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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 THE SIGNAL
COMPANIES, INC. AND UOP INC.

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June 11, 1981

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I. STATEMENT OF THE NATURE OF THE PROCEEDINGS AND THE JUDGMENTS AND ORDERS FROM WHICH PLAINTIFF APPEALS

The merger of two Delaware corporations, UOP Inc. ("UOP") and Sigco Incorporated ("Sigco"), became effective on May 26, 1978. Sigco was a wholly-owned subsidiary of The Signal Companies, Inc. ("Signal"), which is also a Delaware corporation. Before the merger, 50.5% of the stock of UOP was owned by Signal and the remaining 49.5% of UOP's stock was owned by several thousand "minority" stockholders. Prior to the announcement of a possible merger, the stock of UOP was being publicly traded at a price of about $14.50 per share. The merger was contingent upon the approval of a majority of the minority shares voting on the transaction, and, in fact, the minority shareholders who voted with respect to the transaction enthusiastically approved it by voting their shares in favor by a ratio of nearly 12 to 1.

After the merger, Signal owned all of UOP, and UOP's former minority stockholders owned the right to be paid $21 for each share of UOP stock they owned prior to the merger. All but approximately 100,000 of the 5,688,302 shares of UOP owned by its minority stockholders prior to the merger have been exchanged for the $21 per share payment. No appraisal actions or lawsuits challenging the merger, other than this suit, have been filed.

Plaintiff's complaint (A11-114*) was filed in the Court of Chancery on July 6, 1978, alleging individual, class action, and derivative claims arising from the May 26, 1978 merger. By Order dated April 26, 1979, the derivative counts were dismissed, with prejudice, and stricken from the complaint (A311), because plaintiff was not a stockholder of UOP when the complaint was filed (A215-220).

On April 26, 1979, Vice Chancellor Brown also entered an Order: (1) certifying the action as a class action pursuant to Chancery Court Rule 23(b)(3); (2) certifying the named plaintiff, William B. Weinberger, as the class representative; and (3) including as members of the class those former UOP shareholders who voted against the merger and/or have not turned in their UOP shares for the merger price (A313).** The reasons for the Order are set forth in the Vice Chancellor's Memorandum Opinion dated April 5, 1979 (A295-310). Plaintiff's applications for certification of an interlocutory appeal from the Orders of April 26, 1979, pursuant to Delaware Supreme Court Rule 42, were denied by the lower court (A325-327), and by this Court (A344-345).

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* "A-___" refers to the Appendix of the Appellant;
"B-___" refers to the Appellees' Joint Appendix.
The Proxy Statement with respect to the subject merger was attached to the complaint and is set forth at A18-114.

** For purposes of notice to the class, the parties agreed that the class consisted of those former shareholders of UOP as of May 26, 1978, who have not since exchanged their shares for the merger price (Docket Entry #121, p. 2).

On December 17, 1979, for the reasons set forth in its Opinion dated November 28, 1979, the court below entered an Order dismissing the original complaint (A360). Weinberger v. UOP, Inc., Del.Ch., 409 A.2d 1262 (1979) ("Weinberger I"). The Order dismissing the original complaint also granted plaintiff's motion for leave to file an amended complaint (A360).

The amended complaint* (A318-324) seemed to charge that the minority shareholders had been misled into approving the merger and that their approval should therefore be set aside; that there was no valid business purpose for the merger; that the merger price of $21 per share was unfair; and that the defendants had conspired to deceive the minority shareholders and to advance the interest of Signal to the detriment of the minority shareholders of UOP. It was on these issues, after full discovery by all parties, that trial began in the Court of Chancery on May 20, 1980, and concluded on June 3, 1980. On May 21, 1980, plaintiff filed a motion to enlarge the class to include all minority shareholders of UOP as of May 26, 1978, the day the merger became effective (A638). On February 9, 1981, after extensive post-trial briefing and argument, Vice Chancellor Brown handed down his Decision After Trial in which he concluded:

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* The caption of the amended complaint names the directors of UOP as individual defendants, but service of process was not attempted with respect to those directors. Earlier, plaintiff agreed to dismiss the individual defendants named in the original complaint, without prejudice, in a stipulation approved by the court below on February 1, 1979 (Docket Entry #61).

> "This case was tried over a period of eleven days. There are well over 3000 pages of testimony. The trial exhibits comprise several volumes. Post-trial briefing and argument has been extensive. It would be difficult to believe that anything worth arguing about has been omitted. The contentions of the parties have been thoroughly presented and considered, as the _ad nauseum_ length of this decision would seem to bear out. _Viewed overall, I find that the terms of the merger were legally fair to the plaintiff and the other minority shareholders of UOP_.
>
> "Judgment will be entered in favor of the defendants UOP and Signal as well as in favor of the defendant Lehman Brothers. This decision makes it unnecessary to consider plaintiff's motion to enlarge the class. An appropriate form of order may be submitted." (emphasis added).

Weinberger v. UOP, Inc., Del. Ch., 426 A.2d 1333, 1363 (1981) ("_Weinberger II_"). A Final Judgment Order was entered in favor of the defendants on February 19, 1981 (A1961).

The plaintiff has appealed from the Orders dismissing the derivative counts and limiting the class (PB,* p. 3). The plaintiff has also appealed from the lower court's refusal to consider his motion to enlarge the class, and, of course, from the Final Judgment Order entered below.

This is the brief of Signal and UOP in opposition to plaintiff's appeal and in support of Vice Chancellor Brown's Decision After Trial and the Final Judgment Order entered thereon.

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* "PB" refers to the Opening Brief Of Appellant In Support Of His Appeal.

II. SUMMARY OF ARGUMENT

A. Response of Signal and UOP to Plaintiff's Summary of Argument

1. Plaintiff's summary:

> "The Court below erred in dismissing the derivative count because UOP, in the merger, survived and remained an entity, and the Court below erred in originally limiting the plaintiff class to those UOP stockholders who voted against the merger and/or who did not turn their certificates in and the Court below erred in refusing to consider and grant plaintiff's motion for the enlargement of the class to include all of the minority stockholders of UOP as of the date of the merger."

PB, pp. 4-5.

Response: Denied. The trial court correctly concluded (1) that the derivative counts in the original complaint should be dismissed because plaintiff was not a stockholder of UOP when the complaint was filed, and because the derivative counts were moot; and (2) that the appeals from the class action determination and the lower court's refusal to consider plaintiff's motion to enlarge the class were rendered moot by the trial court's decision on the merits.

2. Plaintiff's summary:

> "The Court below erred in its interpretation of the law and in applying the law to the facts in connection with the fiduciary responsibilities of the defendants, vis-a-vis the minority stockholders in a cashout merger."

PB, p. 5.

Response: Denied. Any error by the trial court in interpreting the law inured to the benefit of plaintiff because the trial Court required defendants to prove more than that which is required under the law.

3. Plaintiff's summary:

> "The Court below erred in applying an appraisal standard in determining whether the cashout merger of the minority stockholders was intrinsically fair at a $21 price especially in view of the decision of this Court in Lynch."

PB, p. 5.

Response: Denied. The trial court applied the proper standards in determining that the merger consideration was fair to the minority shareholders of UOP even though he did not have to reach that issue, and this Court's recent decision in Lynch v. Vickers Energy Corp., Del.Supr., ___ A.2d ___ (1981) (No. 105, 1979) has no application in this litigation.

4. Plaintiff's summary:

> "Since the record shows that the defendants failed to carry out their fiduciary obligations to the minority, the Court below erred in holding that the structuring of the vote on the merger so that it would essentially be ratified by a majority of the minority was significant."

PB, p. 5.

Response: Denied. The trial court correctly concluded that none of the defendants breached any fiduciary duty to the minority shareholders of UOP, and the structure of the vote with respect to the merger was a significant, if not controlling, factor in the transaction.

B. Summary of Signal's and UOP's Arguments

1. This Court must accept the trial court's findings of fact unless such findings are not supported by any substantial evidence and are clearly wrong.

2. The trial court correctly concluded that Signal had bona fide purposes for the merger, and that all aspects of the merger were entirely fair to the minority shareholders of UOP, even though, as hereinafter discussed, defendants submit that the court did not have to reach those issues.

3. The trial court correctly concluded that the Proxy Statement made complete disclosure of all relevant facts upon which a reasonable stockholder could make an informed judgment concerning the proposed merger, and there was no evidence of fraud or misrepresentation that would warrant setting aside the affirmative vote of the minority stockholders of UOP for their own benefit. Therefore, in light of the structure of the vote on the merger, and the overwhelming approval of the minority shareholders, defendants submit that judgment should have been entered in their favor, without further inquiry into Signal's purposes for the merger or the entire fairness of the transaction.

4. In light of the trial court's findings that none of the defendants breached any fiduciary obligation owing to the minority shareholders of UOP, and that the merger was entirely fair to those shareholders, the dismissal of the derivative counts and the issues relating to the size of the class are moot.

III. COUNTERSTATEMENT OF FACTS

A. Introduction

The "Statement of Facts" in plaintiff's opening brief (PB, pp. 6-39) is an inaccurate summary that at some times distorts and at other times completely ignores the extensive record developed at trial in the Court of Chancery and Vice Chancellor Brown's findings based on that record. This distortion is compounded by plaintiff's utter disregard for Supreme Court Rule 14(b)(vi), which requires each party to state the standard and scope of review applicable to each issue. Rather than acknowledge that the Vice Chancellor's findings of fact made after trial must be accepted unless "clearly wrong", Nepa v. Marta, Del.Supr., 415 A.2d 470, 471 (1980), plaintiff relies on his own factual contentions that were rejected by the trial court and makes no attempt to assess the evidence most favorable to defendants, the successful parties below, as plaintiff is required to do. Turner v. Vineyard, Del.Supr., 80 A.2d 177, 179 (1951). In fact, plaintiff's "Statement of Facts" submitted to this Court is remarkably similar to the factual contentions he made both before and after trial and which were rejected, on the evidence, by Vice Chancellor Brown. Compare, e.g., plaintiff's "Factual Outline of the Case" in his "Pre-Trial Memorandum on Liability" (A374-407) and plaintiff's post-trial briefs (A1615-1695; 1747-1813) with the Vice Chancellor's Decision After Trial, Weinberger II, 426 A.2d at pp. 1334-1341, 1347-1363. Plaintiff's distortion of the record is further compounded when he combines his previously rejected contentions of fact with his misinterpretation of the Vice Chancellor's legal conclusions and then inaccurately describes those combinations as what "the lower court held" (PB, pp. 45-47).

In essence, plaintiff's "Statement of Facts" (and, in fact, his entire brief) is nothing more than a motion for reargument with respect to factual and legal contentions which have been rejected by the trial court after a full trial on the merits--hardly a proper exercise before this Court. See, The Standard and Scope of Appellate Review at pages 27-28, infra. Rather than attempt to respond to each of plaintiff's factual contentions, the relevant facts as found by the trial court set forth hereinafter will be quoted directly from Vice Chancellor Brown's Decision After Trial with record citations being provided after each finding.

B. The Relevant Facts As Found By The Trial Court*

Signal is a diversified, technologically based company operating through various subsidiaries. Two of its wholly-owned subsidiaries are The Garrett Corporation and Mack Trucks, Inc. The former is engaged in the design, engineering, manufacture and sale of transportation related equipment and services, including those involved in the aerospace industry. The latter

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* What follows is quoted directly from Weinberger II, 426 A.2d at 1335-1340. For ease of reading, quotation marks have not been used, and the Vice Chancellor's findings of fact have not been indented or single-spaced; footnotes and record citations have, of course, been added.

is similarly involved in the area of heavy-duty motor trucks and truck tractors (B323, 401). Through substantial investments in other companies Signal is also engaged in the manufacture of industrial products, land development, radio and television broadcasting, entertainment and shipping (B402-403). Its stock is publicly held and is listed on the New York, Philadelphia and Pacific Stock Exchanges.

UOP, formerly known as Universal Oil Products Company, is a diversified industrial company which, as of the beginning of 1978, was engaged in six major lines of business. These included petroleum and petrochemical services and related products, construction, fabricated metal products, transportation equipment products, chemicals and plastics, and other products and services including land development, lumber products, and a process for the conversion of municipal sewage sludge into organic soil supplements (A24; B520). Its stock was publicly held and was listed on the New York Stock Exchange at the time (A25).

The defendant Lehman Brothers is an investment banking firm with a long-standing business relationship with UOP (A29).

