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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM B. WEINBERGER, Plaintiff-Below, Appellant, v. UOP, INC., et al., Defendants-Below, Appellees,	)	No. 58, 1981 Appeal from Certain Orders Entered By The Court of Chancery Of The State Of Delaware In And For New Castle County In Civil Action No. 5642.

BRIEF OF LEHMAN BROTHERS KUHN LOEB INCORPORATED

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Dated: June 11, 1981

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NATURE OF THE PROCEEDING

This is an appeal from a final judgment of the Court of Chancery, Hon. Grover C. Brown, Vice Chancellor, entered on a decision dated February 9, 1981, which granted judgment after trial in favor of all defendants. The action was tried to the Court below over an eleven-day period commencing on May 20, 1980. Final judgment was entered on February 19, 1981.

This brief is submitted by defendant Lehman Brothers Kuhn Loeb Incorporated ("Lehman" or "Lehman Brothers"). Defendants The Signal Companies, Inc. ("Signal") and UOP Inc. ("UOP") are filing a joint brief which sets forth in full the nature and background of the proceedings, the relevant facts, and a complete response to the arguments of plaintiff. Lehman adopts those statements and arguments, and will not repeat them here. This brief will concern itself with a discussion of the facts relevant to Lehman's position in this case, the Vice Chancellor's decision insofar as it relates to the claims against Lehman, and a brief response to plaintiff's arguments against Lehman.

SUMMARY OF ARGUMENT

A. Response to Plaintiff's Summary of Argument as it relates to Lehman Brothers.

1. Denied that Lehman acted in Signal's interests rather than the interests of the minority shareholders of UOP or that Lehman is liable to the minority shareholders of UOP on either agency or fiduciary principles. Plaintiff has not established either agency or a fiduciary duty on behalf of Lehman and has not offered clear and convincing factual evidence to support either theory. The trial Court correctly concluded that Lehman is not liable to the minority shareholders of UOP.

2. Denied that the basis of Lehman's opinion was not disclosed or that the holding of Denison Mines Ltd. v. Fibreboard Corp., 388 F. Supp. 812 (D. Del. 1974) is applicable. The complete Lehman opinion, including the basis upon which it was rendered, was disclosed in the proxy statement. Denison Mines Ltd. v. Fibreboard Corp., in which neither the opinion nor its basis was disclosed, is inapposite.

3. Denied that the Lehman Brothers 1976 draft memorandum was directed to Signal or was material in any respect. Plaintiff has not offered any legal or factual basis for the contention that the memorandum should have been disclosed to anyone. The trial Court correctly concluded that the memorandum had not been disclosed to anyone and that Lehman had no obligation to disclose it when it rendered the fairness opinion.

4. Denied that there was no separate Lehman opinion apart from that of Mr. Glanville. The Lehman opinion was prepared by Lehman personnel under Mr. Glanville's direction following a complete investigation. The trial Court properly determined that the opinion was that of Lehman Brothers, not Mr. Glanville.

B. Summary of Argument of Lehman Brothers.

1. The lower Court's detailed findings of fact as to Lehman are fully supported by the record and should be accepted by this Court because they are not clearly erroneous.

2. The trial Court correctly concluded that there was no evidence of any conspiracy among Lehman, Signal and UOP to act contrary to the interests of the minority shareholders of UOP.

3. Plaintiff has wholly failed to offer any authority in support of his claim of a breach of fiduciary duty on the part of Lehman Brothers.

4. The trial Court correctly concluded that there were no misrepresentations or omissions in the proxy statement regarding Lehman's opinion on the fairness of the merger price. The fairness opinion was that of Lehman Brothers, not Mr. Glanville personally. The basis for Lehman's opinion was contained in the opinion letter, and thus the requirements of Denison Mines Ltd. v. Fibreboard Corp., 388 F. Supp. 812 (D. Del. 1974) were fulfilled. There was no obligation on the part of any defendant to disclose the existence of the 1976 draft memorandum.

COUNTER-STATEMENT OF FACTS AS TO LEHMAN

This action arises out of the 1978 acquisition by Signal, then owner of 50.5 percent of the outstanding shares of UOP, of the remaining 49.5 percent of the stock. The transaction, which provided that UOP shareholders would become entitled to receive $21 per share in return for their UOP stock, was overwhelmingly approved by the minority UOP shareholders. Lehman Brothers, an investment banking firm long familiar with the business of UOP, had been retained by UOP to render an opinion to its board as to whether the proposed merger was fair and equitable to the minority shareholders. Lehman thereafter rendered such an opinion, and the opinion letter was incorporated in the proxy statement issued in connection with the merger proposal.

A. The Longstanding Relationship between Lehman and UOP.

Lehman had served as UOP's investment banker for almost twenty years, from the time of its initial public stock offering to the time of the merger (B 48-49).* James Glanville, a managing director of Lehman Brothers at the time of the merger, had been an active member of the UOP

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*"B ___" refers to Appellee's Joint Appendix, filed contemporaneously herewith.

board of directors since 1972 and was a member of the audit committee of the board.*

In 1959, Lehman Brothers represented UOP in its initial public stock offering when the company came out of the trust for the American Chemical Society (B 48). Glanville became acquainted with UOP at that time. Subsequently, Lehman worked on several transactions to secure necessary financing for UOP, including the financing of a catalyst plant and a mortgage on its Des Plaines office building (B 49), and a possible private placement of UOP notes (B 126-28). In addition, because of UOP's continuing need for additional equity, Lehman Brothers had made various efforts to develop public offerings of UOP shares (B 59).

