BEFORE THE SUPREME COURT OF THE STATE OF DELAWARE

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.

No. 58, 1981

Supreme Court Building
Dover, Delaware
September 14, 1981
2:00 P.M.

BEFORE: HON. JUSTICES WILLIAM DUFFY, WILLIAM T. QUILLEN and JOHN J. McNEILLY.

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APPEARANCES:

PRICKETT, JONES, ELLIOTT, KRISTOL & SCHNEE,
By WILLIAM PRICKETT, ESQ.,
For the Plaintiff.

MORRIS, NICHOLS, ARSHT & TUNNEL,
By A. GILCHRIST SPARKS, III, ESQ.,
For Defendant-UOP.

POTTER, ANDERSON & CORROON,
By ROBERT K. PAYSON, ESQ.,
-and-
LATHAM & WATKINS,
By ALAN N. HALKETT, ESQ., of the California Bar
For Defendant - The
Signal Companies, Inc.

RICHARDS, LAYTON & FINGER,
By R. FRANKLIN BALOTTI, ESQ.,
For Defendant-Lehman
Brothers Kuhn Loeb, Inc.

ALSO PRESENT:

BREWSTER L. ARMS
Vice President and General Counsel
The Signal Companies

* * *

PROCEEDINGS

MR. PAYSON: May it please the Court:

This is the time set for this Court to hear the oral argument in the case of Weinberger verses UOP, et al. Before Mr. Prickett's argument, I would like to introduce to the Court Mr. Alan Halkett, who is a member of the California Bar and a partner in the firm of Laytham & Watkins, and I would also like to move his admission pro hac vice. I would also like to introduce to the Court Mr. Brewster Arms, who is the senior vice president and general counsel of The Signal Companies.

JUSTICE DUFFY: Mr. Arms, good afternoon. And Mr. Halkett, good afternoon to you, sir. You are admitted pro hac vice.

MR. HALKETT: Thank you, Justice Duffy.

JUSTICE DUFFY: Mr. Prickett.

MR. PRICKETT: May it please the Court:

In presenting an oral argument one must necessarily be selective, especially in a case that has been fully tried, and in an appeal which necessarily includes interlocutory decisions. I have, therefore, selected four points to discuss with the Court. In doing so I don't mean to waive or denigrate any of the many

other issues found in the record and covered in plaintiff's brief. Of course I'm prepared to vary this presentation to discuss other issues which may be of more interest to the panel, and I will, of course, try to answer any questions that are put to me.

The issues which I have selected to discuss I believe are fundamental. They are important not only to the correct resolution in this case, but they are critical to the evolution and clarification of the Delaware corporation law. The four points are as follows:

First, it being agreed that in a cash-out merger the majority stockholder is a fiduciary to the minority, what is required of the majority to discharge that responsibility? The ancillary point: Are professionals such as accountants, investments, bankers and attorneys, bound by the same standard as their principal, or do they answer to a different standard?

The second point: Is the economic advantage of the majority stockholder in and of itself a valid business reason or purpose justifying the cash-out of the minority?

The third point: It being agreed that complete candor as to all material facts is the applicable

standard, was that standard met by the defendants in this case?

The fourth and final point: What is the correct measure that should be applied to determine the value of the minority shares in deciding whether the terms of the cash-out merger meets the test of intrinsic fairness. Let me turn to the first point:

Everyone agrees that in a cash-out merger, the majority stockholder is a fiduciary for the minority. The foregoing only states the principle, and the issue presented by this case, and perhaps more generally, is what is a corporate fiduciary required to show that he has done in order to discharge that responsibility.

The court below has espoused the defendants' view that a corporate fiduciary fully discharges its responsibility to the minority simply by being careful not to impinge on the strict legal rights of a minority. The approach taken is basically a negative one.

The plaintiff believes that this approach is incorrect; that it is far too narrow, and that it is at odds with the entire concept of trusteeship both in terms of trust law from which the principle evolves, and in its specific application to the Delaware corporate law, particularly in cash-out mergers.

A fiduciary, we believe, has an overriding affirmative obligation. It is to do more than simply not work against the interests of the cestui. He has a continuing obligation to actively advance the interests of the cestui. What is required is a demonstration of what in homely terms is called best efforts.

The record in this case shows that there were no best efforts at all on the part of any of the majority corporate fiduciaries. On the contrary, the record discloses that Signal, the majority stockholder, worked solely to advance its own economic best interests, a cash-out of the minority. The Signal directors, who were also directors of UOP, and thus have a double measure of fiduciary obligation to the minority, now bear fiduciary obligations to the minority as instructed by counsel. But the record is devoid of any affirmative action on their part of advancing the interests of the minority.

Mr. Crawford, president of UOP, but a Signal man throughout, did nothing whatsoever to advance or protect the rights of his minority shareholders. When all is said and done -- and I guess this is the point -- when all has been said and done, the record shows that Mr. Crawford agreed from the outset

with Signal in the cash-out of the minority at the very price range set by Signal. He never determined himself, nor sought any advice on the value of the minority stock, nor did anything to prevent their cash-out.

The so-called independent members of the UOP Board, what is the record so far as they are concerned? They met on three days business notice at Signal's request. They had no written information. They never inquired as to whether the cash-out price had been negotiated. They assumed without inquiry that it had been, giving as their reasons that it had been because it should have been.

The only justification that the UOP Board gave for approving the majority's cash-out price was because the 1975 tender and direct purchase price was also $21. That's irrelevant. The question was, what was the value of those shares in 1978, not what was the price that the majority had paid in a tender and direct purchase from years before.

Mr. Glanville's opinion was the second reason that the board gave in justification for their approval of the cash-out of the minority, but they never learned the critical fact so far as the record discloses,

and that is that Mr. Glanville's opinion was based solely on the fact that the price was 50 percent greater than the market price.

Thus this record is devoid of any showing of affirmative action by any of those who concededly had fiduciary obligations to the minority.

Plaintiff's view is that on this record there should have been a general holding by the court below that the defendants are liable to the minority under the principles of Singer, Tanzer, Najjar and Sterling. The court below, however, subscribed to the defendants' view that the defendants were exculpated from their fiduciary obligations, and what were the reasons? As to Signal, Signal was exculpated because it found itself in a conflict of interest. The court below essentially said Signal did not have to carry out its fiduciary responsibilities because Signal was wearing two hats. It had the responsibility to the Signal stockholders and a responsibility to the UOP minority shareholders.

The court never faced the problem of what to do about this conflict of interest, the fact that Signal deliberately got itself into a situation that had this implicit conflict of interest. It never faced

the fact that its always true that this conflict of interest exists, and it never faced the fact that it was not disclosed that Signal was not going to carry out its fiduciary responsibilities because it was in a conflict of interest situation.

The court below also exculpated the UOP management and board. As to Mr. Crawford, the president of UOP, the court below said that he had no obligation to make a best effort for the minority. All he had to do was to say that he thought it was ~~there~~ fair. So far as the independent members of the UOP Board are concerned, the court below said that they discharged their fiduciary responsibilities because they did not decide in a vacuum.

If the repeated holdings of this Court that the majority has fiduciary obligations to the minority in a cash-out merger are to have any real meaning or force, then the basic thrust of the decision of the court below has got to be reversed. It's got to be made clear that the discharge of fiduciary obligations in a cash-out merger must be affirmatively carried out; that conflicts of interest which are always present must be squarely faced and resolved so that corporate fiduciaries can carry out their obligations rather than

pretending or straddling.