THE RELEVANT FACTS

In 1974 Signal sold another of its wholly-owned subsidiaries, Signal Oil and Gas Company, for the sum of $420 million in cash (B324). In the process of looking for investments for this cash surplus, it became interested in UOP as a position by Signal (B7-14, 23-27). The report of Arledge and Chitiea (A1472-1499) indicated that it would be a good investment for Signal to acquire the remaining 49.5 per cent of UOP at any price up to $24 per share.*

This report was discussed between Walkup and Shumway who, along with Arledge, Chitiea and Brewster L. Arms, internal counsel for Signal, constituted Signal's senior management personnel (B10-11, 28-29, 35, 358). In particular, there was discussion as to what the proper price should be if the acquisition was to be pursued, keeping in mind that as a majority shareholder Signal owed a fiduciary responsibility to the minority shareholders of UOP as well as to its own shareholders (B164-167, 182-185, 186-187, 333-338). It was ultimately concluded that a meeting of Signal's Executive Committee would be called and that it would be proposed to that group that Signal, through the merger process, acquire the remaining outstanding stock interests in UOP at a price within the range of $20 to $21 per share (B333-334).

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* We strongly disagree with the Vice Chancellor's suggestion that the report done by Arledge and Chitiea "indicated" that acquiring the minority shares of UOP at any price up to $24 per share would be "a good investment for Signal." The study was only a comparison of the economic effects of a possible acquisition at different stock prices from $17 to $24 per share, i.e., at $17, $18, etc. In fact, the study showed that if Signal were to acquire the minority shares at $24 per share, the total investment of more than $136.5 million (5,688,302 shares x $24 per share) would generate only $7.8 million in additional income, or a return of only 5.7% (A1493). While a return on investment of 5.7% may not represent a negative yield, it is hardly a "good investment" for a major industrial concern.

The Executive Committee meeting was set for February 28, 1978 (B474). Although he was not a member of Signal's Executive Committee, word was sent to Crawford in Des Plaines, Illinois, UOP's headquarters, asking him to attend Signal's Executive Committee meeting in Los Angeles (B336). On his arrival, and prior to the meeting, Crawford was asked to meet privately with Walkup and Shumway (B160, 336). At that time, as a courtesy to Crawford according to Signal, Crawford was advised as to what was happening, and specifically he was asked, as president of UOP, for his reaction to the proposed price range of $20 to $21 per share (Ibid.). Crawford stated that he thought that such a price would be "generous" and that it was certainly one that should be submitted to UOP's minority shareholders for their ultimate determination (B268).* He further stated, however, that 100 per cent ownership of UOP by Signal could give rise to internal problems at UOP. Employees, he felt, would have to be given some assurance of their future place in a fully Signal-owned operation. Otherwise he feared the departure of key personnel. Also, many of UOP's key employees had stock option incentive programs which would be wiped out by a merger, and Crawford felt that some adjustment would have to be made, such as to provide a comparable incentive

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* Crawford was only expressing his personal reaction to the proposed price range. Contrary to plaintiff's suggestion (PB, p. 12), Crawford did not "agree", in the sense of committing UOP or its Board, to anything, nor could he have done so. See pages 106-108, infra.

possible candidate for acquisition. To this end, friendly negotiations were initiated between representatives of Signal and UOP (Ibid.). Signal proposed $19 per share as a fair price to pay to obtain a controlling interest in UOP. The representatives of UOP sought $25 per share (B4). In the arm's length bargaining that followed, an understanding was reached between the two companies whereby Signal agreed to purchase from UOP 1.5 million of UOP's authorized but unissued shares for a price of $21 per share (B564). This purchase, however, was made contingent upon Signal making a successful cash tender offer for 4.3 million publicly held shares of UOP, also at a price of $21 per share (B567). The combined acquisition in this manner of 5.8 million shares was designed to give Signal a 50.5 percent stock ownership interest in UOP (B522). The board of directors of UOP advised the company's shareholders that it had no objection to Signal's tender offer at that price (B567). Immediately prior to the announcement of the tender offer, UOP's common stock had been trading on the New York Stock Exchange at a fraction under $14 per share (B522).

The negotiations between Signal and UOP occurred during April 1975 (B324). The resulting tender offer was greatly oversubscribed. Although Signal had sought only 4.3 million shares at $21 per share, some 7.8 million shares (or 78.2 percent of the total outstanding shares of UOP) were tendered. As a consequence, Signal purchased only 55 percent of the tendered shares on a pro-rata basis (B573-574). Signal did, however, through this tender offer and direct purchase from UOP, achieve its goal of becoming a 50.5 percent shareholder of UOP (B574).

Thereafter, at UOP's annual meeting, Signal was content to nominate and elect only six members to UOP's thirteen member board of directors (A50-51). Of these, five were either directors or employees of Signal (Ibid.). The sixth, a partner in the investment banking firm of Lazard Freres & Co., had been one of Signal's representatives in the negotiations and bargaining with UOP concerning the tender offer and purchase price for the UOP shares (Ibid.; B4-5).

In addition, the president and chief executive officer of UOP retired during 1975, and Signal caused him to be replaced by James V. Crawford, a long-time employee and Senior Executive Vice President of The Garrett Corporation, one of Signal's wholly-owned subsidiaries (B253-257).* Crawford also replaced his predecessor on UOP's board of directors (B253). He also was made a director of Signal (B258).

Shortly after Crawford assumed his duties as president and chief executive officer of UOP, he, along with Signal, became aware for the first time of a major financial problem

* An example of how plaintiff has mischaracterized the record is his statement that in 1975 "...UOP's Chief Executive Officer, Mr. Logan, was replaced by a long time Signal executive, Mr. Crawford" (emphasis added) (PB, p. 7), and his later reference to Mr. Crawford as "...the Signal executive who, as noted, had been made President and Chief Executive Officer of UOP by Signal..." (emphasis added) (PB, p. 12). In fact, Mr. Crawford was never an employee of Signal, nor did he serve in any other capacity directly for Signal until he became a member of Signal's Board in 1976 (B253-256, 258).

with regard to a refinery constructed by one of UOP's divisions at Come-By-Chance, Newfoundland (B259-260, 326). Eventually, the Come-By-Chance refinery operation ended in bankruptcy, as a result of which UOP suffered for 1975 an unanticipated operating loss of some $35 million (B259-260, 405, 592). In addition, lawsuits were filed against UOP and its subdivisions seeking some $189 million in damages as a result of the Come-By-Chance venture (B407). These suits were still pending at the time of the events complained of herein, and although UOP's management feels that the claims are defensible and that they will not result in any serious consequences to UOP's financial condition, their existence caused the financials for both UOP and Signal to be qualified for the year ending December 31, 1977 (A45, 62; B260-262, 296-299).

In the two years following UOP's disastrous 1975 performance, its fortunes steadily improved so that by the end of 1977 UOP's earnings and operating record had substantially neared its performance for 1974, the year immediately preceding Signal's acquisition of its majority interest. For example, UOP's gross revenues for 1977 were some $730 million as compared to $781 million in 1974; its income from continuing operations before extraordinary items was $24.3 million in 1977 as compared to $24.6 million in 1974; its net income per share was $2.74 (including an extraordinary item of $0.62 per share) in 1977 as compared with $2.78 (including $0.32 per share from discontinued operations) in 1974 (B592).

Sandwiched between this, UOP had suffered the $35 million unexpected loss in 1975, or a net loss of $3.19 per share, but a net income of $23.5 million in 1976 representing a net income of $2.06 per share (Ibid.). In other words, the figures indicated that the Come-By-Chance disaster was an unusual occurrence,* and that by the end of 1977 UOP looked to be the same company that had attracted Signal for its investment potential in 1975.

During this same lapse of time, Signal had been largely unsuccessful in finding other suitable investment candidates for its excess cash (B328-329). It had entered into talks with two other companies during 1977, but neither proposed transaction came to fruition (Ibid.). Accordingly, by February 1978, Signal had no other realistic alternatives (it only sought acquisitions at the time on a friendly basis), and therefore it again looked to UOP (Ibid.).

At the instigation of certain of Signal's management personnel, including William E. Walkup, its board chairman, and Forrest N. Shumway, its president, it caused a feasibility study to be made concerning the possible acquisition of the balance of UOP's outstanding shares (B7, 358). This study was performed by two officers of Signal, Messrs. Arledge and Chitiea, both of whom were also directors of UOP and who had been placed in that

* While the Come-By-Chance disaster may have been unusual, it also reflected the risks inherent in certain of UOP's businesses (B576).

as to Signal shares, if he was to maintain his level of personnel and efficiency at UOP following the merger (B267-269). At the same time, he voiced no objection to the price range proposed, nor did he suggest that Signal should consider paying more than $21 per share for the minority interests (B306).

Later, at the Executive Committee meeting, these same considerations were discussed, with Crawford taking a similar position (B476). Also considered was the 1975 tender offer and the fact that it had been greatly oversubscribed by UOP shareholders at $21 per share (B274-276). In addition Signal was confronted with an image problem in that, as controlling shareholder of UOP, it was required under accounting procedures to take into account 100 per cent of UOP's debts and sales, but by the same token it could take only 50.5 per cent of UOP's earnings (B474-475). This factor tended to distort Signal's own debt/sales-equity ratios, making its stock appear less attractive in the market place (B331-332). The acquisition of the balance of UOP's shares provided the solution to this situation.

As a result of these and other factors which made the acquisition of 100 per cent ownership of UOP seem advisable from Signal's standpoint, and based upon the consensus that a price of $20 to $21 per share would be fair for Signal as well as for the minority shareholders of UOP, Signal's Executive Committee authorized its management "to negotiate" with UOP "for a cash acquisition of the minority ownership in UOP, Inc. with the intention of presenting a proposal to the Board of Directors of

[Signal] on March 6, 1978" (B477). Immediately following this February 28, 1978 meeting, Signal issued a press release in which it was stated as follows:

> "The Signal Companies, Inc. and UOP, Inc. are conducting negotiations for the acquisition for cash by Signal of the 49.5 per cent of UOP which it does not presently own, announced Forrest N. Shumway, president and chief executive officer of Signal, and James V. Crawford, UOP president.
>
> "Price and other terms of the proposed transaction have not yet been finalized and would be subject to approval of the boards of directors of Signal and UOP, scheduled to meet early next week, the stockholders of UOP and certain federal agencies."

(B424-425). The press release further revealed that the closing price of UOP's common stock on February 28, 1978, was $14.50 per share (Ibid.).

Two days later, on March 2, 1978, Signal issued a second press release in which it announced that its management would be recommending a price in the range of $20 to $21 per share for UOP's 49.5 per cent minority interest (B473). The press release pointed out that Signal had previously announced that "negotiations" were being conducted for Signal's acquisition of this minority interest (Ibid.).

Between February 28, 1978 and Monday, March 6, 1978, Crawford was in contact by telephone with all of UOP's non-Signal directors (B279-280). Also during that period Crawford retained the services of the defendant Lehman Brothers for the purpose of rendering an opinion as to the fairness of the price to be paid the minority for their shares (B285). He selected Lehman Brothers for two reasons. First, the time schedule between the announcement and the board meetings was short (only three business days)* and since Lehman Brothers had been acting as UOP's investment banker for many years, he felt that it would be in the best position to respond on such short notice (B286-287). Secondly, James W. Glanville, a long-time director of UOP, was also a partner of Lehman Brothers and had long acted as a financial advisor to UOP (Ibid.). Crawford felt that Glanville's familiarity with UOP as a member of its board as well as being a member of Lehman Brothers would also be of assistance in enabling Lehman Brothers to render an opinion within the existing time constraints (Ibid.).

Crawford telephoned Glanville for this purpose and, in response to this inquiry, Glanville gave his assurance that Lehman Brothers had no conflicting interests such as would prevent it from undertaking the task (B287). Glanville also gave his personal reaction that a price in the range of $20 to $21 would certainly be fair since it represented almost a 50 per

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* In light of the February 28, 1978 press release, trading in UOP common stock on the New York Stock Exchange was halted on March 1, 1978 (B319). Signal and UOP wanted the halt of trading to continue until final action had been taken by both Boards, but the Stock Exchange refused the companies' request for such action (Ibid.). Obviously, if trading had been halted as requested, speculation in UOP's stock in anticipation of the action to be taken by the Boards would have been avoided. It was therefore desirable to have the Boards meet as soon as possible in order to terminate such speculation.

cent premium over UOP's market price (B69).* Glanville sought a fee of $250,000 for Lehman Brothers for providing the requested fairness opinion. Crawford thought this too much and, as a result of the discussions that followed, Glanville finally agreed that Lehman Brothers would furnish the opinion for $150,000 (A29).

