#116

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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

PLAINTIFF'S PRE-TRIAL MEMORANDUM ON LIABILITY

William Prickett
George H. Seitz, III
PRICKETT, JONES, ELLIOTT & KRISTOL
1310 King Street
Wilmington, Delaware 19899
Attorneys for Plaintiff

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TABLE OF CONTENTS

TABLE OF CITATIONS

Table of Citations Cont'd.

NATURE OF THE PROCEEDINGS

This action was filed July 6, 1978, as an individual, class and derivative suit by the plaintiff against The Signal Companies ("Signal"), UOP, Inc. ("UOP"), and Lehman Brothers Kuhn Loeb, Inc. ("Lehman Brothers") as well as certain individual defendants. It arises out of the cash-out merger of the minority public stockholders ("minority stockholders") of UOP. The corporate defendants appeared and answered. Substantial discovery, including depositions, production and interrogatories, has been taken by both the plaintiff and the defendants. The individual defendants were dismissed without prejudice. After briefing and argument, the Court entered orders:

(a) Dismissing the derivative counts, and

(b) Certifying the action as a class action with the plaintiff as the class representative but limiting the class to those stockholders of UOP who had voted against the merger or who have not turned their shares in since the time of the merger.

An interlocutory appeal was taken from the dismissal of the derivative counts and that part of the class action order limiting the class. The Supreme Court declined to accept certification of the plaintiff's interlocutory appeals. (Note)

Note: Pursuant to Rule 23, an order providing for notice to the class has been entered without prejudice to the plaintiff's right to move to enlarge the class at a later time.

Thereafter the defendants moved to dismiss the complaint. After briefing and argument, the Court granted the defendants' motion to dismiss. The plaintiff then filed an amended complaint which the corporate defendants have answered.

The case is set for trial on May 19, 1980. The first two days have been set aside by the Court to read the depositions offered by the plaintiff and review the exhibits. The testimony will commence on Wednesday, May 21, 1980, at 10:00 A.M.

This is the Plaintiff's Pre-Trial Memorandum. (Note)

Note: Page References and Quotations: In this brief, pages of the transcript will be referred to by the name of the deponent, thus: "(Crawford 9)". In quotations, matters in parenthesis and underlining is added throughout unless otherwise noted.

A R G U M E N T

I. FACTUAL OUTLINE OF THE CASE

A. Signal Acquired 50.5% of the Stock of UOP Through Arm's Length Negotiations in 1975

In 1975, Signal negotiated an arm's length tender and purchase for 50.5% of the common stock of UOP (Logan 37 et seq.). Mr. James Glanville, a partner of Lehman Brothers and a director of UOP, was retained by UOP for a fee of $450,000.00 to help Mr. Logan, President of UOP, in these negotiations (Logan 39). In the final round of negotiations, UOP started by demanding $25.00. Signal countered by offering $19.00. After bargaining, the parties finally settled on a compromise price of $21.00 (Logan 42-47, 53). Since UOP needed capital, the deal was structured so that $30 million of stock was purchased from UOP at $21.00 with the balance, in order to come up with 50.5%, coming from a tender to the public stockholders (Logan 49, 54). Mr. Glanville abstained from voting on the matter when it came before the UOP Board, presumably because of his financial interest in the outcome arising out of the $450,000.00 fee (U-313).

Signal's purchase of 50.5% of the stock of UOP was designed to give Signal complete control of UOP and Signal's public filings repeatedly concede that Signal has complete control of UOP (U-326). Specifically, soon after obtaining control of UOP, Signal caused five members of its management to be elected to the UOP Board (Messrs. Shumway, Walkup, Arledge, Wetzel and Chitiea) (Ex. U-7). UOP's Chief Executive Officer, Mr. Logan, was replaced by a long time Signal executive, Mr. Crawford; Mr. Crawford was also elected to the Signal Board (Crawford 14, 36; Logan 64). Mr. Crawford's appointment by Signal as Chief Executive Officer and President of UOP was a clear career and financial promotion for Mr. Crawford (Shumway 12-13).

In 1976, after Signal had acquired control of UOP, Mr. Glanville, a managing director of Lehman Brothers, had Mr. Altman and Mr. Seegal of Lehman Brothers' staff prepare a Memorandum addressed to Mr. Forrest Shumway, President of Signal, advising that Lehman Brothers, after research and study, had concluded that it would be advantageous for <u>Signal</u> to acquire the common stock of UOP still owned by minority stockholders at $21.00 per share (Seegal 19, et seq.; EX LB-40). Actually, though the Memorandum was prepared at the specific directions of Mr. Glanville, he denied having any recollection of it whatsoever at the time of his deposition. (Seegal 20; Glanville 28) (Note)

Note: The significance of the Memorandum is that as early as 1976, Mr. Glanville, a director of UOP and hence a fiduciary of the minority stockholders, was having research done and a Memorandum prepared delineating that it was in the interest of Signal to cash-out the minority shareholders. The price recommended to Signal was $21.00, the 1975 tender price, and the price in the 1978 cash-out merger.

B. Signal's Program to Acquire the Balance of UOP Stock at $21.00 Was Solely to Further Its Own Economic Advantage

From 1975 through January, 1978, Signal considered many investment and merger possibilities (Shumway 18-21). Though Mr. William Walkup, Chairman of the Board of Signal, testified that during the above period the possibility of acquiring the balance of the stock of UOP was discussed by Signal management (Walkup 12), Mr. Shumway testified to the contrary: that is, that the possibility of taking over the balance of the equity in UOP first came up in January, 1978, when he, Forrest Shumway, President of Signal, conceived of the idea (Shumway 19-23). UOP had suffered losses in the Come-By-Chance Refinery venture back in 1976 but, in January, 1978, UOP's President, Mr. Crawford, reported that UOP's net income in 1977 "was at a record level" (Ex. U-49).

Mr. Shumway directed Signal's chief financial officer, Mr. Chitiea, and Mr. Arledge, Signal's Vice President in charge of planning to evaluate the economics from Signal's point of view of Signal's acquiring the interest of the minority shareholders. A detailed financial analysis was made by Signal management in response to Mr. Shumway's direction that an evaluation be made of the proposal from Signal's point of view (Shumway 29, PX 68). Mr. Chitiea and Mr. Arledge, Vice President of Signal for planning, made a presentation that showed that, based on the financial information made available to them (but not available to the public or to UOP outside stockholders), the acquisition of the minority's shares would be economically advantageous to Signal at any price up to $24.00 per share. The analysis by Messrs. Arledge and Chitiea culminated in a firm decision by Signal management (Note) that it would be in Signal's best interest to take over the minority stockholders' common stock. Signal management advocated the adoption of the proposal by the Executive Committee of Signal on February 28, 1978 (Shumway 28). No outsider and specifically no investment banker had been asked at that point to evaluate the value of the minority shares from the point of view of UOP's minority stockholders (Shumway 24).

Mr. Shumway testified as follows on the reason for the acquisition (Shumway 43):

> "Q. And the first reason you presented, therefore, was that you didn't have alternatives on the horizon, the near horizon, that would require the cash or, I suppose, the credit of Signal so that you had the resources available to make that acquisition; is that right?
>
> "A. Yes.
>
> As an alternative we always have other places we could put funds, but they didn't think they were as attractive as this.

Note: Signal's top management consisted of Mr. Walkup, Chairman of the Board; Mr. Shumway, the President; Mr. Chitiea, Vice President for Finance; and Mr. Arledge, Vice President for Planning. All four were directors of Signal (U-7). Mr. Shumway, Mr. Walkup, Mr. Chitiea and Mr. Arledge were also all on the UOP Board (U-7).

"Q. But that's not what you said here. You said here, quote:

> '... no other major cash expenditures by this Corporation are anticipated in the near future,'

indicating that you had no other cash expenditures that would preclude that; is that what you meant by that?

"A. I don't know what the secretary meant.

"Q. Tell us what you meant.

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

C. Mr. Crawford, Signal's Designated President of UOP, Immediately Agreed to Signal's Plan, Including the Price

James Crawford, the Signal Executive who, as noted, had been made President and Chief Executive Officer of UOP by Signal, was summoned by Mr. Shumway, the President of Signal, to come from Chicago (the corporate headquarters of UOP) to Los Angeles (the corporate headquarters of Signal) for the meeting of the Executive Committee of Signal of Tuesday, February 28, 1978 (Crawford 36). Though Mr. Crawford had been elected a director of Signal in November, 1975, he did not ordinarily attend Executive Committee meetings (Crawford 37-38). He was not told in advance why he was being summoned. When he arrived at Signal headquarters, he met privately with Mr. Walkup, Chairman of the Board of Signal, and Mr. Shumway in Mr. Shumway's office (Shumway 40). Mr. Crawford was told that, at the Executive

Committee meeting to be held later that same day, Signal would "acquire" the 49.5% of the publicly held stock of UOP at a "range" of \$20.00 to \$21.00 (Crawford 41-42). Mr. Crawford admitted that he stated at the initial meeting with Mr. Shumway and Mr. Walkup that he favored Signal's move and specifically stated that the price range of \$20.00 to \$21.00 was "generous" to the minority stockholders (Crawford 44). He made this statement without consulting his own management, the Board of UOP or any independent investment adviser (Crawford 44). Between the time of the original private meeting between Mr. Crawford and Messrs. Shumway and Walkup and the Executive Committee meeting later that day (February 28, 1978), Mr. Crawford did not consult with anyone (Crawford 47). He appeared at the meeting of the Executive Committee; after Mr. Shumway had delineated Signal's program to acquire the minority's stock at a price of \$20.00 to \$21.00, Mr. Crawford stated to the Signal Executive Committee his unequivocal approval of the plan, including a price for the minority stockholders of \$20.00 to \$21.00. (Note) Mr. Crawford admitted that he never made any attempt

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Note: If Mr. Crawford had been truly "independent", President of UOP instead of a "loyal" Signal Executive, Signal could never have gotten him to come to a private preliminary meeting with the President and Chairman of the Board of Signal followed by a meeting of the Executive Committee of Signal at which they would have been able to obtain his immediate and complete acquiescence to a cash-out merger of his minority shareholders at a price range set solely by the officers and Executive Committee of the majority shareholder.

whatsoever to obtain or negotiate for any additional consideration beyond the $20.00-$21.00 which Signal management had already itself decided to pay the minority shareholders. Nor did Mr. Crawford even inquire whether Signal would offer a tax free exchange of the UOP stock for Signal's own stock and thus give the minority the opportunity to continue their equity participation in the Signal-UOP venture without adverse capital gains consequences. In short, Mr. Crawford did nothing to protect the interest of the minority shareholders of UOP. (Crawford 46)

> "Q. My question to you was not that. My question was: Did you ever attempt to get a nickel more for those stockholders?
>
> "A. Your question was: Did I attempt to get more than 20 or 21?
>
> "Q. Yes.
>
> "A. And I answered that question negatively.
>
> "Q. So in this meeting with Signal, Signal's President and Chief Executive Officer, you indicated that you felt that the offer was generous?
>
> "A. Yes."

The price range of $20-21 originated entirely with Mr. Forrest Shumway, President of Signal, the majority holder of UOP stock: it was not the product of research, study or consultation, nor was it the outgrowth of negotiations. Mr. Shumway never had any evaluation done to determine the <u>value</u> or <u>worth</u> of the minority shares: he simply felt that the price was "fair" to the minority shareholders) (Shumway 55).

The price range of $20-21 was initially presented to the management of Signal, i.e., Messrs. Walkup, Chitiea and

Arledge (as well as Brewster Arms, Esquire, house counsel for Signal). Messrs. Walkup, Chitiea and Arledge were also directors of UOP (Ex. U-7). None of them even suggested, as UOP directors, that the minority shareholders were entitled to a higher price. None of these UOP directors attempted to negotiate on behalf of the unrepresented outside stockholders of UOP.

Brewster Arms, Esquire, house counsel of Signal, was present at the Executive Committee meeting of February 28, 1978. He alerted Messrs. Shumway, Walkup, Wetzel, Chitiea and Arledge to their obvious conflict of interest and of their fiduciary responsibilities (Ex. 278, Minutes of the Meeting of the Executive Committee of Signal 2/28/78):

> "Mr. Arms pointed out the fiduciary responsibilities of those persons who are common directors of both this company and UOP (namely, Messrs. Arledge, Chitiea, Crawford, Shumway, Walkup and Wetzel) and he commented particularly upon the unique role of Mr. Crawford as director of both companies and the President and Chief Executive Officer of UOP."