In Harriman versus DuPont is an example of where that was done right at the very outset. That there could be no charge that anybody didn't carry out their corporate obligations, their fiduciary obligations, because they resolved the conflict of interest.

First, this Court should indicate that a board of directors is required to show in a cash-out merger that they did the requisite investigation, and that they considered the whole matter carefully including the matter from the point of view of the minority rather than simply acceding in haste to the wishes of the majority.

JUSTICE DUFFY: How does that get worked out, or how would it get worked out in practice under your thesis?

MR. PRICKETT: The conflict of interest?

JUSTICE DUFFY: Right.

MR. PRICKETT: So far as the board is concerned, if we take DuPont as an example, it was determined that there was a conflict of interest, and therefore, they divided the group so that they only had a responsibility one way, and then they made decisions that were commensurate with that responsibility. For

instance, each side went out and hired its own investment banker. They hired attorneys, and then they proceeded to do an arms-length negotiation, and nobody could attack that because they had faced the conflict of interest, and everybody made a best effort on behalf of the side that they were on.

Now, in this situation it would seem to me that the board should categorically state we are on the side of the minority. Signal is well represented, and is dominant here, and we are going to hire our own investment banker. We are going to take our time.

JUSTICE DUFFY: Which board are you talking about now?

MR. PRICKETT: UOP, not Signal.

JUSTICE DUFFY: But your focus, though, was on the duty of the majority.

MR. PRICKETT: Oh. Your Honor, so far as Signal was concerned, I think if they set up not just token representation, but reall honest-to-gosh representation armed with teeth and professionals who demonstrated that they stood up to Signal, and did not tamely do their view, and said we're not going to meet on three days; don't be ridiculous; we want ten days, we want our own investment banker, and we want lawyers because

you have all those things, and we represent the minority, and if your deal is as good as you say it is, in due course we will approve it, but we're not going to do it -- we're not going to jump simply because you say so -- That's not what happened here at all.

JUSTICE DUFFY: Let me just explore this with you for a minute:

There is a fiduciary duty owed by the majority to the minority.

MR. PRICKETT: Yes, sir.

JUSTICE DUFFY: Now, that duty, while I don't recall seeing it specifically identified or described as such, but is that duty owed by the stockholder as stockholder or by the board as a board?

MR. PRICKETT: And you're still referring to Signal, the majority?

JUSTICE DUFFY: Right.

MR. PRICKETT: Well, I think it becomes interchangeable. As the court below indicates, Signal itself is the majority stockholder.

JUSTICE DUFFY: But it's Signal then as distinguished, perhaps, from the board itself?

MR. PRICKETT: Of Signal.

JUSTICE DUFFY: Right. Which owes the duty,

does it not?

MR. PRICKETT: Well, I think it's difficult to separate Signal as a stockholder and Signal which works through its board or its management. I think the duty as such runs through all of them in order not to oppress the minority of a company in which they and the minority shareholders both own stock.

JUSTICE DUFFY: Well, how do you respond to the argument that the Signal board owes a duty to the Signal stockholder, and that by dividing the board into two camps is not meeting that responsibility?

MR. PRICKETT: Well, this is not a new situation. A trustee often finds itself in that situation. And how do you do it? You get yourself out of the conflict of interest. You don't say I was right; I was wearing two hats, and I steered the middle course. What you do is do what DuPont versus Harriman did. They resolved it, and they got on opposite sides, and then they carried out their responsibilities. And here Signal should say, we've got to make sure that the minority is properly represented in this case, and therefore, we are going to make sure that the independent directors or the management can demonstrate a best efforts by people willing, able with the time and

the interest to represent the minority. They didn't do it. They simply set up a nice pattern that shows that they observed the technical formalities, but nobody made a best efforts on this.

Let me proceed:

The ancillary question in this first argument is the question as to whether professionals who have employed cash-out mergers are held to the standards of the dominant majority, or the corporate fiduciaries, or is there a lower standard? The lower court flatly decided that Lehman Brothers did not have to meet the same standard as the other defendants. We think that decision is doubly wrong.

First of all, Mr. Glanville himself was a director of UOP, and thus came within the ambit of the corporate responsibility of all the directors. But secondly, and beyond that, we think that professionals necessarily should be held to the standard in a cash-out merger of the principals, and if nothing else, as demonstrated in this case, their fees reflect the risk that they take for violating that standard.

In short, to wrap up on point number one, the record as a whole is devoid of any showing of an affirmative discharge of what this Court has called the

highest sort of fiduciary responsibilities, and we think the time has come when the Court has got to breathe meaning and life into the phrase, and hold that it's more than just mouthing it. You've got to affirmatively demonstrate that you have done what a trustee would do, and that is affirmatively carry out the responsibilities.

JUSTICE QUILLEN: Mr. Prickett, assume -- and I understand your position is to the contrary -- but assume that the Court found that the $21 was intrinsically fair to the minority.

MR. PRICKETT: Yes.

JUSTICE QUILLEN: What does that do to the first argument?

MR. PRICKETT: Well, I would suppose that you would find then that there has been a violation -- You are assuming that they haven't carried out their responsibilities, but $21 happens to be fair. No damage.

JUSTICE QUILLEN: So would there be an affirmance for reasons other than what was stated below?

MR. PRICKETT: Yes. But I would hope even if the Court did that, the Court would still take this opportunity to breathe life into something that remains without full explanation as to what you mean

when you place this heavy burden of responsibility. This case is important for us, but it transcends our importance in the sense of corporate law, and I think it needs to be said as to what you have got to do to discharge that responsibility.

Let me hurry on to the second point:

The court below found as a fact that Signal had cashed-out the minority because taking over the equity interests of the minority would serve the best interests of Signal, and this finding of fact is confirmed by the record.

Mr. Shumway, president of Signal, so stated unequivocally at the beginning of his deposition, and Mr. Walker confirmed it at the conclusion of the trial.

The lower court then flatly ruled as a matter of law that the advancement of the economic advantage of the minority in and of itself totally satisfied the Singer requirement. A cash-out merger is only justifiable if the majority has a proper business purpose.

We think that decision is flatly wrong. It flies in the face of the Court's decision in Singer, Tanzer and Najjar. In those cases, this Court

prohibited the majority from cashing-out the minority for its own economic advantage. That is, to be rid of the minority.

The court below justified its ruling not on Singer, but supposedly on the basis of Sterling. Several answers suggest themselves.

Singer specifically states that this is a decision of first impression by this Court, and therefore, Singer rather than Sterling is the decision that controls. And in Sterling the proper business purpose issued was never overtly raised, and never ruled on, at least directly. And finally, in Sterling a proper business purpose can be discerned.

What the lower court then has done is to eviscerate the proper business purpose rule. Under the lower court's reformulation of the rule, the only time a cash-out merger becomes improper is where the plaintiff can show quixotically that the best interests of the majority will not be served. And I just can't take time to delve further into the mysterious implications of that sort of reasoning.

This Court has held that a cash-out merger without a proper purpose is forbidden, and unless the Court is prepared to retreat or abandon from that, then

the lower court must be reversed, and this cash-out merger held to be violative of this Court's clear prohibition of doing exactly what Signal did, advancing its economic interests at the expense of the minority.