In 1975, Lehman acted as UOP's investment banker in connection with Signal's combination tender offer and direct purchase of UOP stock, which had resulted in Signal becoming the majority shareholder of UOP. This transaction was "a significant plus for UOP" (Logan Dep., p. 51), providing the company with a needed infusion of equity funds of approximately $30 million (Glanville Dep., p. 18; Logan Dep., pp. 41, 53, 84) and UOP's shareholders with a favorable offer to tender their shares at a price of $21 per share

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*The depositions of Lehman Brothers personnel (Messrs. Glanville, Schwarzman, Seegal and Pearson) were placed in evidence by plaintiff as part of his case and thus were binding on him. To the extent that reference is made to portions of depositions not contained in the appendices, they will be referred to as "____ Dep., p. ___."

(B 54). The stock had closed just prior to announcement of the tender offer at a fraction under $14 per share.

The 1975 tender offer was substantially oversubscribed (see B 80) by a factor of almost two to one. In an enthusiastic response to Signal's offer to purchase 4.3 million (43 percent) of the total outstanding UOP shares, the shareholders tendered 7.8 million (78 percent) of all outstanding shares. Pursuant to the terms of its offer, Signal could only purchase 55 percent of the tendered shares, and therefore had to return the remaining 3.5 million shares to the stockholders.

Mr. Glanville and his Lehman colleague, Roger Altman, had primary responsibility for Lehman's work for UOP in this transaction. Frederic Seegal, a Lehman Brothers' associate, performed statistical and other backup work for Mr. Altman (B 125).

B. UOP After the 1975 Transaction.

Toward the end of 1975, major financial problems, which had been unforeseen at the time of the April 1975 Signal transaction, surfaced at UOP. They arose out of the bankruptcy of the Come-By-Chance refinery constructed by UOP in Newfoundland. As a result, UOP ended 1975 with an unanticipated operating loss of nearly $35 million, and the financial statements of both UOP and Signal were qualified by their accountants. Litigation over the matter ensued and remains pending to this day.

Following these adverse developments in late 1975, UOP's performance slowly began to improve to the extent that, by the beginning of 1978, UOP was approaching its performance for 1974, the year before Signal's initial acquisition (see B 592). Even in 1978, however, at the time of Signal's merger proposal, UOP's performance had not matched that of 1974, and it was Lehman's opinion that UOP's future was "flat" (B 68).

C. The 1976 Draft Memorandum.

Sometime in the spring of 1976, Roger Altman of Lehman Brothers approached his colleague, Fred Seegal, and asked him to look at the considerations which might be involved in the possible acquisition by Signal of the remaining shares of UOP (B 129). Seegal thereafter assembled statistical materials on the subject and prepared a draft memorandum for submission to Altman (B 22-23). Altman and Seegal subsequently revised the first draft into its present draft form.*

Plaintiff has continually mischaracterized the draft as a Lehman Brothers opinion to the effect that Signal should purchase the remaining outstanding stock of UOP by means of a cash offer of up to $21 per share (see, e.g., PB 7-8).** Far to the contrary, the draft simply set forth

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*The draft is labeled "Confidential Draft Memorandum to Mr. Forrest Shumway, Considerations Relating To The Signal Companies' Investment in UOP" (PX-LB-40, B 395-98).

**"PB" refers to the Opening Brief of Appellant in Support of His Appeal.

for possible consideration certain advantages and disadvantages that Signal's acquisition of full control of UOP would have. The draft expressed the view that Signal should consider the acquisition and that, if it wished to accomplish the transaction, the company should be prepared to pay in the range of $17 to $21 per share in some combination of cash, stock and debt. The draft expressly refrained from attempting to set any particular price which Signal should pay for the stock, including any consideration of what would be a fair price to the UOP shareholders. Rather, it confined itself to an analysis of the price range within which a transaction might be negotiated from a business or financial view. Indeed, from an investment banking standpoint, the draft indicated that an offer below the 1975 $21 price was in order. The only reason supporting a $21 price was a non-financial one -- the risk of litigation should a second offer be for a lesser price than Signal's original tender price.

Seegal never spoke to Glanville with respect to the subject matter of the memorandum (B 134, 136). He did not know whether, in fact, Glanville had requested preparation of the draft, or whether it was ever submitted to him (B 131). Glanville testified that he did not recall seeing the document prior to the time of his deposition (B 55).*

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*At the time of trial, neither Glanville nor Altman was associated with Lehman Brothers. Glanville's deposition was taken during discovery, and the transcript was submitted in evidence. Plaintiff never sought to depose Altman. Plaintiff's inexplicable and unfair comment on the fact that Glanville did not testify at trial (PB 52) injects

The draft memorandum was never put in final form, was never adopted by senior management at Lehman Brothers, and was never sent to Signal or UOP (B 135). In short, the draft never saw the light of day outside of Lehman Brothers (B 56). None of the top executives of Signal or UOP ever saw the draft before it was shown to them during discovery proceedings (B 156, 47).

The document lay unused in Lehman's files from 1976 until some time during Lehman's 1978 work in connection with Signal's merger proposal. It was then retrieved from the files by Seegal because it contained useful statistical data as to Signal's 1975 tender offer, which facilitated analysis of the proposed 1978 transaction (B 149-51).

William Pearson, a young Lehman associate responsible for statistical analysis of the 1978 merger proposal, confirmed that he used only the statistical data in the draft (B 98). The senior members of the Lehman team involved with the 1978 merger either never reviewed the document (B 110) or were unaware of its existence (B 55). There

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(Footnote continued from previous page).
into the record on appeal a matter which Lehman understood was clearly resolved at trial. Counsel for plaintiff was well aware that Glanville was not called to testify because, among other reasons, he was hospitalized, as Lehman Brothers' counsel stated to the Vice Chancellor (Tr. 1626-27). Counsel was prepared at that time to submit to the Court a letter from Glanville's physician substantiating the particulars of his medical condition, but because plaintiff's counsel stated to the Court that he accepted the fact of the hospitalization, the submission of the letter was considered unnecessary. In his post-trial brief, plaintiff's counsel apparently retreated from his representation to the Court, and the physician's letter was submitted as Exhibit A to the Posttrial Memorandum of Lehman, Dkt. 179, filed September 19, 1980.

was simply no evidence whatever to suggest that the substance of the draft memorandum was used in any way in connection with Lehman's work on the 1978 merger proposal.