During this period Crawford also had several telephone contacts with Signal officials (B315-316). In only one of them, however, was the price to be paid for the shares discussed (B339-340). In a conversation with Walkup, Crawford advised that as a result of his communications with UOP's non-Signal directors it was his feeling that the price to be paid would have to be the top of the proposed price range, or $21 per share, if the approval of UOP's outside directors was to be obtained (B281-283, 318, 339-340). Again, however, he did not seek any price higher than $21 per share (Crawford Dep., p. 46).

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* Glanville testified:

> "Q. --so that you did a calculation in your head that the premium was in the area of 50% and that sounded right to you based on what you knew?
>
> "A. That sounded appropriate, correct.
>
> "Q. And therefore, if they had said, at that time [March 1, 1978], the price is 21, you could have said, that price is fair at that time?
>
> "A. Correct, <u>from that point of view</u>." (emphasis added).

B69.

Having undertaken to provide a fairness opinion, Glanville assembled a three-man Lehman Brothers team to do the work (B61-62). These persons examined relevant documents and information concerning UOP, including its annual reports and its Securities and Exchange Commission filings from 1973 through 1976 as well as its audited financial statements for 1977, its interim reports to shareholders, and its recent and historical market prices and trading volumes (B106-107, 108, 409, 422).* In addition, on Friday, March 3, 1978, two members of the Lehman Brothers team flew to UOP's headquarters in Des Plaines to perform a "due diligence" visit, during the course of which they interviewed Crawford as well as UOP's general counsel, its chief financial officer, and other key executives and personnel (B83-87, 111-112, 118-119, 139-148).

As a result of these efforts, the Lehman Brothers team concluded that "the price of either $20 or $21 would be a fair price for the remaining shares of UOP" (B117-119, 93). They telephoned this impression to Glanville, who was spending the weekend in Vermont (B119).

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* In one of his most egregious mischaracterizations of the record, plaintiff states that "Back in New York, they [representatives of Lehman Brothers] did 'a cursory two day review of publicly available statistical data...' (A1927 Op.)" (PB, p. 23). Plaintiff has cited the opinion below to make it appear that the quoted language is a finding of fact by the Vice Chancellor. In fact, the Vice Chancellor stated: "[P]laintiff says that...in reality the Lehman Brothers team had done nothing more than a cursory two-day review of publicly available statistical data..." (emphasis added). Weinberger II, 426 A.2d at 1351. Plaintiff's citation of his own contention (which was rejected by the court below) speaks for itself.

On Monday morning, March 6, 1978, Glanville and the senior member of the Lehman Brothers team flew to Des Plaines to attend the scheduled UOP directors meeting (B63). Glanville looked over the assembled information during the flight (B64-65). The two had with them the draft of a "fairness opinion letter" in which the price had been left blank (B121). Either during or immediately prior to the directors' meeting that followed, the two page "fairness" letter was typed in final form and the price of $21 per share was inserted (B121, A102-103).

At the appointed time on March 6, 1978 the meetings of both Signal's board and UOP's board were convened (B350-353, 499-505). Telephone communications were maintained between the two meetings (B504). Walkup attended UOP's meeting so as to be able to present Signal's position and answer any questions that UOP's non-Signal directors might have (B341). All of UOP's non-Signal directors were present for the meeting either in person or by means of conference telephone (B499).

First, Signal's board unanimously adopted a resolution which authorized Signal to propose to UOP a cash merger at $21 per share as outlined in a certain merger agreement and other supporting documents (B353). Of significance, Signal's proposal required that the merger would have to be approved by a majority of UOP's outstanding minority shares voting at the shareholders meeting at which the merger would be considered and, in addition, that the minority shares voting in favor of the merger, when coupled with Signal's 50.5 percent interest, would have to comprise at least two-thirds of all UOP shares (A28, 89).* Otherwise the proposed merger would be deemed disapproved (Ibid.).

UOP's board then proceeded to consider the proposal. Copies of the proposed agreements were delivered to the directors in attendance. (Copies had been forwarded earlier to the directors participating by telephone.) (B499). They also had before them financial data for UOP for the years 1974 through 1977, UOP's most recent financial statements, market price information and budget projections for 1978 (B289, 426-430, 479-498). In addition, they were presented with Lehman Brothers fairness opinion letter, as to which Glanville made comments concerning the information which had gone into its preparation (B502, 365-388).

After discussions on the matter, Walkup and Crawford left the meeting, the purpose being to permit a free and uninhibited exchange between UOP's non-Signal directors (B320, 502; A1364-1365). A resolution to accept Signal's offer was then proposed (B502-503). Walkup and Crawford returned to the meeting, and Signal's other four directors on UOP's board were placed in telephone communication (B504).

On the advice of counsel, Walkup, Shumway, and UOP's other three Signal directors abstained from voting (A1366-1367;

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* Actually, the two-thirds voting requirement did not become part of the final merger agreement until some time later. Compare, PX-74, Draft of Agreement Regarding Merger, p. 15 with A89.

B15, 31-32). All five indicated, however, that if they had voted they would have voted in favor of the resolution (A1367; B504). The remaining UOP directors, including Crawford and the representative of Lazard Freres & Co. nominated to the board by Signal, all voted in favor of the resolution, and thus approved the merger on terms proposed by Signal (B504).*

On March 7, 1978, UOP sent a letter to its shareholders advising them of the action taken by UOP's board with respect to Signal's offer (B421). In this letter it was pointed out, among other things, that on February 28, 1978 "both companies had announced negotiations were being conducted" (Ibid.).

Despite the foregoing swift action taken by the boards of the two companies, the vote on the merger was not submitted to UOP's shareholders until UOP's annual meeting on May 26, 1978 (A20). In the Notice of Annual Meeting and Proxy Statement sent to shareholders in May (A18-114), UOP's management and board urged that the merger be approved (A29, 60). In the proxy statement, UOP's shareholders were also advised as follows:

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* The eight non-Signal directors on UOP's fourteen-member Board of Directors were George L. Clements, the retired Chairman of the Board of the Jewel Companies, Inc.; James W. Glanville, a Managing Director and Member of the Board of Lehman Brothers; Richard A. Lenon, the Chairman of the Board, President and Chief Executive Officer of International Minerals and Chemical Corporation; John O. Logan, Chairman of the Board of UOP; Frank J. Pizzitola, a General Partner of Lazard Freres & Co.; William J. Quinn, Chairman and Chief Executive Officer of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Robert S. Stevenson, the retired Chairman of the Board of Allis Chalmers Corporation; and Maynard P. Venema, the retired Chairman of the Board of UOP (A49; B294-295).

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

A28.

Initially the word "negotiations" had been used rather than the word "discussions" in the original draft of the Proxy Statement (B460). However, when the Securities and Exchange Commission sought the details of the "negotiations" as part of its approval of the Proxy Statement, the term was deleted and the word "discussions" substituted in its place (A28).

The Proxy Statement further indicated that the vote of UOP's board in approving the merger had been unanimous.* It also advised the shareholders that the investment banking firm of Lehman Brothers had given its opinion that the merger price of $21 per share was fair to the minority shareholders of UOP (A29). A copy of the Lehman Brothers opinion letter was attached (A102-103).

As of the record date for the Annual Meeting there were 11,488,302 shares of UOP common stock outstanding (A28). Of

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* The March 7, 1978 letter to stockholders (B421), and a March 6, 1978 press release (B423) both made reference to unanimity among UOP's directors with respect to Signal's proposal. However, the Proxy Statement actually described the exact voting by the UOP directors at the March 6, 1978 Board meeting, including the fact that five directors abstained from voting due to their affiliation with Signal, but would have voted in favor of the merger had they voted (A22, 28).

those shares, 5,688,302 were owned by shareholders other than Signal (Ibid.).

At the meeting only 56 percent, or 3,208,652, of the minority shares were voted (Docket Entry #105). Of these 2,953,812 voted in favor of the merger and 254,840 voted against it (Ibid.). Thus, of the minority shares voted, the merger was approved by a ratio of nearly 12 to 1. When Signal's shares were added to the minority shares voting in favor, a total of 76.2 percent of UOP's outstanding shares voted for the merger while only 2.2 percent opposed it (Ibid.).

Computed another way, however, and as plaintiff would prefer to view it, 43.6 percent of the minority shareholders did not vote at all, and 7.9 percent of those who did voted against the merger. In other words, while the merger was overwhelmingly approved by the 56 percent of the minority shareholders who actually took the trouble to vote, the merger was only approved by slightly more than 50 percent of all the minority shareholders who were entitled to vote.

Under the terms of the agreement, however, the merger became effective on May 26, 1978, and each share of UOP stock, other than those owned by Signal, was automatically converted into a right to receive $21 in cash (A88).

IV. ARGUMENT

A. The Standard And Scope Of Appellate Review--This Court Should Accept The Lower Court's Findings Of Fact And Conclusions Of Law Unless They Are "Clearly Wrong"

As recently reaffirmed in Warren v. Goldinger Brothers, Inc., Del.Supr., 414 A.2d 507, 509 (1980):

> "...this Court's standard of review as 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.' Lank v. Steiner, Del.Supr., 224 A.2d 242 (1966)."

Even when the factual conclusions are characterized as "sharply in dispute", this Court has stated:

> "In an appeal from a judgment in a non-jury case, this Court generally accepts the Trial Court's findings of fact if they are sufficiently supported by the record and are the product of an orderly, logical, and deductive process. Levitt v. Bouvier, Del.Supr., 287 A.2d 671 (1972)."

H&H Poultry Co., Inc. v. Whaley, Del.Supr., 408 A.2d 289, 291 (1979). The scope of review exercised by this Court has also been described as follows:

> "...the findings of the court [below], sitting as the trier of the facts, will not be disturbed if reasonably supported by competent evidence. A finding based upon inference meets this test if there is competent evidence from which the inference may be fairly and reasonably deduced. When there is competent evidence to warrant the material findings of the trial judge, we will not substitute our judgment for his."

Turner v. Vineyard, Del.Supr., 80 A.2d 177, 179 (1951). And, in the exercise of judicial restraint, the findings of the trial court that are supported by the record are accepted by this Court, "...even though independently [this Court] might have reached opposite conclusions." Application of Delaware Racing Ass'n, Del.Supr., 213 A.2d 203, 207 (1965). If there is sufficient evidence to support the findings of the trial court, this Court "must affirm". Oliver B. Cannon & Son, Inc., v. Dorr-Oliver, Inc., Del.Supr., 336 A.2d 211, 213 (1975).

The application of these principles has led this Court to hold that:

> "...the only question for this court to determine is whether there was any competent evidence from which the trial judge could reasonably make such findings of fact. When determining whether findings of fact have evidentiary support, we consider only the evidence most favorable to the successful party below." (emphasis added).

Turner v. Vineyard, supra, 80 A.2d at 179.

With these standards of review in mind, coupled with the fact that Vice Chancellor Brown reviewed the evidence below "...in light of the overall burden imposed on the defendants to demonstrate the entire fairness of the merger terms to the minority shareholders of UOP" (Weinberger II, 426 A.2d at 1347), we will show that the Vice Chancellor's findings of fact were entirely correct and that each of such findings was supported by substantial evidence. We will also show that the Vice Chancellor actually required defendants to prove more than that which is required by Delaware law.

B. In Light Of The Manner In Which The Vote On The Merger Was Structured And The Finding By The Trial Court That Neither Signal Nor UOP Made Any Material Misrepresentations Or Failed To Disclose Germane Information, No Inquiry Into Purpose Or Entire Fairness Was Required

The court below entered judgment for the defendants, none of which has any quarrel with that result. The Vice Chancellor correctly concluded that Signal and UOP (hereinafter sometimes collectively referred to as the "defendants"), as well as Lehman Brothers, had met the burden of proof and satisfied all of the legal standards imposed upon them at trial. However, defendants submit that the burden of proof and legal standards that they were required to satisfy exceed the burden and standards that are, or should be, required under Delaware law.