The third point: There is no dispute between the parties themselves, or indeed between the plaintiff and the court below on the standard of disclosure that is applicable. Lynch embodies the standard. Complete candor as to all material facts. The material facts are defined in the trilogy of the federal cases as those facts which a reasonable stockholder would consider significant.

On rereading, I think our briefs are a trifle light on one aspect of the Lynch doctrine that is significant in the context of this case. This Court has held that if complete disclosure is made, the majority is entirely free to argue its own view of the significance or non-significance of any matter that has been fully disclosed. One of the primary aspects of this appeal is whether the record in this case meets the agreed standard of complete disclosure. We believe that the court below erred in holding that the defendants had satisfied the tests of complete candor. It would take far more time than I have to detail, if it

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needed to be, the many, many instances in which we believe the defendants failed to meet the standard of complete candor. But let me touch on a few examples:

The Arledge-Chitiea reporter of January or February before the cash-out merger. Messrs. Arledge and Chitiea, two UOP directors, drew up a report that was disseminated to the majority stockholder. It was based on inside UOP financial information, and showed, among other things, that Signal would profit from the cash-out merger at any price up to $24. This report was used by Signal directors and its executive committee in determining whether to do the merger, and determining the $21 price. The report was not disclosed to the independent UOP directors, nor was it disclosed to the minority stockholders. A reasonable stockholder would regard a current financial study made of the value of UOP by two of its directors who were financial men as significant in evaluating Signal's cash-out merger itself and the price.

The court below makes specific findings that the report was made and that the facts that I have just disclosed were in fact true, but the opinion of the court below is silent as to the legal effect of the non-disclosure of the Arledge-Chitiea report to the

minority.

Unless this Court is prepared to temper the standard of complete candor, we think that reversal is required because of the failure of Signal to disclose the existence of that very important report, and we say this based in part again on Lynch. In Lynch, there was a failure to disclose an important report, and the Court said that if disclosure was made, the majority was free to argue its significance or non-significance just as they are doing here, but they must disclose it.

Secondly, negotiations: The record is clear it was repeatedly represented that there were negotiations as to the terms of the merger. There was a first press release, a second press release, some letter to the stockholders. The majority deliberately led the minority to believe that there were negotiations between UOP and Signal including price. The only that that's significant is that somebody is about to get cashed-out. But in fact there weren't any, and when the SEC demanded details, they changed the word in the proxy statement. There was no correction of the press release.

Now, what is the justification that was

presented for this, and what was accepted by the court below? Not that there was complete disclosure, but that there couldn't be negotiations because of a two-hat situation, and the two-hat situation, that is, the basic conflict of interests that prevented the carrying out of responsibilities to the minority, was not disclosed.

Third, I come to the 1976 Lehman Brothers recommendation of Mr. Shumway, the purchase at $21. In this context, I think that the Court has got to decide the question that I have alluded to before. That is, is Lehman Brothers held to the high standard that is applicable to the corporate fiduciary or is it a lower standard?

Secondly, on the merits: It is clear that Lehman Brothers saw that report. Mr. Glanville denies remembering it, but Steve Schwarzman, the senior man at Lehman Brothers, saw it, and he said he knew what it was and how important it was, so he didn't read it. He looked at it, didn't read it, but he never disclosed it either to Lehman Brothers generally so they could face up to the fact, nor to Signal, but most important, to the minority stockholders. And we think that report was important. It would have given the stockholders a

basis for evaluating, first of all, the price of $21, and secondly, it would have given them the basis for evaluating what reliance they could put on Lehman Brothers.

In summary, then, whether viewed individually or collectively, we think that the standard of complete candor, not partial candor, but complete candor, was violated repeatedly and this vitiates the otherwise insulating vote of the majority to the minority.

The fourth and final point I come to is the standard which the lower court used in determining as to whether the cash-out price was intrinsically fair.

JUSTICE QUILLEN: Excuse me just a moment. I got confused on the figures on the vote.

Am I correct that there was a majority of the minority?

MR. PRICKETT: Oh, yes.

JUSTICE QUILLEN: It was pretty close, wasn't it?

MR. PRICKETT: No, no. I can't represent that to the Court.

JUSTICE QUILLEN: Let me put it another way:

Was there an absolute majority of the minority?

MR. PRICKETT: I don't have the figures here.

JUSTICE QUILLEN: There were about 43 percent that didn't vote, as I recall.

MR. PRICKETT: A large number didn't vote. Seven percent voted against, and the balance voted for. So that it was represented repeatedly and repeatedly in this brief it was 12 to 1 in favor. Sure, but 40 percent didn't vote. We think that the vote is vitiated by the lack of candor. You know, if you don't give them complete facts, of course you're going to win the vote. And where you don't carry out your duties, of course you can win the vote, and I'm surprised they didn't get more. As it was, it was pretty close.

But let me come to the final point, and that's the question of the standard by which you measure intrinsic fairness of a merger.

I hope our briefs make it clear that regardless of the standard adopted, the single calculation represented by Mr. Purcell is manifestly wrong.

Now, the court below skips over this, but it's important because what Mr. Purcell did was to do an appraisal calculation, and then add a premium kicker. But he miscalculated the premium kicker, and the court

below never even mentioned it, though he delineates the methodology in two places. But if you eliminate noise and get a consistent starting place, Mr. Purcell ends up precisely on the same number that Mr. Bodenstein does, and it is important, and I stress it since the court below slow clearly skipped over it.

But transcending that patent mistake is the question what is the standard by which intrinsic fairness is measured?

JUSTICE QUILLEN: Let's go back to the big mistake for a minute:

Is what you are saying that there was noise in some comparables --

MR. PRICKETT: Noise --

JUSTICE QUILLEN: -- that your man took into account and that their man didn't?

MR. PRICKETT: Yes.

JUSTICE QUILLEN: Okay. There was no evidence of any noise in this case?

MR. PRICKETT: Noise in this transaction. This one was so swift that there was no noise, and no Aunt Millies out in Duluth bought stock.

JUSTICE QUILLEN: As a matter of fact, the price was low, was it not, at the time?

MR. PRICKETT: It was $14.50, and it was perfectly clean, Your Honor. There was no leak. There was no increase in volume and no increase in price in premonition, and I think you can say it was announced on the 28th, and therefore it was done before there could be any leaks or premonition of what was going on. So you had $14.25, or $14.50, and $21, and it's very clean. You can see that. In other situations there was noise, or premonition, and to measure the difference of the percentage you've got to get a consistent price. That is, the uneffected market price. And that's what Mr. Purcell did not do. The Court saw it, but never decided why Purcell's calculation premium was correct. He just accepted it.

Now, as I said, that's an error specific to this case, and the determination here, but transcending this case is the standard by which fairness is measured, and the lower court flatly rejected the concepts that the value of the minority shares is determined by what the majority is acquiring, and simply took what is basically an appraisal approach, that methodology, and added to that a premium kicker, and said it's generally fair.

The lower court's reasoning on this part

of the opinion is, I think, murky at best, but he says it's based on Mayflower. But Mayflower was a stock-for-stock transaction with a cash alternative, and all that Mayflower says is that stock-for-stock was pretty fair, is in the ballpark.

This is a cash-out merger where there is a determinative price, and of course nothing given for the under value to non-economic producing assets. The claim being made in Mayflower, which was rejected by the Chancery Court and the Supreme Court, was a claim for liquidation value. We are not claiming that. We want our stock back, and if we can't get it back, we want stock of Signal, and if we can't get that, we want rescissionary damages; what Signal has taken away from us. That's not what Mayflower was about.

