. Glanville was a director of UOP. But in addition, this case shows that one who collaborates in a breach of fiduciary duty is liable along with the principals, so that we think the case is important for that reason.

Now, having touched on two other matters, let me turn to those items that I would like to point out for the Court in this oral argument. First of all, I think that it would not be inappropriate to touch on the question of the burden of proof.

As a starting point, I think it is too clear for argument that where the majority stockholder effects a cash-out merger of the minority, the defendants in that situation have the burden of proof on two items. One, they have got to establish a proper business purpose; and secondly, they have got to establish the intrinsic fairness of the transaction. And thus, if this case arose without a stockholder vote, it is clear that the defendants would have had the burden of proof on those two items.

But here we have a transaction that is a little bit different. It is the next development in the unfolding attempts in this area to effect a cash-out. And the new wrinkle is to have submitted the proposed transaction, the proposed merger, to a vote of the majority of the minority. And the question in this context is where does the burden of proof lie in a case where there has been a submission of the proposed merger to the majority of the minority.

In Tanzer No. 2 Vice Chancellor Hartnett had a situation in which he said that the Supreme Court had not spoken definitively on the question of where the burden lies where there is a majority of the minority ratification. He did seem to say -- he didn't seem to say. He said it flatly -- that in that case the Supreme Court had held that the defendant had the burden of proof, though he limited the holding by saying that it was the law of the case.

Now, I reread that decision a couple of times, and it would seem to me that Vice Chancellor Hartnett was indicating that he thought the Supreme

Court was imposing the complete burden of proof on the defendants even when there was a ratification by the majority of the minority. But it is hard to tell. And he does limit it to saying that is the law of the case in that particular case. So that I don't think I can represent to the Court anything that is broader than that.

In this case Your Honor indicated in the opinion on the dismissal of the original case first that where there was a ratification by a majority of the minority vote, this placed on the plaintiff the burden of vitiating that ratification by the stockholders. I am not conceding that Your Honor's decision that the burden lies on me in that situation is correct. Nevertheless, it was a ruling of the Court, and it is the law of the case until the Supreme Court changes it; and therefore, we approached the trial in the light of Your Honor's ruling that we had the burden of proof.

Now, just to skip forward, if we meet that burden of showing that the stockholder ratification is vitiated by the acts of the defendant, then it is a nullity, and we are back in the situation that obtains under Singer and its progeny; that is, it is just as if there had been no ratification by a vote of the majority of the minority, and the defendants clearly have the burden of proof of establishing, one, a proper business purpose, and, two, that the merger was intrinsically fair.

Therefore, I guess the first thing that the Court must address itself to, in our view, is whether under the ruling that the Court made we have established that the vote or ratification of the majority of the minority was vitiated by acts of the defendants. Now, in making that determination the Court must first determine what is the standard that measures the defendants' conduct in order to determine whether the vote of the stockholders is a ratification or a nullity.

In this situation it is clear from the original cases dealing with stockholder ratification prior to Singer and, indeed, since Singer that ratification, indeed, does insulate the transaction from attacks, but that is dependent on there being complete disclosure. That is, if the stockholders ratified by a majority of the minority vote a transaction but it is shown that there was not complete disclosure, that facts were withheld or there was overreaching in obtaining the vote, then clearly, even under cases such as Gottlieb, the vote is a nullity, because you have got to have complete disclosure for the vote to be of any effect.

Now, the case, therefore, turns at least initially on the question as to whether the defendants did or did not make complete disclosure to the stockholders in submitting it to a ratification by the majority of the minority. Now, in determining that question the Court must, first of all, determine what is the standard which the defendants have to meet in terms of disclosure. And on this we have guidance in the Lynch case, in which the Supreme Court tells us that what they must do is disclose everything. They are under a burden of not partial, not token, but complete candor. And therefore, as the Court looks at the situation, you have to determine whether or not the defendants have used complete candor.

In Lynch, very significantly, there was a sort of veiled disclosure about the existence of an appraisal by a geologist. The Supreme Court said that there had not been the requisite disclosure. The Court did not pass on the significance of the appraisal or its effect. It said that is not the function of the Court. The Court must require that the stockholders be given all information, and they said hard facts, not soft facts, meaning by that that the defendants in a situation like this must submit all facts to the stockholders and not simply what they select and that the Court is not to indulge in evaluating the significance of the facts. The Court must simply determine whether the facts were submitted to the stockholders. That, we think, is the standard that measures whether or not the defendants have carried out their obligations to the stockholders and whether or not the ratification of the proposed merger is vitiated or not.

Now, having determined the standard, the Court then must look at the record and make a judgment as to whether or not there was, as measured by the standards set by the Supreme Court, candid disclosure of all the facts to the stockholders. And I submit if there is one thing clear in this case, it is that there was not that requisite disclosure. And I can't possibly in the time allotted to us go through all of the facts, but let me touch on some significant ones.

First of all, there were representations affirmatively from the outset of the situation that there had been negotiations on price. It was repeatedly represented to the minority in the form of press releases, twice or three or four times repeated in a letter to the stockholders, in the notice and the proxy statement in various ways that there had been negotiations on price. The plain fact of the matter is, there were not. Factually, there weren't any such negotiations.

As a result of the discovery in this case and, indeed, at the trial it came out that the representation that there had been negotiations that led to the price was, in fact, just plain wrong. There were no negotiations.

The defendants spent a lot of time quibbling in their brief about the meaning of the word "negotiate" and about whether a couple of phone calls between the chairman of the board of Signal and Signal's appointed head of UOP were negotiations or discussions. But it seems to me that when you measure that conduct by the standards set by our courts of complete candor, not quibbling, that there was a total failure to inform the stockholders that, in fact, the price was not set by negotiation. On the contrary, it was set by Signal and agreed to, and nobody negotiated.

Now, the case is stronger than that, however. In a mid-trial speaking motion there was an admission by counsel for the defendants that there had, in fact, not been negotiations. They said there couldn't be. Why? Because there was a conflict of interest . Signal was wearing two hats. UOP was wearing two hats. And therefore, there were no negotiations. There couldn't be. And that is the two-hat pure-heart theory. What we did was not negotiate. We represented. We simply took the middle course and found what we thought in our own hearts was the right price.

Now, to represent to the stockholders that you had negotiated when, in fact, what you had done was not negotiate, because you couldn't negotiate because of the conflicts of interest, it seems to me falls dramatically short of that complete candor that Lynch speaks of. But that is only one.

Well, let me emphasize that this is not, as the defendants now try to suggest, a quibble or semantics or anything else. It is very important to the guy who is being sold out to know whether, in fact, there has been arm's length bargaining or whether, in fact, there has been an amiable discussion that cannot be a negotiation because the guys who were having the discussion stand on both sides of the transaction. It is critical.

Now, in a tender offer situation it does not make any difference how the price is arrived at. Mr. Shumway could make it up in his bathtub, while he is shaving or anything else, because he is making an offer, and the stockholders are free to accept or decline. And the offer may be fair, unfair, generous, not generous. It does not make any difference. But in a cash-out merger, where everybody is bound, it is critical to know whether or not the best price has been arrived at for your shares, because you are going to be bound. And therefore, it is critical to know whether your fiduciaries have done their corporate duty, as they represent, in negotiating for you or whether they have, as they say, not been able to do that because of a conflict of interest that exists on both sides of the transaction.

Now, that is the first situation that, measured by the Lynch standard, does not come up to snuff in terms of complete disclosure.

Secondly, and perhaps equally important, is the representation to the stockholders that the proposed merger, its terms and particularly its price had been passed upon by an independent banker. Lehman Brothers was retained and paid for an opinion. The opinion was initially directed to the board of directors of UOP, but they knew and Signal knew and UOP knew that the real purpose of that opinion was to sell the stockholders that somebody independent of Signal and, indeed, UOP had taken a long, hard look at the situation and determined that the price that Signal had set was, in fact, fair. But this wasn't only a representation that Lehman Brothers had done this. It was a representation that Mr. Glanville, a person knowledgeable in the affairs of UOP because of his long service on the board of UOP, had taken a look at the situation and made a study and, based not only on the status of UOP but its future, opined to the stockholders that the price was fair.

Now, the facts in this record completely negate that either Lehman Brothers or Glanville made any such study. Mr. Glanville was off skiing in Vermont between Friday and Monday, when the opinion was given. He never looked at the study that his juniors made back in New York. And he said quite candidly on his deposition that the basis for his opinion was simply because, in his view -- incorrectly, as it turns out -- $21 represented a 50-percent premium over 14.50, the market price, and that, in his view, that was a fair price, though it turns out that in comparable situations, when measured and analyzed not just off the wall or off the top of your head or as you do a Stem Christie, actually, the market was paying between 70 and 80 percent in terms of premium in comparable situations; that is, mergers with a hundred million dollars made in the applicable period. And the way to determine that is not off the top of your head, as you are negotiating for your own fee, but to sit down and do the hard work and measure what is the premium that is being paid in comparable situations.

Now, so far as Lehman Brothers is concerned, they made up a team, not consisting of Mr. Glanville, because he was not around -- after he negotiated his own fee he had nothing more to do with the backup work. He did not even look at it. On an early-morning plane he may have thumbed through it or glanced at it, but he didn't need that, because he had already made up his mind. He made up his mind without even hearing the price.

Now, what does the backup work consist of? Well, it consists of what is called a due-diligence visit. That is a one-day visit to Chicago by three juniors who never had anything to do with UOP. And due diligence in itself suggests to me a sort of perfunctory visit. You have got to do it to show you have been duly diligent. And what they did was go out and talk to a couple of people for a day and then fly back. And then Mr. Schwarzman went to Florida, and two juniors, Mr. Pearson and Mr. Seegal, sat down to do the report, and Mr. Seegal left it to Mr. Pearson, one year out of business school, to finish it up on Sunday. Well, okay. But what does it consist of? A real analysis of the worth of the shares? No. It consists of pushing together prior statistical work that existed in the Lehman library, including an item that I will come to, and a comparison between the prices of UOP stock and certain financial figures in 1975 contrasted with 1978. There is no attempt to evaluate the worth of the shares. There is just a measurement and a determination that there is a certain coincidence between certain 1975 figures and certain 1978 figures.

Now, let me suggest to you that the minority was entitled to a lot more than that. There was $150,000 paid for this opinion, and they were entitled to a lot more than just a one-page comparison between 1975 and 1978.

The 1975 transactions were a tender and a direct purchase from a group of stockholders who had nothing to do with those who owned in 1978. And in 1978 they were entitled not to what the guys had gotten in 1975 or what was offered. They were entitled to the value of their shares.

In addition, let me suggest that the significant thing was that UOP had changed. It had turned around, and in every single feature of its financial reporting there was a steep upward incline from the nadir of 1976, except in gross revenues, and that had been because they had shifted away from the construction that was a low-profit item. That is what they were entitled to have the bankers look at and make a comparison of and a determination, and not a comparison between '75 and '78. So that in that connection and in line with Judge Stapleton's observations in the Dennison case, it is clear that Lehman Brothers was hired, retained and paid in order to convince the stockholders, the minority stockholders, that an independent, prestigious, New York banking house had really considered the matter and could opine that the price was fair, based on a study, based on a review by Mr. Glanville about not only the situation as it obtained but, as was specifically said, the future prospects of UOP. And that was not done.

But it is worse than that. In 1976 Mr. Glanville had ordered a study made of the advisability from Signal's point of view of doing exactly what was done in 1978; that is, cashing out the stockholders. And he concluded that at any price up to $21 in 1976 it would have been to Signal's advantage to do this.

Now, we think that under the terms of the Lynch case, complete candor, there was an obligation to disclose the hard fact, and that is that this independent banker and a director of UOP had commissioned a study by Lehman Brothers and the results of that study. Now, it may be, as the Court indicates in Lynch, that the stockholders would determine that that was of no significance. But what Lynch tells us is that it is not up to the defendants and it is not up to the Court to determine the significance. The stockholders are entitled to the hard facts, and from there they are entitled to make the evaluation. And to suggest that it would not be significant to a stockholder to know that the very banker who is advising you that $21 is fair in 1978 had two years before come to the conclusion, when your company's fortunes are at its nadir, that $21 is fair and advantageous to your opponent I think is to fly in the face of reality. Clearly, any stockholder would want to know that.

Now, let me point out that Glanville does not remember that he ordered it, but Schwarzman knew about it. He saw it and he looked the other way, and he didn't bring it to Glanville's attention and he didn't bring it to anybody else's attention. Why? Because he knew that that was a no-no; that is, that the stockholders were entitled to that. And therefore, he took the attitude that he wasn't going to look at it. But that is not the standard.

He has the duty as a vice-president of Lehman Brothers of affirmative, complete candor to the stockholders and the hard facts. And therefore, we don't think it is any defense for Mr. Glanville to say he does not remember or Mr. Schwarzman to say look the other way. The stockholders are entitled to the hard facts.

Now, let me turn to another aspect. There was a repeated representation to the minority that management recommended this proposed merger to the minority stockholders. Now, management is clearly not the board of directors. It is a different group. They overlap, but it is a different group. Management are the people paid by the stockholders to run the company. They represent all the stockholders. And the stockholders are entitled to complete fidelity from their paid servants, and they are entitled to rely on the fact that when there is a dispute or a situation that puts one set of stockholders at odds with another -- that is, a majority stockholder seeking to acquire the shares of the minority -- that the management will be neutral; that is, it will not favor one stockholder over the other. And therefore, the minority stockholder should be able to have some confidence in the neutrality of the management, its independence.

It is important to the minority stockholder because the management knows more about the company than anybody else. They are the hands-on people. And when it is represented that management has studied the proposal and has found it is fair and recommends it to the minority, the minority is entitled to believe that management has really looked at this.