We believe that, under the facts of this case, the Vice Chancellor should not have considered in his Decision After Trial whether Signal had bona fide purposes for the merger, or whether the terms of the merger were entirely fair to the minority shareholders of UOP. The minority shareholders of UOP were given the absolute right to determine if the merger was in their best interests and they decided that it was. Because, as Vice Chancellor Brown specifically found, the Proxy Statement set forth all relevant information upon which a reasonable shareholder could make an informed judgment with respect to the proposed merger, the minority shareholders' overwhelming approval of the transaction should have been controlling. Nevertheless, if this Court believes that purpose and entire fairness were proper issues for scrutiny by the court below, Vice Chancellor Brown properly concluded, based on all the evidence (even with the burden of proof placed upon the defendants), that Signal had bona fide purposes for the merger and that all aspects of the transaction were entirely fair to the minority shareholders of UOP.

Plaintiff's original complaint was dismissed on defendants' motion pursuant to Chancery Court Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Weinberger I, 409 A.2d 1262. The original complaint attempted to state a cause of action under the teachings of Singer v. Magnavox Co., Del.Supr., 380 A.2d 969 (1977) and Tanzer v. International General Industries, Inc., Del.Supr., 379 A.2d 1121 (1977), by alleging that Signal, as the majority shareholder of UOP, had breached its fiduciary duty to the minority shareholders of UOP "...because the cash-out terms of the merger were grossly inadequate insofar as they pertained to the minority and because the sole purpose of the merger was to benefit Signal by eliminating the minority from further participation in UOP's corporate enterprise." Weinberger I, 409 A.2d at 1264. Significantly, the original complaint did not allege that Signal had used its majority position to bring about a predetermined result, nor did it contain allegations of fraud or misrepresentation. Id. at 1267.

The mergers under consideration in Singer and Tanzer were structured so that approval of the minority stockholders was not required to effectuate the transactions. In fact, the proxy statement in Singer advised the minority stockholders that approval of the proposed merger was assured regardless of how the minority voted because the proponents of the merger owned (and intended to vote) sufficient shares to provide the required statutory majority approval. Singer, supra, 380 A.2d at 972. This factor led this Court to hold in Singer:

> "We turn, first, to what we regard as the principal consideration in this appeal; namely, the obligation owed by majority shareholders in control of the corporate process to minority shareholders, in the context of a merger under 8 Del.C. §251..."
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> *   *   *
>
> "[A] majority stockholder standing on both sides of a merger transaction, has the 'burden of establishing its entire fairness' to the minority stockholders, sufficiently to 'pass the test of careful scrutiny by the courts.'" (emphasis added).

Id. at 972, 976.

Although Signal, as the owner of 50.5% of the outstanding shares of UOP, could have effected the subject merger unilaterally, it voluntarily chose to let the minority shareholders decide whether the merger should be consummated. Unlike the mergers under consideration in Singer and Tanzer, the proposed Signal-UOP merger was expressly conditioned on the approval of a majority of the minority shares of UOP voting on the issue, and the approval of not less than two-thirds of all the outstanding shares of UOP.* Thus, because of the manner in

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* The latter provision was included so as to provide an incentive for the minority stockholders to vote on the proposal (B574).

which the merger was structured, Signal was not in control of the corporate process, nor did it stand on both sides of the transaction. This crucial distinction was recognized by Vice Chancellor Brown in _Weinberger I_:

> "...Signal has utilized its majority position, not to assure the accomplishment of the result it wanted, _but so as to leave the critical decision to the vote of the minority shareholders_.
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> *　　　　*　　　　*
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> "...Signal did not use its majority position to accomplish the...[merger] since its majority vote was of no force and effect unless the plan of merger was first approved by the voting members of the 49.5 per cent minority and approved by enough of them so that their shares, when added to Signal's 50.5 per cent majority holdings, amounted to at least two-thirds of all UOP shares." (emphasis added).

409 A.2d at 1266.

Having focused on the operative facts that distinguished the Signal-UOP merger from the mergers considered in _Singer_, _Tanzer_, and _Roland International Corp. v. Najjar_, Del.Supr., 407 A.2d 1032 (1979), the Vice Chancellor concluded in _Weinberger I_:

> "Since the minority shareholders here were not powerless to stop the merger--as was the case in _Singer_, _Tanzer_ and _Najjar_--and since there consequently was no use of its position by the majority shareholder which would give rise to the _Singer_ duty to scrutinize the entire transaction so as to insure fair treatment of the otherwise vulnerable minority, then it would seem that the rationale of _Singer_, _Tanzer_ and _Najjar_ would not apply."

409 A.2d at 1266. The Vice Chancellor continued by holding that

> "...when approval is made to depend on the minority vote, then the Singer rationale is inapplicable and the burden should shift to the complaining member of the minority to show fraud, misrepresentation or other conduct attributable to the majority shareholder which would warrant setting aside the affirmative vote of the minority for their own benefit. Compare Michelson v. Duncan, Del.Supr., 407 A.2d 211 (1979).
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> * * *
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> "The motion to dismiss the complaint in its present form will be granted."

409 A.2d at 1268.

Defendants submit that the Vice Chancellor's reasoning in Weinberger I was eminently sound and was rooted in fundamental principals of Delaware corporate law. To hold otherwise would permit a single, dissenting minority stockholder to require a majority stockholder to prove the entire fairness of the terms of a merger in every instance, even when the majority had not used its position to effectuate the merger, but had left the decision in the hands of the minority. Weinberger I, 409 A.2d at 1268.

In order to circumvent the dismissal of his action, plaintiff filed an amended complaint which included the allegations of the original complaint, but added new allegations claiming that Signal had abused its fiduciary duty to the minority stockholders of UOP. In essence, the new allegations in the amended complaint charged that certain press releases, a letter to UOP's stockholders, and the Proxy Statement with respect to the proposed merger were false and misleading and that the defendants conspired with each other to deceive the minority shareholders of UOP (A324)*, in that, plaintiff alleged: Mr. Crawford, the President of UOP, agreed to a merger price without proper evaluation (A320-321); the press releases that referred to "negotiations" were misleading (A321-322); Lehman Brothers was not independent and did not perform a thorough evaluation (A322); characterizing the approval by UOP's board of directors as "unanimous" was misleading (A322-323); and UOP management wrongly made it appear that they were acting in the best interest of the minority shareholders (A323-324). Defendants denied all of these allegations, and it was on these issues that the defendants were required to proceed to trial.

At the close of the plaintiff's case, defendants moved for dismissal under Chancery Court Rule 41(b) on the ground that upon the facts and the law the plaintiff had shown no right to

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* Although it is not entirely clear, it seems that plaintiff has now abandoned his conspiracy theory. In any event, there is nothing in the record to support such a theory. There is absolutely no evidence of any agreement among the corporate defendants. Signal made an offer which was accepted by the Board of UOP, subject to the approval of the minority shareholders. UOP retained Lehman Brothers to render an opinion as to whether the proposed merger was fair to UOP's minority shareholders. Except for the negotiations and discussions between representatives of UOP and Signal, there is no evidence of any agreement to do anything (except of course, the Merger Agreement and the Agreement Regarding Merger). Similarly, the record is devoid of any communication between any representative of Signal and Lehman Brothers. In this respect, it is clear that Crawford was acting on behalf of UOP in his discussions with Lehman Brothers. In short, there is not the slightest indication of any wrongful act by any of the defendants, nor is there any evidence whatsoever that any of the defendants conspired with anyone to commit a wrongful act, and Vice Chancellor Brown properly so held. Weinberger II, 426 A.2d at 1348.

relief (TR 969-1045*). The legal foundation for the Rule 41(b) motion was that the Vice Chancellor had previously held in Weinberger I that the minority vote requirement rendered the Singer rationale inapplicable, and that plaintiff had failed to meet his burden of proving the fraud and misrepresentation allegations in the amended complaint "...which would warrant setting aside the affirmative vote of the minority for their own benefit." Weinberger I, 409 A.2d at 1268. The Vice Chancellor reserved decision on defendants' Rule 41(b) motions and defendants were then required to present their evidence (TR 1042-1045). After the trial was completed, the court concluded that it would be wasteful to brief and decide separately defendants' Rule 41(b) motions, and directed the parties to proceed with post-trial briefing, stating that:

> "No factual or legal inference should be drawn one way or the other from my decision to decline to render judgment on the rule 41(b) motion as of the time it was made."

Letter Opinion dated June 23, 1980, Docket Entry #170, p. 6.

The Vice Chancellor's Decision After Trial, rendered after post-trial briefing and argument, contains a detailed and careful series of factual findings and discussion of the evidence presented at trial. Weinberger II, 426 A.2d at 1335-1340, 1350-1363. After reviewing this Court's decisions in Sterling v. Mayflower Hotel Corp., Del.Supr., 93 A.2d 107 (1952), Singer,

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* "TR ___" refers to pages of the trial transcript not included in the appendices.

Tanzer, and Najjar, Vice Chancellor Brown concluded that despite the manner in which the vote on the merger in this case was structured, and the absence of any fraud or misrepresentation in securing that vote, "...the ultimate burden is on the majority shareholder to show by a preponderance of the evidence that the transaction is fair" (Weinberger II, 426 A.2d at 1345), and that the purposes for the merger were bona fide (Id. at 1346).

Defendants cannot reconcile the burdens imposed upon the defendants in Weinberger II, with the Vice Chancellor's conclusion in Weinberger I that: (1) the Singer rationale was not applicable in this case; (2) that the burden was on the plaintiff to show fraud or misrepresentation because the minority shareholders had the power to prevent the merger; and (3) that Signal did not use its position so as to require the court to scrutinize the transaction for entire fairness. Weinberger I, 409 A.2d at 1266, 1268. The only difference between the original complaint that was dismissed by the court in Weinberger I and the amended complaint upon which the trial in Weinberger II was predicated, was that the amended complaint added allegations of fraud and misrepresentation, none of which were proved by the plaintiff at trial.

The foundation of the trial court's Decision After Trial is Sterling v. Mayflower, supra. In the merger under attack in Sterling, the minority stockholders lost their shares of Mayflower, the acquired company, as a result of the vote of the majority shareholder which stood on both sides of the transaction. That was also the case in Singer, Tanzer and Najjar. However, that is not the case here, where the minority shareholders of UOP had the right and power, after a complete disclosure of all germane facts, to approve or disapprove the merger proposed by Signal.

In light of the fact that the subject merger was contingent upon the approval of a majority of the minority shares of UOP, and that the minority shareholders were fully informed with respect to the proposed transaction, we submit that the purpose for the merger and the overall fairness of the terms of the merger (including, of course, the price) are irrelevant. Indeed, under the facts of this case, to the extent the court below did subject the merger in question to scrutiny for "purpose" and "entire fairness", it was substituting its judgment for that of UOP's fully informed minority stockholders, thereby impinging upon the long recognized right of a stockholder in a Delaware corporation, most recently reaffirmed in Tanzer, "to vote his shares in his own interest". 379 A.2d at 1124.

The doctrine set forth in Singer and Tanzer was quite obviously designed to give minority stockholders some protection against possible exploitation by a majority stockholder using the strict letter of the Delaware General Corporation Law while controlling both sides of a transaction. That protection was not needed here because Signal did not stand on both sides, or control, the transaction. Because the minority stockholders of

UOP were given the right to approve or disapprove the proposed merger, the only question which the Vice Chancellor should have considered was: Were the minority shareholders of UOP given such information as a reasonable stockholder would consider important in deciding whether to approve or disapprove the proposal--i.e., did Signal and UOP disclose all information in their possession germane to the merger? Lynch v. Vickers Energy Corp., Del.Supr., 383 A.2d 278, 281 (1977). Having answered that question in the affirmative, we submit that the Vice Chancellor should have entered judgment in favor of the defendants, without going on to consider the issues of purpose and fairness.*

Despite his conclusion (completely supported by the record below), that defendants had met the applicable standards of disclosure, and the fact that the minority shareholders of UOP had the right to decide whether to approve the merger and

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* It is absolutely clear that Signal had the statutory authority to propose and consummate a cash merger under 8 Del.C. §251. As Justice Duffy held in Singer:

> "To state the obvious, under §251 two (or more) Delaware corporations 'may merge into a single corporation.' Generally speaking, whether such a transaction is good or bad, enlightened or ill-advised, selfish or generous--these considerations are beside the point. Section 251 authorizes a merger and any judicial consideration of that kind of togetherness must begin from that premise."