JUSTICE DUFFY: Mr. Prickett, your time is up, in a little bit more. We have been here close to 35 minutes.

MR. PRICKETT: Yes, sir. I will then terminate my argument at this point, Your Honor.

JUSTICE DUFFY: You may have some time for rebuttal.

MR. PRICKETT: Thank you.

MR. HALKETT: Justice Duffy, and if it please the Court, my name is Alan Halkett, and I am here representing one of the defendants in this case, The Signal Companies. Our time will be divided between my presentation and that of Mr. Balotti, who will speak after me on behalf of one of the other defendants, Lehman Brothers.

Before going too far away from the presentation made by plaintiff's counsel, there are one or two things, if I may, that I would like to say before getting back to the general line of this.

Number one, the record in this case at trial is a fairly substantial one both in terms of the documents and in terms of the evidence presented, and we realize, those of us who have lived with this case for a long time, that it's hard for someone to get up to speed and know them as well as perhaps those of us who have lived with it.

I certainly urge the Court insofar as any of the factual bases on this Court's decision, that it will refer first to the record, and not to the argument of any of the counsel as to the facts on what the record is, because it's very easy that they take on shadings. Mr. Prickett has made one or two statements

in his presentation which are not supported by the record, and I think that certainly there is advocacy involved on both sides, but I hope that the record will be considered.

Number two, Justice Quillen asked a question which I would like to put an answer on here.

I believe you asked Mr. Prickett, as I understood it, whether or not at the time of this transaction in February 1978 the price of UOP stock was low. The prices of the stock, the market prices at which the UOP stock had been quoted is an exhibit to the Dillon Reed report, Exhibit 1 to that report going back to 1974 with great detail, and we submit that the price of the stock of fourteen and a half dollars, approximately, on the day before the announcement was not low. In fact, it was well within a very narrow range of what the stock had been selling for over the past two years with lows in 1977 down as low as 13, and so forth. So this is not a case in which all of a sudden there was a depression in the value of the shares at which the decision was made to cash-out the minority.

Mr. Prickett has approached the argument here on talking about how does someone in a position of a majority stockholder resolve the difficulty of varying

fiduciary duties, varying responsibilities to this group of shareholders and to that group of shareholders, and he has suggested that Signal did absolutely nothing here to carry out any affirmative duty.

We respectfully submit that the means and the way in which this merger was conducted and established is the absolute best way known, to use Mr. Prickett's term, to get out from under the middle, and that is to allow the very people who are affected to make the ultimate decision as to whether they want to go forward with the merger. And that's precisely what was done. There was not simply a transaction set up on the surface. The minority were required to vote on this transaction, and by that I say they were required to vote because there was the 66 and two-thirds percent minimum vote requirement to carry the day, and since Signal only owned fifty and a half percent, the minority had the vote. If they had all stayed home and voted by sitting on their hands, the merger would not have taken place. Those who did vote, it required a majority of the minority stockholders voting, and they got of those who voted some ninety-some percent who voted in favor of this transaction.

We submit that there is absolutely no better

way whatever to have a cash-out merger than to let those individuals in the position of the minority make that ultimate decision.

One other point I would like to make --

JUSTICE QUILLEN: I'm not sure its significant, but I'm curious. I'll ask you the same question I asked Mr. Prickett:

Did you get an absolute majority?

MR. HALKETT: Yes. And it is in the Vice Chancellor's opinion.

JUSTICE QUILLEN: I got a little confused with the 43 and the 7, which I added together and got over 50, and that left me short.

MR. HALKETT: Your Honor, the numbers are there, and the percentage of the total voting was about ninety-some percent, and the total of the entire minority, even counting those who did not vote, was in the fifties, but it was over 50 percent.

JUSTICE QUILLEN: Thank you.

JUSTICE DUFFY: Mr. Halkett, are you saying that that's the way in which the majority met its obligation, fiduciary obligation to the minority?

MR. HALKETT: Well, no. I think that this whole area is one that is far too complicated to try to

answer by answering that there is a way in any one case to meet one's fiduciary responsibilities. I believe, as we have argued in our brief, that one way of proceeding is to permit the minority to make the ultimate decision, and so long as that minority's vote is fairly obtained, and they vote in favor of it, that should obviate the need for then examining so-called bona fide purpose, or getting into the entire ambit of "fairness of the transaction". I think --

JUSTICE DUFFY: What you're saying then is that if 51 percent of the minority approves it, that makes it all right no matter what it may do in terms of fairness.

MR. HALKETT: Well, I have difficulty putting some of these together.

JUSTICE MCNEILLY: Into your statement you have to build in the complete candor standard.

MR. HALKETT: Certainly. I think that --

JUSTICE DUFFY: Assuming complete candor.

MR. HALKETT: Then I think what you're saying is that assuming that the transaction is carried out at a time and under circumstances which are fair and proper, that should end the inquiry if they have voted in favor of it and have decided that's what they

want to do under those circumstances.

But to come back here to this particular case, if I may --

JUSTICE DUFFY: Well, that makes irrelevant, or at least unnecessary, the inquiry as to price. That is, what you are saying is if it's structured at $21, and 51 percent of the minority find that acceptable, then that meets our obligation, that is the majority's obligation under Sterling and the other cases, to treat the minority with fairness.

MR. HALKETT: I think so as long as --

JUSTICE DUFFY: Is there any case law to support that?

MR. HALKETT: No. Where we seem to be --

JUSTICE DUFFY: I know that that's not all that there is to this case, but that's what you are arguing now.

MR. HALKETT: Well, we are arguing two things here, and I think I would like to come back and start at this point.

What we have here is not an argument before a trial court de novo before we start the presentation of evidence and we are talking about our opening statement, or what we intend to prove. What we are talking

here about is an appeal from a lengthy trial in which Vice Chancellor Brown had before him -- I forget the exact number -- five or six live witnesses. He had as part of the transcript the better part of the depositions of more than a dozen witnesses which had been taken in the case. He had something like 3,000 documents which were admitted, and we had 10 days of trial testimony.

As I understand -- and I think it is clear what Vice Chancellor Brown did in his decision in this case. He said he recognized that this Court had established in this area of cash-out mergers a rule, or call it two rules, which said the starting point is to decide whether or not the purpose of the cash-out merger was bona fide, and as discussed in Singer and decided in Tanzer and subsequently, the other side of the coin, that the sole purpose of the merger is to get rid of the minority shareholder, or shareholders. And in Tanzer, this Court decided that where the legitimate economic business interests of the parent are served, that meets the burden of the purpose as the first step.

The next step, if there is to be a next step, is this large area of entire fairness of the transaction. If the threshold is not crossed on the

purpose -- For example, if, based on the record, a trial court were to find that the purpose was to solely rid the company of the minority, that's where the case ends. But having gotten through that, the next question is the court must examine the transaction for entire fairness. And that is precisely what Vice Chancellor Brown did here.

There have been numbers of elements that can possibly go into what does one consider in deciding entire fairness. We respectfully submit that it is very difficult, if not impossible, to be fair by trying to decide in advance what one must consider fair down the road someplace.

Now, obviously price comes into it. Obviously a number of things come into it. And the trier of the facts here considered all of these various factors including all of those which plaintiff's counsel is arguing here today, and concluded that the transaction was entirely fair to the minority.

JUSTICE DUFFY: He decided this before this Court's opinion and the most recent opinion in Lynch against Vickers.