Is there anything in this record to suggest that the management of UOP took a look at this? The only thing that is suggested in the record is that Crawford, a man nominated and placed at the head of UOP by Signal, had looked at it, and he ran the whole thing, and there is no evidence at all that anybody else in UOP management even got a sniff at the situation. So that we think that it is wrong to represent to the minority that management, this supposedly neutral group of experts, the guys who really know the company, has looked and has found the transaction fair. There is no evidence that management did any studies of the value of UOP's minority shareholders and came up with an opinion and based on that they could recommend in the proxy statement to the stockholders that the merger was fair.

Now, those are but a few of the more important situations where the obligation of complete candor by the defendants to the minority was violated. There are others. And there is the fact that, viewed as a whole, or, to use the defendant's phrase, the total mix, this case represents a situation where Signal, the dominant controlling stockholder, has used its present power and its ability to control the situation in the future to motivate the whole situation to obtain this vote. And therefore, based on that, it seems to me that the Court has got to conclude that the ratification or the alleged ratification by the majority of the minority is vitiated because for a number of reasons there was not that complete disclosure that is the only basis for holding that a ratification by the majority of the minority has been effective to insulate the transaction from the judicial scrutiny that would otherwise obtain.

I turn, then, to the question as to whether Signal had a proper business purpose. Now, here it seems to me that we are clearly in an area, regardless of whether the Court adheres to its prior ruling that we had the burden of proof on the majority-of-the-minority situation, where Signal, the defendants, clearly had the burden of proof. And the Court then has to examine what is the evidence on this point. We submit not only has Signal not carried its burden of proof but the proof is entirely the other way.

It is clear from the record and, indeed, it is admitted that Signal carried out this merger because taking over the minority stock position was at that time clearly to Signal's economic advantage. What was the factual situation? There is no controversy about it. Signal had amassed a great deal of cash. It needed to invest that cash. It looked about for an acquisition situation. It came up with two. It turned out after negotiations or perhaps discussions that it could not effect either one of those two proposed acquisitions. It still had the large amount of cash. It then turned to UOP.

What was the situation of UOP? After the 1975-76 Come-By-Chance disaster UOP had turned around. It had reduced its long-term debt. It had reduced its short-term debt. Its earnings were up, its dividends were up, and the five-year forecast submitted by Crawford to Arledge was, indeed, promising. "Promising" is a conservative word. But before Signal decided what it would do, it had studies made. And the studies, based in part on confidential information that Signal had access to because it was the controlling stockholder, confirmed to Signal management that at any price which Signal itself figured up to $24 the merger would be profitable to Signal. Thus, as Mr. Walkup said in a phrase that I will come back to, it was the only game in town.

The question that the Court faces is whether Signal's purpose in taking over UOP's minority stock position because it would economically be advantageous to Signal states a proper business purpose. Surprisingly, the brief concedes -- I think perhaps they were forced to -- that Signal's real purpose in doing this was because it was to Signal's economic advantage to take over the minority position. It was not only the only game in town; it was the best game, and especially if you could get it at $21.

Now, the defendants say in their brief that it is a proper business purpose to advance the economic interest of the dominant stockholder. And we take the contrary position. We say that Singer stands for the proposition that if your only reason is to advance the economic fortunes of the majority by cashing out the minority, you haven't stated a proper business purpose. All you have said is, it is good for me and bad for you. We suggest that Singer itself stands for the proposition that you must have some proper business purpose aside from the economic advantage, because if all you had to state was that it is to your advantage, then you would have a proper business purpose in every case, because you wouldn't do it unless you thought it was to your advantage.

Now, Signal had stated quite candidly in their brief, as, indeed, their executives stated on deposition and at trial, that the reason they did it was because they needed an investment vehicle for this large amount of cash and it was their best investment possibility. The Court as the trier of fact can do as Vice Chancellor Marvel did, and that is look at this and find that is really the reason they did it.

But in their papers, not only their briefs in this court but in the proxy statement and elsewhere, they recognized apparently that Singer would preclude them if their only reason was simply their own economic advantage. So they have trotted a number of other reasons that they tender as ostensible justification and as a proper business purpose. Let me suggest to you, however, that on the stand Mr. Walkup, chairman of the board, really cut their ground out from under them. He admitted that all of the alternative reasons that were advanced were in existence at the time they took over the controlling position in UOP; that is, there was the potentiality, not the actuality, but the potentiality for conflict. There was the possibility that they could not take advantage of a technical interchange of information, a shuffling of money between the divisions of Signal, and possibly some deals because of the presence of a minority shareholder interest. These were all reasons that were there when they elected to take only 50.5 percent of the stock of UOP.

And I would suggest that it cannot be

that you can create in a kind of bootstrap fashion your own proper business purpose by buying into a situation that has implicit in it reasons that might give rise to a proper business purpose. If they had arisen after the time you had gotten into that deal -- but you cannot by self-help make your own proper business purpose.

The only one that may be said not to have been in existence -- and it is difficult to tell from what Mr. Walkup says -- is the ostensible reason that government policy may change and inhibit in the future the cash-out merger of minorities. I suggest to you, Your Honor, that that cannot be a proper business purpose; that is, the circumvention in the future of governmental policy that suggests that a cash-out merger by the majority of the minority is not a good idea.

Therefore, when you examine the alternative reasons, you find in the first place they are afterthoughts. They are, as Chancellor Marvel said, somewhat contrived. But worse than that, they were in existence when these people took on the position; and therefore, they are not really proper business purposes in the sense that they are a necessity to the continued prosperity of the dominant stockholder's business. It is such that they were in existence when they took that position.

So Signal, having the burden of establishing a proper business purpose in this case, has not carried that burden. On the contrary, the record establishes that they had no proper business purpose except, as they say, it was the only game in town and it represented an economic possibility, the only economic possibility for a meaningful investment of Signal's funds along the lines that they wanted to do. They could invest in dozens of other things, but in terms of the acquisition market, it was the only thing they could do. So they looked at the minority and pushed them out, because it was the best deal for Signal. And we say that is not a proper business purpose.

I turn, then, to the second aspect of the case on which the defendants had the burden of proof. They clearly had the burden of proving the intrinsic fairness of the merger, its terms and its price.

Now, let me go back. At the time of the date of the merger neither Signal nor UOP nor Lehman Brothers had made any determination of the worth of

UOP's minority shares. I will not prolong the argument by rehearsing what is so clearly in the record, but let me just state that Signal never considered the worth of the minority shares. They had studies made, but the effect of the studies was, at what price will this cash-out merger be profitable to us. They never said what is the value of the UOP shares. Signal determined that the merger would be profitable, the acquisition of 100-percent ownership of UOP would be profitable for the foreseeable future from Signal's point of view at any price up to $24.

Signal's management determined that a price range of $21, 20 to 21 would be the price that it would pay for this minority interest. They really didn't say that. They authorized the executive committee to negotiate from that price range. But what was the basis on which the management set a price range of 20 to 21? As I have said, it was based, one, on their studies of at what price it would be profitable to Signal. And secondly, so far as the minority shares were concerned, they justified the price by saying, one, it was the same price that we paid in the transactions of 1975, apparently not focusing on the fact that the price in 1975 has no bearing on '78's price. In the first place, the transactions in '75 were a tender offer. The stockholders were free to accept or not accept; and secondly, a direct purchase by arm's length negotiation directly with the UOP people. What bearing does that have on the worth of the shares in '78?

Secondly, they justify it by doing a comparison between certain figures in 1974 and certain figures in 1978, and they say, "Look. They are just about the same; and therefore, that gives us the justification for paying the same price for UOP shares in '78 as we did in '74." But that is wide of the mark. The question is, what is the worth of the shares. And that question was never addressed by Signal's management as they set this price, which, incidentally, was never changed.

In connection with that, Mr. Shumway said, well, we set the price. There was also a 40-percent premium, and we had the feeling that that was right. They never determined what the acquisition market was, in fact, paying in terms of premiums in that time in $100,000,000 mergers. So they never determined really what one in comparable situations would pay. They just had the gut feeling that this was fair.

Now, if they were negotiating and they were making a tender offer, no problem. That is fine, because they make an offer and the stockholders take it or leave it, and whether the price is fair or generous or anything else doesn't make any difference. There is a price and the stockholders can take it or leave it. But here, where there is a cash-out merger, there is an obligation to determine what is the worth or go through negotiations.

Now, let me say that neither the UOP board nor the UOP management ever went through any sort of analysis to determine what the worth of the minority shares were. They simply did the same sort of thing. They said, well, the figures are about the same as '74, and we paid that; and therefore, the price has got to be 21. It begs the question. The question is, what are the shares worth, not what we paid in '74, '75, and not what are some of the comparable figures. The question is, what are the shares worth. And that neither the UOP management nor the UOP board went through.

Now, I am not going to go through what Lehman Brothers and Mr. Glanville did. The record is clear, and I have already delineated it. But clearly, they didn't make any such determination.

Now, there was a question that was never answered at trial and was never even addressed in the briefs, and that is, if Lehman, based on its research and a draft of an opinion in 1976, could conclude that it was in Signal's best interest to cash-out the minority at anything up to $21, how do you square that with a determination in 1978, when there have been two stellar years for UOP since the disaster was over, that the price of 21 was fair to the stockholders. And they never answered it. So Lehman at the time never made any studies of the worth of the minority shares. And worse than that, they never squared with the stockholders, because they didn't even reveal it, or with this Court, how you can square an opinion in 1976 that anything up to 21 was in Signal's best interest with an opinion two years later essentially directed to the stockholders that 21 was fair to them.

Let me make one other point. I would suppose that you could make a financial analysis of the worth of the shares and then say to your stockholders, we have made a financial analysis of the worth of the shares and we have concluded that it is worth so many dollars, and we have had a study made and comparative analysis made by a financial analyst or an investment banker, and we have determined that this is, as best we can, the fair worth of the shares. That is one way of doing it. But there is a far better way, and it is a way that really reflects what the value is, and that is to negotiate. That is, forget all the figures. Each side comes to the bargaining table armed with whatever information it has. It has its strengths and its weaknesses, and it hammers out a bargain, and it is the best possible bargain that the defendant Signal can make. And conversely, it is the best possible bargain that the common stockholders can make. And if they don't get together, there is no deal struck. But if they do and there has been honest, hard-fought bargaining, then you can say the price is fair, because both sides have exerted their best efforts to obtain the best price, and they have met on common ground.

Now, let me say that there was no negotiation here, though it was represented that there had been. So that we neither had financial analysis at the time nor did we have negotiation. What we had was a price set by Signal and agreed to by UOP. Thus, the defendants came to this trial with a very, very heavy burden. They had the burden of showing intrinsic fairness, and that included convincing the Court that, in fact, though there had been no analysis at the time and no negotiation, the price of $21 was for some reason fair.

Now, the Court then has to determine whether the defendants carried their burden. What did they do to carry their burden? They didn't bring Mr. Glanville. They didn't bring Lehman Brothers. These are the people who were supposed to have assured the minority stockholders that the price was fair. But those guys were not called, and none of them showed up in the courtroom. I will not pause here on the inferences that should be drawn from that. Instead, the defendants collectively went out and hired a new investment banker, Mr. Purcell of Dillon Read, and his task was to provide in 1980 the justification for the 1978 $21 price. And therefore, the defendants elected to place their responsibility for the burden of proving intrinsic fairness on Mr. Purcell.

Now, let me pause before we go into Mr. Purcell's testimony. Mr. Crawford and Mr. Walkup were witnesses in this courtroom, and what they said here was that the price was fair not because of negotiation but because, since each was wearing two hats, they could not negotiate; and therefore, they steered a middle course and arrived at a price that was fair to both sides. Now, the fallacies in that are perhaps too numerous to catalogue in this argument. But let me point out that aside from the nondisclosure of this novel theory of how you carry out fiduciary responsibilities, the minority is entitled to more than the opinion of the executives of UOP and Signal that the price is fair, because that is really all they are saying. They are saying, in our opinion, the price was fair to both. But that is not what the minority is entitled to. They are entitled to a fair price, not the price that in the opinion of the dominant stockholder is fair.

So that as the defendants approached this trial, they could not and did not rely on Mr. Crawford and Mr. Walkup or Signal to justify the intrinsic fairness. They laid that burden on Mr. Purcell. The Court, of course, will review Mr. Purcell's elaborate report and his testimony both on direct and cross and will evaluate his testimony. But I suggest to the Court that I think you will remain as mystified as I am when you look at all that to find out how Mr. Purcell really finds that $21 is a fair price. He prepared an elaborate report stuffed with figures and backed up by elaborate-looking exhibits. But when you boil it all down, there is no analysis at all.

First of all, he finds the market price, and that takes three or four pages of his report. What is all the deal about? The market price is what the market reflected, and you don't have to go through an elaborate recitation of prices to come up with the market price. It is there. And then he goes through an equally elaborate labyrinth to come up with the investment value, and that comes out to about the same figure, something in the area of $15. And then he says, "Well, I disregarded the net asset value." Why? Well, because it wasn't going to be liquidated; and therefore, traditionally, you don't give much weight to that.

The significant thing is that he did not give any weight at all to the net assets in the sense of really determining whether they were undervalued assets. And why does he do that? Well, he did a due-diligence visit and he talked to Mr. Crawford, and what did Crawford say to him. Crawford said, "There are no undervalued assets on my balance sheet." What did Mr. Purcell really expect Mr. Crawford to say; "Yes, I have got a lot of undervalued assets and we never valued them and you ought to look at those or you ought to have an appraisal made"? Who is kidding whom? Mr. Crawford is the chief executive officer of one of the defendants in this case. He has put his name and career on the line that what he did was fair. Is he going to turn around and tell Mr. Purcell, "Yes, there were undervalued assets"?

Purcell, looking at the situation and saying that he perhaps has no expertise in timberland situations, doesn't even turn to his own timberland experts in the house of Dillon Read to find out whether it is realistic to carry on a balance sheet 220,000 acres of timberland at $38 an acre. He doesn't even do that. He just relies on Mr. Crawford, who tells him, no, there is nothing undervalued.

Now, the next thing that Mr. Purcell did was, he took into account the structure of the transaction. And I am mystified to this day as to what effect that has. But what he seems to say is, well, because the stockholders voted in favor of the transaction, the transaction is, therefore, fair. And it seems to me that that is clearly wrong.