In fact, even if Lehman had used the draft memorandum in connection with its work on the 1978 transaction, there was nothing in the draft either prejudicial to the UOP stockholders or in any way harmful to their interests. The memorandum explicitly identified the fairness of the price to the UOP shareholders as a factor to be considered, but specifically did not address that issue or select any particular amount as an offering price. It noted the possibility of shareholder litigation should a price less than the 1975 tender price of $21 be offered, although investment banking analysis indicated a lesser price was appropriate. Moreover, the draft involved a consideration of the advantages and disadvantages of the acquisition as they existed in 1976, a wholly different period from 1978.

Thus, plaintiff's question why, if $21 per share was in Signal's best interest in 1976, the same price was in the best interests of the UOP stockholders in 1978 (PB 52) is easily answered. Plaintiff, of course, has totally misread the 1976 report. The draft did <u>not</u> take the position that Signal should pay $21 per share. Indeed, the memorandum never purported to render an opinion on the fairness of any price to the UOP shareholders and specifically disclaimed selecting any particular price which Signal might consider paying for the stock.

The 1976 draft memorandum was totally immaterial in the context of Lehman's work on the 1978 transaction, and any claim that there was some obligation to disclose in the proxy statement the mere existence of the draft, which plaintiff concedes was never sent to Signal or UOP, is clearly without merit.

D. 1978 Signal-UOP Merger.

On Tuesday, February 28, 1978, the secretary to Mr. James Crawford, President of UOP, informed Glanville, as a UOP director, that Signal intended to propose the acquisition of the remaining shares of UOP it did not already own at a price in the range of $20 to $21 per share, and that the UOP board would meet to consider the offer in one week (B 57-59). The closing price of UOP stock just prior to announcement of the merger discussions was $14.50 per share.

1. UOP's Retention of Lehman Brothers to Render a Fairness Opinion.

On or about the next day, Wednesday, March 1st, Crawford personally spoke with Glanville. During that conversation Glanville gave his initial personal reaction that a merger price in the range of $20 to $21 per share would be fair (B 46). Crawford asked Glanville whether Lehman could render an opinion to the UOP board as to the fairness of the transaction and Glanville agreed to do so (B 60). According to Crawford, the major reasons he asked Lehman to render the fairness opinion were the long

association Lehman and Glanville had with UOP and their knowledge of UOP's business and financial condition, which placed Lehman in the best possible position to respond with an opinion within the given time constraints (Tr. 1451-52).

Glanville thereafter contacted Stephen Schwarzman, a Lehman officer who had substantial experience (B 62) and had worked with Glanville on a number of other matters (B 105). He asked Schwarzman to organize a team to work on the fairness opinion, and they developed a working plan to accomplish the matters which needed to be covered before the scheduled board meeting (B 61). Mr. Schwarzman contacted Fred Seegal because of his previous experience on UOP matters and Bill Pearson, a young associate, to complete the Lehman team (B 107).

Pearson was assigned to review Lehman's files and assemble all relevant public documents on UOP in order to gain a better understanding of the company's business. The documents examined by Pearson included a five-year history of annual reports, 10-K's, 10-Q's, Moody's summaries, proxy statements and public news releases (B 106). He was also to assemble information on multiple-stage mergers, premiums, and other matters relevant to the fairness determination (B 106-07). Pearson was given responsibility for assembling the relevant statistical data, while Schwarzman and Seegal were to apply their business and financial judgment to the project (B 108).

2. Lehman's Due Diligence Visit to UOP Headquarters.

On the evening of March 2, 1978, Messrs. Schwarzman, Seegal and Pearson flew to Chicago for a due diligence visit at UOP the following day (B 139). On Friday, March 3, they held a day-long series of meetings with Crawford and the heads of UOP's various operating units, its general counsel, and its independent auditors. Schwarzman described the purpose of the visit:

> In matters of this type, it's very important for someone in my position to ascertain that there is nothing material that has happened that has not been revealed in the public information and financial statements or on a prospective basis, that is likely to top the company which would increase its value to a substantial degree, and the due diligence process itself, which is designed to be one of almost overlapping checks on what any individual might tell you about the business and its prospects, is very important to us, in order to confirm our initial judgments regarding value, which are obtained from a review of the historical financial numbers and our understanding of the business. [B 109].

In the meetings with Crawford, they discussed UOP's recent operating performance and prospects, reviewed budgets and forecasts, and compared the 1977 results with the 1978 projections. They found "that UOP was an ongoing concern that would not involve any material surprises" (B 84). Mr. Schwarzman recalled:

> [Crawford] indicated to me that it would be unreasonable to assume that the business was capable of rapid growth. That in terms of its -- of

> restoring its financial health from the period ending December 31, 1975, he indicated that great strides had been made and I agreed with him and upon reviewing with him each of the individual areas of the businesses, he indicated that there was nothing of an extraordinary nature to be considered by an outsider, in assessing the business. [B 120].

A line-by-line review of UOP's balance sheet and operating statements with the company's chief financial officer resulted in the same conclusion (B 85, 144). Discussions with UOP's general counsel concerning the Come-By-Chance litigation made the Lehman group aware of its complexities and was a factor in their determination of value (B 112-13).

Upon conclusion of the due diligence visit, Schwarzman conferred by telephone with Glanville. He told Glanville that, in his judgment, a price in the range of $20 to $21 would be a fair price for the remaining shares of UOP (B 117). Schwarzman testified that, in arriving at the opinion that $20 or $21 per share would be fair:

> I meant that the price being paid to the minority shareholders, given my understanding of the business of UOP and its operating history, which was not distinguished.... [t]he earnings for the 12 months prior to the offer in 1978 were approximately 13 percent below what they had been for the 12 months preceding the offer in 1975. The stock market in 1978, during the relevant period, was approximately eight percent below ... [t]he market price in 1975. The company, during this period, had had a very unimpressive record. The Come-By-Chance situation was a cloud over the company's future.