MR. HALKETT: I don't believe, Your Honor, that the Lynch versus Vickers situation changes anything

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in this case. First of all, in the Lynch versus Vickers situation, on the liability phase of it there were two questions, as we understand it.

Number one, there was a report which had been prepared which indicated a value of the corporation's assets which was available to the majority shareholder, and which was not disclosed to the minority in the proxy material. No such fact exists anywhere in this case, not withstanding the plaintiff's effort to try to create one.

They discuss this internal report that was created at Signal in which there is something about anything up to $24 would be a good investment. All that report is -- and that's one of the reasons I urge the Court to look at the evidence. That report clearly on its face shows what it was. Namely, a proforma spread sheet showing the economic income effect to the Signal Companies of buying these shares at different prices in a range from roughly $17 to $27. And it is obvious that in any such sheet you will come to a point where if you pay so much for it, you won't earn any money, and it will be uneconomic, and at the other end you make a lot of money. And someplace in there you cross over the boundary that says if we pay "X" dollars, and

we expect to earn "Y" dollars, we will have such and such return on our money.

As a matter of fact, what this report then was based upon is the same factual information that was given to the minority shareholders in the proxy material. The only difference in it was, was it contained in Signal's arithmatic, mathematical calculations as to what happens when you put those figures together.

It is obvious then that what Signal found is that at a range of between $17 and $24 or $25, the dollars back would be some incrementally greater than that which they would spend. They wouldn't lose money on it. This doesn't necessarily make it a prudent nor a fair investment from its standpoint.

I can invest money today in a passbook savings account at the bank and earn five and a quarter percent, but that's not necessarily either a good or a prudent investment if I'm taking care of someone's money and if I know the market today will command 15 or 16 percent if I simply take it down and put it in a different kind of fund. That's all that was, was an analysis of the economic result. There is no need, and there is case law which says it is not necessary to put in proxy material conclusions which the reader can fashion for

himself.

JUSTICE DUFFY: Didn't the Vice Chancellor here apply an appraisal remedy, or an appraisal test?

MR. HALKETT: No. If we are talking about the Lynch versus Vickers case, true, which is the damage case. The situation there, as I understand it, is having found liability, this Court determined that upon all of the facts rescission was the appropriate remedy which should have been afforded but for the fact that it was then impracticable or impossible to order rescission. And therefore, in order to compensate the party in favor of whom liability had already been found, what is the way you come up with a monetary sum that is the equivalent of rescission?

In this case the question is not one of damages. The question is one of how does one fairly evaluate the price of stock in a merger. You can't assume liability for that purpose. And what the Vice Chancellor did is to say that he would be guided by the various principles that had been established in the prior appraisal cases, but he went beyond that. And if you will read his opinion, he said, taking that and considering the other financial information which he had -- he concluced that the price of $21 was fair.

Now, if, hypothetically -- Well, before I go to that:

The first question is as of what date and as of what time is he making that evaluation? And he was making it for the time of the merger.

Now, hypothetically let us suppose that he had concluded otherwise. Assume he had concluded on liability that this was a transaction which was not fair, or that Signal and/or other defendants had not fairly treated the minority, and therefore, he was now to fashion a remedy, and had felt that that remedy should be rescission, but then he could not award rescission. Then it would be a new and different examination as of a different period of time, as this Court established in Lynch versus Vickers in approaching what the damages are, and those damages are not the fair value as of the date of the merger. That's the distinction between the two.

JUSTICE DUFFY: On the burden of proof, do you concede that it's your responsibility to -- that is, the defendant's responsibility to show that the result was one which treated the minority with entire fairness?

MR. HALKETT: That certainly is the law as established here and as I understand to be the law in

the State of Delaware, and we have not challenged nor quarrelled with that. It is, as we understand it, the burden which the Vice Chancellor imposed upon us.

JUSTICE DUFFY: He wrote a great deal, and he discusses a lot in discussing the defendants' expert as to what he testified to. Did he also take your side of it, that is your expert -- Purcell, was that his name?

MR. HALKETT: Yes.

JUSTICE DUFFY: -- and say that through him and in such other ways as you may have proved or shown, that he concluded that you had acted with entire fairness?

MR. HALKETT: Yes. I think that what the opinion shows in its length is that he was not going to, and did not judge this case solely on the presentation made by the plaintiff. In fact, Your Honor, at the conclusion of the plaintiff's case and before we went forward, we made a motion for judgment at the conclusion of the plaintiff's case both on the theory of the failure of proof as well as on our theory that having failed to show that there was any lack of candor in the proxy material, that should end the matter. He reserved his ruling on that. As he points out in his opinion, his reservation of the ruling should not be deemed to

indicate one way or the other. He then required us to go forward and to put on our affirmative defenses in the case, which we then did. His opinion addresses the evidence throughout that he received during that phase of the trial, and he has discussed on numerous issues his balancing of both sides, and discussing it being more persuasive, or whatever, on the side of the evidence presented by the defendants. I believe we were put to that burden, and I believe that we met that burden.

JUSTICE DUFFY: On the internal processing of this, that is by the Signal board, does the record show whether or not there was within the board any affirmative presentation of the minority's interests on what had to be done to establish entire fairness? Were there any advocates of --

MR. HALKETT: Well, the record shows clearly, Your Honor, that the in-house legal counsel for the Signal Companies, Mr. Arms, who is present here -- and it is reflected in the minutes -- advised Signal's board throughout that it owed a fiduciary duty to the shareholders of UOP, and that they must take into account in the actions which they are taking that duty and the carrying out of that duty to the UOP share-

holders, and that is a part of the record in this case.

JUSTICE DUFFY: But there was no independent -- the independent directors in Signal were not -- nor any other group within the board, I take it, were -- I ask only what's on the record -- were charged with testing that from the point of view of the minority?

MR. HALKETT: Are you talking about the UOP board or --

JUSTICE DUFFY: No. Signal. Signal owes the duty?

MR. HALKETT: No. There was no committee as such, and it seems difficult for me just on the original hearing imagining how you could have any such committee of the Signal board, because the entire board in addition to owing a duty to the UOP minority, has a duty to all of the Signal shareholders. So I don't see how you could get a small group of the Signal shareholders to abrogate that responsibility to their own shareholders. Certainly not without the Signal shareholders' approval.

JUSTICE DUFFY: The point may be academic, but let me just ask you the same question I put to Mr. Prickett:

Is the fiduciary duty owed by the majority

stockholders, is that what we're focusing on?

MR. HALKETT: Yes.

JUSTICE DUFFY: So, it's stockholders as stockholders, isn't that right?

MR. HALKETT: I think certainly it is. The majority stockholders.

JUSTICE DUFFY: And it isn't the board as such except in a representative capacity, is that right?

MR. HALKETT: That's true. The board of Signal represents Signal, which is a majority stockholder in UOP.

JUSTICE DUFFY: And it is Signal as Signal, i.e., the majority stockholder, which has the duty?

MR. HALKETT: I believe so, yes.

JUSTICE DUFFY: All right. Thank you.

MR. HALKETT: I don't want to leave Mr. Balotti without time, but there is about one short point on which --

JUSTICE DUFFY: I don't know how much time he wants. But why don't you go ahead and finish up, and then we'll hear him.

MR. HALKETT: Thank you, Your Honor.