In the first place, what he is asked to do is not to determine whether it won in a popularity contest but what the value was. And the fact that the stockholders did or did not accept it is not germane to his evaluation. In fact, as we have shown, the stockholders did, in fact, vote for it, but they were not given the complete facts. And therefore, to base his evaluation on a vote of the stockholders is not only beside the point but shows that he doesn't really understand what is going on, and that is that the vote is only significant if there is complete disclosure.

But as I indicated, Mr. Purcell did more than just be the evaluation expert. He purported to stand up there and testify on the ultimate question; that is, that there were no misrepresentations. So he was a little bit bound by his own situation and undertaking.

Now, the next thing that he did was to compute the percentage of premium. But you will remember that Mr. Purcell did not do that. I guess that was a job for underlings in his firm, because a Mr. Daum and a Mr. Reid did that calculation and prepared Exhibit 6 and 7 of the Dillon Read report. And what they did was to take hundred-million-dollar transactions within a roughly comparable period and determine the percentage of premium paid in that. But in doing so they mechanically took as the starting point the day before the announcement of the merger. The result of that was that they never screened out whatever run-up there had been in volume and price by news or rumors or leaks concerning the impending mergers.

Now, that doesn't always happen. In the UOP-Signal transaction that we are concerned with there were no rumors and no leaks, and you see that by the fact that the market price doesn't go up and the volume doesn't increase in the weeks prior to the time of the announcement of February 28. But in many cases it does happen. And therefore, if you really want to measure the difference between the unaffected market and the merger price to get a percentage, you have got to look back, you have got to do a little bit of analysis and determine what is the unaffected market price.

Now, it mystifies me why, Mr. Purcell knowing, because he testified after Mr. Bodenstein, that Mr. Bodenstein had analyzed each and every one of the transactions that Mr. Daum and Mr. Reid had included and had shown by analysis in Exhibit 6 exactly which ones were correct in the sense that you didn't need to screen anything out and which ones weren't, there was no answer on that. He didn't bring Mr. Daum and Mr. Reid, and Mr. Purcell made no real explanation, except we always do it this way.

Well, if you are trying to determine the percentage of premium, you really want to know what is the unaffected market price and what is the premium as of the time of the merger. And he wasn't interested in that. He wanted a percentage that came out 30 to 40 that would tie in with this merger. And there was no answer on that at all.

Now, I have paused a little bit on this. Why? Because it is very important. Mr. Purcell says the market price was 14.50. Okay. Fine. We all know that. The investment price is the same thing. He disregards the net asset value and the structure. That doesn't have anything to do with it. So that his determination that the price of 21 is fair depends clearly and entirely on Mr. Daum and Mr. Reid's percentage of premium. And there is just no answer to the fact that when you analyze it -- I mean analyze it -- the percentage in comparable situations is 70 to 80 percent and not 30 to 40 percent, as Mr. Purcell said.

So in spite of this, Mr. Purcell in his report suddenly right out of the blue says, "Based on all the foregoing, I conclude the price of 21 is fair." He doesn't tell us why or he doesn't tell us how in the report. He gives you a lot of facts, some of which are wrong, most of which appear in the record are not contested, and suddenly he says the price is right.

So I thought, well, at trial he is really going to show us his gifts and give us the benefit of some real analysis, and we are going to be hard put when Mr. Purcell gets on the stand, because he is going to make us country cousins look sick. Nothing like that happened. He went through the same exercise. He told us what the market value was. He told us what the investment value was. He ran through his report. And then suddenly he says, "Based on all of that, I think the price is fair," and that is all he says.

So that if the case stopped there, I would suggest that the Court would be forced to conclude that the defendant, coming into the case with the burden of proving intrinsic fairness, had failed. Neither Signal nor UOP nor the absent Lehman Brothers nor, indeed, Mr. Purcell introduced that quantum of testimony even ex post facto that would justify a finding that the price of $21 was fair.

But the case didn't end there. We came armed with the testimony of a qualified expert, who had, in fact, done his homework and not only did it but told the Court and the defendants how it was done. What was done by Mr. Bodenstein for the first time in this entire sorry transaction was an analysis of the worth of the minority shares. Until he did it nobody else faced the question and made any determination.

Now, Mr. Bodenstein didn't just review the facts and say, "Based on my experience and my prestige and my firm's prestige, in my opinion -- and take it for what I say -- the worth of the shares is so-and-so." What he did was, I think, what the Court should expect in a case like this. He did a number of analyses, and he took the time and trouble to explain them all to the Court and to the defendants. There is no rabbit out of the hat at all. There is no "It is my gut reaction based on all the foregoing," and all of that. He tells you exactly why and how he comes to the conclusion. He also tells you that no matter who came to it, be it Signal, be it a third party, be it the minority, that the analysis has got to be the same if you are evaluating the worth of the minority. So it doesn't matter where you come from. This is the analysis that he would make.

Now, in addition to that, Mr. Bodenstein took out any possibility of a radical or wild opinion, speculations or predictions. He was, first of all, conservative. For example, he postulated no growth to UOP, though, in fact, the record showed since the time of the recovery from the Come-By-Chance disaster consistent growth for UOP. And it is clear that the five-year forecast made not by Mr. Bodenstein but by Mr. Crawford for UOP and submitted to Signal postulated growth. But in making his analysis, he postulated no growth.

He took a conservative discount figure and he combined, for example, a conservative analysis of the excess liquidity with a very conservative estimate of the true value of the forestlands. He took two conservative numbers, put them together and then discounted them further by taking a further conservative number. So that what he did was to analyze the situation to make a determination of the value of the minority shares in '78.

He, incidentally, clearly indicated that the best way of determining value for the shares would have been an arm's length negotiation. But since that was precluded by the activities of the defendant, he did what had to be done, and that is analyze the situation and make a number of determinations to determine the value of the minority shares.

The Court will remember that his numbers did not come out exactly alike. Unlike Mr. Purcell, who comes out right on 21, his analysis produced an area. Some figures are higher. I think there is one that was lower. But based on that, not on an individual one, Mr. Bodenstein could say that the value of those shares was not less than $26 per share.

Now, the defendants had the burden of proof on the question of intrinsic fairness, and they did not carry that burden. Instead, having failed to carry their burden, they mounted a furious attack in their brief on Mr. Bodenstein. In three or four days of cross-examination they never laid a glove on him, really. So in their briefs, recognizing they are going to lose this case unless they can discredit Mr. Bodenstein, they mount an attack on him and seek to suggest to the Court a method of calculating the damages that will justify the $21 that was set without any reference to the worth of the minority shares.

First of all, they overlook the comparative analysis. Right at the outset of his testimony Mr. Bodenstein delineated a careful comparative analysis, backed up by the tables appearing in his report, that indicated that on that basis alone the shares of UOP were worth not less than $26, and they just overlooked it. They try to get the Court to believe if it didn't read the record that no such analysis was made. They prefer to concentrate on Mr. Bodenstein's analysis by the discounted cash-flow method.

First of all, they try to eliminate that by making what amounts to a post-trial motion to strike his testimony, though no timely motion was made at that time. Secondly, they have dredged up an unreported opinion in the Frick case, and they say that because in the Frick case the Court disallowed testimony that used the discounted cash-flow method, that there is a general prohibition against anything that is denominated discounted cash-flow method.

I suggest to the Court that, first of all, the Frick case is an appraisal case and, as I will come to in a second, that is a different sort of an animal. Secondly, when you examine the Frick case, you find that the Court did not really say that the discounted cash-flow method is forever barred like a leper from this courtroom. What it did say was that in that situation the expert had made projections by extrapolations and projected way in the future and then discounted it back to present worth, and that was clearly unacceptable in terms of the history in appraisal cases of values based on projections. That is not what happened in this case at all.

Mr. Bodenstein's situation is not an extrapolation of his own and then a projection. First of all, he did one retrospectively, not a projection at all. Secondly, he did one on what amounts to one-half of what is already in the record and not his extrapolation or his projections: management's projections. And thirdly, he did a discounted cash-flow analysis based not on his projections, not on his extrapolations, not on his speculation, but on what Crawford, a defendant in this case, furnished to Arledge as management's projection and what Signal itself used in coming to the determination that it was going to take over the minority position.

Therefore, this is a different animal from the Frick case, and it is not subject to the infirmities that led the Court in that particular case to say it would not allow that sort of analysis as the basis for a recovery.

Now, secondly, the defendants try to drag this case around the corner and make it into an appraisal case. Singer and Najjar made it clear that a defendant caught in a cash-out merger cannot relegate the plaintiffs to an appraisal, perfectly clear, and that is what they are attempting to do.

THE COURT: May I stop you there.

MR. PRICKETT: Sure.

THE COURT: Before I forget. The case law indicates the standards that are to be applied in appraisal actions for determining the value of shares on the date of a merger. Are you interpreting the Supreme Court's various insinuations that appraisal is not the only remedy as meaning that if you are seeking a valuation of the shares in this type of action, that you must use some different approach for determining the value?

MR. PRICKETT: Yes.

THE COURT: Because it seems to me that the corollary of it would be, you would be right back to having an appraisal action in a different form, would you not?

MR. PRICKETT: That's right.

THE COURT: In a different fashion. I mean, if you took this case and applied the general considerations that go into an appraisal action, we would be getting an appraisal of the stock, would we not?

MR. PRICKETT: That is exactly what we would be getting, and why have we wasted all the time in proving liability. I mean, we are entitled to that from the outset. If the Court is going to say, well, we have gone round the barn and we have found liability and now we are going to appraise your shares, it seems to me that the Supreme Court would say in any case where there is an unfair cash-out merger, the remedy is appraisal. And so what is all the fuss about? If you don't like the price when you have been cashed out, you are back at merger, and Singer is just a nullity.

THE COURT: Is there not one possible difference, though, to the extent that liability enters into it? What you are then doing is, in effect, valuing the stock for all the shareholders, not just those who qualified or sought an appraisal.

MR. PRICKETT: Well, I think that is correct. That is, in an appraisal situation only those who realize that they had been diddled and take the affirmative steps to get appraisal, and if they go through that monstrous remedy, those are the only people who recover; whereas, in fairness, in a cash-out merger, where you make a showing of liability, you then have a recovery on behalf of the entire class who has been defrauded. So that the remedy is broader. And for the individual shareholder, if the quantum of relief is the same, why should he bother about his neighbor? He just goes in and says the price is not fair, and all he has got to do is prove the price is unfair, and then he recovers a fair price.

But I suggest that I think Singer and Najjar, while they don't spell it out clearly, suggest that the remedy, quite apart from the fact that the class is broader, is a different remedy.

THE COURT: So you have to figure it a different way or compute it a different way.

MR. PRICKETT: That's right.

THE COURT: Is that the approach you are using here?

MR. PRICKETT: Yes, I think so.

Let me pause a little bit on what the defendants did. The defendants would like to have this treated as an appraisal case, just as if it was a statutory appraisal, as if Mr. Weinberger had asked for appraisal on the 6th of July and we were now at the point of appraisal. Then they go through the mumbo-jumbo of the appraisal remedy, the balancing of this and that. And by assuming various figures they can get it to come out the way they want; that is, they, for example, postulate a 14-percent discount figure. And there is no testimony that gives any basis for that. But by means of these examples they can show the Court and you can show any price you want from $5 to $100 by just balancing the pieces, and then you come out and you have your appraisal figure.

Now, let me say that even if you accept that premise, they just didn't do enough with Mr. Purcell to establish the basis for that. As we pointed out in the brief, they just don't have enough even for a decent appraisal case.

Now, I was going to touch on Tanzer 2 and Lynch, and maybe it is time to do it. I think, Your Honor, in approaching this situation -- and this is perhaps the most ticklish problem that the Court faces; that is, what is the remedy. I think Tanzer and Lynch do not provide much by way of help.

In Tanzer there was no contest; that is, there was no testimony put in by the plaintiffs, so there was no contest on what the defendants' experts said. So the Court simply accepted that as the value.

And in the same way Lynch turns on its particular fact, and there is no guidance, and there is no attempt by either one of those two courts to face the problem as to what the scope of the remedy is in a fairness case where the matter has been litigated and there is evidence by the plaintiff on the true value.

So in a sense the Court is going to be facing a situation where it has got to determine what is the proper remedy in a fairness case where the plaintiff has put in evidence that shows a price contrary to the cash-out merger price. And I think that in approaching this you have to take a look at what would have happened in different factual situations.

Supposing this action had been brought prior to the time of the merger and we had presented the Court with the record that is now before it. The remedy that the Court would have enforced there, assuming you agreed with us, would be to enjoin the merger. You would find that there had not been disclosure in terms of the proposed election and that, therefore, the election would be enjoined until there had been a proper disclosure. And what would you be doing there? You would be preventing the stockholders from being cashed out. You would be keeping them in the same place they were in but for the action of the defendants.

Now, if the Court had not had an opportunity to enjoin the vote but the action had been filed immediately thereafter and the record were before the Court a couple of days afterwards, clearly what the Court would do then would be to order a new vote after disclosure of all the relevant information. What is the Court doing then? It is putting the stockholders back in the position they would have been but for the derelictions of the defendants.

Now, that is quite different from the appraisal action. You can't enjoin an action where there is going to be an appraisal. They go through with it and then there is a determination of the price. It is kind of a condemnation. But here clearly the Court can enjoin, can order a new election, and I suppose that but for the rights of third parties the remedy of choice would be rescission; that is, put the stockholders back before they were wrongfully deprived of their shares, and then they are back in the same position and the defendants are back in the same position. So that is clearly what the remedy is. You either prevent it or you put it back. And in this case the remedy of choice by the Court would be to undo the harm and put everybody back in Square 1.

I don't think it takes much imagination to show that in this case, two years having intervened, two and a half years having intervened, it literally is impossible to put the stockholders back. Rights of third parties have intervened and everything else. But that has still got to be the objective; that is, to put the stockholders in the position they would have been but for the wrongful acts of the defendants. Now, that is different from appraisal.