Brewster Arms, Esquire, a director only of Signal, (since he alone had no conflict of interest) urged that the price for the minority stock be only \$18.00 or \$19.00 per share. (Note) None of the UOP directors at that time (or

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Note: Though Mr. Arms as a director of Signal had a perfect right to urge his own views on the price Signal should pay for the UOP shares, there is nothing in the record to indicate that Mr. Arms had any qualification that would give him any expertise on the question as to the true <u>value</u> of the minority shares of UOP, nor did he have any evaluation made: he was simply bargaining as a Signal director for the best deal from Signal's point of view. The problem was that none of the UOP directors recognized that they had the duty to do likewise for the minority shareholders.

indeed ever) urged a price greater than \$20-\$21, much less negotiated themselves or even inquired if someone else had negotiated for the best possible price for the minority. Either Mr. Arms never made it clear that these UOP directors had a duty to negotiate themselves on behalf of the minority (or at the very least see that someone conducted such negotiations) or these UOP directors disregarded his advice. The plain fact is that there were no negotiations on price: the price range of \$20-21 had been finally determined by Signal management even before Mr. Crawford was summoned and readily agreed.

D. The Press Releases and Proxy Statement Were Issued to Give the Minority Stockholders the Impression That There Had Been Negotiations in Connection With the Price of \$21.00

Though there never were any negotiations at all, the investing public, including the minority holders, were falsely led to believe that there were negotiations by Signal and UOP on the price. (Note)

Note: Signal management and Mr. Forrest Shumway in particular knew all about negotiations. In <u>Gimbel v. Signal</u>, 316 A.2d 599 (Chan. 1974), aff'd. 316 A.2d 619 (Del. Supr. 1974), this Court had occasion to review in detail the negotiations conducted by Mr. Shumway, Mr. Chitiea, Mr. Walkup and Brewster Arms, Esquire in connection with the sale of Signal's oil assets. In 1975, Mr. Shumway had personally conducted Signal's successful negotiations for the 50.5% interest in UOP (Logan 42-49). Mr. Shumway and Mr. Walkup negotiated salary and other terms with Mr. Crawford when he was asked by Signal to become President of UOP (Shumway 12-13).

Specifically, immediately after the meeting of the Executive Committee of Signal on February 28, 1978, and before the meetings of the Boards of both UOP and Signal on March 6, 1978, there were two press releases published in connection with the acquisition of Signal of the minority's shares. The first was a joint release of Signal and UOP dated February 28, 1978, which reads in pertinent part (PX 146):

> "SIGNAL NEGOTIATING
> FOR UOP COMMON STOCK
>
> "The Signal Companies, Inc. and UOP Inc. are conducting negotiations for the acquisition for cash by Signal of the 49.5% of UOP which it does not presently own, announced Forrest N. Shumway, president and chief executive officer of Signal, and James V. Crawford, UOP president.
>
> "Price and other terms of the proposed transaction have not yet been finalized and would be subject to approval of the boards of directors of Signal and UOP, scheduled to meet early next week, the stockholders of UOP and certain regulatory agencies. The closing price of UOP's common stock (NYSE) on February 28, 1978, was $14.50 per share."

The public, including the public stockholders, was given to believe that (1) UOP and Signal were <u>negotiating</u> when in fact there never were any negotiations, and (2) the price had not been finalized when in fact Mr. Crawford, the Chief Executive Officer of UOP, had stated to the President and Chairman of Signal his agreement that the price of $20.00 to $21.00 was "generous" to the minority stockholders and had repeated his acquiescence to the Signal acquisition and the above price to the Executive Committee of Signal (Crawford 43).

Two days later, on March 2, 1978, a second press release was issued by Signal (PX 110):

> "SIGNAL TO RECOMMEND
> PRICE OF $20-21 FOR
> OUTSTANDING UOP SHARES
>
> "Forrest N. Shumway, president and chief executive officer of The Signal Companies, Inc. announced today that Signal management will recommend to its directors for their approval a price in the range of $20 to $21 a share in the proposed acquisition of the outstanding 49.5% minority interest in UOP Inc.
>
> "Last Tuesday the company announced it was conducting negotiations for Signal's acquisition of this interest. If Signal's directors approve, the offer will be presented to the UOP directors for their review and approval. Both boards are scheduled to meet Monday, March 6. A further announcement will be made following the meetings."

This second release made it appear that there had been negotiations in the interim that had led Mr. Shumway to announce that he would recommend a price "in the range of $20 to $21 a share" to Signal's Board. (Note) Actually, Mr. Shumway had, before February 28, determined the price range and announced it to the Signal management and Executive Committee as well as Mr. Crawford. He knew he had the full agreement of the President and Chief Executive Officer of UOP, James Crawford, to Signal's entire plan, including the price range. Mr. Shumway testified that Mr. Crawford never

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Note: These press releases were published, inter alia, in the Wall Street Journal (U-49-110), the New York Times (LB-17), and the Daily Herald (U-49-146). They were officially filed with the SEC by UOP as an amendment to its 13d (U-155).

attempted to get more money for the UOP shareholders (Crawford 66). Thus, though there were no negotiations whatsoever on behalf of the minority, the two press releases were designed to and did in fact make it appear to the minority shareholders that there had been negotiations on their behalf. Those press releases were deliberately false and misleading and were material to UOP's stockholders in considering whether to vote in favor of the merger. It is clear that there were no negotiations whatsoever on price. Signal decided it was to be $20-$21 before talking to Mr. Crawford. After February 28, 1978, Mr. Crawford talked by phone to Mr. Shumway who told him he would recommend to Signal's Board that they pay $21.00 (Shumway 104). Mr. Crawford also talked to Mr. Walkup (Walkup 36). It is clear that no attempt was made by Mr. Crawford to negotiate for a price beyond $21.00 or for better terms (i.e., a stock-for-stock tax-free exchange) (Shumway 104; Walkup 36-37; Crawford 46).

After the meeting of the Boards of UOP and Signal on March 6, 1978, Signal issued a press release saying in effect that the price was the result of "negotiations" (EX 24). On March 7, 1978, UOP sent a letter to its minority stockholders specifically stating that, on February 28, 1978, "both companies had announced negotiations were being conducted..." (U-49-075).

The Notice of Annual Meeting and Proxy Statement 1978 which was sent to stockholders of UOP in May, 1978, strenuously urging them to vote for the merger, did not correct the false representation that had been made to the stockholders in the above press releases that the price had been arrived at through negotiation on their behalf. On the contrary, the Proxy Statement represented to the minority shareholders that there had been "negotiations" conducted on their behalf in connection with the price. However, the Introduction states (U-7, page 3):

> "The price was determined <u>after</u> discussions between James V. Crawford, a director of Signal and Chief Executive Officer of UOP, and officers of Signal which took place during meetings on February 28, 1978, and in the course of several subsequent telephone conversations."

(The foregoing statement is repeated verbatim at page 9 of the Proxy Statement.) The price was not determined <u>after</u> discussions: the price range was determined unilaterally by Signal, announced to Mr. Crawford who immediately agreed. The foregoing language creates the impression that there had been negotiations (i.e., "after discussions"). Moreover, on page 13 of the UOP Proxy, it was flatly represented that there had been <u>negotiations</u> (EX U-7, page 13):

> "On February 28, 1978, the last day of reported trading prior to the public announcement that UOP and Signal were conducting negotiations for the acquisition for cash by Signal of the 49.5% which it does not presently own ..."

The explanation of the use of the word "discussions" lies in the fact that the original draft of the Proxy Statement stated there were "negotiations" leading to the price (U-82). However, when the SEC challenged the claim of "negotiations" and demanded details (U-82), UOP used the vague term "discussions" (U-81). However and most important, neither in the Proxy Statement nor elsewhere was the repeated assertion of the alleged "negotiations" made to the public and particularly UOP's minority stockholders ever retracted.

In short, the press releases and the later Notice of the Annual Meeting and Proxy Statement deliberately and falsely led the minority stockholders to believe that there had been negotiations on their behalf in connection with the price: in truth, no negotiations whatsoever took place.

Ostensibly, the full Board of Signal considered and fixed the price of $21.00 at the March 6, 1978 meeting. Actually, Mr. Shumway and the Signal management had fixed the price before February 28. In fact, Mr. Crawford told Mr. Glanville on March 2nd that the price would be $21.00 (and obtained an assurance that Lehman Brothers could and would provide a fairness letter for a fee of $250,000.00) (Crawford 117, Ex. U-49-23).

E. The Retention of Lehman Brothers Gave the Minority Stockholders the False Impression That a Disinterested Investment Banking House Had Carefully Considered the Signal Proposal, Including the Price and Had Issued an Opinion That the Price Was Fair to the Minority

After Mr. Crawford returned to Chicago, he promptly got in touch by phone with Mr. James Glanville (Glanville 42). As previously pointed out, Mr. Glanville was a managing director of Lehman Brothers, a New York investment house (Glanville 4-7). Mr. Glanville had been a member of the

Board of UOP for a number of years and for a fee of $450,000.00 had helped UOP in the negotiations with Signal for the acquisition by Signal of 50.5% of the UOP stock in 1975 (Glanville 12-22). Mr. Crawford asked Mr. Glanville whether Lehman Brothers could provide a "fairness" opinion to the Board and minority stockholders on the Signal acquisition of the minority's shares at $20.00 to $21.00 per share (Glanville 43). (Mr. Glanville made no mention or reference to the fact that he had directed the preparation of a Memorandum addressed to the President of Signal advising that it was in <u>Signal's</u> interest in <u>1976</u> to buy out the minority stockholders at $21.00 per share (LB-40). Mr. Glanville stated that he could not remember if Mr. Crawford asked if Lehman Brothers had a conflict of interest (Glanville 43).) (Note) Mr. Glanville immediately replied that Lehman Brothers could give such an opinion (Glanville 43). Mr. Crawford noted at the time that Mr. Glanville had in fact said (Crawford 119-120):

> "Q. 'No problem with $21 - no negotiation.'
>
> Now, this being your note, what did that mean?
>
> "A. He said that his off-the-cuff reaction was that he would have no problem with $21 as a fair price. He didn't feel that it was necessary or proper to negotiate in order to increase that price. He was referring to the position that he might take as a member of the Board of Directors."

Note: At his deposition in this case, Mr. Glanville claimed he had no memory at all of the Memorandum (Glanville 24-28).

Mr. Glanville quoted $250,000.00 as the price of the opinion (Glanville 43). (Note) Mr. Crawford stated that he was shocked by the price. Though Mr. Glanville claimed that his loyalty was to the stockholders of UOP (Glanville 45), the entire week before the meeting of the Board of UOP was spent in active negotiations between Mr. Crawford and Mr. Glanville on the price that Lehman Brothers would charge for the

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Note: Mr. Glanville was a director of UOP: as such, he was under an obligation to give his opinion on matters affecting UOP, including the fairness of the Signal stock acquisition, to the Board and his fellow directors. In arriving at his opinion, Mr. Glanville did no work or research himself: he simply arrived at an opinion on hearing the Signal price of $20-$21. Actually, what happened was that after haggling on the price, Mr. Glanville sold his opinion on fairness to UOP for $150,000.00. If Mr. Glanville had the right to sell his opinion and be paid from UOP assets (Crawford 103-104) so did every other member of the UOP Board. The name and prestige of Lehman Brothers was being sought as a means of influencing the minority stockholders. This is precisely what Judge Stapleton found this same New York firm did in Denison v. Fibreboard, 388 F.Supp. 812, at 821-822 (D.C. Del. 1974).

fairness opinion (Ex. U-71). (Note)

Mr. Glanville had Mr. Schwarzman, Mr. Pearson and Mr. Seegal, subordinates at Lehman Brothers (Seegal 45), make a one-day "due diligence" visit on March 3, 1978 (Seegal 50) to UOP headquarters. Messrs. Schwarzman, Seegal and Pearson interviewed UOP's management: the bright future, both short and long range, of UOP (which Signal had advance private information on) was confirmed. They were assured by UOP management, UOP counsel and UOP's auditors that there would be no "surprises" (Seegal 53; Pearson 9-12). Back in New York, they also reviewed some documents (Seegal 51), including the 1976 Memorandum prepared at Mr. Glanville's direction advising Signal's President that it would be in Signal's interest to purchase the minority shares in 1976 at

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Note: Mr. Glanville originally demanded $250,000.00 plus indemnification as the price for the Lehman "product" (Schwarzman 10), i.e., the opinion. Mr. Crawford expressed righteous "shock" and proceeded to get the Lehman "product" he felt he needed by intense arm's length bargaining: it included all the familiar litany that both sides necessarily use in arm's length bargaining to arrive at a final figure that both sides can agree to: shock (U-49-083), reminders of past favors (U-49-23), attempts to enlist others (U-49-23), promises of future benefits unrelated to the negotiation at hand (U-49-25-127), offers (U-49-23) and counter-offers (U-49-25-127). Mr. Crawford demonstrated that he knew how to bargain to achieve the best result from his position under the circumstances (i.e., by negotiation): he got Mr. Glanville to agree to $150,000.00 rather than the $250,000.00 originally demanded. The significance is that Mr. Crawford (though he knew how) did not even attempt to negotiate for UOP minority shareholders.