Lynch versus Vickers -- the other part of the liability one was an indication that at some point

along the line Vickers had concluded that $15 a share would not be an inappropriate price to pay because they had actually authorized someone to go out and buy shares at that price. There is absolutely no comparable evidence at all in this case -- There never was a time that anyone within the Signal organization either considered or authorized or approved any price above the $21 per share that they actually paid, and in fact the evidence showed that there were those within the management who felt that for Signal that was too high a price to pay. And that leads to the final point that I would like to make, and that is on this question of negotiating -- not the terminology. I think it is clear from the opinion that Vice Chancellor found that there were indeed negotiations, and the question that Mr. Prickett really raises is a definition of his of how you negotiate, start high or start low. You can't take any of these out of the context in which they arise.

Assume a situation as we had here where Signal is the majority shareholder, and who has been told that it therefore has a fiduciary duty to the minority to treat them fairly. If Signal had concluded, as it did, that a fair price range to pay was in the $20 to $21 range, if Signal had offered $17 a share,

would that offer itself not have been breach of their fiduciary duty to the minority? And what if, playing high-low games, as Mr. Prickett would have, having Signal offer less than it thought it was worth, and let's assume that Signal thought that $20 was the high price here, and the UOP board considered the $17 offer and came back with a $19 counteroffer which is still below what Signal, let's say, assumed was a fair value, what does Signal then have to do? Tell the UOP board we reject your offer, and offer you $20?

It is not the same thing, and you cannot even start to assume that you are going to negotiate at arms-length between two people who are not at arms-length, and impose the sort of duties that this Court and others have imposed upon people standing in that position.

JUSTICE QUILLEN: What's wrong with Mr. Prickett's example of the DuPont-Christiana merger -- what's the name of that case -- Harriman.

MR. HALKETT: I'm not sure to what specific --

JUSTICE QUILLEN: Well, the idea, as I understand it, was they took the independent people on each board, and told them to go at it along with

professional help.

MR. HALKETT: I think you run into a different type of question, which is the same sort of thing that has happened in other kinds of cases. You then have an examination of who is or who is not independent, and having gotten to the part that says these people are independent, are you not then back to having somebody, this Court or another court, decide whether it was fair, what was done by those people who are independent.

What you have here is a test of the entire fairness, and to interpose another mandatory step which may not be feasible in all cases, and then come back to a fairness test seems to me to simply be taking this out of practical context, and getting us precisely back to the point where we are now. And the point where we are is we tried it, we met our burden, and on the facts there is absolutely no basis for a reversal.

Thank you.

JUSTICE QUILLEN: Let me ask one more question:

Was there any time pressure in this case?

MR. HALKETT: Time pressure?

JUSTICE QUILLEN: Yes. Sometimes when you

are dealing with an outside party they impose time pressure, but why was the time set -- the three days notice given to the UOP board? Time pressure on Lehman too.

MR. HALKETT: What there is is under the Securities and Exchange Commission rule, a company is required to disseminate to the public information -- I forget the precise language. They must make a public announcement where there are any events which may materially affect the marketplace. And the longer these merger and other transactions -- information is out before the public, the greater the impact they have on the very stockholders you are trying to protect, because in real life what happens is by the time the merger gets through, the arbitrageurs own the stock, not the shareholders. They are bought out.

Here the question was what effect the merger and the potential buy-out was going to have in the marketplace, and to combine two factors. Number one, the shortest allowable period of time within which to do the job that was required, plus not allow the market to churn indefinitely, and that's what was done here. And the question of whether or not three days or two days or three weeks or four months is enough, we

submit is part of the overall examination of whether under all of the circumstances this was fair to the minority, and we submit that question is included in this entire envelope which was certainly taken into account by the Vice Chancellor.

JUSTICE DUFFY: Thank you, Mr. Halkett.

MR. HALKETT: Thank you.

JUSTICE DUFFY: Mr. Balotti, the time on your side is all gone, but you may have ten minutes.

MR. BALOTTI: Your Honor, I will try and be far more brief than ten minutes.

As Mr. Halkett has indicated, I represent Lehman Brothers, which is also a defendant in this action, although it was not one of the constituent parties to the merger. As you know, Lehman Brothers was an outside professional organization hired to render an opinion on the merger, and I underline "Lehman Brothers"

Throughout the course of this case, and again today, Mr. Weinberger through his counsel has characterized that the opinion that was given was Mr. Glanville's. In fact that is not true. The opinion rendered on the merger was the opinion of Lehman Brothers.

It is emphasized in the briefing that the Lehman Brothers name was desired on the opinion. True.

That's what was desired; that's what was obtained. Not Mr. Glanville's.

It is urged today before the Court that Lehman Brothers should have the same standard in evaluating its conduct applied as that of the participants, fiduciaries in the true sense of the word. The reasons advanced are twofold. The first is that Mr. Glanville was on the board of UOP, and it is acknowledged that at the time Mr. Glanville was also a managing director of Lehman Brothers. There is no warrant in the law of Delaware, as I understand it, for imposing fiduciary duties on corporations just because they have one person who sits on both of their boards. To my way of thinking, it is no more logical to impose a duty in this case for that reason than it is to say that the DuPont Company owes Citibank a fiduciary duty because Mr. Shapiro happens to be on both boards. There just is no warrant for that conclusion.

Secondly, Mr. Weinberger urges that professionals have a higher standard. I will acknowledge that some professionals do have higher standards than ordinary people.

JUSTICE DUFFY: Well, let me just explore a

couple of aspects of this with you. If you are getting into this, why, tell me so. But did Lehman Brothers know the purpose for which the appraisal was to be given?

MR. BALOTTI: Yes, sir, Lehman Brothers did.

JUSTICE DUFFY: Was it in connection with a cash-out merger?

MR. BALOTTI: Mr. Glanville was told when he was first asked if Lehman Brothers could provide the opinion that the proposal to be considered was a merger whereby the minority would receive cash for their shares of stock. Yes, sir.

JUSTICE DUFFY: Was Lehman Brothers aware that the purpose of what it was about, i.e., it's scrutiny or study, or appraisal, had to do with what kind of benefit, or how much money was going to the minority?

MR. BALOTTI: Well, that is not exactly what they were asked, Justice Duffy. What they were asked --

JUSTICE DUFFY: I know. Right. But were they aware that -- Can you answer my question? I don't want to press you if I have misstated it badly, but my

point is did Lehman Brothers know that the purpose of this directly had to do with the amount of money that the majority were going to pay to the minority?

MR. BALOTTI: Certainly Lehman Brothers knew that the question put to them, whether the price of $21 was a fair price that was to be paid in a merger whereby Signal would be acquiring the shares of the minority -- yes, sir, in that sense they were certainly aware that it was cash to be paid by the majority stockholder to the minority stockholders of UOP.

JUSTICE DUFFY: Well, did it make any difference to Lehman Brothers which group was going to benefit, if any of them, or either of them were, by this appraisal?

MR. BALOTTI: No, sir. The question that they were asked to resolve was whether or not $21 per share was fair from a financial point of view. That does not include what we in the legal system think of as the rubric of intrinsic fairness, or some fairness in that sense, because that is a legal determination, and not an investment banker's determination.

JUSTICE DUFFY: Well, I take it that Lehman Brothers knew that Signal controlled UOP.

MR. BALOTTI: Well, certainly they knew that

Mr. Glanville on the board knew who his board members were, and to the extent that one can draw control from the number of people on the board, they knew that.