In appraisal you simply say on this date what was the value. You don't look at anything else. And you have all of the case law interpretations on limitations of rights. But that is not what you are doing here. You are doing something entirely different. You are trying to put the stockholders back in the position they would have been in but for this action. And therefore, what you want to do is to fashion a remedy under your equitable powers that tries to achieve that without cutting into the rights of third parties.

Now, one way of doing it would be, of course, to order Signal to pay the difference between the value they paid and the value of the stock in their own stock. That puts the stockholders in the position of having an equity participation in the entity that gobbled them up without tax consequences. That may not work. Signal may not have the stock. And in addition, you give the former stockholders of UOP something they may not want at this point. You may give them a share in Signal which they don't want. And therefore, the Court may well say, well, we will give them an option; that is, an option of having an equity participation based on the difference in value or cash. If they prefer cash, they are entitled to that, but it is not up to the defendant to complain, because they put us all in this situation, including the defendants.

But, Your Honor, there are manifest problems about a remedy such as that. It is probably the equitable thing to do; that is, to give them the option of having an equity participation or cash. But that may be complicated. And therefore, the simplest thing to do is to award money damages. And to do that the Court has got to be attempting not on an appraisal basis but on a basis of trying to put the stockholders back in the position they would have been in but for the actions of the defendants. And therefore, you determine what, in fact, was the value of the stock as of the time that the merger took place. You find those damages and you award them interest since that time. And that is what you do.

Now, this is not a windfall. Make no mistake. This is not a windfall to the stockholders of UOP. On the contrary, they would have had their money back in 1978 but for the illegal merger and the unfair price. So they are not getting a windfall. They are just getting what is coming to them. And conversely, Signal is not being punished for its manifest wrong-doing. It is simply paying fair value for what it took over. It is getting, then, at a fair price the income stream that it took over from the minority shareholders.

Now, I have talked perhaps too long. Let me conclude.

The chairman of the board of UOP said in this courtroom that this cash-out merger was done because it was the only game in town. Let me use his analogy. Signal decided to acquire the chips of the minority. It, therefore, decided to set up a game. It stacked the deck and it pocketed some of the aces. It quickly dealt itself and some other people who participated in the game a hand, but it selected the players who would conduct the game for the minority shareholders.

Crawford didn't play for the minority shareholders. He turned his cards up from the outset and he agreed that Signal was going to win. Lehman was the shill in the game. They were brought in to make it look like there was a fair game going on. The directors of UOP went through the motions and they agreed that Signal had won fair and square.

The stockholders, to use the analogy, were not at the game but they were told about it later. They weren't told everything, but they were assured that the hand had been played fair and square and that they had been diligently represented. They were told that they were the winners in the game and that their winnings were in the amount of $21. They were not told how the game was played, and they were not told that Signal had no other option, and they were not told that Signal would find the take-out merger profitable at any price up to $24. And they believed they were the winners because they were told so by people they had a right to rely on.

In fact, the winners in this game were Signal, the people who dealt the hand, set the price and controlled all the players.

What we suggest, Your Honor, is that the trial and the record in this case show that this was an unfair cash-out merger of the minority, the very sort of situation that the courts of Delaware well before Singer and since Singer have said that they would protect minorities against. The record in this case is complete, and the Court should set the merger aside or should order damages in the amount that proof has shown; that is, that the value of the shares of the minority was not less than $26 per share. Thank you, Your Honor.

THE COURT: All right. Thank you very much, Mr. Prickett.

MR. PAYSON: I was going to ask for a short recess before Mr. Halkett makes his response, Your Honor.

THE COURT: We are definitely going to do that. Mr. Payson, you are ahead of me as usual. We will take a fifteen-minute recess before we resume.

(Brief recess taken.)

THE COURT: Sorry I anticipated everybody coming in. I thought I was five minutes late, so everybody else would be here; my usual procedure.

Mr. Halkett.

MR. HALKETT: Good afternoon, Your Honor. To start with our presentation here, I am not sure quite where you dive into this pool, but we will try.

First, I will assume that this Court has read and will be familiar with the contents of the various briefs that have been filed, and I know that during the course of the trial you made notes as we went along and you are generally familiar with the evidence that was presented; and therefore, I am not going to try and go back over everything we said before.

THE COURT: Let me say I concur in that. I did grant Mr. Prickett, since he is representing the plaintiff, perhaps a little longer than I had intended, but under the circumstances I think it was proper. I will not think ill of your side if you don't respond to the minute in equal time. The briefs were very comprehensive, and I have read them, and they do discuss the evidence in great detail.

Let me say this. I don't think it is necessary to go over in detail every point that is also addressed in your briefs, because they are lengthy but very comprehensive, as I view them, in addressing the evidence. So we can go on that basis.

MR. HALKETT: Well, we will try to in discussing those matters be selective in some way, and on that score I think that in the plaintiff's reply brief we were at times taken to task for not having replied to everything or to have set forth in our brief various matters which the plaintiff apparently feels we should have addressed ourselves to. I would like to say at the outset that we have, we believe, in our briefs met head-on all of the real and credible issues, both legal and factual, in this case, that we will continue to do so and not address ourselves simply to little bits and pieces of fluff that seem to float around in the air.

Another part of the problem in discussing the case is that the plaintiff himself seems to change direction or change focus on what his case is all about. We find in the reply brief arguments on things that were not included in the earlier briefs and an emphasis on matters today, for example, which were not briefed in the reply brief, on the matter, for example, of the burden of proof. It is a little difficult for us to grab a hold of this case.

In that connection, first of all, we started out with what clearly was a complaint for fairness case. That metamorphosed in some fashion into a case for some type of misrepresentation intertwined with a fairness case. And now in the reply brief we seem to be dealing with some sort of reprehensible conduct case, according to the reply brief, plus misrepresentation, plus fairness. So if we don't come totally to grips with all of what the plaintiff thinks we ought to, it is for these reasons.

Now, at the outset there is a tenor put on the discussion this morning I would like to come back to, and that is this business of the standard by which the conduct of the defendants is to be measured, and that is one of the Lynch versus Vickers case of disclosure and candor. And I believe that the plaintiff during his discussion earlier this morning kept using the term "complete candor." One of the great difficulties in a case of this type is dealing with this idea of what "complete" means.

Let me give you an example of the type of difficulty that apparently even the plaintiff suffers from in this case. I would like to turn to the plaintiff's reply brief at Page 21, and at the top of that page he has a subsection which I would like to read, and I quote. "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," citation to PX-295. It then goes on, "Paragraph 2. Business Purpose for Form of Transaction." He then quotes.

Now, I have here, and I would like to hand up to the Court before I say anything more, a copy of the relevant page of that document. I will hand a copy to plaintiff's counsel, since apparently either he overlooked it or we get to this question of complete candor. That is, the brief does not contain nor refer to Paragraph 1 of that exhibit on that page, which says, "Business Purpose of Transaction. Signal, as the owner of 50.5 percent of UOP, believes this transaction will enhance its investment in UOP, eliminate potential conflicts of interest, provide for a freer flow of resources between and among UOP, Signal and Signal's other wholly-owned subsidiaries, provide access to Signal's management and expertise, and provide other economies through consolidated operations." That is what Signal told the Commissioner of Internal Revenue was the purpose and the business purpose of the transaction. Surprisingly, not one word of that paragraph appears in this plaintiff's reply brief when he says what we told the Commissioner of Internal Revenue was our business purpose.

Now, perhaps that is not complete candor by the plaintiff with this Court as to what is contained in the evidence. Maybe it is just a good example of the great difficulty that one has in disseminating information to people in trying to pick out from a mass of facts what constitutes complete candor.

So what we are talking about here is a case in which at the outset we are trying to decide whether or not any of the materials that were supplied or not supplied to the minority shareholders are such that this Court should set aside the vote of those minority shareholders approving this transaction. As we have said before and as I think we have to say again, somehow or other the fact of the vote and the fact that that was given to the minority shareholders is constantly being repressed by the plaintiff in this case. In fact, I find it absolutely incredible that anyone can describe or find a way even to describe as reprehensible conduct on the part of the defendants submitting to the minority shareholders the right to vote on the merger. That is what the plaintiff says in his brief.

Throughout the plaintiff's reply brief there are statements such as, "Defendants now admit" or

"As defendants themselves acknowledge," and et cetera. There are just too many of those in the brief to take on one at a time, but I do want to say generally that we did not make such admissions. We do not so acknowledge, as the plaintiff tries to put those words in our mouth. And as the plaintiff's reply brief is read, I wish the Court to understand that we do not agree with any of those statements that the plaintiff has therein set forth. Some of them I will talk about a little bit specifically, but generally, I want to make that comment.

A moment on the plaintiff's motion to enlarge the class at this point and why we did not undertake a specific response to that motion at this time. First of all, the determination of the class as well as Mr. Weinberger's suitability as a class representative for that class was based upon the original complaint; namely, that of the fairness hearing. Where we end up in this case will obviously or may obviously affect what an appropriate class might be or should be and who a proper class representative ought to be. For example, if, indeed, we are trying a fairness case here, then we submit there should be no change in the class. On the other hand, if there is some other view of the type of case that we are trying here, then questions such as Mr. Weinberger's suitability to represent another class come into play, without spending a lot of time on it at this point. And the reason we didn't reply earlier was to avoid having to spend a lot of time that might be unnecessary.

As the Court is probably aware, Mr. Weinberger, who is in court today, during the course of his deposition testified under oath that he was not misled by any of the materials which had been supplied to him; quite the contrary. He did not rely upon any of the materials that had been supplied to him; quite the contrary. He did not vote on the merger, and he had made up his mind in advance of the meeting that he was not going to vote for the merger for the very reasons that he found that the price was inadequate, he found that Lehman Brothers was not independent and things of that kind.

Depending upon what might otherwise be an appropriate class, we submit that Mr. Weinberger would not be an appropriate class representative to represent anyone who is deemed to have been misled or to have acted in reliance on any such material. But, as we have said, that should wait another day, and I want to merely make a statement for the Court that there was a reason for our taking the position which we did. I think there has been enough time and enough words spent on too many things at this point.

I would like to turn, then, to the question of the role of the parties in this case -- namely, the role of the defendants -- and try to put that into some context rather than in terms of a bit-by-bit reply, line by line, to the plaintiff's position. First of all, on Page 19 of the plaintiff's reply brief they state, "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," et cetera.

Now, there is no testimony in this record whatsoever that any counsel for any defendant said that any defendant had a conflict of interest. What the evidence, in fact, does show is that the counsel indicated to their respective clients that they owed a responsibility and a duty to both sides. Signal's in-house counsel told the Signal directors on many occasions that since they served in the positions in which they did, they had duties to both sides.

For example, Mr. Prickett is an officer

of this court, and as such he owes a fiduciary duty to the Court and to the legal process of the state. Mr. Prickett also owes a fiduciary duty to his client in this case. Are we, then, to conclude that there is a conflict of interest in Mr. Prickett's position in trying this case for the plaintiff? Obviously not.

What one has is a situation in which one can and often does have a position in which he owes obligations to two or more parties, and the question is how does one deal with that particular situation, how does one handle it, and where are the accommodations made in dealing with the parties to whom one has dual responsibilities.

That was the situation which we described and talked about earlier in this case and which Mr. Prickett refers to in his brief as the two-hats situation. Notwithstanding Mr. Prickett's statements to the contrary, we have not abandoned that position. It is not a position one abandons. It is a fact, and it is one about which one cannot be unaware in trying to analyze what went on in this case.

Apparently, however, the plaintiff's position in this case is, having stated the relationship as one of conflicting interest, he then builds on that on some sort of rationale that, therefore, one owes everything to one side or the other. One is bound by the law and otherwise to do everything one can for one side, and the other side has to find some other way to take care of itself. Well, that obviously, again, is not the case, and I am not going to start citing other types of examples.

We are not here in a position in which we were obligated to favor either all of the minority shareholders of UOP to the exclusion of the shareholders of Signal or vice versa. It seems to us that that is precisely the thrust of the Singer and related cases. They are predicated upon the situation in which you have a majority shareholder of a company, and the law places on that majority shareholder a fiduciary duty to the minority. The majority also has a fiduciary duty to its own stockholders. So what does one do to resolve that conflict?

Now, in the past apparently it was sufficient that the majority shareholder had a duty, and its only duty was to its own shareholders. Singer has said that is not the case. You owe a fiduciary duty also to the minority, and you are required to deal with that minority in a way which is fair, not that which is the absolute best interest of the minority; that which is fair to the minority as well as fair to the majority. And that is where we started out in this case. That was our position and that is what the people testified to.

Now, again, the whole business of Singer and this balancing of responsibilities comes out in the plaintiff's argument on this so-called $24 a share, his reference to Exhibit 74. It is a long exhibit, and I don't intend to go through it other than to make mention of it at this point. That was an internal study prepared at Signal in advance of the Signal board meeting to decide whether or not the board of directors of Signal was going to adopt and approve a proposal of a cash merger of the minority shares. Various figures were analyzed at stock prices ranging from $18 up to and through $24 a share.

Now, first of all, there is no question but that that exhibit shows that, had Signal purchased the shares at $24 a share, it expected that it would have made money on it. In fact, what it shows, I believe, is that there would have been roughly a 6-percent return on its investment for the year 1978 if it were to have purchased those shares at that price.

Does that mean that Signal was obligated to the minority shareholders of UOP to have paid not 24, but 25, 28, 30, 32, up to that point in time, where Signal made not a dime off it? Is that what the plaintiff here is trying to suggest? Because if it is, then what would Signal be doing to its other shareholders to invest money at no return?

Interestingly enough, at $24 a share what one comes up with, as I said, is roughly a 6-percent return. And if you turn to the testimony of Mr. Bodenstein, Mr. Bodenstein himself in talking about what people were willing to invest in such secure things as corporate bonds never went below a 7-and-1/2-percent return. So the plaintiff here would have Signal in its prudent exercise of its responsibility to its own shareholders make an investment less secure than bonds at a return rate lower than anything Mr. Bodenstein said people were investing. It makes no sense.