380 A.2d at 973.

overwhelmingly exercised that right in favor of the transaction, Vice Chancellor Brown held:

> "Since the merger terms were proposed by Signal and agreed to by UOP's board which at least it superficially controlled, Signal (as it has always conceded) still stood on both sides of the transaction and therefore, under Sterling, still owed a fiduciary duty to UOP's minority in dealing with UOP's property. The evaluation of the purpose element as required by Tanzer, as well as a consideration of the other challenged factors which went into the decision to fix the merger price at $21 per share, was not obviated by Signal's decision to leave the vote in the hands of the minority."

Weinberger II, 426 A.2d at 1347. We do not understand these holdings.

In the first place, Signal never conceded that it stood on both sides of the transaction. The very purpose for making the merger contingent on the approval of a majority of the minority shares was to insure that Signal could not stand on both sides of the transaction, and Signal has consistently maintained that position in this litigation. See e.g., Signal's Post-Trial Brief, Docket Entry #178, pp. 95-97.

Secondly, we do not know what the Vice Chancellor meant by the phrase "superficially controlled" since there was absolutely no evidence that Signal exercised any control over the independent members of UOP's Board, who constituted a majority of the Board and all of whom voted in favor of the merger.* In fact, the Vice Chancellor found, <u>on the evidence</u>, that:

> "...the non-Signal members of UOP's board were substantial businessmen in their own right, some of whom had served on UOP's board for a considerable number of years and who were therefore familiar with UOP's present condition, past performance and future prospects. They included a former president and chief operating officer and a former chairman of the board of UOP, each of whom owned more than 7,000 shares of UOP and who therefore had more than passing reason to be interested in the adequacy of the price proposed by Signal. While there are different ways to approach the same problem, and while plaintiff would urge that a different approach than that taken by UOP's board should have been required, I cannot find on the evidence that UOP's board failed to

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* It is well established that:

> "[a] plaintiff who alleges domination of a board of directors and/or control of its affairs must prove it. Blish v. Thompson Automatic Arms Corporation, 30 Del.Ch. 538, 64 A.2d 581 (1948)"
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> * * *
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> "'Control' and 'domination' are here used in the ordinary meaning of the words and they may be exercised directly or through nominees. But, at minimum, the words imply (in actual exercise) a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling."

Kaplan v. Centex Corp., Del.Ch., 284 A.2d 119, 122-23 (1971). See also, Greene v. Allen, Del.Ch., 114 A.2d 916, 920 (1955), rev'd on other grounds, Del.Supr., 121 A.2d 919 (1956) ("I use 'dominate and control' in the sense that, criminality aside, his wishes were their commands"). Plaintiff offered no such proof.

> properly weigh and consider the transaction with regard to the interests of the minority shareholders. It does not appear that they were operating in a vacuum."

Weinberger II, 426 A.2d at 1354-1355. The Vice Chancellor also held:

> "...there is no evidence which indicates by a preponderance that UOP's board abdicated its fiduciary responsibility." (emphasis added).

Id. at 1362.

Finally, even if there were evidence to support a conclusion that Signal controlled UOP's board, it is undisputed that UOP's minority stockholders had the final word as to whether or not the merger would go forward. Accordingly, the issue of Signal's control over the UOP board cannot logically be a basis for a departure from the lower court's original conclusion in Weinberger I which was premised upon the power of the minority "to stop the merger". Id. at 409 A.2d 1266.

In any event, as we will now show, Vice Chancellor Brown was entirely correct when he found "...no material misrepresentation or failure to disclose germane information by UOP in the Proxy Statement or by Signal in the press releases...." Weinberger II, 426 A.2d at 1353.

C. The Plaintiff's Charges Of Misrepresentation Are Without Merit, And, As The Court Below Found, The Proxy Statement Made Full Disclosure Of All Germane Facts

In Lynch v. Vickers Energy Corp., Del.Supr., 383 A.2d 278 (1977), a case involving a tender offer by a majority shareholder of a Delaware corporation for all outstanding shares of such corporation, this Court outlined the test for disclosure owed by a majority stockholder to the minority stockholders as follows:

> "...whether defendants had disclosed all information in their possession germane to the transaction in issue. And by 'germane' we mean, for present purposes, information such as a reasonable shareholder would consider important in deciding whether to sell or retain stock. Compare TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 96 S.Ct. 2126, 2133, 48 L.Ed.2d 757 (1976)."

Id. at 281. Thus, this Court adopted the same disclosure requirements which are applicable under the federal securities laws, i.e., whether a reasonable shareholder would consider a fact important in deciding how to vote. TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

In Kaplan v. Goldsamt, Del.Ch., 380 A.2d 556, 565-566 (1977), the court held:

> "To summarize this point, while a corporation must adequately inform shareholders as to matters under consideration, the requirement of full disclosure does not mean that a proxy statement must satisfy unreasonable or absolute standards. Many people may disagree as to what should or should not be in such a statement to shareholders, and as to alleged omissions the simple test (sometimes difficult of application) is whether the omitted fact is material. Kaufman v. Shoenberg, 33 Del.Ch. 211, 91 A.2d 786 (1952). There is obviously no requirement to include insignificant information. Compare Baron v. Pressed Metals of America, Del.Supr., 35 Del.Ch. 581, 123 A.2d 848 (1956); American Hardware Corporation v. Savage Arms Corporation, 37 Del.Ch. 10, 135 A.2d 725 (1957). Provided that the proxy statement viewed in its entirety sufficiently discloses the

> matter to be voted upon, the omission or inclusion of a particular item is within the area of management judgment. Schiff v. RKO Pictures Corp., 34 Del.Ch. 329, 104 A.2d 267 (1954).
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> "This long standing view of the Delaware courts comports with the recent expression of the United States Supreme Court in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976) wherein it was stated that in order for an omission to be material,
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> '...there must be a substantial likelihood that the disclosure of the fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.' Id., 96 S.Ct. at 2132."

When plaintiff's allegations, evidence, and arguments are tested against these standards, defendants submit that he has utterly failed to meet his burden of proof in this case.

1. Negotiations

The central theme of plaintiff's case appears to be: there were no negotiations between Signal and UOP on the merger price and, because the UOP stockholders were told in the February 28, March 2 and March 6, 1978 press releases, and the March 7, 1978 letter to stockholders that negotiations as to price were being conducted, their vote in favor of the merger should be set aside (PB, pp. 66-74).* Let us then analyze these assertions.

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* Repeatedly, plaintiff misleadingly suggests that the February 28, March 2 and March 6, 1978 press releases and the March 7, 1978 letter to stockholders stated that there had been "negotiations as to price". In fact, the March 6 press release (PX 24) makes no reference whatsoever to negotiations, while the other press releases and the March 7 letter refer generally to negotiations but do not state that such negotiations were limited to the issue of price (B421, 424-425; PX 110).

Webster's Third New International Dictionary defines "negotiate" as follows:

> "to communicate or confer with another so as to arrive at the settlement of some matter: meet with another so as to arrive through discussion at some kind of agreement or compromise about something: come to terms esp. in state matters by meetings and discussions."

Black's Law Dictionary (4th Ed.) defines "negotiation" as:

> "The deliberation, discussion, or conference upon the terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale, or other business transaction."

Whether, then, there were in fact "negotiations" between UOP and Signal on the terms of the merger means: were there discussions or communications so as to arrive at an agreement on the price and other terms of the proposed merger? Clearly there were.

The negotiations or discussions or conversations or communications between Signal and UOP regarding a possible merger began on February 28, 1978 at the meeting attended by Messrs. Shumway, Walkup, and Crawford, and they continued until well after the March 6 Board meetings. At the February 28th meeting and at the Signal Executive Committee meeting which immediately followed, the possible price range of $20-$21 was discussed, as were other aspects of a possible merger, including the effect on the morale of UOP personnel, stock option rights, and other matters. Following those meetings, Crawford conferred with the UOP directors who were not affiliated with Signal (the "outside" directors). In light of his conversations with the outside directors, Crawford advised Walkup that the price would have to be $21 in order for the proposal to receive favorable consideration by UOP's Board. Significantly, the merger proposal subsequently approved by Signal's Board and offered to UOP's Board was at a price of $21 per share. In arguing the absence of "negotiations" over the price, plaintiff conveniently overlooks the very significant dollar difference to Signal of a merger at $20 per share and a merger at $21 per share, namely $5,688,302, since there were 5,688,302 outstanding minority shares at the time of the merger.* If, as plaintiff suggests, Crawford and the other directors of UOP were simply doing Signal's bidding, it is difficult to conceive why Signal did not just offer $20 per share rather than offer to pay over $5.6 million more after the discussions with Crawford, and after Crawford's conversations with the outside directors.**

Plaintiff also conveniently overlooks the fact that there were continuing negotiations between representatives of Signal and UOP with respect to matters other than price. For example, as of March 6, 1978 (the date of the UOP and Signal Board Meetings at which the merger was approved, subject to final approval by the minority shareholders of UOP), the treatment of stock options and other executive compensation

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* Plaintiff apparently believes one cannot negotiate a price within a range of $1 per share. No authority (or logic) is presented to support this belief.

** In fact, some members of Signal's management at first suggested that the price should be as low as $19 per share (B266).

rights had not been agreed upon, and the total number of shares required to be voted for the merger had not been finalized. (B410-416; PX-74, Draft of Agreement Regarding Merger, p. 15; A89).

In summary, negotiations between Signal and UOP with respect to the terms and conditions of the proposed merger commenced on February 28, 1978, and the press release so advised the world. The press release was also notice to the shareholders (as well as the Stock Exchanges and the financial community at large) that something material might be happening (B339). Similarly, the Proxy Statement advised the minority shareholders that the cash price of $21 per share was reached after discussions between Crawford and officers of Signal on February 28, 1978, and in subsequent telephone conversations, and that is exactly what happened.

Let us assume for the sake of argument that for some reason or another, it was improper for Signal and UOP to have stated in the early press releases that "negotiations" were being conducted. Nowhere in the record of this case is there any showing whatever that any stockholder paid any attention to that language in the press releases in deciding whether to vote for the merger. In fact, the plaintiff, Mr. Weinberger, testified that he decided not to vote for the transaction for other reasons (B201-205, 220-221).

It seems to be just plain common sense that <u>how</u> one arrived at an offering price may be of some interest to the offeree, but is certainly not material to his decision whether to accept. For example, when Signal acquired its first major interest in UOP in 1975, the tender offer (at $21 per share) made no reference to how Signal had arrived at this amount (B520-529), yet 78% of the outstanding shares of UOP (including those owned by Weinberger) were tendered to Signal at that price. Also, whether one equates "negotiate" with "discuss" or not, in the Proxy Statement sent to UOP stockholders in early May, 1978, they were told that the price of $21 per share offered by Signal in the merger was arrived at after "discussions" with UOP (A22, 28). It seems unrealistic to believe that a UOP stockholder would have decided to vote for the merger (i.e., sell his shares), because he read a press release three months earlier which said "negotiation" while totally ignoring the word "discussion" in the contemporaneous, and more definitive, Proxy Statement.

In short, Vice Chancellor Brown was entirely correct in concluding:

> "...I do not find that the press releases of February 28 and March 2 [and therefore the press release of March 6, and the March 7 letter to shareholders] contained material misrepresentations to the extent that they indicated that negotiations were being conducted between the two corporations. Nor do I find any misrepresentation in this regard in the Proxy Statement."

Weinberger II, 426 A.2d at 1352.

2. Independent Evaluation of Fairness

The second of plaintiff's charges of misrepresentation deals with the role of Lehman Brothers (PB, pp. 50-55, 75) and, more specifically, asserts that there had been no evaluation by an independent investment banker. This charge apparently breaks down into two sub-parts: (1) Lehman Brothers cannot be described as "independent"; and (2) in any event, Lehman Brothers made no evaluation. Defendants submit that as to both parts, plaintiff's position is just plain wrong.

a. Independence of Lehman Brothers

The record is clear. Lehman Brothers had served as UOP's investment banker since 1959 when the initial public offering of UOP common stock was made (B48). Not only had Lehman Brothers acted as UOP's investment banker with respect to a number of financings and private placements, it also served UOP in that capacity when Signal acquired 50.5% of UOP's outstanding common stock in 1975 (B49). The only relationship between Signal and Lehman Brothers for the five years preceding the merger was the fact that until late 1973, Lehman Brothers had served as an investment advisor and broker for certain funds in Signal's Savings and Stock Purchase Plan, and that relationship was fully disclosed in the Proxy Statement (A29). The record shows that Lehman Brothers was totally independent of Signal, and having served as UOP's investment banker for almost 20 years, Lehman Brothers was fully familiar with UOP's business and prospects.