JUSTICE DUFFY: Well, I understand the distinction you are making, but let me say that if one may assume for present purposes that Lehman Brothers was employed by the majority in control, by the majority stockholder acting through the board -- It knew that, I take it. Didn't it?

MR. BALOTTI: At the time that Mr. Crawford made the initial call to ask whether Lehman Brothers could render an opinion I don't believe there had been any board action. It was Mr. Crawford acting as the chief executive officer of UOP. So I don't believe there had been any board decision to retain Lehman Brothers or not retain Lehman Brothers when they were retained.

JUSTICE DUFFY: Well, let me ask you this, and we'll get off of that for just a moment:

You are arguing that there should not be any direct liability from Lehman Brothers, the outside independent consultant, to the minority. But under the facts of the situation as presented to the Vice Chancellor, how Lehman Brothers can to be retained, and by

whom, and so on, should the Vice Chancellor -- and I don't say specifically in this case -- but in this case, or this type of case, should the Vice Chancellor take into consideration in evaluating Lehman's expert's testimony where the appointment came from and the terms of retention?

MR. BALOTTI: Two points I would like to make:

First of all, Lehman at the trial did not testify as to the expert valuation other than to have the deposition of Mr. Glanville interposed. The testimony at trial was --

JUSTICE DUFFY: Right. In whatever form, should that be one of the factors taken into consideration by the trier of fact in determining and weighing the testimony which the Vice Chancellor is called upon to do? If you're not going to have direct liability -- and I'm not saying that you should -- but if you are not going to have direct liability against which you argue, why shouldn't the Vice Chancellor weigh the testimony accordingly?

MR. BALOTTI: I have to tell you that I'm not sure I understand the thrust of the question, because it's also important to consider Lehman Brothers'

retention in the context of the fact that Lehman Brothers had been the investment banker for UOP since 1959. It was not as if UOP through Mr. Crawford had gone out and retained someone totally unrelated to UOP. Lehman Brothers had been the traditional banker long before Signal ever bought a share of this stock. They were the banker of the company, the traditional, the normal reference for a question like this.

JUSTICE DUFFY: Let me again get back to this:

Weren't they employed by the majority here?

MR. BALOTTI: No, sir, they were not employed by the majority in this case at all. They never had any contact with anyone at Signal; never ever in this transaction. They were contacted --

JUSTICE DUFFY: Well, I don't mean directly, but through the UOP board, weren't they --

MR. BALOTTI: No, sir, I don't believe so, because the UOP board never retained Lehman for this purpose prior to the --

JUSTICE DUFFY: Who did?

MR. BALOTTI: Mr. Crawford called Mr. Glanville. He was the chief executive officer.

JUSTICE DUFFY: Of UOP?

MR. BALOTTI: Yes, sir. And asked if they would be in a position to render the opinion not to Signal on the validity of the $21 price, but to the minority. Was it fair to the minority. That is the charge, and that is the charge that Lehman carried out.

JUSTICE DUFFY: In weighing whatever testimony came from Lehman in this case, are you saying that the Vice Chancellor should have regarded it as coming from a stranger or third party?

MR. BALOTTI: First of all, the Vice Chancellor I don't think weighed Lehman's testimony as to the accuracy of the price, as to the fairness of the price. He weighed the testimony of the expert retained by Signal for this trial, and that was someone who was not affiliated with Lehman Brothers at all. He weighed that against the plaintiff's expert. He did not mix into that Lehman Brothers' original view back in 1978. So that is not a matter that we need to resolve at this time because it was not a matter considered by the Vice Chancellor.

The only question, it seems to me, which has been put before the Court today is whether there is some higher standard of responsibility for one who does nothing more than carry out a charge to determine whether

or not a merger price is fair from a financial point of view to the minority. That was done. Even assuming we have a higher standard, the only argument which is made by Mr. Weinberger for breach of that standard is the so-called LB4, the document which was referred to as written in 1976. It never saw the light of day outside of Lehman Brothers. It was a view merely what if Signal were to ask us; what would we tell them. I submit it is little different than calls that many of us might have received, or action we might have taken in our law office. We want to test an associate. You might ask an associate what if Signal were to call me about a proposed merger with Signal and UOP, what would I tell them. The associate writes a memorandum. I read it. I say, gee that associate is a pretty smart fellow. Toss it away in some file someplace, and then UOP calls sometime later. I don't believe that that creates a conflict of interest on my part in representing UOP.

JUSTICE QUILLEN: What was the evidence on this memorandum? Was it no one could remember what happened to it, or did somebody positively remember that it never got shown to anybody?

MR. BALOTTI: It was positively shown to the

witnesses for Signal and UOP. None of them have ever seen it. The absolute best recollection of everyone at Lehman who was queried on the matter was that that memorandum never left their files. There is not one scintilla of evidence in this record that shows that anyone other than Mr. Schwarzman, Mr. Seegal and Mr. Pearson, all Lehman employees ever saw that memorandum. And if you will read it, it contains nothing which is at odds with their opinion rendered in 1978.

JUSTICE DUFFY: Thank you.

Mr. Prickett.

MR. SPARKS: Your Honor, I would just like to state for the record that as counsel for UOP, while time does not permit me to separately argue, I do join in the arguments that have been made here.

JUSTICE DUFFY: Thank you, Mr. Sparks.

MR. PRICKETT: Your Honor, I recognize that I am on sufferance at this point, having expended, perhaps unwisely, all my time.

JUSTICE DUFFY: You have ten minutes.

MR. PRICKETT: I will be brief.

First of all, there is a thing that I think I should clear up in response to Justice Duffy's questions.

Let's be clear. There were two boards involved. The Signal board and the UOP board. On the UOP board were five directors who were Signal men. They were both Signal directors and UOP directors. On the Signal board, there were no UOP men at all except for Mr. Crawford, the president of UOP. At the Signal board, there was absolutely no presentation on behalf of the minority shareholders of UOP.

Now let's turn over to the UOP board. At the UOP board, there was no presentation affirmatively on behalf of the UOP minority stockholders. So thus, whether you talk about the Signal board or the UOP board, nobody ever stood up and said I represent the UOP stockholders, and I want to know how this price was arrived at, and I want to know what was done for these people. It never happened anyplace. But I think there is some confusion as to the two boards.

Now, let me come back: There is some question about the price of UOP. I think that's contained in the record. At the particular time that it happened, it was in fact the lowest price of the stock during the month of February, 1978. I don't think it's very significant. I don't think you will find a big dip and a cash-out there. It just happened to be the

lowest at the particular time. They just hit it exactly right.

The majority of the minority wrinkle is the latest attempt to avoid the thrust of cases that start with Guth. The fact that at the end of the process, you make it dependent on the majority of the minority does not, in our view, cut out the whole history of the fiduciary responsibility of the majority for the helpless minority. It is one step, but it doesn't mean that you don't have any responsibility along the way. And it is that very point that I made at the beginnning. You have responsibilities, and it is now, we think, up to this Court to say that you've got to fulfill them. You've got to make a best effort, and you can't simply say, as it is said here, well, in the end it is up to the minority, so we didn't have any obligations along the way to take the affirmative responsibilities that in a pure trusteeship you would expect as a bare minimum. What we are talking about is best efforts.

Now, bona fides: We think that Tanzer says if you've got a compelling legitimate reason such as a tax problem, a debt problem, or something else, you cash-out the minority because you've got a good

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business reason to do it, but you can't do it just because it is a good thing for you to do, and that's precisely what the Vice Chancellor decided, and there is no getting around it.