What you are talking about is, you come back to this situation of finding a balance of what is fair. The majority is certainly not required to give up everything to the minority, nor is the majority now permitted to keep to itself all that the law technically allows it to keep. Our position on the so-called two-hats theory is still there. It can be described as a position in which fairness is required to both sides. And again, despite the plaintiff's characterization of it, this is not a position which we take as an excuse for anything and certainly not an excuse for any sort of improper conduct. It is simply a description of the facts as they are and with which anyone has to deal in this type of case. Were it not so, I think that we would very easily end up that there would be no mergers. And clearly, the Legislature in Delaware has said that there can be and the Court has said, yes, there can be, but it must be fair.

Let's turn to this question of negotiations. This dead horse has been flayed so often, but a few more words I think are important. Contrary to what plaintiff states in his reply brief at Page 11, we have never admitted that there were no negotiations. We have never said that no negotiations were possible, and we have never said that there was a conflict-of-interest situation with respect thereto in this case. What we have said is that there were negotiations, and those have been described in great detail in our brief, and I will not go over them again. We have also said that the negotiations were not only possible; we have said that the negotiations occurred, and we have described those in our brief.

What we have said, what we continue to say, is that there were not and could not be negotiations of the same type which occurred in 1975 and which are the type which plaintiff seems to equate with the word "negotiation"; namely, that the only negotiation that deserves that title is one in which people get together and hammer things out and argue and get down to the best, lowest or highest price either side could come up with.

Again, it seems very clear that the whole thrust of the Singer decision and other cases is to seek ways of testing transactions other than that for the very reason that you cannot have and cannot expect under the situation of a majority and minority shareholder that type of transaction. They said the majority cannot deal in that fashion for its own best interests.

We have also said that such types of negotiations are not mandated anywhere. Nowhere has the plaintiff at any time during the history of this case presented one case or one authority to support the arguments that he makes here about negotiations.

Insofar as it becomes a corollary of that but not exactly on point is his discussion about in reference to the Sugarland case. That is a situation which obviously is inapposite to that here. There, there were at the time of the negotiations with Party A actual offers which had been received from Parties B and C, and which apparently those who were negotiating totally ignored. Here, there was no such situation. There were no other people offering to buy the minority shares.

Secondly, this concept that there would be and we should have looked for competing offers is just nonsense. What is the idea that there is going to be a competing offer from some other source to buy a minority interest, 49.5 percent of a corporation, the other 50.5 of which is owned by some other stockholder who is not selling? We know of absolutely no case whatsoever where there have been competing bids for such a minority interest, nor is there any evidence in this case that there is such a market or that there would be such competing bids.

What we are really, it seems to me, dealing with at this point in this case are numbers of these things, as the plaintiff has gone out and the plaintiff has looked at every possible case in this area that he can find, each of which has different fact situations, deals with different parties under different relationships, different particular circumstances, and has plucked the various criteria that the courts have looked at in those cases and somehow or other tried to transpose them all into this case and say, "Why didn't you talk about this one," and "Why didn't you do that one?" I submit that that is not the way to analyze either this or any other case in this area.

For example, this business of rushing the time. I guess there are a couple of cases in that area in which the management of companies has played games, if that is the correct term, with the holding of stockholders' meetings, the annual meetings, in order to achieve certain results.

Now, what the plaintiff here suggests is that somehow or other this whole transaction was rushed to deny the stockholders some sort of opportunity to really consider the matter. They had almost three months before their vote was taken to consider a whole variety of things, including such things as what the market was doing, whether or not the $21 was a fair price at the time they voted or not. Three months.

This is rushing.

We also run into some things that, again, muddy up the waters in this case. I keep coming back to it, because it is kind of illustrative of what we are dealing with, rather than standing on its own having much significance in this case, and that is the proxy solicitation, employment of the Georgeson firm. If you will recall the way that one started out in this case, this was a situation of nondisclosure that somehow or other this whole thing should be set aside because we didn't tell the stockholders that the board of directors had not voted specifically to do this. After we pointed out in our briefs and argument that, indeed, it says right under that, "As approved by the board of directors," and it says so in the minutes, rather than let go of it, it becomes something else. Now, what it is, it is part of this reprehensible conduct. Somehow or other we are out trying to coerce these people into voting for this merger.

A couple of points on that. How much coercion does one buy a proxy firm for $6,000? Anyone with any knowledge whatsoever of what proxy firms charge and what they can or cannot do would be surprised to know whether they even contacted all of these people for $6,000, never mind put their arms up their backs.

The next thing is the total illogical part of the argument here, which is why on earth did we hire somebody and send them out there to get people to vote for something we didn't have to give them the right to vote on in the first place. And not only that, if we decided what we were going to let them vote and decide on the merger, why on earth are we out there getting people to twist their arms to get out and vote and vote in favor of it, because we ourselves had set a 66-and-2/3-total-vote requirement? We didn't have to do that if we were out to do in the minority.

Lehman Brothers. I think a bit was said more this morning on that subject than certainly I had expected by the offhanded way in which the plaintiff in his brief had dismissed the Lehman Brothers brief. But I will leave the large part of that to Lehman Brothers' counsel. But over and over and over the plaintiff in this case misstates what that document is all about and misstates the testimony on this record. And each time, again, it shifts a little bit.

First of all, it is not now and never has been Mr. Glanville's opinion which was given to the stockholders. It was the opinion of Lehman Brothers.

This morning for the first time I heard it was a combination of Glanville and Lehman Brothers. At least they are backing up that far.

Secondly, they talk about this business of that report having recommended a purchase at $21 a share. There is not one place in that document where such a recommendation is stated. If you want to try and find a recommendation in that document at some price, the best you can do is $19 a share, but at that you have got to work at it.

Now, it is also fascinating on that subject that what we have is an argument on the one hand that somehow or other a document prepared and somebody's idea of what this was all worth in 1976 becomes so terribly important that the stockholders should have known about it while the same party is arguing that we were unfair because the stockholders didn't have the right in May, 1978 to rely on opinions that had been done in February and March, 1978. In other words, on the one hand, waiting two months while things changed was too long, while on the other hand, everybody should have been bound by something that happened two years ago.

Also, insofar as it affects us, the plaintiff's reply brief talks in terms of our having abandoned Lehman Brothers and the Lehman Brothers opinion. That is utter nonsense. First of all, I think it should be pointed out that the Lehman Brothers opinion was and is part of the material upon which we rely in setting forth the transaction. It was a part of the proxy material, and we don't abandon any of that. We have never abandoned any member of that organization. But what on earth is the need to drag people into court and to come down from whatever their business activities are when they have already been deposed, their testimony has been taken, and at the outset of the trial has all been placed in evidence by the plaintiff himself? What is there to be gained by bringing somebody down to do it all over again?

Finally, Lehman Brothers was never the Signal expert. Signal did not hire Lehman Brothers. Signal, in fact, had no outside investment banking firm involved in this transaction. However, having gotten into trial, having gotten into court, it seems only prudent that Signal would have gone out and would have retained for purposes of this trial an expert to opine on the subject of the values and other matters involved here. That is what we did. By so doing we certainly were not abandoning Lehman Brothers. Lehman Brothers had never been our expert on anything.

So when one looks at the situation of who are we, who are the defendants and what were we doing in this case, I think some of these things we have just gone over need to be put back into context.

I would like to go and turn to the subject of damages, fairness of the price, things of that kind, assuming we have gotten there. And as we pointed out in our brief, we think the burden was and is on the plaintiff in this case to show that the vote of the shareholders should not be counted. Before I leave that, just because I don't want to be accused a few minutes hence of having agreed with the plaintiff's position on that subject, I believe the test in looking at what the shareholders had is not as the plaintiff stated. I don't know that there is a matter in even a practical sense where you can say that you can have a complete disclosure. As the plaintiff himself is apparently aware in his brief, referring to our submission to the Internal Revenue Service, at times one has to make a choice. As the Court in Lynch versus Vickers said, and I quote, "Whether defendants had disclosed all information in their possession germane to the transaction in issue, and by 'germane' we mean for present purposes information such as a reasonable shareholder would consider important in deciding to sell or retain stock."

It is not everything you know. It is not everything you did. Somebody has to make some value judgment to keep the dissemination of information from taking on the size and bulk of the Manhattan Telephone Directory. And what those decisions are is information such as a reasonable shareholder would consider important in deciding to sell or retain stock.

What we have discussed in our brief is these matters which the plaintiff has raised about negotiations and so on in the context of that standard and not some other standard.

Turning, then, to the question that says if the Court were looking at this for whatever reason in terms of a fairness case, what do we have, we have not said nor are we saying now that we think this is an appraisal case or should be an appraisal case, and I will talk a little bit more about the discussion of appraisal as it comes into our brief. But based upon some of the questions Your Honor asked of plaintiff's counsel and the discussion on that, I would like to turn to that for a minute.

It seems to us that what one has and what one had in Delaware was, prior to Singer the law permitted a merger and a merger under which the minority shareholders are taken out for cash and that the only right that the shareholder then had was to come in and say, "I think the price I got for my shares was unfair." And therewas then an examination of one thing and one thing only, and that was, what was a fair price for the shares that that stockholder now had been required to turn over.

What Singer did is, we believe, expand that situation to say not only does the law provide that the majority shareholder has the right legally to cash-out the minority shareholders but he must do so in such a way that the entire transaction is fair, not just the price, because if that was all Singer was saying, then, in our view, Singer would simply be saying let's turn it back into an appraisal case. It gets inexorably tied into, it seems to us, what the possible remedies are pre-Singer and post-Singer and appraisal case and non-appraisal case.

Certainly, it is clear that in an appraisal case if the plaintiff there were to have requested some sort of injunctive relief or some sort of rescissionary relief, as a matter of law he would have had no basis to even discuss that with the Court.

Under the so-called fairness case now those possibilities are open to the Court to be considered not just on the price but on a whole variety of criteria. And I believe it is the Tanzer case which tries at least to articulate some eight, nine or ten different criteria, which, depending on the particular fact circumstance, may be something that a court should look at to determine the entire fairness of the transaction. One of those criteria is the fairness of the price. Another of those is the business purpose, and so on. But they are by no means equivalents in terms of the various criteria.

In an appraisal case there was one thing that the Court looked at, and that was the fairness of the price. In a Singer-type fairness case what the Court looked at was a whole variety of different criteria, of which one is the fairness of the price.

Now, what we are then saying is, whether it is in an appraisal case or whether it is in a fairness case -- and directing one's attention to that particular element, to wit: the fairness of the price -- how does one go about it? Is there a different way of arriving at a fair price in one case than in another case? And we submit to the Court that there is not. The inquiry in both cases is the fairness of the price.

Now, historically, because of the appraisal remedy and the appraisal cases which have gone on for a long time pre-Singer, some standards had been adopted and some standards had been articulated by the courts in giving people some guidance as to how one comes out in arriving at a fairness of the price for a minority shareholder whose shares are being merged out. We believe, as we have stated in our brief, that the relationship of that test, which was evolved in the appraisal cases over through the fairness cases -- I believe it is the Poole case which we have cited in our brief. And the language that we have cited there -- and again -- yes, Poole versus --

THE COURT: I know what you mean. I can't pronounce it either.

MR. HALKETT: Thank you. As we have pointed out, then, the criteria applied in a fairness case should be the same type as applied in an appraisal case.

Now, let me stop a minute and back off a little. Value, fair price, is an interesting concept, one that has bothered me for a long time in a lot of different ways, before law school as a business major, as an undergraduate in accounting courses, and as a lawyer trying lawsuits over various types of property, whether you get into condemnation or whether you get into property damage or whatever you get into when you start talking about the fairness of price of anything. And the one universal thing that I think is true throughout any of these types of situations is the need to depend and rely upon so-called experts once somebody strays away from the most simple exercise of trying to determine what something is worth or the value of something.

Methods of valuation, people still struggle with that. They write books about it. People who write books about it then write later books about it, trying to grapple with the subject.

First of all, this business of capitalizing future income or however the term is used, sure, that is used, and it is used in a number of types of cases. I have been exposed to it in a number of types of cases. They are generally the types of cases in which what one is really talking about is a present existing thing which is going to be a wasting asset over a period of time, such as a gravel pit or something of that kind, in which one is trying to say that its real value is what it will sell for in the future. One tries to estimate what the future income stream will be, because you are going to have X million pounds of gravel which you are going to sell over so many years at such-and-such a pound, et cetera, and you take the present value of that, and that is the value of that undredged gravel pit. But we are not dealing with a gravel pit in this situation. We are dealing with an ongoing business. And the question, then, is one of what is a method of evaluation that might fairly lead to coming up with a fair or reasonable value of the shares in that company.

The case which we have cited in our brief, although it is an appraisal case, certainly and admittedly does not disqualify it from the analysis that one has to go through of how do you evaluate shares. And as the Court there said on Page 9 of its opinion -- and I quote -- "Thus, the cash-flow technique sought to be invoked here is, in my opinion, overly speculative for the same reasons; i.e., that it rests upon events which have not been shown to be reasonably probable of happening." It is speculative.

Now, Mr. Bodenstein's way of arriving at his value in this case was to use that method, which we say is too highly speculative in a case of this sort to serve as any real indication or proper evaluation method of these shares. Contrary to, again, plaintiff's putting words in our mouth, we have not and we are not moving to strike Mr. Bodenstein's testimony. He is entitled to any way of arriving at his opinion he wants to. If Mr. Bodenstein wanted to arrive at it by looking at phases of the moon, he is entitled to it, and it goes to the weight of that opinion and to the credibility of the witness. And that is all that that case says, that that sort of technique, in attempting to evaluate shares in a company, is not a reliable or valuable technique in arriving at what one is seeking to find; namely, the fair value.