$21.00 ((LB-40, Seegal 63). Mr. Schwarzman was aware of the Memorandum but claimed he had not reviewed the Memorandum (LB-40; Schwarzman 19-25). Mr. Glanville did not participate in this due diligence visit nor did he even review the report made of the visit (Seegal 79). He was in Vermont on the weekend of March 3-5 before the Chicago meeting of Monday, March 6, 1978 (Glanville 58). He never met with Mr. Seegal and Mr. Pearson who had done the actual work. He only met Mr. Schwarzman as they were flying out from New York to Chicago on March 6, 1978, the very morning of the 9:00 A.M. Chicago meeting of UOP's Board (Glanville 70-71). He may have "glanced" at the paperwork on the plane trip from New York to Chicago (Glanville 73): he "thumbed" through it (Schwarzman 53).

Mr. Glanville testified that without any work or review of any documents whatsoever, he could give the requisite fairness opinion. Mr. Glanville made no determination of the value of the minority shares: his opinion was solely based on the fact that the price of the stock before the Signal announcement was in the area of $14.50 (Glanville 114) and $21.00 represented, therefore, the market price plus a fifty percent premium (Glanville 117-118).

> "Q. Did you yourself make any computation as to what the proper premium was in this case?
>
> "A. In my head -- first, I don't understand the expression proper premium. The premium in this case was about 50% and that was a calculation I did in my head when I first heard what the price level was.

"Q. I see. So that when you first heard what the price was to be -- is that $21? --

"A. 20 to 21.

"Q. -- so that you did a calculation in your head that the premium was in the area of 50% and that sounded right to you based on what you knew?

"A. That sounded appropriate, correct.

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

"A. Correct, from that point of view.

"Q. And I take it that in this situation you did not make any written calculations at all?

"MR. HAGAN: What do you mean by 'written calculations'?

"Q. You didn't write anything down on any piece of paper, you yourself?

"A. No, sir." (Note)

In the Notice of Annual Meeting of Stockholders and Proxy Statement (EX U-7), the defendants made it appear to the minority stockholders that an independent and prestigious New York banking house had carefully considered the Signal proposal and had, after due consideration, given an opinion that the price was fair. There was no careful consideration of the price much less the value of the stock of the minority shareholders by a banking house: Mr.

Note: Actually, even under Mr. Glanville's rough and ready approach, a price of $22.00 would have been more nearly fair to the minority than $21.00 (i.e., $14.50 + 50% premium = $21.75).

Glanville had made up his mind the moment he heard Signal's price. (Indeed, he had Lehman Brothers prepare a Memorandum in 1976 advising Signal that it was in Signal's best interest to acquire the same shares at that very price.) Mr. Glanville spent the entire week negotiating on the price that Lehman Brothers would charge for his fairness opinion. His subordinates at Lehman Brothers did some pro forma paperwork and a one-day "due diligence" visit to UOP headquarters but Mr. Glanville did not review or even consider this paperwork.

The written Lehman Brothers opinion was delivered to the Board of UOP on March 6, 1978. The first page simply recites claims of work done and disclaimers. These are followed by a statement that Mr. Glanville who signed the letter for Lehman has been a director of UOP since 1972 and "is familiar with the business and future prospects of UOP" (EX U-7, pg. D-1-2). The only operative part of the letter is one sentence (EX U-7, pg. D-2):

> "On the basis of the foregoing, our opinion is that the proposed merger is fair and equitable to the stockholders of UOP other than Signal."

The stockholders are given no explanation or reasons for the opinion. (Note) More flagrant is the affirmative non-disclosure that this opinion is nothing more than the "off

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Note: In Denison v. Fibreboard, 388 F.Supp. 812 at 822 (D.Del. 1974), Judge Stapleton said of a similar letter by Lehman Brothers, "... the bare reference of the Proxy Statement to an opinion of an investment house that the transaction was 'fair to the company stockholders' without further reference to the basis for that opinion was misleading."

the cuff" opinion of Mr. Glanville that $21.00 is fair solely because $21.00 represents the market price of $14.50 plus a "50%" premium. In addition, the minority stockholders were entitled to know that Mr. Glanville, contrary to what was represented, was not basing his opinion on the "future prospects of UOP".

F. Signal's Plan Included UOP Board Approval to Make It Appear to the Shareholders That Their Board Had Deliberated the Proposal and, After Deliberation, Had Recommended It Unanimously to the Stockholders

Mr. Crawford and UOP's management worked assiduously with Signal's management and legal staff to facilitate Signal's take-over of the minority stock in UOP (EX U-49-23, U-49-24, U-49-30). For example, he agreed that the UOP Board would meet on March 6th, just six days after the announcement of Signal's acquisition program was disclosed to and approved by Mr. Crawford, to consider the Signal proposal. The haste with which this "Saturday night special" merger was rammed through precluded any real consideration by the UOP Board. It also precluded obtaining a meaningful outside banking opinion. Most important, it prevented any third party from making a competing offer. Finally, it precluded the minority stockholders from taking any action before the Board (controlled by Signal) had gone on record as "unanimously" approving the merger. The Boards of UOP and Signal not only met the same day but, though the Boards met in Los Angeles and Chicago, the Board meetings were connected by telephone (EX 36).

Of course, since Signal was the majority stockholder of UOP, it had determined the composition of the UOP Board (U-7). The UOP Board consisted of five Signal executives (Mr. Shumway, Mr. Walkup, Mr. Chitiea, Mr. Arledge and Mr. Wetzel) and six other directors whom Signal nominated and elected (Mr. Pizzitola, Mr. Clements, Mr. Lenon, Mr. Quinn, Mr. Stevenson and Mr. Venema). Besides Mr. Crawford, the former Signal executive when Signal had installed as President and Chief Executive Officer, Mr. Walkup, Chairman of the Board of Signal and himself a director of UOP, appeared at the UOP Board meeting in Chicago and formally presented the Signal program, including the price of $21.00 (EX 36). The UOP directors received their first documentary information at the meeting itself (EX 298).

The minutes of the meeting of UOP's Board of March 6, 1978 (Plaintiff's EX 298) show that Mr. Crawford urged Board approval even before Mr. Walkup of Signal presented the Signal program to the Board:

> "At the request of the Chairman, Mr. Crawford advised the Board that the proposed merger with Signal would appear to have minimal effect on UOP employees, their benefits and the UOP managers. He stated that some 250 employees have exercisable options to purchase UOP common stock and therefore an equitable arrangement would be needed for either an exchange of stock covered by such options or a buy-out based on the difference between the option prices and $21 per share. He was of the opinion that the proposed merger with Signal owning 100 per cent equity in UOP would have a beneficial effect on its customers. He anticipates after the proposed merger becomes effective that the Board of Directors will be changed to an all-inside Board at an appropriate time. The proposed merger-offer will give UOP stockholders an opportunity to accept or reject an approximate

45 per cent increase in the market value of UOP common stock. He expects the stockholder response to be similar to the response received in Signal's 1975 tender offer for UOP common stock, which was over-subscribed.

"Mr. Walkup then stated that Signal proposed in the cash-merger transaction to use funds on hand supplemented by short-term borrowings, which later could be changed to long-term loans. He said UOP as a wholly-owned company would make an outstanding investment for Signal in that Signal's earnings would be increased (presently Signal can consolidate only 50.5 per cent of UOP's earnings while required to consolidate all UOP revenues and debt), Signal's ratios would improve, as well as improved return on sales and facilitate the flow of resources to UOP and from UOP to other Signal units. Signal will be able to provide financial assistance to UOP when needed as Signal has provided similar assistance to Mack Trucks, Inc. and The Garrett Corporation, both wholly-owned subsidiaries, in the past. Signal's full equity ownership of UOP will permit joint ventures with other Signal units which would not be feasible with a minority ownership interest outstanding.

"Mr. Walkup further stated that the $21 per share offering price was arrived at after comparing UOP's values in 1974 - 1975 with present values. (Note) The market value of UOP common stock at the time the 1975 tender offer was made was $13.875 and a premium of 51 per cent was offered to UOP stockholders at $21. The market value of said stock on February 28, 1978 was $14.50 - with a 45 per cent premium in the $21 cash-merger offer. At the end of 1974, UOP's earnings from operations were $24,600,000 - while in 1977, said earnings were $24,300,000. Stockholders' equity in 1974 was $193,900,000 as compared to $227,900,000 in 1977. However, the latter figure included approximately $31,000,000 provided by Signal in its purchase of 1,500,000 shares of UOP common stock in 1975. Dividends in 1974 were at the rate of 70¢ per share - dividends in 1977 were paid at the rate of 62.5¢ per share.

Note: Mr. Walkup confirms again that the price was not negotiated: it was arrived at after "comparing UOP's values in 1974 - 1975 with present values".

Cost savings to both companies would be made in such activities as the elimination of some filing of reports with governmental regulatory agencies and insurance matters. The disadvantage to Signal of UOP ownership includes the Come-By-Chance litigation.

"Mr. Walkup concluded by stating that he anticipated no problems in concluding the proposed transaction and that Signal desires to keep UOP employees whole and not penalize them because of the transaction. He also stated that he would answer any questions other Directors might have and that he would leave the meeting while the other Directors participating in the meeting made their evaluation of Signal's $21 per share offer."

The Board minutes give the impression that Mr. Glanville gave the Board a serious disinterested evaluation of the Signal proposal from the point of view of UOP's minority stockholders (Plaintiff's EX 298, pg. 4):

"The Chairman then presented to the Board for consideration the report of Lehman Brothers Kuhn Loeb with respect to the offer of $21 by Signal to the Corporation's stockholders.

"Mr. Glanville stated that he became familiar with UOP at the time its capital stock was first offered to the public in 1959. In addition, he has served as a Director of UOP since 1972 and he has had familiarity with UOP affairs for many years. After he and his staff had reviewed what they believed to be pertinent financial and other materials, with complete cooperation of management of UOP, they concluded that the proposed merger offer is fair and equitable to the stockholders of UOP other than Signal. Copies of said report were in each Director's book. For the information of Messrs. Lenon, Pizzitola and Stevenson, who were participating in the meeting by means of conference telephone, Mr. Glanville summarized and read verbatim portions of his report to the Board of Directors. (Note)

Note: The "report" referred to is simply the 2-page letter of Lehman Brothers dated March 6, 1978, which simply says, without giving reasons, "On the basis of the foregoing, our opinion is that the proposed merger is fair and equitable to the shareholders of UOP other than Signal" (U-49-092). The "report" is not "Lehman Brothers Summary Data Counseling an Offer by Signal Companies, March 1978" (LB-5).

> "The Directors then posed questions to Messrs. Glanville and Walkup and Counsel for the Corporation with respect to various matters in connection with the proposed transaction. After receiving responses thereto, Messrs. Crawford and Walkup excused themselves from the meeting."

Mr. Glanville had not participated in the review that "his staff" had made: indeed, he himself had only "glanced" at the paperwork (Glanville 73), and he was seen "thumbing" through it on the plane (Schwarzman 53).