There is no evidence that Signal had any communication with Lehman Brothers concerning the merger; there was nothing which Signal promised to Lehman Brothers, either immediate or prospective; and there is nothing to indicate that Lehman Brothers would have had any reason, vis-á-vis Signal, to give anything other than a wholly objective and unqualified opinion.

Similarly, with respect to UOP, there is no evidence whatsoever to show any reason why Lehman Brothers could not or did not render an objective and unqualified opinion. Indeed, in rendering the opinion which it did, Lehman Brothers was acting contrary to its own self-interest--it was likely to lose a long-standing client from which it had obtained substantial business over the years.

Undoubtedly because there are no facts to show that Lehman Brothers' opinion of fairness was anything less than independent (and entirely justified), the plaintiff keeps dragging out a Lehman Brothers 1976 in-house draft memorandum (PX-LB-40) and parading it around as if it were in some way material to this case (PB, pp. 21, 23, 51-52). It is not.

Sometime in early 1976, without any request from Signal or UOP, and indeed without their knowledge, Roger Altman, who had shared primary responsibility with Glanville in connection with Lehman Brothers' representation of UOP in the 1975 transaction, asked Seegal, then a young associate at Lehman Brothers, to look at the considerations which might be involved in a possible acquisition by Signal of the remaining shares of UOP (B129). Seegal thereafter assembled statistical materials on the subject and submitted a preliminary draft to Altman (B130-131). Altman and Seegal subsequently revised Seegal's draft into its present draft form (B133).

At that point, the draft memorandum was put into Lehman Brothers' files. It was never adopted by Lehman Brothers and it was never sent to Signal or anyone else (B56, 132). As Glanville testified: "[PX-LB-40] is a draft document which, to my knowledge, never saw the light of day." (B56). No representative of Signal or UOP ever saw, or was even aware of the existence of, the draft memorandum prior to the discovery proceedings in this case (B6, 30, 39, 55, 103, 156-157, 179, 263-264, 326-327).

The undisputed evidence shows (contrary to plaintiff's innuendoes) that the draft memorandum lay unused in Lehman Brothers' files until Lehman Brothers began working on its assignment from UOP in early March, 1978. The document was retrieved from Lehman Brothers' files because it contained useful statistical data which could be used by Seegal and the other Lehman Brothers' personnel in analyzing the proposed merger (B149-151). Indeed, Pearson, the junior associate of Lehman Brothers who was responsible for collecting public information concerning UOP, used the draft memorandum to gather statistical information (B83, 98). The senior members of the Lehman Brothers team working on the UOP assignment never read the document (B110), or were unaware of its existence (B55).

Plaintiff's suggestion that the mere existence of the 1976 draft memorandum somehow created a conflict of interest for Lehman Brothers in connection with its work for UOP in 1978 simply does not withstand analysis. The controlling facts are uncontroverted--the draft memorandum was never completed and never became a product of Lehman Brothers; the draft memorandum never left the files of Lehman Brothers; the substance of the draft memorandum was never brought to the attention of any senior personnel of Lehman Brothers, and except for its limited statistical value, was not relied upon by anyone at Lehman Brothers in connection with its opinion as to the fairness of the proposed merger rendered to the UOP Board on March 6, 1978.

But the plaintiff is not satisfied just to parade the existence of the document itself; he also apparently feels it necessary to mischaracterize its contents. Thus, plaintiff states:

> "Mr. Glanville made no mention of the fact that, in 1976, he had directed the preparation of a Memorandum addressed to the President of Signal advising that it was in Signal's interest at that time to buy out the minority stockholders at up to $21 per share (PX-LB-40)."

PB, p. 21.

What the draft memorandum actually says is:

> "This section, however, will set forth the considerations which, from a business and financial viewpoint, might support an offer to UOP shareholders within the $17-$21 range. We have not attempted to select a particular price which we think would be fair to the UOP shareholders. We have, instead, focused on this range within which a transaction might successfully be negotiated"

B396. The draft memorandum continues:

> "The key argument favoring a price below $21 can be divided into three segments: first, that conditions have changed since

> April 1975 and that UOP's present condition, from an earnings and balance sheet standpoint, is substantially less favorable today. * * * Second, since Signal had no plan last April to acquire these remaining shares, their acquisition in late 1976 should be viewed independently of the first step. Finally, therefore, viewed as an independent transaction, UOP's prospects today may not merit a market premium for its shares equal to last April's premium." (emphasis added).

B397. The draft memorandum further states:

> "As Table IV below indicates, for illustrative purposes only, that a $19 offer to current UOP shareholders provides approximately the same type of premiums in terms of market value, price, earnings multiples, and book value as did Signal's $21 offer in 1975." (emphasis added).

B398. In short, it is clear that the draft memorandum does not "advise" that in 1976, it would have been in Signal's best interest to acquire the minority shares at up to $21 per share. To the contrary, the draft memorandum suggests a range of prices from $17-$21 per share at which such an acquisition might be accomplished. Moreover, the draft memorandum specifically suggests that a price lower than $21 per share might well have been a fair price in 1976.

The draft memorandum is not relevant to the issue of Lehman Brothers' independence, nor is it otherwise material to the "total mix" of information provided in the Proxy Statement. The Proxy Statement made full disclosure of all relevant facts concerning Lehman Brothers and its fairness opinion (as well as all other facts and information) necessary for the stockholders to make an informed judgment.

b. <u>Evaluation by Lehman Brothers</u>

As indicated previously, part of the plaintiff's charges of misrepresentation involving Lehman Brothers is that Lehman Brothers made no evaluation of the transaction on which to base its opinion of fairness. The evidence is flatly to the contrary, and the court below so found.

At the outset it should be noted that plaintiff has tried to misdirect the inquiry on this point by repeated reference to "Mr. Glanville's opinion", rather than Lehman Brothers' opinion, as if it were Glanville's opinion on which UOP's Board relied and which was given to UOP's stockholders. In fact, it was the opinion of Lehman Brothers which was sought and received by UOP's Board, and it was the opinion of Lehman Brothers which was included as a part of the Proxy Statement. Did Lehman Brothers make an evaluation on which to give its opinion of fairness? According to the uncontradicted evidence, it did.

Lehman Brothers had served as UOP's investment banker since 1959 when the initial public offering of UOP common stock was made. Not only had Lehman Brothers acted as UOP's investment banker with respect to a number of financings and private placements, it had also served in that capacity when Signal acquired 50.5% of UOP's outstanding common stock in 1975. On March 1, 1978, the day following his first knowledge of a possible merger, Crawford contacted Glanville and retained Lehman Brothers to review the proposed transaction and render an opinion to UOP's Board as to whether the terms of the merger were fair and equitable to the minority shareholders of UOP. Lehman Brothers put three people to work on the project: Mr. Schwarzman, Mr. Seegal and Mr. Pearson.

Over the next several days, these three representatives of Lehman Brothers reviewed the relevant documents and financial information concerning UOP. They conducted a due diligence visit at UOP's headquarters in Des Plaines, Illinois to insure there was nothing of substance which was not reflected in the reports and financial documents which they had reviewed, or which was contrary to the knowledge which Lehman Brothers had gained during its long association with UOP. They put together a written report entitled "Summary Data Regarding An Offer by the Signal Companies..." (B365-388), all of which was then reviewed by Glanville who, as a long-time UOP director, had an intimate knowledge of UOP and its financial history, past business activities and future prospects.

Lehman Brothers' opinion letter itself sets forth the basis for <u>its</u> opinion (A102-103), and makes it very clear that Mr. Glanville's knowledge formed only a part of the total evaluation on which Lehman Brothers based its professional opinion. To suggest, as does the plaintiff, that what we are concerned with here is Mr. Glanville's personal opinion is pure sophistry.*

Finally, plaintiff's contention to the effect that UOP's stockholders were misled about Lehman Brothers' opinion is

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* Of course Mr. Glanville had a personal opinion, one which he stated by voting as a director of UOP in favor of the proposed merger.

simply not supported by any of the evidence in this case. The Proxy Statement disclosed the relationship between UOP and Lehman Brothers, the fee that Lehman Brothers would receive for its work in rendering the fairness opinion, the fact that Glanville was a director of UOP and a Managing Director of Lehman Brothers, and the substance of Lehman Brother's opinion (A29). In addition, Lehman Brothers' opinion letter was reproduced as appendix D to the Proxy Statement (A102-103). That letter specifically set forth the bases for Lehman Brothers' opinion.

Plaintiff's reliance upon Denison Mines Ltd. v. Fibreboard Corp., D.Del., 388 F.Supp. 812 (1974) (PB, pp. 50-51), is entirely misplaced. That case involved the solicitation of proxies by Fibreboard in favor of a proposed merger. The proxy statement advised the shareholders that Fibreboard's management had considered the value of the transaction to Fibreboard, including the value to it of one of the merging company's (Yuba River Lumber Co.) timberlands, and that the transaction was fair to Fibreboard and its stockholders. The proxy statement also suggested that Lehman Brothers had made a similar evaluation and had reached the same conclusion. Lehman Brothers' opinion letter was not, however, referred to nor reproduced in the proxy statement. The Lehman Brothers' letter actually indicated that it had not made any independent evaluation of Yuba's timber assets, and that Lehman Brothers had relied upon information supplied by Fibreboard's management in forming its opinion. Judge Stapleton held:

> "I do not suggest that there was anything improper in this since Lehman's opinion letter reveals the basis for the opinion expressed. On the present record, however, 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' <u>without further reference to the basis for that opinion was misleading</u>." (emphasis added).

<u>Id</u>. at 388 F.Supp. 822.

In the present case, Lehman Brothers' opinion letter was attached to the Proxy Statement and it <u>does</u> state the bases for its opinion. It also states:

> "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."

A102.

It is apparent that the court's criticism of the proxy statement in <u>Denison</u>, <u>supra</u>, has no application in the present case, and Vice Chancellor Brown properly so held. <u>Weinberger II</u>, 426 A.2d at 1352-1353. The Proxy Statement in this case made full disclosure of all relevant facts concerning Lehman Brothers and its opinion regarding the fairness of the proposed merger, including the bases for that opinion.

In summary, because of its long-term relationship with UOP, Lehman Brothers was particularly well qualified to opine as to the fairness of the proposed merger. There is absolutely no evidence which suggests that Lehman Brothers was not independent of Signal or that its opinion was somehow otherwise tainted. After study of the relevant information and financial data, and a due diligence visit to UOP's corporate headquarters, Lehman Brothers concluded that the proposed merger was "fair and equitable to the stockholders of UOP other than Signal." (A103). While plaintiff may disagree with that conclusion, his attempts to disparage Lehman Brothers' competence and independence are groundless.

Finally, plaintiff attempts to make much of the fact that defendants did not call Glanville or any other Lehman Brothers' representative to testify at trial (e.g., PB, pp. 37, 52). This is but another example of plaintiff's overreaching. In the first place, Glanville was in the hospital at the time of trial (TR 1626-1627). Even more significant is the fact that plaintiff introduced into evidence, as part of his case, the transcripts of the depositions of Glanville, Schwarzman, Seegal, and Pearson, the four Lehman Brothers' representatives who contributed to the fairness opinion (Docket Entry #42, pp. 1-2). These depositions were taken by plaintiff's counsel who was permitted to cross-examine the deponents pursuant to Chancery Court Rules 30(c) and 43(b). Thus, whatever relevant testimony these gentlemen might have had to offer was in the record as part of plaintiff's case.

In short, Vice Chancellor Brown was entirely correct when he concluded:

"...I find no misrepresentations or lack of disclosure in the Proxy Statement reference to Lehman Brothers"

Weinberger II, 426 A.2d at 1353.

3. The "Unanimous" Vote

The plaintiff's final charge of misrepresentation relates to the vote by the members of UOP's Board at the March 6, 1978 meeting.* The extent to which plaintiff has strained to find some misrepresentation or omission in this case is perhaps best exemplified by his argument concerning the UOP press release dated March 6, 1978 (B423), and the letter to UOP stockholders dated March 7, 1978 (B421). Both of those documents stated that at a meeting held on March 6, 1978, the UOP Board had unanimously approved Signal's offer to acquire, by merger, the 49.5% minority interest in UOP for $21 per share, and plaintiff suggests that such statements as to unanimity were materially misleading (PB, pp. 75-77).