Now, how does one go about it? Well, I have always had difficulty in this case, and I continue to have it in this case philosophically, with why one doesn't just stop by saying, where one is dealing with shares of a corporation which are traded on national exchanges over a sufficient length of time with a sufficient number of shares out there that there is, indeed, a market, the fair market price, the fair value, is simply what the market said it was, in this case roughly fourteen and a half dollars. Somehow or other we have gotten to the point that says one ignores that, pay no attention to that. Certainly, from the standpoint of the plaintiffs in this case, that is the way they approach it. Just ignore the shares. That is what we are trying to value, shares. You ignore what the market is saying and you come about it by looking at projections and you come about it by looking at what the future holds and capitalizing it and doing something of that kind.

On that score I think it is important to realize why there is in our brief that section that discusses these various numbers. Those are not our numbers. Those are not the way we would suggest the Court go about viewing and arriving at the value and the fairness of the price in this case. They are there for one reason and one reason only: It is to show the great facility with which one can manipulate numbers. And I don't mean "manipulate" in a pejorative sense. I mean by "manipulate" just playing games with numbers by taking all of the given that Mr. Bodenstein used and simply changing his discount factor, or you can take onediscount factor and add something else in. It is simply to show why that method is as unreliable as it is and why the Court in this case which we just cited found that the cash-flow technique was overly speculative. That is the Frick case.

Now, interestingly enough, in responding to that the plaintiff says and uses the term which on analysis is meaningless; namely, he made a retrospective cash-flow analysis. Stop and think about that. How on earth do you make a retrospective cash-flow analysis? A cash-flow analysis is taking future income and bringing it back to a present value. It is all prospective. How much will I pay today for a future sum of money, of which I don't know the amount?

Now, what Mr. Bodenstein here did, in speculating as to what the future will hold -- and that is all it is -- is pick on different things from which he then said, "I have the right to speculate, and my speculations are wonderful." And if you will recall, in the first case, when he started his testimony, he took what had actually happened in 1977 and said, "I speculate that it will stay that way unchanged forever." During the course of his testimony he took 1978 and said, "I take what I know of the first part of '78. I will speculate as to the second half of '78, and then I will speculate into the future on what will happen."

Now, the plaintiff says, well, it isn't really speculation because I use Signal's figures. First of all, a correction. Mr. Crawford didn't prepare that five-year projection. Please. The people in the Financial Department of UOP obviously do it. The president of the company doesn't sit down and prepare a five-year projection. In any event, that is merely somebody else's speculation as to what the future will hold.

So there is no such thing as a retrospective cash-flow analysis. It is always a prospective cash-flow analysis, and that is what you did in this case, and it has got its problems. And it is obviously because of problems such as that that in the appraisal cases this Court has taken the position over the years that what you look at is hard facts, and you go back and you look at as many hard facts as you can, including what actually happened during the last five years, what actually happened insofar as the nature of the return of the business, what actually happened insofar as the dividends, what actually happened insofar as the prices at which the stock traded in the marketplace.

Somehow or other what we have here is a

situation in which for the five years which preceded the merger, through good times and bad, through improvements from 1976 on or whatever, by whatever adjectives you want to apply to it, the marketplace never valued these shares at over $19 a share and didn't even get to $19 a share. The highest it ever got was about 18 and 5/8 during that five-year period, and for a good part of that time it was a lot less than that.

Mr. Prickett in his argument, in his looking at Mr. Purcell's report, says something about looking at market, looking at market prices, which, by the way, I remind the Court is one of those things which in the appraisal cases the courts have said we look at and pay attention to. Why? Well, these things all have to be put into context. And it is obviously a concern in testing whether or not a merger is fair to the minority to see if what this really is is a grab by the majority of the minority shares at a time in the history of the company when they can do so and get a bargain or make a deal or take advantage of something that is just around the corner that they know of and the others don't know of or for some external reason the market just is not placing a value on those shares.

So what we are saying is, is the market

price of these shares on the day before the merger an aberrational amount. Why do you analyze the market price? Why do you analyze it over a period of time? Because what you are looking to see is, is that a fair reflection or is it aberration. You find that the stock has been selling historically for $15 a share but this last two months it has been at $10 a share, and now is the time that the majority decides to grab it. That is part of the inquiry not only on whether the entire transaction is fair but whether or not the price is fair, and that is one of the things that Mr. Purcell did. His report gives the prices at which the stock sold over a period of five years, and this clearly was not an aberrational figure.

Secondly, this business of the premium. There is no magic to it. If that is all there were to these cases, we would have a case, we would come in, and we would look at what the market price was, we would get some other ones, we would find a premium, apply it and say, "That is it, fellows. You win, and you lose." It is like anything else, another way of trying to get a handle on the fairness of a price and what it looks like in terms of the marketplace. Whether it is 40 percent or 60 percent or 70 percent or 30 percent, one has to look in the context of a whole lot of other facts and not take them out of context.

To say that Mr. Purcell's entire appraisal was basically an opinion based on the fact of the premium is just utter nonsense and does not deserve to be in the plaintiff's brief and does not deserve to be talked about here.

Why did we not go with this noise and clutter and background? Well, Mr. Purcell testified that in his business as an investment banker the standard practice in that business in trying to discuss and arrive at premiums is to use the market price on the day prior to the announcement of the merger. Might somebody do something different? Of course, they might. How much weight does one put on it one way or another? It all depends.

If you remember, Mr. Bodenstein had some prices that he used for calculating his premiums going back two, three, four months. In fact, one I think went back more than six months before the actual merger. Who knows what happened during that period of time in the marketplace that could have affected the price of shares both nationally, internationally? Rumors of war, changes of administration, all kinds of things happen.

Who knows whether the president of the company died or announced his retirement in that period? Who knows what factors went into this background? And once you start dealing with that, you just start making it a Never-Never Land of using it in any fashion at all.

The question that is here is really the question of, if we are at that point of the fairness of the price, we have had really about four or five different opinions of the fairness of that $21 price. We had it from Lehman Brothers, the boards of Signal and UOP. We have had it by Dillon Read, and we have had it by something more than 92 percent of the shareholders, minority shareholders of UOP. Those who chose to vote on the question of the merger voted in favor of that price. When that is combined with what the market was paying and willing to pay and what these stockholders were willing to sell their shares for immediately prior to the merger, I think that it sets a pretty good standard for the fairness of that price.

Now, before I conclude I want to, if I may, just run down briefly through my notes that I made during plaintiff's presentation, because there are some things in there, although I don't intend to go through everything, that I do want to talk about.

One, the plaintiff keeps talking about this is a ratification case. It is not a ratification case. And I make that distinction because the ratification cases have been cases in which the majority has had the power, has not given to the minority any power to change it and has simply put it to their vote. They have ratified it. That is a different situation than we have here, and I don't think they are necessarily analogous.

There is another comment on this business of Lehman Brothers, and whether it is carelessness or not on the part of the plaintiff, I think it deserves a comment or two in the interests of complete candor in the record. On Pages -- you can tell us -- in our brief we set out who the people were at Lehman Brothers who were assigned to this project and what their relationship was to UOP. Plaintiff's counsel in his remarks said something like they put together a team of people who had had no experience and no knowledge of UOP. That is just simply contrary to the evidence. The team was actually selected on the basis of knowledge which they had and their ability to pull together, based on previously working with this particular client, the information they needed then to go forward. That part of the evidence is in our brief, and I am sure that we can find it. I don't want to misstate it.

I have already talked about this business of their report, and I won't repeat it. What came out during the plaintiff's post-trial briefs was some argument about UOP's management having recommended it. We heard a lot today about UOP's management and whatever. There is not one bit of evidence in this case that however you want to define "management" -- even if you define it the way plaintiff wants to, as something other than the board of directors -- that they did not approve of the merger, and that is all part of plaintiff's burden. If he wants to say to this Court that that was a misstatement, then it was the plaintiff's burden to show that the management, as he defines it, of UOP did not favor this merger, and there is no such evidence and no such burden is there, and I don't know why we are hearing about it now.

The business purpose. There is ample testimony as well as documents all over the record here of a half a dozen or more business purposes in which it was in Signal's interest to acquire the other half of UOP. As we had stated in our brief, we believe that simply saying that it is to one's economic advantage to acquire may well, standing alone with nothing else, satisfy the business purpose requirement. But that is not where we have stopped, not now, not then, not ever. What we have is a whole collection of different reasons, and I am not going to repeat all those, including the reasons we gave to the IRS, which did not seem to be important to the plaintiff.

Now, if one really analyzes it, what is a business engaged in any activities for if it is not in the long range for their economic benefit? Whether it is their economic benefit or saving on taxes, their being able to make loans or to make loans at favorable rates or whatever it is, of course, it is to their economic advantage. That is why they are in business. What other business purpose is there?

By the way, an interesting part of the plaintiff's argument is somehow or other we are to be chastised because we did not come up with, as he said, the real answer to the question in this case, what were these minority shares actually worth. And I would like to pause on that for a minute, and I would like us all to think for a minute as to what Mr. Bodenstein thought that the real value of these shares was. All I heard from Mr. Bodenstein is not less than $26. That means a hundred, one hundred fifty, two hundred, a thousand. That meets that criterion. All he told us is not less than $26. Now, what we have is, we have testimony and we have evidence showing that $21 was a fair price, and that is what we are talking about.

This business of the negotiation again, that troubles me as to what duty one has. For example, if an attorney were to have in trust for a client a certain number of shares of a company with the obligation to sell those shares for the benefit of the client and if someone walked in his door and said I understand you have X number of shares of such-and-such and I will pay you so many dollars, which was way, way in excess of the then market price, I gather that the plaintiff's position in this case is that no matter what those circumstances are, no matter what the price or other things are, that he could not and would not conclude that transaction until he sat down across the table and negotiated at arm's length and wrestled with that other side to see if he couldn't get another nickel out of it. It just doesn't make sense.

I think that we have responded, but the last point here is on this question of the appraisal cases and what the remedies might be. I don't want to repeat myself, but obviously, because of the Court's question, I don't want to leave that until we've said what we think we should. If we are at this point where the Court would decide that the vote of the shareholders is not to be considered and is then looking at the entire fairness of this transaction, the entire fairness includes many of the criteria other than value. On the value of the shares we submit that what the Court is to look at is the various type of criteria as to fairness that has been established in the appraisal cases. And it is not the corollary, I think your term was, that by doing so you turn this into an appraisal case, not in the least. There are a lot of other things that must be looked at and there are other remedies that might be available in some cases.

For example, had Mr. Weinberger in this case, with the knowledge which he purports to have had prior to the merger, believed that the price was unfair and that the transaction was otherwise not in the best interests of the shareholders and had he appeared in this court prior to the stockholders' meeting on May 26, 1978 and brought the case as a fairness case seeking to enjoin the transaction, then this Court if it had been an appraisal case would have been relegated to saying, "No, I can't stop it. You are entitled only to have us look at the value of those shares later." Under fairness-case criteria other factors could have been considered, and a remedy such as injunction may well have been considered and appropriate.

The plaintiff himself recognizes that there are various possibilities in the abstract but has come down to the conclusion that probably the only one that would really work in this case is money. I think realistically that is what all of us have figured out. If we ever got to that stage, that is what we are talking about.

But the misconceptions and misinformation which are communicated here -- one more example before I go. In his argument the plaintiff said that if the Defendant Signal was required to pay in its own stock, it could be done without tax consequences. I am not a tax lawyer, but I know that is not right.

In any event, unless the Court has any questions, I think we have tried to the extent that we can to have covered those matters without repeating what we have said before.

Pardon me. Mr. Payson has pointed out one thing that I think we should talk about. We were flayed about the head and shoulders in the reply brief because we ignored Mr. Bodenstein's comparative analysis. On that subject I do want to turn to the record and I do want to turn to the trial transcript, beginning at Page 692, Line 21. And this was during cross-examination of Mr. Bodenstein on May 27, 1980.

"Question: Now, I'm asking you now to for purposes of these questions assume that you had never done the discounted cash-flow method. Just cast that away.

"You have told us you separately and differently used a comparative analysis method. You also have testified as to what your opinion was as to the value of the shares, your report, and as you've testified, it says not less than 26, and your deposition testimony was the 26 was fair.

"Whether you call the 26 a fair price or not less than 26, how did you get to that $26 figure, Mr. Bodenstein, using your comparative analysis method?

"Answer: Well --".

At this point, Mr. Prickett. "Your Honor, I'm going to object to that. The witness has told the examiner about three times that he didn't do it that way. What the examiner is doing is saying I want you to assume that you didn't do it the way you said you did it. Now, how in the world did you do it?

"You can't do that. You can't ask a witness to assume. He's been very patient in assuming a lot of things for Mr. Halkett, but you can't ask him to assume he did it in a way that he's already told you he hasn't done it.

"The Court: Let me see if I understand correctly then. Did you reach that figure as a result of your comparative analysis approach, Mr. Bodenstein?

"The Witness: The 26?

"The Court: Yes.

"The Witness: Well --

"The Court: The second part of your assignment.

"The Witness: No. I think we reached it more definitely on the discounted cash-flow method, and we tested --".

There is then more of a discussion, more questions in which, in all fairness to the record, he then goes back and, indeed, does talk about comparative analysis method and the use of a comparative analysis method.

And then we go over to Page 700, beginning at Line 16. The Court again: "Let me interrupt a minute. I understand that, and I think really all we are -- to get this aspect of your testimony wound up, we're focusing strictly on the comparative analysis method, and I understand you got -- and correct me if I'm wrong -- but I understand that you got your initial ballpark figure, so to speak, by your discounted cash-flow analysis.

"The Witness: Yes.

"The Court: Okay. That you then tested that, and one of your primary tests was the comparative analysis which we're discussing now.

"The Witness: Right.

"The Court: And Mr. Halkett is trying to say, how did you try to get under strictly the comparative analysis test from 14.50 to 26, if, in fact, you did. Maybe you didn't. And if that is the answer, why, tell us.

"The Witness: Well, you know he is pushing me to the 26, and that's where I am having the problem. As I say, the comparative analysis first showed us that 21 was not fair.

"The Court: Right. I understand that.

"The Witness: And now where do we go?

It is the old give and take. You know, is it 27 or is it 25 or is it 26? We are asked to give an opinion. We have come to one area.