In spite of Mr. Crawford's suggestion that the outside directors take the lead in evaluating the Signal "offer", the proposal was not referred to the Audit Committee or a Special Committee of Directors truly independent of Signal's dominance with the responsibility of considering the matter from the point of view of the minority stockholders (Clements 58). There was no suggestion that the proposal be taken under advisement. The minutes do not reflect any questions by the directors (Clements 34-35; Pizzitola 31). Mr. Schwarzman, the senior Lehman officer who had headed the research, made no presentation and was asked no questions (Schwarzman 53).

Mr. Clements believed it was the responsibility of Mr. Crawford to negotiate the best price for the minority (Clements 39). Mr. Pizzitola assumed Mr. Crawford had conducted negotiations because it was his responsibility to do so (Pizzitola 33). Even Mr. Glanville felt it was Mr. Crawford's responsibility to negotiate the best price and assumed, without ever asking, that Mr. Crawford had done so

(Glanville 92-96). There was no suggestion by the Board that there be a negotiation effected to increase the price to the minority (Glanville 92-96). Nor was there any question raised about bettering the terms, including the possibility of a stock-for-stock tax-free exchange.

The matter was brought on for a vote both by the Signal Board and the UOP Board. Those persons who were both Signal directors and UOP directors (Messrs. Shumway, Walkup, Chitiea, Arledge and Wetzel) voted in favor of the merger as directors of Signal. The same persons abstained from voting for the merger as directors of UOP "on the advice of counsel" (Chitiea 55-57). However, all of the Signal-UOP directors affirmatively stated on the record that but for the conflict of interest they would have voted in favor of the proposal (EX U-298). A UOP press release dated March 6, 1978, said the action of the UOP Board was "unanimous" (U-49-099). A letter was sent to each minority stockholder on March 7, 1978, stating that there had been "unanimous" approval by the UOP Board of Signal's proposal (U-49-075). A similar letter was sent to UOP employees reciting unanimous action by the UOP Board (U-49-087).

These persons who were both directors of Signal and UOP abstained from voting at the UOP meeting with the most notable exception: James Crawford, President of UOP and director of both Signal and UOP and the man who purportedly negotiated on behalf of the minority: he did not abstain but voted for the Signal proposal (EX U-7). (Note)

The minority stockholders were informed in the Notice and Proxy Statement (EX U-7) that the Signal proposal had been laid before the Board, that the Board had considered the proposal, that the Board had had the benefit of the opinion of Lehman Brothers, and that "Signal" directors on the UOP Board had abstained (but signified approval).

Signal, UOP and Lehman Brothers did everything possible to convince the minority stockholders to vote for the proposal (Crawford 178, et seq.). For example, UOP's management, without even Board approval, retained Georgeson & Co., a professional stock solicitation company, to solicit proxies in favor of the Signal proposal (EX U-7, pg. 4).

The Notice of Annual Meeting and Proxy Statement of UOP was prepared, circulated and sent out to the stockholders (EX U-7). The Proxy Statement repeatedly and strenuously urged the minority shareholders to vote in favor of the proposal of Signal, representing that the price which had been negotiated was fair to the minority stockholders of UOP

Note: Mr. Pizzitola, a member of the banking house of Lazard Freres which was the banking house that originally negotiated with Signal for the purchase of the 50.5%, did not abstain nor did he disclose then or in the Proxy Statement that he was on the Board as a result of his affiliation with Signal. Mr. Crawford said Mr. Pizzitola was considered for the fairness opinion but rejected because of the conflict of interest since Lazard Freres represented Signal (Crawford 155).

in the view of UOP's management, its entire Board and Lehman Brothers, an old prestigious New York investment banking house which had been retained and had given an independent opinion to the UOP Board and the minority stockholders.

Signal, of course, had complete control of UOP because it held a majority of the stock. Thus, it stood on both sides of the proposed transaction (EX U-7). To get around this obvious conflict, Signal structured the vote on the merger so that the outcome would appear to have been decided by the majority of the minority (EX U-7). Signal would not vote its shares until after it was known whether a majority of the minority had approved. This was the method chosen by Signal to give the appearance of not having abused its fiduciary position vis-a-vis the minority (EX U-7).

As has been shown, neither Signal nor the captive Board and management of UOP carried out their fiduciary duties to the minority, nor did they make the required full and complete disclosure of the material facts surrounding the transaction. But, in addition, UOP's management went even further: though they should have been neutral as between the majority and minority owners of UOP, they did everything they could to insure that the requisite majority of the minority would vote in favor of the Signal proposal.

All of the "paper" efforts that the defendants had gone through (press releases, fairness opinion, Board consideration, etc.) made it appear that interests of the fractionated and leaderless minority shareholders had been observed culminated in the Notice and Proxy Statement (EX U-7) dated May 5, 1978.

The Notice and Proxy Statement contains numerous statements that are either (a) totally untrue or (b) partially true or are superficially true in form but not in substance. For example, the representation that there had been "negotiations" found on page 13 is totally untrue. In fact, the contrary is true: Mr. Crawford had agreed the first time his superiors at Signal told him what the price was to be. The representation that the UOP Board "considered" the fairness of the merger is a half truth: in fact, the UOP Board were all elected by Signal. The Board was hurriedly assembled less than one week after the first announcement of the proposed merger to UOP's President, Mr. Crawford. At the March 6, 1978 meeting, the Board forthwith gave their approval without any real consideration of fairness of the price or the terms or any inquiry as to how it was arrived at nor whether there had been any negotiations leading up to the price. The representation that Signal had advised that it had not employed Lehman Brothers in the past may be true. But the plain fact is that Lehman Brothers had a real undisclosed conflict of interest: it had taken a position adverse to that of the minority by preparing a Memorandum advising Signal that it was in Signal's best interest to squeeze out the minority for $21.00 in 1976. Most important, there was nothing in the Proxy Statement to warn the unsuspecting minority stockholders that the management and Board of UOP, a company of which they were part owners, were totally dominated by the majority stockholder and that the management and the Board were working hand in glove with Signal to promote Signal's interest (i.e., take over the minority's stock position).

The Notice and Proxy Statement (EX U-7) contains several instances where the management of UOP strenuously urged that the minority stockholders vote for the merger by giving management their proxies (Crawford Introductory Letter, Notice, Proxy, pg. 4, pg. 9, pg. 10). In addition, UOP's management, without even obtaining Board approval, retained Georgeson & Co., a professional stock soliciting firm to solicit proxies in favor of the Signal proposal (EX U-7, pg. 4).

There were more than a score of angry letters of protest from stockholders of UOP to Mr. Crawford in regard to the price (U-49-10), the cash-out (U-49-036), the lack of arm's length bargaining (U-49-043), the failure to offer a tax-free exchange of Signal stock for UOP stock (U-49-067) and the failure to increase the $21.00 price fixed March 6, 1978, when stock prices generally and Signal's stock in particular rose by 15% by May 28, 1978 (U-49-023). Mr. Crawford sent bland answers to all such inquiries from his shareholders (i.e., U-49-035).

On February 28, 1980, UOP stock closed at $14.50. Pursuant to New York Stock Exchange regulations, trading was interrupted because of the announcement of negotiations (Purcell 233). When the stock reopened on May 2, 1978, UOP stock traded at $19.5/8 and, on May 26, 1978, the date of the annual meeting of UOP, it was $21 (Purcell 222-223). Mr. Purcell testified that normally after the announcement of a price range, the stock rises to substantially the area of the price range and remains fairly constant at that figure but does not exceed it (Purcell 224).

Mr. Purcell testified Signal stock was traded February 28, 1978, at about $28. (Purcell 221). Between that time and May 28, 1978, the date when the merger with UOP went through, Signal stock rose to about $39. (Purcell 221). In addition, Mr. Purcell testified that in the period from March 1, 1978, through May 26, 1978, the stock market as a whole rose by about 13% (Purcell 221). Thus, if the Signal offer had not capped the UOP stock, UOP stock would have risen by 13% from $14.50. Therefore, on May 28, 1978, UOP stock would have been trading at 13% higher, or $16.38 (to which an appropriate premium would have to be added).

The terms of the merger, however, did not make any provision for an increase in price to reflect any upward movement of the stock market (Purcell 225). Rather, the Signal proposal was based on the market price of $14.50, the lowest that UOP stock traded for the entire month of February, 1978. In addition, the defendants did not provide for any update on the fairness of the transaction as of the time of closing, May 28, 1978, as contrasted with the time of the announcement of February 28, 1978 (Purcell 226). Mr. Purcell testified that he was familiar with merger agreements requiring the fairness opinion as of the time of closing (Purcell 227).

In this case, the deal was unfair at the time of the announcement and was grotesquely unfair as of the time of the closing because of the general stock market rise of 13%. The unfairness is compounded by several other factors. In the first place, the merger agreement provided Signal with an "out": Signal could have backed out of the deal prior to May 28, 1978, if by any chance the general market had gone down simply by having an affirmative vote of both its Board and the Board of UOP (which Signal controlled (EX U-7, Merger Agreement). Thus, Signal had structured the merger with a "heads, we win - tails, you lose" provision. In addition, and finally, the UOP stockholders were deprived of that portion of the second quarter dividend represented by the period from March 31 through May 28: the UOP Board voted to omit the dividend and Signal thus eventually pocketed 100% of the second quarter dividend (EX 141).

Finally, Signal could have provided for the option of a stock-for-stock tax-free exchange, as was strongly suggested by the Court in <u>Tanzer v. International General Industries, Inc.</u>, 402 A.2d 382, at 391 (Del. Chan. 1979). If this had been done, the UOP stockholders would have continued their equity participation in the Signal-UOP enterprise (unless they wanted to terminate their participation, in which case they could have sold the Signal stock). If there had been a stock-for-stock exchange, the minority stockholders would have shared the spectacular rise which Signal stock enjoyed in the period from February 1, 1978, through May 28, 1978.

In short, the Signal proposal at $21.00 was unfair on February 28, 1978, since it did not represent an arm's length price based on negotiations between representatives of UOP's minority and Signal but simply represented Signal's price. The unfairness was compounded by the terms of the merger which precluded UOP's stockholders from any appreciation of the general rise of stock prices, including Signal's own stock as well as precluding them from receiving their aliquot portion of the dividend earned by their stock in the period from March 31 through May 28, 1978.

Many of the UOP minority shareholders were taken in by the defendants' careful program, believing as they had every right to, that their rights had been fully protected by their corporate fiduciaries and that there had been full disclosure. <u>However, 43.6% of the minority stockholders did not vote at all and 7.9% of the minority voted against the merger</u>. (Note)

Note: In May, 1978, there were 11,488,302 UOP shares outstanding of which Signal owned 5,800,000 and 5,688,302 were owned by others. Only 56.4% of the 5,688,302 shares were voted.

After the merger, Mr. Crawford received and acknowledged written congratulations from other Signal executives for having successfully carried out the merger which eliminated the outside shareholders of UOP. (Note)

Note: It is not without significance that Mr. Crawford signed his acknowledgment of the congratulatory letter from Mr. Mullin of Garrett as follows: "Your blood brother, James Crawford" (EX U-49-4).

OUTLINE OF
APPLICABLE LEGAL PRINCIPLES

Simply stated, this case presents the question whether Signal, the owner of 50.5% of the common stock of UOP, and the other corporate defendants violated their fiduciary obligations to the minority stockholdefs of UOP in carrying out a cash-out merger when the facts are measured against the applicable law. In this section of his Pre-Trial Brief, the plaintiff will outline and show the applicability of the following legal principles:

(a) That, under Delaware law, the corporate defendants are fiduciaries vis-a-vis the minority shareholders of UOP.

(b) That, a threshold requirement in any merger effected by a majority stockholder is affirmative proof by the majority shareholder of a proper business purpose (other than its own economic advantage or the covert objective of ridding itself of unwanted minority shareholders).

(c) That the defendant can not avoid either the burden of proving fairness or its fiduciary responsibilities simply by casting the merger approval in terms of a majority-of-the-minority vote where the majority uses its dominant position to achieve that result or has failed to make full disclosure to the minority.

(d) That the fiduciary obligations of the defendants specially include:

(i) The duty to negotiate the best price and terms for the minority.