> A review of the company's lines of business with executives in the divisions, indicated that there were no unusually optimistic prospects for the business. Many of the operations, in terms of profit credibility seem[ed] to have an erratic pattern over the previous five years, and there was nothing discovered from the due diligence process, which would indicate a change from that pattern.
>
> And if the stock market had accorded -- well, if the company's fortunes had indeed improved expeditiously, it was undiscovered by the stock market as well as myself, as compared with the period prior to the 1975 tender. [B 117-19].*

The weekend of March 4-5 was consumed with a final review by Seegal and Pearson of the statistical and other materials necessary to make a final evaluation of the fairness of the proposed transaction, preparation of a draft opinion letter, compilation of a package of materials for possible use by Glanville and Schwarzman at the UOP board meeting, and discussions with Schwarzman and Glanville (B 152-53).

Pearson prepared the statistical tables which were incorporated into the package of materials taken to the UOP board meeting, entitled "Summary Data Regarding An Offer By The Signal Companies, Inc. To Acquire The Remaining

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*This view of UOP derived from the due diligence investigation is a far cry from plaintiff's comment that as a result of the visit, "the bright future, both short and long range, of UOP ... was confirmed" (PB 22).

Common Shares of UOP, Inc." (B 365-88) (B 92, 121).* A key element of the statistical analysis was a comparison of the proposed transaction with the 1975 tender offer, set forth in Table 1 of the Summary (B 372) (B 88). In addition, Seegal and Pearson carefully reviewed other multiple-stage acquisitions to determine if they were comparable with Signal's proposed transaction (B 91). Results of this comparison were incorporated in both chart and amplified forms in Table 2 and the following pages of PX-LB-5 (B 89-91). Based upon the statistical analysis itself, Pearson concluded "that either 20 or 21 was a fair price" (B 93).

3. UOP Board Meeting -- March 6, 1978.

On Monday, March 6, 1978, Glanville and Schwarzman flew to Chicago to attend the meeting of the UOP board which was to consider Signal's offer. Glanville reviewed the assembled written information during the flight, including the summary and the final draft opinion letter (B 121, 63, 66). He had previously reviewed the substance of the various tables of statistics and draft opinion letter by telephone with Schwarzman (B 64-65).

At the UOP board meeting, after it was learned that Signal's offering price would be $21 per share, Glanville delivered Lehman Brothers' opinion that the offering price

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*The detail of these background materials (B 365-88) belies plaintiff's characterization of Lehman's work as a "cursory two day review" (PB 23). Perhaps epitomizing plaintiff's miscitation of the record, plaintiff's brief attempts to palm off the above characterization as that of the Court below.

was fair and equitable to the UOP shareholders other than Signal. Glanville read the Lehman opinion letter and responded to questions posed by members of the board (B 67, 121).

E. The Basis for Lehman's Opinion on Fairness.

The Lehman opinion letter to the UOP board, which stated that Signal's offering price was "fair and equitable to the stockholders of UOP other than Signal" (B 409, PX-U-7 at D-2), advised that the opinion was based primarily on two elements:

(1) the familiarity of James Glanville "with the business and future prospects of UOP;" and

(2) the particular work performed by Lehman on the fairness opinion, including the review of various financial information concerning UOP, review of the 1975 tender offer, review of stock market prices, review of other multiple-stage acquisitions and conduct of the due diligence investigation.

Glanville's and Lehman's familiarity with UOP's business and prospects has not been disputed even by plaintiff. Indeed, it was one of the main reasons why Crawford believed Lehman was the obvious choice to take on the fairness opinion assignment (B 46). Glanville, however, did not rest Lehman's opinion on his personal belief as to the fairness of the offering price. Instead, he designated an able team of Lehman personnel to study and evaluate the company indepen-

dently in order to confirm that his perceptions concerning UOP's business and future prospects were in fact accurate. The evidence clearly showed that "other qualified persons at Lehman Brothers worked on the project and that a great deal of information was reviewed" before Lehman rendered its fairness opinion (A 1932).

Lehman's research and statistical analysis, as Lehman personnel testified, led inevitably to the conclusion that the merger price was fair. First, numerical measures of performance clearly indicated that UOP was not performing as well in 1978 as it had been at the time of the 1975 tender offer (B 94-96). Pearson succinctly summarized these factors in a report he later prepared for Schwarzman:

> Simply put, our analysis was that at a price of $21 the UOP shareholders were obtaining the same price as offered two years previously in spite of the facts that
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> 1) the Dow Jones Industrial Average had declined 8.2% from 808.43 to 742.12;
>
> 2) UOP earnings per share for the twelve month periods preceding the offers had declined 12.0% from $2.41 to $2.12; and
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> 3) the market price of UOP common stock prior to the 1978 announcement was only marginally (9.6%) higher than prior to the 1975 announcement ($14.50 versus $13.875).
>
> Also, we noted that the $21.00 price was greater than book value of $19.86 at 12/31/78, and also 12% higher

than the highest recorded sale value over the last four years ($18.75). [B 389-90].

Second, it was fair to offer a slightly lesser premium in 1978 than in 1975 (45 percent compared to 51 percent) because, as Pearson testified:

> The first thing is that since the time of the 1975 offer, UOP had suffered dramatic losses, which to the best of my knowledge, had not been anticipated at the time of the 1975 offer.
>
> So that it can be easily argued that investor expectations as to the future value of UOP stock were substantially lessened in 1978 as opposed to the time of the 1975 offer. I also note that the stock market had declined, which is an indication of overall equity investor expectations, and finally, that the numerical measures of the company's performance, principally earnings per share, measured just prior to each of the offers indicated that, at the time of the 1978 offer, the company was not performing as strongly as it was at the time of the 1975 offer.