"Now, in the comparative analysis it is more difficult to be that definitive. But if I could get a little technical here, a price/earnings ratio is no different than a discounted cash-flow method, only you are using the laymen -- people for some reason, because it has been hammered in, P/E ratio is something times the earnings. But that multiple, that 10 multiple, is more technical than just a number. In a discounted cash-flow method it is the future growth, remember, growth in cash, multiplied or really divided by a given interest rate, a perceived required interest rate.

"A price/earnings ratio is the same concept. It is what the investor perceives the earnings are going to grow. It is a valuation method just based on earnings, and it is a projection. It is the investor's projection of future earnings divided by a similar required interest.

"And what we are really saying, if you are saying how do we know that, how did we get into the 26 area, one was those P/E ratios of historical value of 12.3 or the 15 on the median of the group versus the

9.9, which is the expected. And I guess that really was the key target there, where we felt that no company should be selling an earnings stream that we were envisioning for this company at a P/E below that 10. And you might say, well, then, did you multiply 10 by the 2.12 or the 2.62. No, we didn't multiply, but we knew, as we did our back and forth, that that was just too low. And that's how we got to the 26 area."

And with that absolutely clear, concise description on the record of how Mr. Bodenstein used his comparative analysis method, we thought that we just didn't want to touch it. Thank you.

THE COURT: Mr. Halkett, let me ask you just one brief thing here. Do you perceive that in Mr. Bodenstein's approach -- and I am harking back to your views on the fact that the Singer case requires an examination of the entire transaction rather than just a price. I somehow got the drift during the testimony that without maybe him saying so in so many words, Mr. Bodenstein was suggesting that because of the circumstances where a majority shareholder was acquiring 100 percent so that it would thereafter own all of the company, that perhaps in fairness the majority shareholder should be paying something more to the minority that he was removing. Maybe that is part of the justification for using the discounted cash-flow method. I certainly thought that is what he was trying to say, that that was a method he used as a proper one for evaluating this aspect of it as opposed to the appraisal standards of a net asset value and various other things.

My question, then, is, do you feel that that is something that the Court should take into consideration in viewing the entire fairness of the transaction under the Singer rationale as opposed to just applying appraisal standard price computation factors. I think I know what your answer is going to be, but I am interested in knowing the explanation.

In other words, that would, in effect, almost indicate that you can have two different values on the stock, one for appraisal purposes and one for the value that should go to the minority in a situation where the majority shareholder was acquiring the whole thing, which I assume in most mergers happens.

MR. HALKETT: Well, I have to answer that with an answer that I don't like, but I think it is yes and no, in this way: If you had a stockholder which owned 26 percent, 25 percent or 24 percent of the shares of a company which one could acquire by open-market purchases over a period of time or in some fashion -- there was a lot of discussion in the trial about a premium or a value to the ownership of the control because of the right to control what one does and whether one ends up with cash or reinvestments or what one does with the business. And if one assumes that at some point, depending upon the way it is owned, that one does not have ownership or control of the company, then perhaps the way to evaluate the remainder of the shares, whether it is 74 percent or 80 percent or 68 percent or whatever it is, might well be viewed in a way to reflect the fact that the acquiror is not only acquiring but should pay for the acquisition of this beneficial aspect, to wit: control of the company.

Now, at some point in time in order to acquire control at less than 100 percent somebody is paying a premium for that, and that is the reason that Signal paid a premium in 1975, when it acquired a control position. In fact, it controlled. And the point that we were trying to make during the trial is that it should not have to pay again a premium for control when the people to whom it paid the premium for control are the very people who are now the minority shareholders.

Now, I realize that there is some overlap there, but a tender offer wasmade in 1975 to the shareholders of UOP. They were notified that control was being sought and that control was going to be effected by Signal. And therefore, one of the things that went into the mix of price was this element of control that Signal was getting and paying for. Mr. Bodenstein's analysis is one which totally ignores that fact, both of life and of economic reality, by saying, in effect, you start over as if they owned nothing, as if you had a stranger to the transaction who was now going to come in and buy 100 percent, which includes within it the right to control what he does with the company.

So I don't think for that reason that it is appropriate, and there are other ways to look at this also in analogous situations to try to deal with it, and that is --

THE COURT: I think I understand your answer there.

MR. HALKETT: It is like if a large lot in a downtown metropolitan area can be used for a high-rise building or some other very valuable use, and that is in multiple ownership, and you get down now to what is the value of the end piece, the last 100-foot strip, and analyze it as if that person is entitled to the same share in the total value of this large increase in price by putting properties together as the fellow who had now busily built up the ownership of the 90 percent. I am not sure what terms you put on it. If you end up there, maybe you say you milk it for all you can, and if I can get 100,000 a square foot because you need it and that is the fair price -- but it is that sort of analysis that I do not think is appropriate in a case here where everyone acknowledges, the plaintiff acknowledges -- in fact, they argue -- that Signal was a controlling stockholder.

THE COURT: Yes. I think that is perhaps the difference in the analogy you made there. But I think you have answered my question. I just wanted to get your reaction to that, again, in light of the argument you are making that, viewing the entire transaction, you have to view something more than a price. And I wanted to get your reaction to that as a potential element that you should take into consideration, that fairness might require in certain circumstances a different price than fairness would require in others. I do not know that that is a viable concept, but it is something that seems to float into these decisions.

MR. HALKETT: Well, there are two other things, if I may, Your Honor, just briefly on that.

There is an earlier case -- I am terrible on case names, but it is cited in our brief -- in which it was said that in determining the fairness of the price in a situation of this kind in a merger, it is not proper to look at what the advantage is going to be to the acquiror and, in other words, try to divvy up that future advantage among the minority shareholders.

And the second thing here is, I think that when you have had for some period of time, as we did here for a period of two years -- and talking about entire fairness -- those who owned their shares in the spring of 1978 in UOP realized that one of the detriments to ownership, if you want to call it that, and one of the detriments to value that they were paying for and/or trading in the marketplace was the fact that there was a majority shareholder. That was what they were buying. That was what they were selling. That was a fact of their corporate life.

Now, whatever that is, when they then were removed as stockholders, it seems to me, in fairness and in looking at that which is fair, that is a factor that has to be taken into account in determining whether they were being fairly treated. Whether it is an advantage or disadvantage, that was part of their stock ownership.

THE COURT: All right. Thank you.

Mr. Balotti, what is your pleasure?

MR. BALOTTI: Your Honor, it would be my thought that perhaps we could go through and wind this up. But I am certainly willing to do what the Court has --

THE COURT: I would like to get done. I have something else at 2:15. Maybe we can come back at three.

MR. BALOTTI: You have an appointment at three, but we can change that.

THE COURT: I figured you were in that one and we could bend a little.

MR. BALOTTI: I suspect I will be ten or fifteen minutes, but Mr. Sparks will want to speak.

MR. SPARKS: But only for about two or three minutes.

MR. BALOTTI: So we are up to twenty or twenty-five minutes for our side. And Mr. Prickett will have some reply. So I guess we have another half-hour, forty-five minutes.

MR. HALKETT: Your Honor, the only thing

I would like to interject is, I have a four o'clock train. We could stay here or come back, but if I can, I would like to make that train.

MR. PRICKETT: Your Honor, that should tempt me to be prolix. I will be very brief in my reply.

THE COURT: What is your preference; to go ahead and finish it now?

MR. PRICKETT: Let's go ahead, Your Honor.

MR. BALOTTI: Before I start my remarks, the case to which Mr. Halkett referred is Vice Chancellor Hartnett's decision in the Tanzer case, where he held as a matter of law that you couldn't take into account synergism or the synergistic effect of a merger.

Unfortunately, Your Honor, I am afraid that I will be more disjointed than usual this morning, and that is because I find myself in an unenviable position. I came to the hearing today not knowing what the plaintiff was going to say about my client, Lehman Brothers. For months -- well, perhaps years -- I have been after Mr. Prickett to let me know what it is he thinks Lehman Brothers did wrong. I have been after him to tell me his theories as to why Lehman Brothers ought to be held liable.

You may recall the Rule 41 motion I made at the close of his case, when I went through all of his pretrial submissions, pointed out to the Court nothing.

There were three briefs after the trial. I looked forward to receiving those. I looked at them. Nothing. I filed a post-trial brief in which I, once again, pointed out that nothing had been said about Lehman Brothers and, in effect, invited Mr. Prickett to at least come forward in his reply brief. What did I receive? I received his reply brief. At Page 2 he states, "Lehman Brothers has filed a separate answering brief. Note 1. The Lehman Brothers memorandum does not merit a reply." Then he goes on, "Thus, the Court has now for the first time in writing the complete position of all of the defendants." It is a shame that we did not have in writing the position of the plaintiff.

I think in all honesty that there was an ethical obligation on Mr. Prickett's part to set forth his theories. One is not supposed to try and sandbag an opponent by keeping matters for oral argument or for reply brief. I can only guess at what motivated him to put in that footnote, ignore everything I have been trying to get from him for months, and then come forward today and for the first time let us know what the half-baked theories against Lehman Brothers are. And in getting around to those theories, it gave Mr. Prickett the opportunity to play fast and loose with the record.

As Mr. Halkett briefly mentioned, one of the comments that was made today by counsel for the plaintiff -- and this is as close as I can come to quoting it -- was the backup work -- and I am referring to the backup work by Lehman Brothers -- was done by three juniors who never had anything to do with UOP. Uncategorically, absolutely false. At Page 12 of our brief we state, "Mr. Schwarzman contacted Fred Seegal because of his previous experience on UOP matters," cite to a deposition that Mr. Prickett put in evidence. Page 13, "Mr. Seegal, based on his prior experience with the company, brought Messrs. Schwarzman and Pearson up to date on UOP's business and prospects," cite again to a deposition that Mr. Prickett put in the record.

There are other examples. That, I think, is one of the most glaring. I may touch on others as I go through.

Now, what are the two theories that we finally heard of today? One, Lehman Brothers can be held liable because Mr. Glanville was a director of UOP. Mr. Prickett has known that for years. Why has he not come forward before now and said, "This is my theory"?

Secondly, he comes up with his -- shall we call it the collaboration theory -- based on Thomas versus Kempner. Is this a new theory, something which just came about? Well, Thomas versus Kempner is now over three years old. The case it cites for the proposition is now over eight years old. Once again, why wasn't I informed of these theories? As a matter of fact, I could have been informed as late as October 3, when Mr. Prickett sent over the Thomas versus Kempner decision. He didn't comment that this was now his grounds for holding Lehman Brothers liable.

I would suggest, Your Honor, that the plaintiff has waived any right that it may have had to try to find a basis for holding Lehman Brothers liable as a defendant in this action and that the Court should give no credence to any of these theories as a matter of waiver, for want of a better term. But as a matter of law these theories don't mean anything either.

Chancellor Duffy tried a case I guess almost ten years ago, Gluth versus Syntex. In that case one of the arguments that was made -- and, Your Honor, I may have the corporate matters mixed up, but that is because I didn't have an opportunity to prepare for this theory -- was that some of the corporate defendants should be held to a fiduciary responsibility because some of their directors or officers were on the Lomas & Nettelton board of directors. Chancellor Duffy went through the theory, absolutely rejected it flat on its face. As far as I know, there is no basis in Delaware law for holding Lehman Brothers liable as a fiduciary because Mr. Glanville was on the board.

I think Judge Stapleton also touched on the same theory in Harriman versus DuPont, not the decision cited by Mr. Prickett, but another Harriman versus DuPont decision. And again, the theory was rejected. There is no basis in Delaware law for that theory.

The collaboration theory I think likewise fails. It is based, as I read the Thomas versus Kempner decision, on a knowing collaboration and a breach of duty by a defendant. There is no evidence in this record of any knowing collaboration, and you really have to look at the Thomas versus Kempner facts.

Mr. Harris Kempner, Jr. was a negotiator of the corporation in the transaction under question, certainly not the same as Lehman Brothers. The Court found on the facts before it that Mr. Harris Kempner, Jr.

was an agent or at least it could be argued he was an agent of the corporation because of his activities in negotiations. This is an argument which has not yet been made with respect to Lehman Brothers, but it perhaps will be before the afternoon is over.

And if we are to accept this collaboration theory, does that mean that the printer who printed the proxy is a collaborator? Does that mean that perhaps Mr. Weinberger, who says he knew all about this dastardly merger before it took place, yet he sat by and let his fellow stockholders be taken advantage of, in his view, is a collaborator? He did nothing before this merger. What about the proxy solicitors? Are they collaborators? It makes no sense.

Your Honor, I must touch on the facts a little bit. The facts I think we set forth in our brief. The main emphasis of the brief was the facts as they touch on Lehman Brothers. What we must remember is that Lehman Brothers is not an insider. It is an independent third party hired to render an opinion. That opinion it rendered. Lehman Brothers does not have any fiduciary obligation to anyone who is involved in this proceeding. That is an allegation in the complaint. It is not even raised today in a belated argument.

The plaintiff criticizes the methods used by Lehman Brothers in arriving at its opinion. First of all, I would have thought that the methodology of Lehman Brothers is basically irrelevant to this proceeding. The stockholders were told what they did, and that should suffice. I am also not sure that this is the proceeding in which this Court ought to be telling the investment community how they ought to arrive at its opinions. And I say that not because the Court is unable to do that but because the Court is not equipped in this proceeding.

The only evidence, I think, before the Court is that Lehman Brothers could have rendered its opinion without the due-diligence visit. It had been the investment bankers for UOP for almost twenty years, took the company public in 1959. It had a long history with UOP, but they went ahead and did the due-diligence visit anyhow. And at that time they visited UOP, talked with all of the important executives, Mr. Crawford, the chief financial officer, Mr. Woods, the chief legal officer, the independent accountants and the heads of the various divisions.

I believe that there was some indication this morning that Lehman Brothers didn't look at the future prospects of this company. I think our brief points out that, in fact, they looked at the budgets, they looked at the forecasts, all of which led them to believe accurately that there were no surprises, the company was as they knew it. What they were hired to do was to render their opinion. That they did.