(ii) The duty to weigh and consider the proposal of the majority from the point of view of the minority, including the fairness of the price and the terms.

(iii) The duty to correct false press releases and make full and complete disclosure to the minority.

II. EVEN BEFORE SINGER, UNDER DELAWARE LAW, THE MAJORITY STOCKHOLDERS WERE ACCOUNTABLE TO THE MINORITY AS FIDUCIARIES

As will be shown hereafter, this case represents an attempt, simply by structuring the merger, to circumvent the basic concepts and guiding principles of the landmark case, Singer v. Magnavox, 380 A.2d 969 (Del. Supr. 1977). Singer is applicable if for no other reason than the fact that it re-enunciated clearly the fiduciary guidelines against which to measure the legality of a merger transaction involving a controlling stockholder. As a starting point, therefore, it is well focused on the Singer decision. The Supreme Court said:

> "We turn, first, to what we regard as the principal consideration in this appeal; namely, the obligation owed by majority shareholders in control of the corporate process to minority shareholders, in the context of a merger under 8 Del.C. §251, of two related Delaware corporations. It is, in other words, another round in the development of the law governing a parent corporation and minority shareholders in its subsidiary. Cf. Folk, The Delaware General Corporation Law, at 77-81, 331-336; Balotti, 'The Elimination of the Minority Interests by Mergers Pursuant to Section 251 of the General Corporation Law of Delaware', 1 Del.J. of Corp. Law 63 (1976)."

(The Court then turned to the necessity of a proper business purpose, a point the plaintiff will deal with later in this brief.) The Supreme Court continued:

> "It is a settled rule of law in Delaware that Development, as the majority stockholder of Magnavox, owed to the minority stockholders of that corporation, a fiduciary obligation in dealing with the latter's property. Sterling v. Mayflower Hotel Corp., Del. Supr., 33 Del. Ch. 293, 93 A.2d 107, 109-10 (1952). In that leading "interested

merger" case, this Court recognized as established law in this State that the dominant corporation, as a majority stockholder standing on both sides of a merger transaction, has 'the burden of establishing its entire fairness' to the minority stockholders, sufficiently to 'pass the test of careful scrutiny by the courts.' See 93 A.2d at 109, 110. See also Bastian v. Bourns, Inc., Del. Ch., 256 A.2d 680, 681 (1969), aff'd Del. Supr., 278 A.2d 467 (1970); and David J. Greene & Co. v. Dunhill International, Inc., Del. Ch., 249 A.2d 427, 430 (1968). The fiduciary obligation is the cornerstone of plaintiffs' rights in this controversy and the corollary, of course, is that it is likewise the measure of the duty owed by defendants.

"Delaware courts have long announced and enforced high standards which govern the internal affairs of corporations chartered here, particularly when fiduciary relations are under scrutiny. It is settled Delaware law, for example, that corporate officers and directors, Guth v. Loft, Inc., supra, and controlling shareholders, Sterling v. Mayflower Hotel Corp., supra; Bennett v. Breuil Petroleum Corp., 34 Del. Ch. 6, 99 A.2d 236 (1953), owe their corporation and its minority shareholders a fiduciary obligation of honesty, loyalty, good faith and fairness. Other cases applying that equitable doctrine include Schnell v. Chris-Craft Industries, Inc., supra; Kaplan v. Fenton, Del. Supr., 278 A.2d 834 (1971); Dolese Bros. Co. v. Brown, Del. Supr., 39 Del. Ch. 1, 157 A.2d 784 (1960); Johnston v. Greene, Del. Supr., 35 Del. Ch. 479, 121 A.2d 919 (1956); Italo-Petroleum Corporation of America v. Hannigan, Del. Supr., 1 Terry 534, 14 A.2d 401 (1940); Condec Corporation v. Lunkenheimer Company, 43 Del. Ch. 353, 230 A.2d 769 (1967); Craig v. Graphic Arts Studio, Inc., 39 Del. Ch. 477, 166 A.2d 444 (1960); Brophy v. Cities Service Co., 31 Del. Ch. 241, 70 A.2d 5 (1949).

"The classic definition of the duty was stated by Chief Justice Layton in Guth, where he wrote:

> "'... While technically not trustees, ... [corporate directors] stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and

motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest. The occasions for the determination of honesty, good faith and loyal conduct are many and varied, and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale.'

"5 A.2d at 510. While that comment was about directors, the spirit of the definition is equally applicable to a majority stockholder in any context in which the law imposes a fiduciary duty on that stockholder for the benefit of minority stockholders. We so hold."

In Tanzer v. International General Industries, Inc., 379 A.2d 1121 (Del. Supr. 1977), the Supreme Court reaffirmed the foregoing principles. In Roland v. Najjar, 407 A.2d 1032 (Del. Supr. 1979), the Supreme Court, in making clear that the Singer doctrine was applicable to short form as well as long form mergers, said:

"We begin our review by returning to Singer. In that case, this Court reaffirmed the long settled Delaware law of fiduciary duty which governs the relationship between majority and minority shareholders and, applying it to a merger under 8 Del.C. §251, we said:

"'We hold the law to be that a Delaware Court will not be indifferent to the purpose of a merger when a freeze-out of minority stockholders on a cash-out basis is alleged to be its sole purpose. In such a situation, if it is alleged that the purpose is improper

> because of the fiduciary obligation owed to the minority, the Court is duty-bound to closely examine that allegation even when all of the relevant statutory formalities have been satisfied.'

380 A.2d at 979.

"The unmistakeable focus in Singer was on the law of fiduciary duty. See 380 A.2d at 976. Such a duty is owed by the majority stockholders (who have the power to control corporate property and, indeed, corporate destiny) to the minority stockholders of the corporation when dealing with the latter's property. It may not be circumvented by full compliance with the procedures permitted under and required by the corporation statutes, nor is it discharged by remitting minority shareholders to a statutory appraisal remedy (often based upon the status of the market and the elements of an appraisal), the timing of which is entirely within the control of the majority. The fiduciary duty is violated when those who control a corporation's voting machinery use that power to 'cash out' minority shareholders, that is, to exclude them from continued participation in the corporate life, for no reason other than to eliminate them.

"In Tanzer, we held that even when a parent corporation has a bona fide purpose for merging with its subsidiary, the minority shareholders of the subsidiary are entitled to a judicial review for 'entire fairness' as to all aspects of the transaction. 379 A.2d at 1125. In other words, the fiduciary duty exists even if the majority has a bona fide purpose for eliminating the minority: in that case, the duty of the majority is to treat the minority fairly."

The Court also said:

"It should be noted that the merger under scrutiny here is of a kind different from those involved in Singer and Tanzer. In Singer, the merger followed a takeover by a previously unrelated corporation. Tanzer considered a merger of two affiliated corporations. The merger described in the case at bar, however, presents a classic 'going private' transaction, with the majority having complete control over the timing of the 'squeeze play' on the public stockholders -- a timing conceivably selected to favor the majority only, based upon the status of the market and the elements of an appraisal. According to the complaint, the merger was simply the means chosen to eliminate the comparatively few public shareholders of Roland. It has been argued with persuasion that this type of merger calls for the strictest observance of the law of fiduciary duty. 89 Yale L.J. at 1365. We agree."

In Lewis v. Great Western Corp., No. 5397, Sept. 15, 1977, 3 Del. Journal of Corp. Law 583 (a copy of which is attached), this Court said (even before Singer) (pg. 585):

> "Since the defendants Hunt own 65% of the common stock of GWU, and since GWU owns all the common stock of HIRCO, it is obvious that the Hunts, as controlling majority shareholders, stand on both sides of the merger transaction. When this occurs the business judgment rule gives way to the rule of Sterling v. Mayflower Hotel Corp., Del. Supr., 93 A.2d 107 (1952) and David J. Greene & Co. v. Dunhill International, Inc., Del. Ch., 249 A.2d 427 (1968) and places the burden of establishing the 'entire fairness' of the proposed transaction on those who stand upon both sides of it. Examined against this standard, I am not satisfied at this point that the record reveals the fulfillment of this obligation imposed upon the defendants."

The defendants under Singer have the burden of proving that the cash-out merger of the minority is not prohibited under the stringent fiduciary criteria enunciated by Singer.

III. A MAJORITY STOCKHOLDER IS PROHIBITED FROM EFFECTING A CASH-OUT MERGER OF AN UNWANTED MINORITY WHERE THE PURPOSE IS IN THE ABSENCE OF A PROPER BUSINESS PURPOSE

In Singer and Najjar, the Supreme Court not only restated the general fiduciary standards that govern and regulate the conduct of a majority in a cash-out merger, it specifically prohibited a cash-out merger of the minority in the absence of a proper business purpose:

> "Plaintiffs contend that the Magnavox merger was fraudulent because it was made without any ascertainable corporate business purpose and was designed solely to freeze out the minority stockholders. After a review of the cases, the Trial Court concluded that to the extent the complaint charges that the merger was fraudulent because it did not serve a business purpose of Magnavox, it fails to state a claim upon which relief may be granted. Our analysis leads to a different result, not on the basis of fraud but on application of the law governing corporate fiduciaries."

The Supreme Court then said:

> "We hold the law to be that a Delaware Court will not be indifferent to the purpose of a merger when a freeze-out of minority stockholders on a cash-out basis is alleged to be its sole purpose. In such a situation, if it is alleged that the purpose is improper because of the fiduciary obligation owed to the minority, the Court is duty-bound to closely examine that allegation even when all of the relevant statutory formalities have been satisfied."

After reviewing Bennett v. Breuil, 99 A.2d 236 (Del. Chan. 1953); Condec v. Lunkenheimer, 230 A.2d 769 (Del. Chan. 1967); and Schnell v. Chris-Craft Industries, 285 A.2d 437 (Del. Supr. 1971), the Supreme Court concluded:

"Read as a whole, those opinions illustrate two principles of law which we approve: First, it is within the responsibility of an equity court to scrutinize a corporate act when it is alleged that its purpose violates the fiduciary duty owed to minority stockholders; and second, those who control the corporate machinery owe a fiduciary duty to the minority in the exercise thereof over corporate powers and property, and the use of such power to perpetuate control is a violation of that duty.

"By analogy, if not a fortiori, use of corporate power solely to eliminate the minority is a violation of that duty. Accordingly, while we agree with the conclusion of the Court of Chancery that this merger was not fraudulent merely because it was accomplished without any purpose other than elimination of the minority stockholders, we conclude that, for that reason, it was violative of the fiduciary duty owed by the majority to the minority stockholders.

"We hold, therefore, that a §251 merger, made for the sole purpose of freezing out minority stockholders, is an abuse of the corporate process; and the complaint, which so alleges in this suit, states a cause of action for violation of a fiduciary duty for which the Court may grant such relief as it deems appropriate under the circumstances."

In Tanzer v. International, 379 A.2d 1121 (Del. Supr. 1977), the Supreme Court said in making clear that the acquiror must have a proper business purpose:

"Although we have stated that IGI is entitled as majority stockholder to vote its own corporate concerns, it should be clearly noted that IGI's purpose in causing the Kliklok merger must be bona fide. As a stockholder, IGI need not sacrifice its own interest in dealing with a subsidiary; but that interest must not be suspect as a subterfuge, the real purpose of which is to rid itself of unwanted minority shareholders in the subsidiary. That would be a violation of Singer and any subterfuge or effort to escape its mandate must be scrutinized with care and dealt with by the Trial Court. And, of course, in any event, a bona fide purpose notwithstanding, IGI must be prepared to show that it has met its duty, imposed by Singer and Sterling v. Mayflower Hotel Corp., Del. Supr., 33 Del. Ch. 293, 93 A.2d 107 (1952), of 'entire fairness' to the minority."

This Court as trier of fact should keep the above admonition of the Supreme Court in mind as Signal now attempts to prove a proper business purpose other than its own economic advantage.

The first deposition taken in this case was that of the President of Signal, Mr. Forrest Shumway. He testified that Signal's principal reason for the merger was simply because it represented the best alternative for Signal to use the cash which it had available (Shumway 43):

> "Q. And the first reason you presented, therefore, was that you didn't have alternatives on the horizon, the near horizon, that would require the cash or, I suppose, the credit of Signal so that you had the resources available to make that acquisition; is that right?
>
> "A. Yes.
>
> As an alternative we always have other places we could put funds, but they didn't think they were as attractive as this.
>
> "Q. But that's not what you said here. You said here, quote:
>
> > '... no other major cash expenditures by this Corporation are anticipated in the near future,'
>
> indicating that you had no other cash expenditures that would preclude that; is that what you meant by that?
>
> "A. I don't know what the secretary meant.
>
> "Q. Tell us what you meant.