Now, either that rule obtains or it doesn't obtain, but he has decided the case right squarely in the face of what this Court has held.

Now, there were arguments made today about what the Arledge-Chitiea report does and doesn't do. It's spread sheets, it's this, it's that. Fine. That's exactly what Lynch said. Disclose it. Make all the arguments you want, but you must disclose it. And the plain fact of the matter is there was a finding of fact on this.

Two UOP directors who were also Signal directors made a study, and they did not disclose it. It was used by the majority in its decision to cash-out the minority, and the price at which it would do it. What is sauce for the goose is sauce for the gander, and we were entitled to see that.

Now, there is a suggestion that Signal never authorized more than $21. Of course they didn't. Nobody ever asked them for more, so why should they authorize more? What they did was authorize their

management to negotiate a price, but nobody negotiated. So of course they never authorized more than $21.

There is a discussion of a $17 offer, and that's not correct. You set it up, and you say to a guy negotiate at arms-length. Get the best deal you can for these people. DuPont did it, and nobody even charged the problem of the conflict of interest. Why? Because they resolved it at the outset, and everybody carried out their fiduciary responsibilities. That could have been done here, but it was not done. Instead everybody danced to Signal's tune.

I turn briefly in closing to the arguments made on behalf of Lehman Brothers, and I come back to what I said briefly about it.

The Courts must determine whether Lehman Brothers is held to the standard that corporate fiduciaries are in a cash-out merger, and to do anything less is to invite what has happened here.

JUSTICE QUILLEN: The thrust of that, as I understand it, is to give a duty to disclose the memo that was in Lehman's file.

MR. PRICKETT: That's one thing.

JUSTICE QUILLEN: Is that right? What else is there?

MR. PRICKETT: Well, I think you've got to tell these people, look, you're dealing in a situation where there is a majority-minority cash-out. Everbody else has fiduciary responsibilities. You know what's going on, and therefore you have a responsibility to these people to whom you are ultimately giving advice. And the suggestion here made that Lehman was doing anything other than carrying out a responsibility to the minority is plain wrong. They were advising the minority, look, we have looked at this deal, and we are a big independent investment banker, and you can rely on us. The $21 is fair. In fact that is not correct. They never looked at it. And Mr. Glanville, the man who is paraded around as being knowledgeable, said well, the basis on which I did it was it was 50 percent higher than market price.

Now, that is not disclosure, and it is not carrying out the responsibility, and you've got to put it on them; otherwise you find that the people who are hired in this situation don't live up to the standard that you are requiring of everyone else.

JUSTICE QUILLEN: So what it comes down to -- and I'm not trying to minimize it -- but what it comes down to is a duty of disclosure plus liability

if we find the price is inadequate, is that right? Is that the thrust of it? I'm just trying to find what the thrust of this fiduciary duty is.

MR. PRICKETT: I think it's coterminous with the responsibility to the minority.

JUSTICE QUILLEN: All right. But what are you asking us to do with regard to Lehman Brothers?

MR. PRICKETT: I ask you to reverse the determination, and find all three defendants liable.

JUSTICE QUILLEN: So Lehman Brothers would be liable too for the difference of, you say, 26 and 21?

MR. PRICKETT: Yes, I think so. Having taken that responsibility of advising on something critical that they knew was important, and that they knew, and they allowed their opinion to be paraded around -- look, minority, you can rely because Lehman, big New York investment banker, has looked at this thing, and it's okay.

JUSTICE QUILLEN: Let's assume they are not fiduciaries. Wouldn't they have some legal responsibility?

MR. PRICKETT: Oh, I think they would.

JUSTICE QUILLEN: That's what I'm trying

to figure out, Mr. Prickett. Maybe I'm a little slow. It's late in the day here. But what difference does it make whether you call them fiduciaries or contracting parties?

MR. PRICKETT: I think it's important in the context of the developing law of Rawl. From my point of view, I don't think it makes any difference. I think they are responsible in the sense of whether you call it fiduciary responsibility or just plain failure to somebody that they had a contractual responsibility to. That is, when you cut it all away, they were asked to provide an opinion to the minority, and if they have failed in that, they are responsible under other theories. But I think in the context of this situation, you may want to make it generally known that he who advises in a corporate cash-out had better recognize that his responsibilities are coterminous with that of the other players in the scenario.

Let me terminate by three other points:

First of all, it is perfectly clear that Glanville knew that the majority stockholder of UOP was Signal. Glanville above all others knew it because he had helped them by the 50.5 percent. They could have gotten 70 percent, but they got 50.5. And

thereafter their filings with the SEC specifically admitted that they controlled UOP. Glanville wasn't a stranger who learned this at the eleventh hour. He knew it for -- between '78, '76, '75. He knew it, and he knew who controlled this thing. Furthermore, he was on the board of UOP all the time. He couldn't have helped but know that.

There was a question asked as to whether the Vice Chancellor should weigh the testimony of Lehman Brothers or Glanville. Lehman Brothers and Glanville didn't appear at trial. Nobody from Lehman Brothers came, and the Vice Chancellor did not weigh their opinion in considering whether the price was intrinsically fair because when it all boiled down, Glanville determined that the price was fair because he said, "I determined right away that it was 50 percent above the market price", and that was there. So that had nothing to do with it.

JUSTICE QUILLEN: Is that so bad as a gut reaction?

MR. PRICKETT: It is a gut reaction, a horseback reaction.

JUSTICE QUILLEN: I didn't ask you that. I asked you is it as bad as a gut reaction? Someone offers

you 50 percent above market. Isn't your gut reaction, well, that seems pretty fair to me?

MR. PRICKETT: Well, that's exactly what Glanville said.

JUSTICE QUILLEN: Well, I'm saying is that unreasonable? That's what I'm asking you.

MR. PRICKETT: Yes. For $150,000 you are entitled to a lot more than a gut reaction of even a man like Glanville. And why? Because in fact when measured by comparable situations, 50 percent was not fair. That's not what the market price was saying, and anybody who took the trouble to look it up could find that out.

Why did Glanville say that? Because he knew Signal wanted it, and he thought it was defensible without checking it, without asking anybody about it. So he says gut reaction, sure that's fair. And he said it in the first phone call. No need for negotiations; $21 is okay. And that's what we paid $150,000 for, and that was the opinion that was used.

Now, where was that opinion used? It was used repeatedly. Not the underlying fact, but Mr. Glanville of Lehman Brothers, New York investment banker, has studied the thing and determined it's fair. And

the Vice Chancellor, though he never considers it on intrinsic fairness, says that the UOP board and the Signal board and management was justified. Why? Because they used Glanville's opinion. But they didn't come to trial at all. They knew we would cut them to pieces there with that.

Now, who was he employed by? Who was Glanville employed by? Because we've seen some mix-up on that. He was employed by Mr. Crawford, president of UOP, but a Signal director. So that his employment, we think, was tainted by the fact that he was employed by Crawford.

(At this point the Supreme Court tape ended.)

CERTIFICATE

I, HENRY D. SKOGMO, Official Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 2 through 66 contain a true and correct transcript of the Supreme Court tape recording of an argument in the above matter stenographically reported by me on March 23 and 24, 1982.

IN WITNESS WHEREOF, I have hereunto set my hand this 31st day of March, 1982.

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

Typed by:
L. M. Reeder