All of which justify a lower market premium. [B 97].

Third, Lehman took into account the fact that the 1975 offer, also at $21 per share, had been oversubscribed by a factor of nearly two to one, clearly confirming that a large percentage of UOP shareholders had considered $21 per share to be a very favorable price at a time (April 1975) when the company's prospects and record were superior to those at the time of the 1978 merger, and when the market price of the stock ($13-7/8 per share) was essentially the same as that in 1978.

Finally, the due diligence investigation Lehman performed not only had revealed no surprises in UOP's various lines of business but had, in fact, permitted Lehman to confirm its initial judgment as to UOP's future prospects. Lehman concluded that the future earnings of UOP would be a function of the results of its various divisions and the growth potential of its various businesses, and indeed, given those factors, that the future of UOP "was flat" (B 68).

Accordingly, based upon its knowledge of UOP and analysis of the foregoing factors, Lehman rendered its opinion that the merger price of $21 per share was fair and equitable to the UOP shareholders other than Signal. The opinion letter was thereafter incorporated into the proxy statement issued in connection with the merger.

F. The Amended Complaint.

The amended complaint essentially made only two allegations against Lehman Brothers. It asserted that Lehman Brothers owed a fiduciary duty to the minority stockholders of UOP and that the duty was somehow breached (A 3). It also asserted that the "defendants," presumably including Lehman Brothers, entered into a conspiracy to deceive the minority shareholders and to advance the interests of Signal to their detriment (A 3-4).

Plaintiff wholly failed to prove either of these claims at trial. As noted in the opinion of Vice Chancellor

Brown, there was simply no evidence whatever that a conspiracy existed among the defendants to shortchange the UOP minority shareholders. Weinberger v. UOP, Inc., Del. Ch., 426 A.2d 1333, 1348 (1981). Nor did plaintiff offer any legal authority to support his contention that Lehman, in rendering its fairness opinion, owed the same fiduciary duty to the minority stockholders as did Signal, the majority shareholder. Id.

G. The Evidence at Trial Relating to Lehman and the Vice Chancellor's Decision.

Plaintiff sought to prove his case against Lehman Brothers essentially through the deposition testimony of the four Lehman witnesses, Mr. Glanville and the members of the Lehman team who participated in the work on the fairness opinion, Messrs. Schwarzman, Seegal and Pearson.*

Plaintiff's theory that Lehman Brothers was in some way acting in the interest of Signal, rather than that of the UOP minority shareholders, and thus breached some unspecified fiduciary duty, or was part of a conspiracy with UOP and Signal, was completely rejected by the Vice Chancellor in his detailed findings of fact. The sole proof offered on this issue at trial was the existence of the 1976 draft memorandum described above.

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*Plaintiff's comment on the fact that no Lehman witness testified at trial overlooks the deposition testimony in evidence consisting of the complete deposition transcripts of all four members of the Lehman team. All four deposition transcripts were submitted as part of plaintiff's case in chief.

The Court rejected plaintiff's characterization of the document as a Lehman "opinion" that Signal should purchase the remaining UOP stock by means of a cash offer of $21 per share* and found that the evidence wholly failed to support any theory of liability as against Lehman. 426 A.2d at 1348. As the Vice Chancellor pointed out, even assuming that it could be said that Lehman Brothers had some responsibility for knowing of the existence of the document, the "uncontroverted" lack of knowledge on the part of Signal and UOP undercut any charge of conspiracy. Id. Accordingly, these claims were dismissed.

The Court found significant in regard to the Lehman fairness opinion that a copy of the opinion letter was included in the proxy materials with the acknowledgment that Lehman had not made any independent appraisals of assets, but had relied upon the accuracy of audited and other financial information provided or made available by UOP, thereby satisfying any requirement of Denison Mines Ltd. v. Fibreboard Corp., 388 F. Supp. 812 (D. Del. 1974). 426 A.2d at 1352-53.

The Court similarly rejected plaintiff's assertions regarding alleged misrepresentations and omissions as to

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*Plaintiff continues to mischaracterize the draft memorandum in his brief on appeal, now calling it a Lehman conclusion that advised Signal to acquire UOP at a price up to $21 per share (PB 7-8). In fact, the memorandum was never put in final form, never adopted by Lehman management, and never sent to Signal. Moreover, the draft did not purport to value the stock at $21 per share, to advise a cash offer, or to assess the fairness of any price.

Lehman's independence, finding that "there is no convincing evidence that Lehman Brothers had any commitment to Signal that would have had any bearing on its opinion." 426 A.2d at 1353. This finding was expressly based upon Lehman Brothers' 20-year familiarity with UOP's business and prospects, the absence of any communications between Signal and Lehman Brothers concerning the merger, and the fact that no one at UOP or Signal had any knowledge of the existence of the 1976 draft memorandum. Id. The evidence demonstrated that the work of other "qualified" Lehman personnel and the review of "a good deal of information" had been performed by Lehman in preparation of the opinion letter. The opinion given on fairness was the opinion of Lehman Brothers. Id.

It is from the dismissal by the lower Court of these unsupported charges against Lehman that plaintiff appeals.

ARGUMENT

I. THE STANDARD AND SCOPE OF REVIEW.

The standard of review that this Court has consistently applied to findings of fact and conclusions of law of the Court of Chancery "permits reversal only if there be no substantial evidence to support such ultimate findings so as to demonstrate them to be 'clearly wrong.'" Warren v. Goldinger Brothers, Inc., Del. Supr., 414 A.2d 507, 509 (1980). Thus, this Court has stated that it must affirm factual findings by the Vice Chancellor which are supported by sufficient evidence. Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc., Del. Supr., 336 A.2d 211 (1975). Cf. Fairfield Builders, Inc. v. Vattilana, Del. Supr., 304 A.2d 58, 60 (1973).