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

Furthermore, in its request to the I.R.S. for a tax ruling on the transaction, UOP stated, inter alia, that one of its purposes was so that there would be "no minority shareholders after the transaction" (EX 45, pg. 7). In the Proxy Statement prepared at leisure after the hasty approval of the Signal and UOP Boards on March 6, 1978, elaborate and detailed reasons were advanced as to the purpose of the merger (EX U-7): as to these ex post facto reasons, the Court should scrutinize them carefully to see whether they are meritorious or are simply later inventions or pretexts to circumvent the prohibition against mergers whose real purpose is the economic advantage of the acquiror.

The plaintiff believes that the Court could and should resolve the issue of liability in plaintiff's favor on this threshold issue. It should then focus its attention on the proper equitable remedy to redress the wrong done to the minority shareholders of UOP.

IV. THE DEFENDANTS CAN NOT AVOID EITHER THE BURDEN OF PROVING FAIRNESS OR THEIR FIDUCIARY RESPONSIBILITIES SIMPLY BY CASTING THE MERGER APPROVAL IN TERMS OF A MAJORITY OF THE MINORITY VOTE SINCE THE MAJORITY HAS USED ITS DOMINANT POSITION TO ACHIEVE A FAVORABLE VOTE AND HAS FAILED TO MAKE FULL DISCLOSURE TO THE MINORITY

The defendants, obviously aware of the holdings in Singer, devised a technique to avoid the appearance of having carried out the merger through their voting strength. The technique, of course, is to provide that the merger shall only be effective if a majority of the minority first votes for the merger proposal. Once again, Singer is instructive: the Supreme Court points out that the Delaware Courts have looked through form and procedure in just such situations:

> "In this appeal it is uncontroverted that defendants complied with the stated requirements of §251. Thus there is both statutory authorization for the Magnavox merger and compliance with the procedural requirements. But, contrary to defendants' contention, it does not necessarily follow that the merger is legally unassailable. We say this because, (a) plaintiffs invoke the fiduciary duty rule which allegedly binds defendants; and (b) Delaware case law clearly teaches that even complete compliance with the mandate of a statute does not, in every case, make the action valid in law.
>
> "The last stated proposition is derived from such cases as Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437, 439 (1971) (which involved advancement of the date of an annual meeting, accomplished in compliance with the relevant statute) wherein this Court said that '... inequitable action does not become permissible simply because it is legally possible;' and from Guth v. Loft, Inc., Del. Supr., 23 Del. Ch. 255, 5 A.2d 503, 511 (1939), in which the Court,

> responding to an argument for a narrow examination of issues, said that '[t]he question [at issue] is not one to be decided on narrow or technical grounds, but upon broad considerations of corporate duty and loyalty.' We apply this approach and reject any contention that statutory compliance insulates the merger from judicial review."

The admonition in Tanzer v. International, 379 A.2d 1121 (Del. Supr. 1977), quoted above requiring the Trial Court to be alert to "subterfuges" or efforts to escape from its (Singer's) mandate is germane.

The defendants structured the merger so as to insulate themselves from carrying out their fiduciary duties and to avoid judicial scrutiny by claiming that the minority stockholders ratified the merger by voting in favor of the merger and are thus estopped or precluded from challenging the merger. (Note)

In Elster v. American Airlines, 100 A.2d 219 (Del. Ch. 1953), Vice Chancellor Branhall made it clear that a stockholder is precluded from complaining of corporate action only if the stockholder has full knowledge of all the facts:

> "It is well established that a stockholder cannot complain of corporate action in which, with full knowledge of all the facts, he or she has concurred. Finch v. Warrior Cement Corporation, 16 Del. Ch. 44, 141 A. 54. There is no averment in the complaint of any failure on the part of defendant, or of any of those charged with its management, to make full disclosure of all the facts relating to the option plans sought to be attacked. According to the affidavit offered by defendant, which is not disputed, all facts

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Note: It should also be noted that Judge Stapleton was not taken in by such a ploy in Jacobs v. Hanson, 464 F.Supp. 780 (D.C. Del. 1979).

pertinent to the option plans had been placed upon the public records of the New York Stock Exchange and had been forwarded to every stockholder of record of defendant, as required by the regulations of the Securities and Exchange Commission. She therefore had ample notice of all pertinent facts surrounding the adoption of the option plans at the time the shares which she held were voted in favor thereof. Goldboss v. Reimann, D.C.S.D. N.Y., 55 F. Supp. 811."

In Gottlieb v. McKee, 107 A.2d 240 (Del. Ch. 1954), Vice Chancellor Branhall said:

"The rule is a general one that he who participates in or acquiesces in an action has no standing in a court of equity to complain against it. Equity will not hear a complainant stultify himself by complaining against acts in which he participated or of which he has demonstrated his approval by sharing in their benefits. Trounstine v. Remington Rand, Inc., 22 Del. Ch. 122, 194 A. 95. See 13 Fletcher, Cyclopedia of Corporations, (Perm. Ed.) Sec. 5862, p. 209. However, it is essential to the doctrine of estoppel that the party sought to be estopped should have had the means of knowing the facts or have been in such a position that he ought to have known them. Ainscow v. Alexander, 1944, 28 Del. Ch. 545, 39 A.2d 54. See also cases cited in 19 Am. Jur., Estoppel, Sec. 49, p. 648. It is true that the meeting was an annual meeting and that the proxy was a general proxy entitling the holders thereof to vote the same upon all questions which might arise at the meeting. However, since plaintiff had no knowledge of the fact that the resolution in question was to be presented and was informed that the management of Syndicate intended to present no other items of business at the meeting, she is not estopped from asserting any right which she may have had relative thereto. ..."

In Gottlieb v. Heyden Chemical Corp., 91 A.2d 57 (Del. Supr. 1952), the Supreme Court held:

"We understand that where the board members vote themselves stock options and do not obtain stockholder ratification, they themselves have assumed the burden of clearly proving their utmost good faith and the most scrupulous inherent fairness of the bargain. Fletcher, Cyclopedia of

> Corporations, (Perm. Ed.), Secs. 913, 916, and 921. Where there is stockholder ratification, however, the burden of proof is shifted to the objector. Holthusen v. Edward G. Budd Mfg. Co., D.C., 53 F.Supp. 488. In such a case the objecting stockholder must convince the court that no person of ordinarily sound business judgment would be expected to entertain the view that the consideration furnished by the individual directors is a fair exchange for the options conferred."

However, the Court went on to point out that the burden is shifted only where the approval is obtained from <u>fully</u> informed stockholders:

> "In our view, therefore, the entire atmosphere is freshened and a new set of rules invoked where formal approval has been given by a majority of independent, fully informed stockholders. ..."

Since the majority stockholder was seeking to acquire the minority's shares, it had a fiduciary duty to the minority of "complete candor". In <u>Lynch v. Vickers</u>, 383 A.2d 278 (Del. Supr. 1978), Justice Duffy said:

> "Relying on Allied Chemical & Dye Corporation v. Steel & Tube Co., Del. Ch., 120 A. 486 (1923), and Epstein v. Celotex Corporation, Del. Ch., 238 A.2d 843 (1968), the Chancellor determined that Vickers, <u>as the majority shareholder of Trans-Ocean, owed a fiduciary duty to plaintiff which required 'complete candor' in disclosing fully 'all of the facts and circumstances surrounding the' tender offer</u>. 351 A.2d at 573. <u>We agree with that statement of the law</u>. Compare Singer v. The Magnavox Company, et al., Del. Supr., 380 A.2d 969 (1977); Lank v. Steiner, Del. Supr., 224 A.2d 242, 244 (1966), applying the 'special circumstance rule' to a director possessed of special knowledge withheld from a stockholder with whom he is negotiating for purchase of his stock; and Iroquois Industries, Inc. v. Lewis, Del. Supr., 318 A.2d 134 (1974)."

. . .

"Defendants concede that they owed plaintiff a fiduciary duty of complete frankness but assert that they discharged that duty by accurately disclosing that TransOcean's net asset value was 'not less than $200,000,000 ... and could be substantially greater.' Technically speaking, the language may be accurate; but that kind of generality is hardly a substitute for hard facts when the law requires complete candor. And when, as here, management was in possession of two estimates from responsible sources -- one using a 'fear' approach defining value in terms of its lowest worth, and the other a more 'optimistic' or ceiling approach defining value in terms of its highest worth -- it is our opinion that complete candor required disclosure of both estimates. If management believed that one estimate was more accurate or realistic than another, it is free to endorse that estimate and to explain the reason for doing so; but full disclosure, in our view, was a prerequisite.

"A second reason why we think that the Court of Chancery was mistaken in applying the law was that it incorrectly substituted a 'disclosure of adequate facts' standard (351 A.2d at 575) for the correct standard, which requires disclosure of all germane facts. Completeness, not adequacy, is both the norm and the mandate under present circumstances."

In this case, the defendants had the obligation to disclose, among other things, that the basis of the opinion of the expert witness whom they retained for the alleged benefit of the minority was nothing more than an "off the cuff" reaction that $21.00 was fair because it added to the market price a 50% premium. Denison v. Fibreboard, 388 F.Supp. 812 (D.C. Del. 1974).

The minority stockholders of UOP were not fully informed of the material facts concerning the merger on which they voted at the annual meeting. On the contrary, not only were facts withheld from them, they were deliberately misled on many important and material aspects of the merger: among others, the following:

(a) They were not given full or correct information on the fact that the price of $21.00 was in fact set by the majority stockholder.

(b) They were repeatedly and deliberately misled into believing that there had been negotiations on their behalf in connection with the price and terms of the merger.

(c) They had been falsely led to believe that an independent and prestigious investment banker had made an evaluation of the price on their behalf and had advised that the price was fair.

(d) They had been told that the UOP Board of Directors had considered the merger and voted unanimously to recommend the merger to the minority stockholders.

The doctrine of ratification by the use of a majority-of-the-minority vote has no application where, as in this case, the majority has deliberately misled the minority by deliberate misinformation and concealment of important facts surrounding the merger.

Folk, The Delaware Corporation Law, pg. 83, summarizes the applicable law as follows:

"b. Approval by stockholders. The statutory test is twofold: (1) the material facts as to the party's 'relationship or interest' and as to the substance of the contract or transaction must be disclosed by the interested party, or at least the stockholders must have knowledge of such facts, and (2) the transaction must be 'specially' approved in good faith by the stockholders.

"Under prior law, stockholder ratification was often effective to validate a transaction otherwise open to challenge, for 'the entire atmosphere is freshened and a new set of rules invoked where formal approval has been given by a majority of independent, fully informed stockholders.' Ratification, however, 'can never constitute the only requisite to validity,' at least absent unanimity. To be effective the ratifying stockholders must have knowledge of what they are asked to approve, and 'the burden is on him who relies on a ratification to show that it was made with a full knowledge of all material facts.' Mere availability of knowledge from books present at the meeting is not the equivalent of actual knowledge, nor does approval of the minutes of a preceding meeting of itself constitute ratification which validates everything which the minutes disclose to have been done. Although one who knowingly votes to ratify a voidable transaction may not thereafter challenge the ratification, voting a general proxy which failed to disclose that a ratification resolution would be introduced at an annual meeting does not bar the stockholder from thereafter attacking it. Finally, the Delaware courts have held that fraud could not be effectively ratified by stockholders, nor waste of corporate assets, except by a unanimous vote. (Citing cases.)"

In addition to the fact that the defendants are not entitled to having the vote of stockholders as a ratification because of the lack of full disclosure, the defendants are also barred by the fact that the record shows that they have used the corporate machinery and funds to achieve the favorable vote by the minority on the merger.