Now, some comment about the time in which they took to render that opinion, the short time. Again, the only evidence in this record is at Page 1397, where the Court asked Mr. Purcell was the time short. Mr. Purcells' response was something to the effect that, not given the fact that Lehman Brothers had a long history with UOP. There was no problem in Lehman Brothers rendering an opinion because of its background with the company.

Whether Lehman Brothers should have done something different in rendering their opinion is not a matter that ought to be addressed. All that ought to be considered by the Court in looking at Lehman Brothers is what it did, how it relates to the transaction, the fact that it was hired to render an opinion, the opinion was rendered, fully disclosed to the stockholders, unlike the case which Mr. Prickett refers to by Judge Stapleton. All of the facts are laid out.

Now, we have also heard again about LB-40, which is the memorandum prepared by Lehman Brothers in 1976. That memorandum continues to be mischaracterized before the Court. Let's remember what this memorandum is. It is a memorandum that never got out of Lehman Brothers. It was never asked for by UOP or Signal. They knew nothing about it. It had nothing to do with it, never shown to them. It says that a range of 17 to 21 might be fair and hints that less than $21 is a correct price but that, because of lawsuits, perhaps something in the range of $21 might have to be paid. This again is fully treated at Pages 5 to 10 of our brief, which doesn't merit a reply.

There is one other thing I want to comment on, Your Honor, and that is the fact that LB-40 was not used by anyone in arriving at their opinion in 1978. One of the people from Lehman Brothers took from that document some statistical material. That statistical material was used, but that was to save a step so that it wouldn't have to be recompiled. Again, today we heard the comment that Mr. Schwarzman saw the document. As we point out at Pages 8 and 9 of our brief, in fact, he saw the cover page, never read the document, and it is, I believe, an unfair characterization of the record to say he read it or saw it.

There is an interesting comment again this morning by Mr. Prickett that he acknowledges that Mr. Glanville had no knowledge of this document in 1978, when he was working on the opinion and rendering the opinion of Lehman Brothers. But he says Mr. Schwarzman knew of it and should have disclosed it. Well, I think that again comes from putting Lehman Brothers in with the rest of the defendants in this case and not treating them separately. The proxy that went out, which was complete, fair and accurate, was not a Lehman Brothers proxy. They didn't write it. The obligation to disclose was on the other parties, and they did that. They disclosed everything.

Your Honor, that is about all I have to say about Lehman Brothers, but I did want to bring to the Court's attention one other comment with respect to the question the Court put to Mr. Halkett about Mr. Bodenstein having used an approach because this was a hundred-percent ownership situation. At Pages 958 to 960 of the transcript the Court put that question to Mr. Bodenstein, and Mr. Bodenstein categorically denied that there was any difference, that he would use the same method for an appraisal or for this proceeding today.

So I think that while the Court's question is a good one and an interesting one, it is one that Mr. Bodenstein himself would have to say that there is no difference. Thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Balotti.

Mr. Sparks.

MR. SPARKS: Your Honor, I have only a few brief comments. As I sat and listened to Mr. Halkett and Mr. Balotti, I checked off a number of the things I would have otherwise said.

First, I do want to repeat one thing Mr. Halkett said, and I think it best comes from me as counsel for UOP, and that is that UOP, certainly myself as counsel for UOP, has never disavowed, abandoned in any way the Lehman Brothers opinion. That was an important portion, as Mr. Crawford testified, of the decisions that were made after consideration by UOP's board of directors. And there has been no effort on the part of my client to abandon that whatsoever. That leads to one other significant overstatement that I believe Mr. Prickett made -- and I caught some other insignificant ones -- and by "overstatement," I mean a statement that simply is not supported by the record.

Perhaps I should say misstatement.

Again, as best as I could copy it down, Mr. Prickett said all that UOP's directors did was compare 1975 and 1978 in an attempt, as I understood it, to describe what Mr. Prickett thought was the mental process of UOP's collective board of directors in evaluating the Signal proposal. That, Your Honor, simply is not correct, and the record makes that abundantly clear.

Of course, the UOP board, among other things, considered the Lehman opinion. The record is also clear that there were reports prepared by the Financial Department of UOP at Mr. Crawford's request which were considered by the board. But perhaps more important than any of those things and something that has just sort of been pushed aside in Mr. Prickett's analysis is the fact that on the UOP board were significant independent businessmen, at least four present or former chief executive officers of other companies, Mr. Clements, Mr. Lenon, Mr. Quinn, Mr. Stevenson. These people all brought to the UOP board and to their evaluation of this transaction not only a thorough knowledge of UOP's business, because all of these people had been on the board of directors of UOP for some considerable period of time, but they also brought their own views as chief executive officers of other companies as to what or how one ought to look at this transaction.

At two depositions of those people that Mr. Prickett took, Mr. Clements and Mr. Lenon, each of them testified as to the way in which that individual would look at the transaction. Mr. Prickett never went forward to take Mr. Quinn and Mr. Stevenson's deposition. I think he would have found it counterproductive, because I am sure those gentlemen also would have had their own appropriate views of how to look at the transaction. And whether you agree with the particular approach followed by Mr. Clements or the particular approach found in Mr. Lenon's thought process in looking at this transaction, the fact is that these were experienced businessmen and they brought their own views to the board, and those have to be respected.

I don't believe that Mr. Prickett anywhere in this record has mounted any sort of attack on the independence of the thought processes of those people. I just don't think there is anything in the record. I know there is nothing in the briefs. I think the Court cannot overlook that. And it is simply incorrect to state that all UOP's directors did was to compare 1975 and 1978.

Finally, Mr. Prickett began the closing portion of his opening argument with a hypothetical which sounded to me like some sort of a poker game or something out of the script of The Sting. It began with a quote which Mr. Prickett ascribed to Mr. Crawford, something have to do with the only game in town. First, Your Honor, I don't recall Mr. Crawford having made any such statement at trial.

THE COURT: I think it was Mr. Walkup, wasn't it?

MR. PRICKETT: Walkup.

MR. SPARKS: It may have been Mr. Walkup, but I don't believe Mr. Crawford made such a statement. I think it is clear that Mr. Crawford, like the other UOP directors, viewed their fiduciary duties and responsibilities in this matter most seriously. I think that the Court had an opportunity to evaluate the testimony of Mr. Crawford as he appeared here before Your Honor, and I think if anything came through clearly from that it was that he viewed his responsibility and role in this as a serious matter, and he viewed his fiduciary responsibility to the minority stockholders of UOP seriously. And I would submit, Your Honor, that the entire hypothetical that Mr. Prickett posed started with a false premise, and there was no basis in the record for any of the following points as he followed them through.

This was not a game. This was a serious exercise by experienced businessmen of fiduciary duties. I think they performed them. I think the record shows that both insofar as their disclosure obligations and insofar as any other obligation, including the obligation of fairness that they had to the minority. Thank you, Your Honor.

THE COURT: Very well. Thank you, Mr. Sparks.

MR. PRICKETT: Your Honor, I am mindful of the time, and I will be brief.

Let me take them in inverse order. First of all, I did not say that Mr. Crawford had said that it was the only game in town. It was Mr. Walkup. Crawford was a player and a player on the Signal team. He didn't deal the cards and he wasn't in it.

Secondly, there is a statement that there were some independent directors on the UOP board. Let me remind you that those self-same directors testified that they thought that there had been negotiations in connection with the price. If these gentlemen were so knowledgeable and had looked into the matter so carefully, how come they testified that they thought there had been negotiations leading to the price? It seems to me that if you are a responsible director, you can at least get the facts straight.

Now, I also detected that there was an argument made that a couple of other independent directors would have testified so and so if they had been called. I think that is inexcusable. Their testimony was not taken. It is not in the record. And therefore, any suggestions as to what they would have done are clearly inappropriate.

Now, let me turn briefly to Mr. Balotti. I am not going to answer all of that. So far as I am concerned, the important thing is that LB-40 was an opinion by the banker, and I think it shouldhave been disclosed to the stockholders. It would have been significant in any reasonable stockholder's approach on the matter, knowing what these people had said. Now, there is a suggestion that Mr. Glanville didn't know about it. That is not correct. He knew about it. He directed it, and his subordinates said so. What he said was that as of the time in 1978 he couldn't remember he had done it. So let's be clear.

Glanville was the guy who directed the report being made. And when it came time, he said he didn't remember it.

Let's also be clear about what Mr. Schwarzman said. I never said that Schwarzman read it. It is clear that he didn't, or at least he claims he didn't, because he recognized that it was an explosive document, that there was an obligation to reveal it. So he read the cover, saw what it was, and said this is dynamite, in effect, and he didn't read it. But that is not what is required.

He is supposed to disclose to the stockholders the hard facts, and one of the hard facts was that in their file was an opinion that, no matter how you gloss over it, was a suggestion to Signal that at the nadir of the fortunes of UOP they cash-out the minority at 21, that it be in their interest, and then they are turning around two years later. That is what Schwarzman saw. He saw that they were on the verge of giving a contrary opinion, so he said, "I won't look at the first one."

Now, let me turn, then, briefly to what

Mr. Halkett said. The first point I note he said is that we are claiming that it is reprehensible to submit the transaction to the stockholders. That is not at all what we said. What we said was that it is reprehensible to submit the merger proposal to the stockholders when you do not exercise complete candor. I suggest the contrary is true; that is, if you want to do one of these transactions, there is nothing wrong with it, and you can probably avoid some of the pitfalls if you make complete disclosure. And if the stockholders with everything in front of them say, "Okay, we buy the deal," and they have all the facts, you probably can do that, because, as the early cases say, a stockholder fully informed who makes up his mind that he wants to do it has no standing to complain. It is when you do not do that and when you engage in reprehensible conduct, such as nondisclosure or overreaching. Then the matter is fatally defective.

Now, secondly, we are told in Exhibit 64, which was admitted, that Signal made a study and that this study came to the attention of the directors of UOP, and it indicated that Signal at up to a price of $24 would make a profit. Now, the cases say that as a fiduciary you owe the obligation of complete candor to the minority. And if the UOP directors, who happened to be Signal directors, knew this -- and, of course, they did -- they had an obligation to turn it over. There is no such thing as retaining this privately for Signal. The UOP minority stockholders were entitled to know it. And if Signal had said, "Look, we can do this transaction at anything up to $24 but we are not going to do it because we only make a 6-percent profit," fine, you make that disclosure, and the stockholders know it, and then if they turn it down, too bad. But if they vote for it, fine. But what you can't do is not give them the information. And there is a clear case where they had information clearly germane to how the stockholders would vote and they withheld it.

Now, I see that in the answer the two-hat theory is again espoused. Now, I think that Mr. Halkett is fair to the Court in saying that they were wearing two hats, and I think it is fair to say that since they were wearing two hats, there could not be a negotiation. But then why do you represent to the stockholders that there were negotiations? If that is the fact, tell them it. Say there can be no negotiations in this because we are in a situation where we are wearing two hats, so there has been no negotiation on the price. What you can't do is say we are negotiating on your behalf but privately say we are not negotiating; we are doing something else because we are wearing two hats. And that is decisive.

Now, there is a suggestion that there was no rushing of the situation because, in fact, the stockholders' alleged vote took place three months after the initial situation. Who are they kidding? What I have been talking about and what has been clearly talked about is that Signal's executive committee announced this proposal to cash-out the minority to Crawford, their boy on the UOP board, on one day, and six days later the whole board votes for it. And by that time the card game is over, and Signal has the vote of the UOP board. It has management supposedly. It has got Lehman Brothers, who has cranked out an opinion. And then they trot all this out to the stockholders.

Now, finally, let me say that the defendants' argument on damages again stems from an attempt to relegate this case to an appraisal case. The Frick case is not applicable because the vice in Frick was not the method as such but the results, and that is clearly not the case here. As the Court has heard in the testimony, Mr. Bodenstein did not make extrapolations and projections. Rather, he explained what he did and he took figures from the company's own figures and their own projections and simply applied the method to them.

In short, Your Honor, I would suggest that we have now heard from all three of the defendants on oral argument. Nothing in the presentation adds anything substantially new to what was finally included in the briefs that were filed. I suggest that this is a case where the Court should, first of all, find that the vote by the majority of the minority is tainted by the lack of complete candor on the part of the defendants; secondly, that the defendants' have failed to prove a proper business purpose for Signal; and thirdly, they have not carried their burden of proof of showing intrinsic fairness and that, on the contrary, the evidence submitted by the plaintiff shows that the worth of the stock as of the time of the merger was not less than $26 and probably a good deal more and that, therefore, the Court should award monetary damages or other equitable relief to all of the stockholders who were cashed out at that time. Thank you, Your Honor.

THE COURT: All right. Thank you very much, Mr. Prickett.

Gentlemen, I think perhaps we have reached the end. It seems to me you have submitted four or five hundred pages' worth of briefs, and we have now discussed the matter for four hours, after having tried it for eleven days, with various motions and opinions preceding that. And I guess maybe it is time you all quit and I started to work.

So I thank you for your arguments and your presentations. Certainly the matter has been presented with customary vigor, as I come to expect from counsel involved.

Mr. Halkett, again, it has been a pleasure to have you here. I compliment you on the presentation of your argument. I have not found one yet that was not well presented or easy to follow, which helps me quite a bit. And I say the same for you, Mr. Prickett. I don't mean to show partiality here. I am trying to compliment the visiting fireman, because it is always good to have him.

All right. I will take the matter under advisement. I understand your positions on the motion to enlarge the class. I will come up with something on that somewhere along the line. We really didn't get into it today that deeply, thank heavens. I don't think it was the time to. I understand your positions on it, and I will try not to forget that.

All right. I think maybe we can all go to lunch. Thank you.

(Court adjourned at 1:55 p.m.)

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CERTIFICATE

I, LORRAINE B. MARINO, Official Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 2 through 132 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above stated cause, before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this day of October, 1980.

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Official Reporter for the
Court of Chancery of the
State of Delaware

Transcribed by:

Patricia Ann Bilson

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