Further, this Court will not substitute its judgment for that of the Court of Chancery where the findings are the result of an "orderly, logical, and deductive process." H & H Poultry Co., Inc. v. Whaley, Del. Supr., 408 A.2d 289, 291 (1979). Accordingly, where findings of the Court of Chancery are supported by the evidence, "such findings will be accepted unless 'clearly wrong and the doing of justice requires their overturn.'" Science Accessories Corp. v. Summagraphics Corp., Del. Supr., 425 A.2d 957, 966 (1980), citing Levitt v. Bouvier, Del. Supr., 287 A.2d 671 (1972).

As we will demonstrate, the Vice Chancellor's findings of fact are supported by the record and are the result of an orderly, logical and deductive process.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT THERE WAS NO CONSPIRACY OR BREACH OF FIDUCIARY DUTY ON THE PART OF LEHMAN BROTHERS.

A. There Was No Evidence Of Conspiracy.

Plaintiff has continually maintained that Lehman Brothers conspired with Signal and UOP. However, as the Vice Chancellor correctly concluded, plaintiff has failed to provide even a scintilla of evidence to support his novel theory of liability.

To establish the existence of a civil conspiracy, plaintiff must prove the existence of four requisite elements by a preponderance of the evidence: (1) a conspiratorial object; (2) a meeting of the minds on that object; (3) overt acts; and (4) damage to the plaintiff proximately caused by the acts. Baker v. Rangos, 324 A.2d 498, 506 (Pa. Super. 1974). See also Van Royen v. Lacey, 277 A.2d 13, 14 (Md. App. 1971). Plaintiff's brief does not purport to establish the existence of these essential elements. Rather, plaintiff is content merely to allude to the existence of the undocumented "conspiracy" (PB 47-55) as if it were an established fact.

The Court below determined that the trial record was totally devoid of evidence that Lehman Brothers conspired with either Signal or UOP. 426 A.2d at 1348. Indeed, the adoption of plaintiff's theory would have required the Vice Chancellor to engage in rampant speculation and rely on assumptions which are totally unsupported by either the law or the trial record.

Plaintiff implies that the mere existence of the 1976 draft memorandum somehow "proves" that a conspiracy existed. However, it is uncontroverted that neither Signal nor UOP ever saw the draft memorandum. 426 A.2d at 1348, 1353. Moreover, there is no evidence to suggest that Mr. Glanville was even aware of its existence prior to this action. 426 A.2d at 1348. On the basis of the evidence adduced by plaintiff in support of his conspiracy theory, the Vice Chancellor properly concluded:

> Thus, even if Glanville, and through him, Lehman Brothers, can be charged with some responsibility for knowing of the existence of LB-40 prior to the fixing of the merger price, the uncontroverted lack of knowledge on the part of anyone at either Signal or UOP undercuts the plaintiff's conspiracy charge. Quite simply, they could not conspire based upon something about which they had no knowledge. Id.

Indeed, plaintiff's trial evidence failed to substantiate either the existence of any conspiratorial object or the essential meeting of the minds of Lehman, Signal and UOP.

Further, the trial record does not reflect any evidence that plaintiff was damaged in any way by the putative conspiracy. Id. Thus, even if plaintiff had established the existence of a conspiratorial object, a meeting of the minds and overt acts by a preponderance of the evidence (which, of course, he did not), there still could be no civil conspiracy. 15A C.J.S. Conspiracy §1(1); see also 16 Am. Jur.2d Conspiracy §49.

In sum, neither the trial record nor plaintiff's post-trial briefing reflects even an attempt to satisfy the requisite elements for proof of civil conspiracy, much less the required proof by a preponderance of the evidence. Accordingly, the Vice Chancellor correctly dismissed plaintiff's conspiracy charge against Lehman Brothers.

B. There Has Been No Showing Of A Breach Of Fiduciary Duty On The Part Of Lehman Brothers.

Plaintiff's implicit recognition of the speciousness of his conspiracy theory is reflected in his attempt to create a breach of fiduciary duty allegation out of whole cloth (PB 48-50). As in the case of his civil conspiracy contentions, plaintiff did not demonstrate either the existence or breach of a fiduciary duty at trial. Rather, plaintiff surprisingly appears to argue that Lehman Brothers somehow has the burden of proving that it acted in the interests of the minority shareholders (PB 49). Of course, no legal or factual basis is offered for this assertion, and it was properly rejected by the Vice Chancellor. 426 A.2d at 1348.

On appeal, plaintiff (for the first time) cites only one authority, Laventhol, Krekstein, Horwath & Horwath v. Tuckman, Del. Supr., 372 A.2d 168 (1976), for his argument that Lehman Brothers breached an unspecified fiduciary duty. In Laventhol, the sole question before the Court was whether the equitable exception to the statute of limitations established in Bovay v. H. M. Byllesby & Co., Del.

Supr., 38 A.2d 808 (1944) should be extended to alleged co-conspirators of corporate fiduciaries. 372 A.2d at 169. The defendant certified public accountants moved to dismiss on the basis of the statute of limitations. The Court held that accountants who purportedly have conspired with self-dealing corporate fiduciaries may not rely upon the statute of limitations. The sole holding of Laventhol is that defendants who have conspired with self-dealing fiduciaries are "bound by the same standard for statute of limitations purposes as the fiduciaries ..." 372 A.2d at 170. [Emphasis added].