In Condec Corporation v. Lunkenheimer Company, 230 A.2d 769 (Del. Chan. 1967), the Court said:

> "Finally, we are not here concerned with the need of proving corporate injury as has been held to be the case when a stockholder attacks derivatively the spending of corporate funds for the purchase of his corporation's own stock, Kors v. Carey, 39 Del. Ch. 47, 158 A.2d 136. This rather is a case of a stockholder with a contractual right to assert voting control being deprived of such control by what is virtually a corporate legerdemain. Manipulations of this type are not permissible, Canada Southern Oils v. Manabi Exploration Co., 33 Del. Ch. 537, 96 A.2d 810."

In Schnell v. Chris-Craft Industries, Inc., 285 A.2d 437 (Del. Supr. 1971), Justice (now Chief Justice) Herrmann said:

> "'Thus plaintiffs reasonably contend that because of the tactics employed by management (which involve the hiring of two established proxy solicitors as well as a refusal to produce a list of its stockholders, coupled with its use of an amendment to the Delaware Corporation Law to limit the time for contest), they are given little chance, because of the exigencies of time, including that required to clear material at the S.E.C., to wage a successful proxy fight between now and December 8. ***'
>
> "In our view, those conclusions amount to a finding that management has attempted to utilize the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office; and, to that end, for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management. These are inequitable purposes, contrary to established principles of corporate democracy. The advancement by directors of the by-law date of a stockholders' meeting, for such purposes, may not be permitted to stand. Compare Condec Corporation v. Lunkenheimer Company, Del. Ch., 230 A.2d 769 (1967).
>
> ***
>
> "Management contends that it has complied strictly with the provisions of the new Delaware

Corporation Law in changing the by-law date. The answer to that contention, of course, is that inequitable action does not become permissible simply because it is legally possible."

In Young v. Valhi, 382 A.2d 1372 (Del. Chan. 1978), Chancellor Marvel held in enjoining a proposed merger:

> "In fact, I am satisfied that the merger before the Court is the prototype of the kind which the Supreme Court now seeks to prevent by its application of strict standards of fiduciary behavior to the conduct of majority stockholders in their dealings with the minority, the ground on which I base my decision as to the relief which should be entered after final hearing having its base in what I believe to have been the use of technically correct but devious corporate action on the part of Contran for the purpose of accomplishing a merger designed to eliminate all minority stockholders of Valhi, namely the proposed circumventing of a charter provision of Valhi for the benefit of minority stockholders, of which Contran had constructive if not actual knowledge at the time of its acquisition of control of Valhi in 1975, namely the requirement that 80% of its stock must vote in favor of a merger with another corporation holding at least 5% of its shares. By seeking to evade such charter provision through the formation of the subsidiary, VIS Corp., all of the stock of which is owned by Valhi, and the proposed merger of such non-operative corporation and Valhi by means of a mere majority vote, Contran has undertaken to manipulate corporate machinery to accomplish an inequitable result, namely the unilateral elimination of any interest in Valhi on the part of its minority stockholders in exchange for cash by a vote of less than 80% of such corporation's voting stock. Compare Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971), and Condec Corporation v. Lunkenheimer Company, Del. Ch., 230 A.2d 769 (1971)."

In the context of the record of this case, the majority-to-minority vote was itself a manipulative device or technique barred by the Schnell doctrine. What really has happened is that there has been a "charade" played on the minority: by hastily obtaining the "unanimous" approval of the UOP Board and then parading the result to convince the minority stockholders to vote for the merger is a manipulation of corporate machinery in view of the fact that the UOP Board was nominated and controlled by the majority stockholder, Signal.

The record discloses that the defendants, including UOP's management, mobilized UOP's corporate funds, corporate personnel and the corporate machinery to effect Signal's design -- that is, to get the majority of the minority to vote in favor of the merger. As part of this effort to work Signal's will, the management of UOP, even without UOP Board approval, retained and paid Georgeson & Co., a proxy soliciting firm, to solicit proxies in favor of "management" (i.e., for Signal). See Schnell v. Chris-Craft Industries, supra. (Note)

The timing of the merger announcement (before the disclosure of UOP of the excellent first quarter results), the omission of the second quarter dividend and the shrewd reservation in the terms of the merger for Signal to abort if the market went down are further violations by the majority of the principle that the majority should not utilize its control position to obtain an unfair advantage over the minority.

In short, in view of the guidelines of Singer and the doctrines of Schnell, the device that the majority sought to employ a majority-of-the-minority vote should be held to be insufficient to circumvent the fiduciary responsibilities of the defendants vis-a-vis the minority stockholders.

Note: UOP's management should have been scrupulously neutral vis-a-vis the majority and the minority rather than working assiduously for the majority stockholder.

V. THE DEFENDANTS VIOLATED THEIR FIDUCIARY RESPONSIBILITIES TO THE MINORITY BY FAILING TO NEGOTIATE, FAILING TO CONSIDER AND EVALUATE THE TESTIMONY, BY PUTTING OUT AND NOT CORRECTING FALSE INFORMATION AND BY FAILING TO RETAIN AN INDEPENDENT BANKER TO EVALUATE THE PROPOSAL FROM THE POINT OF VIEW OF THESE STOCKHOLDERS

As has been previously shown, the defendants, under the doctrine of the Singer case and its successors, had general fiduciary obligations to the minority stockholders. This general obligation requires utmost fidelity. The record in this case shows that Signal and the other corporate defendants failed to carry out their obligations: on the contrary, they joined in a plan to effect the merger and attempted to structure it in such a way as to avoid by seeming to obtain ratification of their fiduciary obligations.

Beyond the foregoing, however, there are certain definite and specific obligations which these corporate fiduciaries violated.

A. The Duty to Negotiate

As has been shown, the defendants are fiduciaries of the minority. As such, they had an outstanding obligation to do the best that they possibly could for the minority in terms of the merger. Critical to this obligation was the obligation to negotiate on behalf of the minority for the price and the terms of the merger. The importance of negotiation as the best means of determining price can not be overestimated.

The article, "Legal Standard of Fairness of Merger Terms Under Delaware Law" (hereafter "Fairness of Merger Terms"), by Charles M. Nathan and K. L. Shapiro, 2 Del. Journal of Corporate Law, pg. 44, begins:

> "It is probably axiomatic that when a board of directors considers a proposal to merge or otherwise combine the corporation with a second company, the board's principal consideration should be the fairness of the proposed merger terms to the stockholders of their corporation.
>
> "Whether such board consideration of the fairness of a proposed merger is subject to judicial scrutiny, and if so when and of what nature, are of course different questions. However, it now seems clear that the corporate law of many states, including that of Delaware, permits judicial scrutiny of the fairness of proposed merger terms in situations in which one of the constituent corporations to the merger controls or dominates the second corporation and the legal challenge is mounted prior to consummation of the transaction. <u>Judicial scrutiny is presumably considered appropriate in these circumstances because of the possibility that the proposed merger terms may not have arisen from the kind of arm's-length dealing that, in the normal functioning of the market place, is likely to produce a fair price</u>."

The authors go on to say (pg. 46):

> "Although the Delaware courts do not normally articulate the concept as such, the 'intrinsic fairness' doctrine appears to be an attempt to use the process of an independent judicial review of the terms of the challenged merger as a substitute for the arm's-length negotiation that the courts presume to have been absent in situations involving controlling and controlled corporations."

In <u>Abelow v. Symonds</u>, 184 A.2d 173 (Chan. 1962), Chancellor (then Vice Chancellor) Marvel made it clear that arm's length bargaining is the best method of arriving at a fair selling price, saying:

> "While arm's length bargaining between a willing buyer and seller is a time tested method of arriving at a fair selling price for corporate assets, an independent and honest appraisal is some times by necessity the only acceptable method of establishing fair value. (Citing cases)."

On appeal, in Abelow v. Mid-States Oil Corp., 189 A.2d 675 (Del. Supr. 1963), Chief Justice Southerland, in denying a motion for reargument, pointed out that where there is arm's length bargaining between the parties, there is no necessity for invoking the aid of the Court:

> "On Reargument
> "It is insisted earnestly, and in greath length, that the Court has fallen into grievous error. We are told that we have ignored the controlling principle of law -- when the minority is oppressively treated by the majority, equity will right the wrong. We did not overlook such an elementary rule; we held it inapplicable. The exchange of stock upon which the charge of fraud is based is an arm's length transaction between Tennessee and the individual stockholders of Middle."

In Palley v. McDonnell Company, 295 A.2d 762 (Del. Chan. 1972), Vice Chancellor (now Chancellor) Marvel held that the controlling stockholder had violated its fiduciary obligations in the "so called bargaining" with its controlled subsidiary by failing to take a reasonable position vis-a-vis the interest of the subsidiary:

> "Meanwhile, as the development and manufacture of the cameras in question progressed, Hycon began to experience financial problems in its efforts to maintain an adequate operating capital account with which to complete performance of its contracts with McDonnell. In order to meet such capital demands, Hycon, with the approval of a majority of its shareholders, thereupon sold a total of 918,202 shares of its common stock to McDonnell at a price of $6.25

per share, the total payment realized as a result of such transaction being $5,738,766. Such sale resulted in McDonnell's acquiring approximately 56% of Hycon's common stock, thus giving the latter control of Hycon, and placing McDonnell in a position in which it was required to deal with Hycon within the strictures of the rule of intrinsic fairness which governs the conduct of a parent toward a subsidiary during the course of a transaction accomplished without the participation of the subsidiary's minority stockholders. See Sinclair Oil Corp. v. Levien, Del. Supr. Ct., 280 A.2d 717. And it is clear on the record here that prior to the transaction complained of Hycon and McDonnell had been engaged in price negotiations as to the appropriate price which the latter should pay for the former's cameras and that McDonnell, in control of the so-called bargaining, had demonstrated little interest in taking a reasonable position as to what Hycon should be paid for its product, thus failing to practice that high degree of fairness required of a parent in its dealings with its subsidiary in an arrangement which might prove detrimental to the latter's minority stockholders, particularly in a transaction in which the parent well knew that its subsidiary was in apparent financial straits."

In <u>Gimbel v. Signal Oil Companies, Inc.</u>, 316 A.2d 599 (Del. Chan. 1974), Chancellor (now Justice) Quillen recognized the importance of arm's length bargaining, saying:

> "One recognized test on the directors' business judgment is the free market price. In Marks v. Wolfson, supra, Vice Chancellor Marvel employed 'the classic test imposed in the early Delaware cases' in reaching his conclusion that the sale price established for the corporate assets satisfied the law:
>
>> 'In actual point of fact the evidence sustains the finding in my opinion that the bargaining which resulted in the sale here in issue took place between a willing buyer who was not required to buy and a willing seller who was under no real compulsion to sell and that such bargaining was genuine and motivated by self-interest on the part of those on opposite sides of the bargaining table.'
>
> 41 Del. Ch. at 124, 125, 188 A.2d at 686 (Ch. 1963)."

The defendants have fiduciary obligations to the minority in such a situation, including the obligation to negotiate for the best terms and price for the minority that is to be cashed out. In this case, the evidence is all to the contrary. First, there was no bargaining at all between Signal and the management and directors of UOP. Signal simply stated a price range at the outset and Mr. Crawford agreed from the very first that the price range was "generous". He admitted that he had not attempted to negotiate better terms or for a "nickel" more. Thus, it is clear that there was no negotiation on behalf of the minority stockholders.

However, the defendants' situation is far worse. Not only was there no negotiation but there was repeated affirmative representations made by press releases and official filings that the price had been arrived at as a result of negotiations. Indeed, even some of the directors of UOP were led to believe apparently by UOP and Signal press releases that there had been negotiations. This was based not only on the press releases but on the feeling they had that Mr. Crawford, as the Chief Executive Officer of UOP, had an obligation to negotiate on behalf of the minority stockholders.

The Proxy Statement in its original form would have continued the representation that there were negotiations. The SEC questioned the time, place and manner of negotiations. When faced with this inquiry, UOP took out references in the Proxy Statement to alleged "negotiations" and simply said that the price had been arrived at "after discussions on February 28th and telephone calls thereafter between Crawford and officers of Signal" (U-7). The foregoing is not only incorrect but there is a total failure on the part of the defendants to undo the misimpression that they had created by representing in letters and press releases to the stockholders that there had been negotiations.