The record shows that the non-Signal directors and Crawford all voted in favor of the proposed merger (B504). The directors of UOP who were affiliated with Signal (other than Crawford) abstained from voting on the advice of counsel, but indicated that if they had voted they would have voted in favor

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* In his post-trial brief on liability, plaintiff argued that the Proxy Statement was misleading, (1) insofar as it represented that UOP's Board had evaluated the merger (A1632), (2) because it should have stated that the proposed merger was not referred for consideration to an independent group of directors (A1677), and (3) because it should have revealed that UOP's Board did not authorize the retention of Georgeson & Co. to solicit proxies in favor of the merger (A1682). These arguments have not been advanced in this Court, and therefore, have been abandoned by plaintiff. In any event, they were properly rejected by the court below.

of the transaction (Ibid.). Thus, while there were not fourteen votes in favor of the merger, all fourteen members of the Board favored the merger, and it is clear that there was unanimity on the subject. Even if, for the sake of argument, the press release and letter to stockholders were in some way inaccurate, any infirmity was cured in the Proxy Statement which described the exact voting by the UOP directors at the March 6, 1978 Board meeting (A22, 28).

Once again, the Vice Chancellor was correct when he concluded:

> "...I find no material misrepresentation in the fact that the vote of UOP's board to approve the terms of the merger was said to be unanimous."

Weinberger II, 426 A.2d at 1353.

4. The Proxy Statement Made Full Disclosure Of All Relevant Facts

The fact is that the ninety-six page Proxy Statement made full disclosure of all material facts related to the proposed merger. It included, among other things, a discussion of the terms and effects of the merger, the vote required to approve the merger, the business and recent financial history of UOP, the interests of directors and officers of UOP in the outcome of the merger, market price information, appraisal rights, and federal income tax consequences (A22-25).

The Proxy Statement also outlined Signal's businesses and the source of funds required to consummate the merger (A25-26). It detailed Signal's purposes for the merger as follows:

"Signal has informed UOP that Signal decided to propose the Merger to UOP for several reasons. Among these reasons are: to increase its investment in UOP's high technology businesses, to increase Signal's earnings and return on sales (Signal now consolidates in its financial statements 100% of UOP's operations and balance sheet items but only its 50.5% share of UOP's earnings), to improve investors' understanding of Signal, to eliminate potential conflicts of interest, to provide for a freer flow of resources and technology among UOP, Signal and Signal's wholly-owned subsidiaries and to benefit from certain tax, accounting and other economies that wholly-owned operations can provide."

A26.

The Proxy Statement told the shareholders how the $21 per share price had been reached, and that UOP's management recommended a vote in favor of the merger (A28-29). The shareholders were also told that UOP's Board had received the opinion of Lehman Brothers on March 6, 1978, and that Lehman Brothers would receive a fee of $150,000 in connection with that opinion (A29). They were told that Glanville was a director of UOP and a member of its Audit Committee, as well as a Managing Director and Member of the Board of Lehman Brothers (Ibid.). The Proxy Statement disclosed that Lehman Brothers had performed various financial services for UOP during the preceding five years, and that Lehman Brothers had performed no financial services for Signal or its subsidiaries during the same period except that until November, 1973, it served as an investment advisor and broker for certain funds in Signal's Savings and Stock Purchase Plan (Ibid.).

The Proxy Statement set forth the price range of UOP's stock from 1973 through the first quarter of 1978, and provided per share information with respect to book value, income (loss) before extraordinary items, net income (loss), and dividends for the same period (A31-32). The shareholders were also given information concerning UOP's capitalization and a five-year summary of operations and retained earnings and other financial data (A33-34).

The Proxy Statement contained management's analysis of operations and a five-year summary of UOP's operations in different industries (A35-38). There was a detailed description of each of UOP's lines of business, and a description of material litigation in which UOP was involved (A39-46). The Proxy Statement also described the properties which UOP owned or leased around the world (A46-48).

The directors and executive officers of UOP were listed, together with the shares of UOP owned by them, and the principal affiliations of the non-officer directors were disclosed (A49). The nominees for election as directors were also listed, together with a description of each nominee's principal occupation, his period of service as a director, and the shares of UOP owned (A50-51). The Proxy Statement disclosed the remuneration of UOP's directors and officers, and gave detailed information as to employment and deferred compensation agreements, incentive and bonus plans, and stock option and stock incentive plans (A52-59). The shareholders were also advised that Arthur Andersen & Co. had been selected as UOP's independent public accountants, and that Georgeson & Co. had been retained (for $6,000.00) to assist in the solicitation of proxies (A60).

The Auditor's Report, which formed part of the Proxy Statement, contained detailed financial statements for UOP for the years 1976 and 1977 (A62-83). Attached as appendices to the Proxy Statement were copies of 8 Del.C. §262 (A84-86), the proposed Merger Agreement (A87-93), the Agreement Regarding Merger (A94-101), Lehman Brothers' opinion letter dated March 6, 1978 (A102-103), and a copy of UOP's SEC Form 10-Q for the quarter ended March 31, 1978 (A104-114).

Representatives of both Signal and UOP, including outside counsel and independent accountants, had carefully reviewed the Proxy Statement prior to its distribution to UOP's stockholders (A43-64; B355, 359-363, 420, 437-455, 457-470, 506-507, 514-516). As Crawford testified:

> "Q Now, subsequent to the March 6 meeting and prior to the mailing of the proxy statement did you review drafts of the proxy statement sent to UOP stockholders in connection with the May 26 annual meeting?
>
> "A Yes, I did. I participated in a great deal of work in connection with the preparation of that proxy statement.
>
> "Q And what was the purpose of that review, in your mind?
>
> "A I wanted to make sure that the proxy statement was accurate and complete.
>
> "Q Why were you interested in assuring yourself that the proxy materials were accurate and complete?

> "A I wanted to be sure that UOP complied with all SEC regulations relating to the content of proxy statements, and I wanted to be sure that the shareholders of UOP had all necessary information in front of them on which they could make a judgment as to the acceptance of the merger offer by Signal."

B290-291.

Finally, plaintiff also agrues that "...Signal never disclosed to the minority stockholders that Signal's studies showed that the cashout merger of UOP's minority shareholders would be profitable to Signal at any price up to $24." (PB, p. 67). There is simply no merit to this argument based on the facts in this case. The "studies" to which plaintiff refers were documents generated internally at Signal in early 1978 to give Signal's management data on which to make a decision on a possible merger. These "studies" were in the nature of accounting spread sheets which, given certain assumptions, presented the financial impact on Signal if Signal were to buy out the remaining UOP shares at prices ranging from $17 to $24 per share (A1472-1499). With the given assumptions, and assuming Signal were to pay $24 per share, these "studies" showed, inter alia, that Signal's Plan Income for 1978 would be increased by only about 6% (A1493). When questioned on this subject during his deposition, Shumway testified that this would be a "...[v]ery low return on a $120,000,000 transaction."

(Shumway Dep., p. 117). Apparently others in Signal's management felt the same because on February 28, 1978, Signal's Executive Committee after considering various data, including these "studies", authorized management to proceed with the proposed merger at a price of $20-21 per share and not anything more. Especially when one considers that some members of Signal's management believed that $19 per share was more appropriate (B266), it is clear that, insofar as Signal was concerned, a price of $21 per share was the highest price regarded as acceptable and fair to Signal and its shareholders, and to UOP's minority shareholders. Later, on March 6, 1978, when the matter of the merger and the question of the price per share to be paid was presented to Signal's Board, there again was no approval of Signal paying under any circumstances more than $21 per share for the balance of the UOP stock. The fact remains that the only figure ever recommended to, or <u>authorized</u> by, Signal's Board was contained in the $21 per share merger proposal submitted to UOP's Board on March 6, 1978. <u>Cf.</u>, <u>Lynch v. Vickers Energy Corp.</u>, Del.Supr., 383 A.2d 278 at 281-282 (1978). To suggest under these circumstances that the Proxy Statement should have stated some hypothetical "profit" to Signal at per share prices never recommended or authorized by its Board, is completely unrealistic, and Vice

Chancellor Brown was clearly correct in disregarding this argument.

Having carefully reviewed and rejected plaintiff's allegations of misrepresentations and omissions, Vice Chancellor Brown held:

> "Under the standards of Lynch v. Vickers Energy Corp., supra; TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976), and Kaplan v. Goldsamt, Del.Ch., 380 A.2d 556 (1977), I find no material misrepresentation or failure to disclose germane information by UOP in the Proxy Statement or by Signal in the press releases, and to this end I find no misuse of the corporate machinery attributable to Signal as majority shareholder, either direct or indirect, which would require that the vote of the majority of the minority shareholders be discounted in evaluating the fairness of the terms of the merger to UOP's minority shareholders."

Weinberger II, 426 A.2d at 1353.

In summary, the press releases, the letter to stockholders, and the Proxy Statement all met the standards of disclosure articulated by this Court in Lynch v. Vickers Energy Corp., Del.Supr., 383 A.2d 278 (1977). Having in their possession all relevant facts with respect to the proposed merger, the minority shareholders of UOP, who had the right and power to approve or disapprove Signal's proposal, voted overwhelmingly in favor of the merger. Thus, we submit that Sterling, and Singer and its progeny have no application in this proceeding, and that the Vice Chancellor should have entered judgment for defendants without considering the purpose for the merger or whether it was entirely fair. However, if this Court agrees with Vice Chancellor Brown that purpose and entire fairness were proper issues for scrutiny, we submit that the Vice Chancellor properly concluded that Signal's purposes for the merger were bona fide and that all aspects of the merger were entirely fair.

D. The Vice Chancellor Properly Concluded That Signal Had Bona Fide Purposes For The Merger And That The Merger Was Entirely Fair To The Minority Shareholders Of UOP

Although defendants do not believe that the Vice Chancellor had to reach the issues, he concluded

> "...that there was a proper purpose for the merger, and that it was not designed as a mere subterfuge to get rid of the minority shareholders, [and]
>
> *   *   *
>
> "...that the terms of the merger were legally fair to the plaintiff and the other minority shareholders of UOP."

Weinberger II, 426 A.2d at 1350, 1363.

As we show hereinafter, Vice Chancellor Brown was entirely correct in reaching those conclusions.

1. The Purposes For The Merger

After Signal's 1975 acquisition of 50.5% of UOP, the acquisition of the balance of UOP's stock was an alternative investment possibility considered by Signal (B177-178). As William E. Walkup, Signal's former Chairman of the Board, explained at trial:

> "Well, ever since the original acquisition of the 50.5 percent the acquisition of the balance of [the] shares was always an investment consideration, but we were evaluating other companies, and always when we would evaluate a company we would then compare it with what would it cost us to acquire the UOP stock, and what would the return on that investment be against the return on the possible acquisition..."

B328.

Signal did not seriously consider acquiring the balance of the UOP shares until early 1978 (A1308-1311; B5-8, 154-155, 328-329). In 1977, Signal had had serious, but fruitless, discussions with another company concerning a possible acquisition by Signal (B328-329). In late 1977, Signal had discussions with another acquisition candidate, but those discussions also came to naught (<u>Ibid</u>.). In one instance, personality conflicts at the top level led to a termination of discussions, and in the other, the potential acquiree simply decided that it was not available for acquisition (A1310).

In early 1978, Signal had no real prospects for investment or acquisition, at least on a friendly basis, other than the balance of the UOP shares held by the public (A1309-1311; B329). There were important business reasons for Signal to acquire the remaining outstanding shares of UOP in 1978. Because of certain accounting rules, even though Signal owned only 50.5% of the common stock of UOP and therefore could report only 50.5% of UOP's earnings, Signal had to report 100% of UOP's gross revenues and debt in its consolidated financial statements (B161, 180, 331). Because of these accounting requirements Signal's operating and balance sheet ratios were distorted, which resulted in serious problems with shareholders and the investment community (B161). As Mr. Walkup explained:

> "Q What effect would distorted ratios have on the financial community's analysis?
>
> A Well, it created a greater number of sales with a smaller percentage of earnings, so that your return of earnings on sales was, in one sense, not competitive. That is one of the parameters investment analysts use, and so maybe establish a lower price/earnings ratio or put a lower value on your stock.
>
> Q What effect, if any, would that have on the Signal shareholders?
>
> A Well, if the investment analysis community is not enthusiastic about it for one reason or another -- these are very good reasons -- why, then, they don't write reports on the stock and don't give it a high rating. It also distorted our ratios as far as the balance sheet was concerned with the debt and could have affected us, for instance, if we had another acquisition potential and the increased debt of UOP might have encroached upon the limits in our loan covenants. Why, I think that was a restriction on us.
>
> All in all, I think we were suffering because of it, and I think our stockholders were suffering."