Moreover, the Supreme Court opinion in Laventhol carefully distinguished the defendant certified public accountants from the corporate fiduciaries. Plaintiff does not cite (and the opinion does not contain) any reference to any fiduciary duty on behalf of the certified public accountant defendants. Indeed, the only references are to an alleged conspiracy with self-dealing corporate fiduciaries. Id. Thus, it is apparent that the breach of fiduciary duty argument, to which plaintiff devotes only one full page of his brief, is nothing more than an attempt to circumvent plaintiff's failure to substantiate his conspiracy allegation. Since the only conceivable source of liability even alluded to in Laventhol is grounded upon proof of conspiracy, plaintiff's breach of fiduciary duty theory must fall with his unsubstantiated conspiracy charge.

C. Lehman Brothers Is Not Liable On Any Agency Theory.

Recognizing that there is no cognizable basis for any finding that Lehman Brothers is directly liable to plaintiff, plaintiff argues that Lehman Brothers is liable on the basis of Mr. Glanville's activities under traditional principles of agency (PB 49). In constructing this tautology, plaintiff conveniently fails to recognize that Lehman Brothers, rather than Mr. Glanville, served as the investment banker for UOP. Similarly, Lehman Brothers, not Mr. Glanville, rendered the fairness opinion. The "Lehman Opinion" to which plaintiff repeatedly refers was simply that: the opinion of Lehman Brothers. 426 A.2d at 1353.

Notwithstanding plaintiff's erroneous factual assumptions, the authorities cited in support of his agency contentions are inapposite. In Mechell v. Palmer, Del. Supr., 343 A.2d 620 (1975), plaintiffs' vehicle was struck by a tow truck driven by a part-time employee of defendant towing company. The defendant operator stated that he was working on behalf of the towing company, and the Court held that the informal nature of the defendant company's operation did not permit it to rule that no agency existed as a matter of law. Id. 343 A.2d at 621-22. Plaintiff neglects to disclose how Mechell is related to the instant case.

The second agency case cited by plaintiff, Coca-Cola Co. v. Loft, Del. Ch., 167 A. 900 (1933), aff'd Del. Supr., 180 A. 927 (1935), actually denigrates plaintiff's

agency theory of liability. After restating the familiar principles of agency, the Coca-Cola Court held that general agency principles will not support the imputation to a corporation of an employee's fraudulent intent to cause injury to another in his trade. Id., 167 A. at 903. Here, plaintiff argues that Mr. Glanville played a central role in the "conspiracy" to defraud the minority shareholders (PB 20-26, 55). The inconsistency of these contentions is obvious. As this Court held in Coca-Cola, an intent to defraud (which has not been proven in this case) cannot be imputed to an employer on any agency theory. Id.

Plaintiff's agency theory of liability is premised upon misstatements of fact and erroneous legal assumptions. Moreover, in light of plaintiff's failure to prove that Mr. Glanville engaged in any wrongful acts, his "agency" argument is unworthy of serious consideration.

III. THE LOWER COURT CORRECTLY HELD THAT THERE WERE NO MISREPRESENTATIONS IN THE PROXY STATEMENT REGARDING THE LEHMAN BROTHERS' OPINION.

An examination of plaintiff's allegations regarding the purported omissions in the proxy statement reveals that there cannot be any basis for a charge of wrongdoing by Lehman Brothers. The sole function of Lehman Brothers with regard to the proxy statement was the rendering of the fairness opinion. However, Lehman Brothers was not involved in the actual preparation of the proxy statement.

Nor was Lehman Brothers involved in the dissemination of these materials to the shareholders of UOP.

Upon consideration of the evidence adduced by plaintiff at trial, the Vice Chancellor held that the proxy materials did not include misstatements or omissions on the part of any of the defendants. 426 A.2d at 1352-53. Nevertheless, plaintiff's allegations against Lehman must be considered in light of the fact that Lehman did not undertake any responsibility whatsoever concerning the preparation or dissemination of the proxy materials.

A. The Fairness Opinion was that of Lehman Brothers and not of Mr. Glanville.

Plaintiff asserts that the Lehman Brothers' opinion must somehow be considered that of Mr. Glanville (PB 53-55, 75). However, all of the negotiations and correspondence relating to the fairness opinion contemplated an opinion by Lehman Brothers, not Mr. Glanville. Although Mr. Glanville obviously had intimate familiarity with UOP, a separate Lehman Brothers team was assembled to conduct a due diligence investigation and compile the opinion (B 61). The Vice Chancellor concluded:

> Finally, however it came about, UOP hired Lehman Brothers to render an opinion, and the opinion given was offered as being that of Lehman Brothers.... [t]he evidence shows that other qualified persons at Lehman Brothers worked on the project and that a good deal of information was reviewed before the opinion letter was issued. In this context, I find no misrepresentations or lack of disclosure in the Proxy Statement reference to Lehman Brothers. 426 A.2d at 1353.

Notwithstanding these uncontroverted facts, plaintiff appears to argue that Mr. Glanville's status as a UOP director somehow establishes that the opinion rendered to UOP was that of Mr. Glanville, not Lehman Brothers. Plaintiff's failure to cite persuasive authority in support of this argument reflects the fact that this theory has been consistently rejected in analogous cases. In Blau v. Lehman, 368 U.S. 403 (1961), plaintiff sought to recover short swing profits obtained through transactions in a corporation's stock. The defendant partner, as in the instant case, was a director of the subject corporation. Holding that the mere fact that the Lehman Brothers partner had been a director of the corporation at the time the transaction had occurred did not render the partnership liable, the Supreme Court declined to treat the partnership and the partner as a single entity:

> Petitioner apparently seeks to have us decide the questions presented as though he had proven the allegations of his complaint that Lehman Brothers actually deputized Thomas to represent its interests as a director of Tide Water and that it was his advice and counsel based on his special and inside knowledge of Tide Water's affairs that caused Lehman Brothers to buy and sell Tide Water's stock. But the trial court found otherwise and the court of appeals affirmed these findings. Inferences could perhaps have been drawn from the evidence to support petitioner's charges, but examination of the record makes it clear to us that the findings of the two courts below were not clearly erroneous. Id., 368 U.S. at 408-09.