B. The Duty to Weigh and Consider

It is elementary that the Board of Directors of a corporation is elected by the stockholders and has a fiduciary and corporate responsibility to the owners or the stockholders to weigh and consider matters that come before it and not simply to decide matters of importance recklessly or without due consideration. As Chancellor Quillen said in Gimbel v. Signal Companies, Inc., the question is whether there was a "failure of the Board of Directors to act on such an important matter with informed reasonable deliberation". (Gimbel v. Signal Companies, Inc., 316 A.2d 599 (Del. Chan. 1974), aff'd, Gimbel v. The Signal Companies, Inc., 316 A.2d 619 (Del. Supr. 1974).) Chancellor Quillen held that in passing on a judgment of the Board of Directors, there was a presumption of validity under the "business judgment rule", saying:

"This presumption, an important aspect of what has generally come to be known as the 'business judgment rule' has been consistently reaffirmed and broadened with respect to the sale of corporate assets over the past several decades. (Citing cases.)

"Application of the rule of necessity depends upon a showing that informed directors did in fact make the business judgment authorizing the transaction under review. Kaplan v. Centex Corp., Del. Chan., 284 A.2d 119, 124 (1971); Mitchell v. Highland Glass Co., supra, 19 Del. Chan. at 329, 167 A. at 833 (Chan. 1933).

"Although not dealing specifically with the sale of a substantial corporate asset, Chief Justice Daniel F. Wolcott recently recognized the strength of the presumption inherent in this rule: 'the board of directors enjoys the presumption of sound business judgment and its decisions will not be disturbed if they can be contributed to any rational business purpose. A Court under such circumstances will not substitute its own notions for what is or what is not sound judgment.'"

Later the Court said:

"Factually, to support its claim of recklessness, the plaintiff basically relies on three related matters; gross inadequacy of the price; the failure of the board of directors to act on such an important matter with informed reasonable deliberation; and specifically the failure of the board of directors to obtain an updated appraisal of Signal Oil properties before agreeing to accept the offer."

After reviewing the facts in the case, Chancellor Quillen said:

"But having given full weight to legitimate considerations of the board, it is necessary at the risk of repetition to pinpoint elements which suggest imprudence. The circumstances are such to raise the question as to whether the Signal board when the sale of Signal's stock was presented were able to perform their fiduciary obligation as directors to make an informed judgment of approving the transaction. In particular, it is difficult to ignore the following facts:

> "The transaction had been in progress since October. I am satisfied that management decided early in the game, and probably in October, that the offer when made would be recommended to the board. Certainly by early December the only reasonable assumption was that management would recommend the transaction to the board.
>
> "Even granting that management had prior legal difficulties with the minority group of which the plaintiff is a member, it is hard to overlook the fact that the minority interest wrote to each board member, expressed opposition to the sale of the oil and gas interests, further stated its belief that any transaction required shareholder approval and further requested to be consulted. Except for obtaining an opinion of counsel to counter the legal position of the requirement of shareholder action, this request was totally ignored by the management and the board. Such lack of consideration from a minority viewpoint of the substantial block of stock and perhaps the largest single block of stock gives rise to the allegation, which probably cannot be established as motivation, that management was trying to effectively freeze out a minority interest. Compare Gerlach v. Gilliam, 37 Del. Chan. 244, 139 A.2d 591 (Chan. 1958).

"There does not appear to be in the record any effort on the part of management to slow to seek a delay in the December 21st deadline which was imposed by the December 18th offer of Burma. Rather the circumstances are consistent with Signal management's approval of the forced decision on a tight time schedule. It is clear that Burma's strategy was to force a quick decision. Roberts' Affidavit, Docket No. 20, ¶15.

"The decision to call a special meeting of the board on approximately two days notice highlights the failure of management to advise the board in their capacity as board members of this very important transaction. Only six directors,

> Walkup, Shumway, Chitiea, Arms, Thompson and Stephenson knew of the purpose of this meeting in advance. Not only was the call short but the management failed to give any notice of the subject matter in advance. The question is not one of legality. The question is one of permitting the board the opportunity to make a reasonable and reasoned decision."

In this case, the Board of UOP, a fiduciary of the minority stockholders, was summoned in less than a week of the announcement of the decision to a special meeting. They were given no documentary information on the proposal nor any background information to study on the value of the shares of the minority. They were first told at the meeting of the price and believed, without ever having questioned it, that this price was the product of negotiation.

In the article, "Fairness of Merger Terms", 2 Del. Journal of Corporate Law, pg. 46, the authors say:

> "The concept of fair dealing examines the relationships between the parties. Deciding whether there has been fair dealing on the part of a controlling corporation involves consideration of the facts and circumstances surrounding the preparation, presentation and negotiation and stockholder approval of the proposed merger terms. For example, in order to avoid a claim that the controlling corporation has unilaterally dictated the terms of the merger or otherwise sought unfair advantage from its control position, it is common practice for the controlled corporation to appoint an independent negotiating committee composed of board members who are not affiliated with the other corporation, to charge that committee with the explicit function of representing the public stockholders and to have the independent negotiating committee retain independent investment bankers and legal counsel to assist in the negotiation and evaluation of proposed merger terms.
>
> ***

"Indeed, several Delaware cases suggest that if adequate procedures are utilized to neutralize the control position of the controlling corporation and prevent it from exercising its dominance and power over the controlled corporation (thereby effectively restoring an arm's-length bargaining situation), the court may, at least as a practical matter, revert to something more like the 'business judgment' rule and may not be as ready to overturn the merger agreement unless its terms are so shockingly unfair from an economic point of view as to border on fraud."

The footnote reads:

"Puma v. Marriott, 283 A.2d 693 (Del. Ch. 1971); Kaplan v. Centrex Corp., 284 A.2d 119 (Del. Ch. 1971). Compare Harriman [Harriman v. DuPont, 411 F.Supp. 133 (D.Del. 1975], (independent committee appointed; merger found fair under Delaware law) with Collins v. Securities and Exchange Comm'n., 532 F.2d 584 (8th Cir. 1976) (independence of committee questioned; same merger found not reasonable and fair under Investment Company Act)."

The UOP Board did not refer the proposal of the majority and controlling stockholder to an independent negotiating committee of Board members. The Board did not ask any questions so far as can be told from the record of the expert picked for them. Nor did they make any determination of the basis of the opinion of the expert. They met, were told of the Signal offer and forthwith voted in favor of the proposal. The UOP Board utterly failed to exercise the requisite business judgment on the Signal proposal that would entitle their decision to some weight or probity.

In Kaplan v. Centrex, 284 A.2d 119 (Chan. 1971), Chancellor Duffy (now Justice Duffy) held that the business judgment rule is only applicable if in fact it is established that the board did in fact exercise its judgment:

> "Application of the rule (i.e., the business judgment rule) of necessity depends upon a showing that informed directors did, in fact, make a business judgment authorizing the transaction under review. And, as plaintiff argues, the difficulty here is that the evidence does not show that this was done. The word director-committee-officer references to the realinement but none of these singularly or cumulatively show that director judgment was brought to bear on the specificity of the transactions."

The duty of the Board to bring their collective judgment to bear on matters important to the interest of the owners (i.e., the stockholders) includes, of course, the obligation of obtaining the requisite information on which to make an informed judgment. Gimbel v. Signal, supra. In obtaining the requisite information, they must use the care of a fiduciary in selecting an independent adviser. But their fiduciary responsibility does not end with having selected and retained a competent and disinterested expert. The Board can not blindly accept the opinion of the expert even if he is independent and qualified. They have an obligation to hear or receive his ultimate opinion, inquire into the basis and reason for his opinion to satisfy themselves that the opinion is based on a sound and thorough examination of the matter and that the opinion rests on such foundation and is not simply an off-the-cuff opinion.

The UOP Board, under Signal's overall guidance, did none of the foregoing in connection with the Lehman Brothers opinion. The opinion was obtained solely for cosmetic reasons: i.e., to sell the minority. Denison v. Fibreboard, supra.

C. The Duty Not to Issue False Information and The Duty to Correct It

The defendants as fiduciaries of the minority had the unqualified obligation of "complete candor". Lynch v. Vickers, 383 A.2d 278 (Del. Supr. 1977).

In Mitchell v. Texas Gulf Sulphur, 446 F.2d 90 (10th Cir. 1971), cert. denied, 404 U.S. 1004, rehearing denied, 404 U.S. 1064, cert. denied, 405 U.S. 918, the Court said:

> "The misleading, misrepresented or untruthful character of the release may appear from the nature of the statement considered alone, or, when the facts are fully disclosed, from the half truths, omissions or absence of full candor concealed therein. See Gilbert v. Nixon, 429 F.2d 348, 356 (10th Cir. 1970); Meisel v. North Jersey Trust Company, 218 F.Supp. 274 (S.D. N.Y. 1963); Cochran v. Channing Corporation, 211 F.Supp. 239 (S.D. N.Y. 1962). Misrepresented or omitted facts become material, hence actionable under 10b-5, when, considering the complaining parties as reasonable investors, the disclosure of the undisclosed facts or candid revelation of misleading facts would affect their trading judgment. See Gilbert v. Nixon, supra; S.E.C. v. Texas Gulf Sulphur Company, 401 F.2d 833, 849 (2nd Cir. 1968), cert. den'd sub nom. Coates v. S.E.C., 394 U.S. 976, 89 S.Ct. 1454, 22 L.Ed.2d 756 (1969); Rogen v. Ilikon Corporation, 361 F.2d 260, 266 (1st Cir. 1966); List v. Fashion Park, Inc., 340 F.2d 457, 462 (2nd Cir. 1965), cert. den'd sub nom. List v. Lerner, 382 U.S. 811, 86 S.Ct. 23, 15 L.Ed. 2d 60 (1965). The implicit variables to be weighed in a materiality analysis are the magnitude and probability of the occurrence of the event, set against the size and total activity of the subject company.

> "The trial court found the April 12 release 'inaccurate, misleading and deceptive with respect to material matters.' Reynolds v. Texas Gulf Sulphur Co., 309 F.Supp. 548, 559 (D.Utah 1970). We agree upon the following recitation of facts found in the record."

In the <u>Texas Gulf Sulphur</u> case, the defendant issued a misleading press release and was held liable to stockholders who sold in the four-day period when the misinformation was uncorrected. Here, the misinformation was never corrected.

In this case, both Signal and UOP issued numerous press releases beginning in early March in which it was represented again and again that Signal and UOP were negotiating in connection with the terms of the merger. A letter was sent to each UOP stockholder in which such representations were made. No such negotiations ever took place. When UOP submitted a draft of the proposed Proxy Statement to the SEC alleging in effect that the price of $21.00 was arrived at through negotiations, the SEC letter of comment specifically asked for details. In the face of this inquiry, UOP revised that section and said in effect that the price was set "after discussions". (Elsewhere in the UOP Proxy, however, there was still a statement about the non-existent negotiations (EX U-7, pg. 6).)

The stockholders thus were led to believe that there had been negotiations on their behalf in connection with the merger. <u>At no time (and specifically no where in the Proxy Statement) did UOP or Signal ever correct that misinformation</u>. Thus, the minority stockholders of UOP voted on the merger, having been gulled into believing that there had been negotiations on their behalf in connection with terms of the merger, including the price.

This state of affairs offends and violates the precept that the majority owes the minority the duty of "<u>complete candor</u>". The Court should find for the plaintiff on liability simply on the basis of this gross abuse of defendants' fiduciary responsibility.

CONCLUSION

As the factual and legal sections of this brief show, the defendants individually and collectively have been guilty of a gross abuse of their fiduciary responsibilities to the minority stockholders of UOP. Under familiar Delaware case law, the Court of Chancery has historically looked through form and protected the minority from such abuses by a dominant majority. Singer and the cases subsequent to that, including Tanzer and Najjar, show that there has been no retreat by the Delaware Courts in their reannouncement of Delaware's function as a protector of minorities and enforcers of fiduciary obligations in corporate matters.

The record in this case, even before the trial starts, spells out a flagrant abuse by Signal, UOP and Lehman Brothers. The Court should have no hesitation in finding on a dozen alternate bases that there has been the type of overreaching that Singer clearly prohibits.

PRICKETT, JONES, ELLIOTT & KRISTOL

By ______________________
William Prickett

By ______________________
George H. Seitz, III

1310 King Street
Wilmington, Delaware 19899
Attorneys for Plaintiff

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