Plaintiff has attempted to impose the same factually inaccurate assumption in this case. Lehman Brothers rendered its fairness opinion on the basis of an independent investigation. The mere fact that Mr. Glanville served as a director of UOP does not, as plaintiff insinuates, compel a different conclusion. Moreover, even if this Court were to discover inferences which might somehow lend credence to plaintiff's unsupported allegations, the logical determination of the trial Court based on sufficient record evidence must be affirmed. Id., 368 U.S. at 409. See p. 24, supra.

B. The Basis for the Lehman Brothers' Opinion was Contained in the Opinion Letter in the Proxy Statement.

Despite plaintiff's allusions to the contrary (PB 53-55), the Lehman Brothers' opinion letter accurately reflected the basis upon which it was rendered. Since this fact alone disposes of plaintiff's reliance upon Denison Mines, Ltd. v. Fibreboard Corp., 388 F. Supp. 812 (D. Del. 1974), it is conveniently ignored in plaintiff's brief.

In Denison Mines, Judge Stapleton held that a reference to a fairness opinion in a proxy statement that failed to disclose the basis for the opinion was misleading. The Vice Chancellor held that the disclosure of the Lehman Brothers opinion letter, which clearly stated the basis for the opinion, rendered Denison Mines inapposite. 426 A.2d at 1352-53. Notwithstanding plaintiff's conclusory statement (PB 51) that Denison Mines somehow applies to

the case at bar, the language of the Denison Mines opinion establishes that the Vice Chancellor was entirely correct:

> On the present record ... I find that the bare reference of the Proxy Statement to an opinion of an independent investment firm that the transaction was "fair to the company and its stockholders" without further reference to the basis for that opinion was misleading. Id., 388 F. Supp. at 822. [Emphasis added].

Unlike the proxy statement in Denison Mines, the UOP proxy statement included a copy of the opinion letter attached as an exhibit. Moreover, the opinion letter explained that Lehman Brothers had relied on the accuracy of audited financial statements and other information furnished to Lehman Brothers by UOP.* 426 A.2d at 1352-53.

In Fisher v. United Technologies Corp., Del. Ch., C.A. 5847 (May 12, 1981) (copy annexed hereto as Exhibit A), defendants disseminated a proxy statement, including two opinion letters, which plaintiffs claimed misrepresented the value of certain stock in a merger. Rejecting plaintiffs' contentions with regard to the opinion letters, the Court held that "the opinions were printed in full, allowing the stockholder to draw his own conclusions as to their credibility." (Id., slip op. at 8-9).

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*The letter stated: "In the process of forming our opinion expressed herein, we did not make or obtain independent reports on or appraisals of any properties or assets of UOP and have relied upon the accuracy (which we have not independently verified) of the audited financial statements and other information furnished to us, or otherwise made available, by UOP." [B 409, 426 A.2d at 1352].

Here, as in Fisher, the full text of the Lehman Brothers fairness opinion was included in the proxy materials. The UOP stockholders, who received a copy of the Lehman opinion, could "draw [their] own conclusions as to [its] credibility." Id.

In summary, plaintiff has offered no cogent explanation on appeal for any determination contrary to that rendered by the Vice Chancellor. The undisclosed, partially-referenced opinion in Denison Mines bears no conceivable relevance to the fully disclosed and properly qualified opinion of Lehman Brothers in the instant case.

C. Lehman Brothers was not Obligated to Disclose the Existence of the 1976 Draft Memorandum.

Plaintiff asserts (PB 51-53) that Lehman violated a "duty of complete candor" by failing to reveal the existence of the 1976 draft memorandum. Yet plaintiff has failed to provide any indication that such a duty even exists on behalf of Lehman Brothers. The duty of complete candor enunciated in Lynch v. Vickers Energy Corp., Del. Supr., 383 A.2d 278 (1977) relates solely to corporate fiduciaries. Plaintiff offers no support for his implicit contention that Lehman Brothers has any fiduciary duty whatsoever to the minority shareholders of UOP. In the absence of a fiduciary duty, there can be no breach.

Even assuming, arguendo, that some hypothetical fiduciary duty on behalf of Lehman Brothers did exist,

Lehman Brothers has done nothing which could reasonably be characterized as improper. Plaintiff's allegation is apparently founded on the incorrect assumption that the 1976 draft memorandum was a legally operative document. After careful consideration of plaintiff's arguments, the Vice Chancellor held:

> There is no evidence of any communications between Signal and Lehman Brothers concerning the merger. As to LB-40 [the 1976 draft] ... the evidence shows that no one at either Signal or UOP was aware of its existence until after this suit was filed. Obviously, there could have been no obligation upon UOP at the time to disclose it as part of the proxy materials, or to comment on its possible effect as to the independence of Lehman Brothers in giving its opinion. 426 A.2d at 1353.

Plaintiff's contention that Lehman Brothers violated a duty of candor in not revealing the existence of a draft document that was never disclosed to or relied upon by either Signal or UOP remains unsupported by either the facts or the law. Accordingly, plaintiff's appeal with regard to Lehman Brothers should be rejected and the judgment of the Vice Chancellor should be affirmed.

CONCLUSION

Despite plaintiff's virtual abandonment of his conspiracy theory and interposition of new theories on appeal, the uncontroverted evidence confirms the correctness of the Vice Chancellor's decision. The trial record clearly establishes that Lehman Brothers did not conspire, misrepresent or breach any fiduciary duty. Rather, the Vice Chancellor's findings of fact as to Lehman are fully supported by sufficient evidence and are the result of an orderly, logical and deductive process.

In view of the foregoing, Lehman Brothers respectfully submits that the judgment of the Court of Chancery should be affirmed.

Respectfully submitted,

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Dated: June 11, 1981