B332. By owning 100% of UOP, the distortion of Signal's financial ratios would be cured, and the investment community would be presented with a more accurate financial picture of Signal and its operations, thus benefitting both Signal and its stockholders.

In addition, 100% ownership of UOP by Signal would avoid potential conflicts of interest between Signal, its wholly-owned subsidiaries, and UOP. After the acquisition in 1975, Signal began to "...see great areas of potential conflicts of interest, among Signal and UOP, among the Research Departments of UOP and Garrett, which is a high-technology company, and among Mack and UOP in the automotive industry." (B21-22, 34-35, 331). As John O. Logan, UOP's former Chairman of the Board, testified:

> "[I]n the areas of energy research, Garrett, as a division of Signal, had certain approaches to problems. UOP had certain approaches.
>
> "In some cases, the progress of UOP [and Garrett] could be enhanced by integrating these activities, but it was pretty difficult to do that as long as the basic posture of UOP was a public company working on the sale of private technology."

B79. Crawford explained that there had been opportunities for various transactions between UOP and Signal which might have been beneficial for both, but were never entered into because of possible conflicts, or at least a perception thereof:

> "None of these were considered appropriate for the reason that since it would be financial transactions between the two companies, it could be misunderstood by stockholders of UOP or stockholders of Signal as favoring the other party."

B45.

Shumway, Signal's Chief Executive Officer, testified at his deposition that Garrett could have been of technical assistance to UOP in its catalyst and nickel recovery programs, but those opportunities were not pursued because of the potential conflicts involved (B172-173). Ownership of 100% of UOP would also facilitate the freer flow of resources and technology among Signal and its wholly-owned subsidiaries, and UOP (A1303-1305; B20, 34-35, 170-171). In short, as Crawford explained at trial:

> "Signal was very cognizant of the rights of the minority shareholders as was the UOP Board. And in many business transactions both groups were scrupulously careful to protect the rights of the minority shareholders. And this was a factor in a number of business decisions. This concern and the time devoted to the protection of those rights would not be a continuing problem in the event that Signal acquired all of the stock of UOP."

B44.

Another important business reason for Signal to acquire the shares held by the minority stockholders included the savings which would result from Signal owning 100% of UOP, including significant tax, accounting, and insurance expenditures (B333). Arledge estimated that tax savings on dividends alone would be $350,000 per year, and that the total "tax savings alone would be roughly a million dollars" annually (B20). In addition, if Signal owned 100% of UOP, it could avoid duplicative reporting to regulatory agencies, and would have to have only one annual shareholders' report, proxy solicitation, and meeting, instead of two (B162, 333). Some economies could also be effected in advertising and through national purchasing accounts (Ibid.).

Finally, Signal's acquisition of the minority interest of UOP was a reasonable investment for Signal, which still had excess cash from the sale in 1974 of its subsidiary, Signal Oil and Gas Company. Despite the serious loss in 1975, by 1978 UOP had shown improvement and Signal continued to believe that UOP was a sound investment for the future. Walkup testified at his deposition:

> "To date [December 14, 1978], it [UOP] has not been a good investment, but we are paid to take gambles and we were gambling in the future that it will be."

B181. Arledge believed that UOP was a better acquisition opportunity for Signal than any others he had recently seen (B19). Shumway believed that the acquisition of the balance of the UOP shares was a desirable investment for Signal because, inter alia, UOP's high technology businesses had a real future (B174-175). As Shumway explained to Signal's Board:

> "[Signal's management supports] an investment in the remaining ownership of UOP for the fundamental reasons which warranted this Corporation's initial investment in UOP."

B352.

In summary, it is absolutely clear that in 1978, Signal had important and legitimate business reasons for considering the acquisition of, and later acquiring, the balance of the UOP shares which it did not then own. It is also clear that Signal's management and directors considered those purposes before proposing the merger to UOP and its minority shareholders (A26, 1472-1474; B350-352, 474-475, 499-500).

There was absolutely no proof by plaintiff that Signal's sole purpose for the merger was to freeze-out the minority shareholders of UOP.* In fact, plaintiff apparently accepts the lower court's finding that the acquisition by Signal in 1978 of the minority shares of UOP "...appeared to be the best investment opportunity then available to it." Weinberger II, 426 A.2d at 1349. (PB, p. 56). Instead, plaintiff now argues that a majority stockholder which proposes a merger in its "economic best interest" (PB, p. 61) does not have a bona fide purpose for the merger as a matter of law unless it is "compelling", relying upon this Court's recitation of the lower court's finding in Tanzer v. International General Industries, Inc., Del.Supr., 379 A.2d 1121 (1977). (PB, pp. 56-65). However, plaintiff's attempt to elevate the lower court's characterization of the purpose proffered in Tanzer into a legal

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* As noted in the previous section of this brief, we do not believe that the purpose for the merger was a proper subject for inquiry in this case. At the very least, however, in light of the manner in which the vote on the merger was structured, and the actual vote by the minority shareholders, the burden should have been on plaintiff to prove that Signal's purposes were not bona fide. See e.g., Michelson v. Duncan, Del.Supr., 407 A.2d 211 at p. 224 (1979), and Fisher v. United Technologies Corp., Del.Ch., C.A. No. 5847 (Letter Opinion dated 5/12/81), a copy of which is attached hereto as Annex A. Plaintiff failed utterly to meet that burden, either on the facts or the law. Moreover, Signal met the burden imposed on it by the court below to show that it had bona fide purposes for the merger.

requirement applicable to this case is belied by this Court's opinion in Tanzer, which required only that the majority stockholder's purpose be *bona fide*:

> "Although we have stated that IGI is entitled as majority stockholder to vote its own corporate concerns, it should be clearly noted that IGI's purpose in causing the Kliklok merger must be *bona fide*. As a stockholder, IGI need not sacrifice its own interest in dealing with a subsidiary; but that interest must not be suspect as a subterfuge, the real purpose of which is to rid itself of unwanted minority shareholders in the subsidiary. That would be a violation of Singer and any subterfuge or effort to escape its mandate must be scrutinized with care and dealt with by the Trial Court."

Id. at 379 A.2d 1124. Indeed, to accept plaintiff's argument would be to impose upon Signal the same sacrifice of self-interest which Tanzer held was not required of a majority stockholder.

We do not understand how the "economic best interest" of Signal does not fully support the *bona fides* of Signal's purposes for the merger. In Tanzer v. International General Industries, Inc., Del.Supr., 379 A.2d 1121 (1977), the *only* reason advanced for the merger there at issue was that it would "facilitate" the majority stockholder's long-term debt financing. This was obviously an economic opportunity for the majority stockholder alone, and could be accomplished only by buying-out the minority stockholders. This Court held:

> "Plaintiffs tacitly concede that there is record support for the Chancellor's finding [that the purpose of the merger was to facilitate the majority stockholder's long-term financing and not just to freeze-out the minority shareholders]. Indeed, it is not even contested because plaintiffs made essentially the same allegation in the complaint, and their argument here is bottomed on the premise that a freeze-out merger between parent and subsidiary corporations designed solely for the purpose of benefiting the parent is impermissible under Delaware law.
>
> "It follows, therefore, that no violation of the rule of Singer has been shown, and that IGI has established a bona fide purpose for the Kliklok merger.
>
> "Since IGI's purpose in causing the Kliklok merger was a proper exercise of its voting power under the rule announced herein, we affirm the order of the Trial Court denying plaintiffs' motion for a preliminary injunction."

Id. at 379 A.2d 1125.

In addition to the fact that the proposed merger with UOP provided the best investment opportunity at the time for Signal's excess cash, Signal had other bona fide reasons for proposing the merger, and Vice Chancellor Brown so held:

> "There were also other benefits which would accrue to Signal, as well as to UOP, in the event that UOP became Signal's wholly-owned subsidiary. The problem of Signal having to account for all of UOP's debts and sales, but only 50.5 percent of its earnings, would be eliminated. The exchange of information and business opportunities between UOP

> and Signal's other subsidiaries would be freed of any potential conflict of interest problems. Significant tax, accounting and insurance savings would be realized, and the cost of duplicative reporting to regulatory agencies would no longer be present."

Weinberger II, 426 A.2d at 1349. Plaintiff contends that these purposes are mere afterthoughts (PB, p. 56, fn.), but the record totally belies that assertion. The facts are that Signal's Executive Committee considered these purposes before recommending the proposed merger to Signal's Board (B474-475), and that Signal's Board considered these purposes before making the merger proposal to UOP (B350-352; A1474). Signal's purposes were also set forth in the Proxy Statement (A26). In short, the record shows beyond question that in early 1978, Signal had important and legitimate business purposes for considering the acquisition of, and later acquiring, the shares owned by UOP's minority shareholders, and Vice Chancellor Brown properly so held.*

2. All Aspects Of The Merger Were Entirely Fair To The Minority Shareholders Of UOP

As noted above, because of the manner in which the vote on the merger was structured and the overwhelming approval of the minority shareholders, we do not believe that it was necessary for the Vice Chancellor to conduct a "fairness hearing", placing the burden on defendants to prove entire

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* Whether relevant or not to the issues in this litigation (and we think not), UOP also had valid business reasons to support the merger, and those reasons were disclosed in the Proxy Statement (A23).

fairness. At the very least, the burden should have been on plaintiff to prove that the merger was <u>not</u> fair to the minority shareholders, a burden which he could not, and did not, meet. In any event, the defendants met the stringent test imposed by the Vice-Chancellor and established that the merger was entirely fair to the minority shareholders of UOP, and Vice Chancellor Brown correctly so held.

a. <u>The Price of $21 Per Share Was Fair</u>

Plaintiff argues that this Court's recent opinion in <u>Lynch v. Vickers Energy Corp.</u>, Del.Supr., ___ A.2d ___ (1981) (Appeal No. 105, 1979, decided April 3, 1981) ("<u>Lynch, Slip Op.</u>") compels a remand of this case "...for a determination of intrinsic fairness and the actual damages suffered by the minority." (PB, p. 97). That decision does not in any way support plaintiff's contention.

<u>Lynch</u> involved a tender offer by a majority stockholder of a Delaware corporation for all the outstanding shares of the corporation. In its first decision in that case, this Court determined that the majority stockholder had a fiduciary obligation to provide to the minority shareholders in its offer all information germane to the transaction, and that there were material omissions in the offering circular as a matter of law. <u>Lynch v. Vickers Energy Corp.</u>, Del.Supr., 383 A.2d 278, 280-281 (1977). The matter was then remanded to the Court of Chancery

for further proceedings and Chancellor Marvel, relying on Poole v. N.V. Deli Maatschappij, Del.Supr., 243 A.2d 67 (1968), held that the appropriate measure of damages was the difference between the fair value of the shares as determined pursuant to the cases developed under the appraisal statute, 8 Del.C. §262, and the amount offered in the tender offer. Lynch v. Vickers Energy Corp., Del.Ch., 402 A.2d 5, 11 (1979). The Chancellor then held that the fair value of the shares was $11.85, 15¢ less than the $12.00 tender offer, and accordingly, that plaintiff and the members of her class had not been damaged as a result of the misleading offering circular. Id. at 12-13. In the second appeal, this Court disagreed, holding that the Chancellor had erroneously relied on Poole, supra. Lynch, Slip Op., p. 6. Justice Duffy pointed out that in Poole, a fraudulent misrepresentation case, the damage formula accepted by the court had been specifically requested by plaintiffs. Id. at 6-8. The Court continued:

> "We do not overrule Poole, which remains appropriate for an action based on misrepresentation. But a claim founded on a breach of fiduciary duty permits a different form of relief, that is, an accounting or rescission or other remedy afforded for breach of trust by a fiduciary."

Id. at 8. The Court went on to hold that the

> "[majority stockholder] will be required to pay rescissory damages to plaintiffs measured by the equivalent value of the...[subsidiary's] stock at the time of judgment."

Id. at 13.

This Court's most recent opinion in Lynch is not applicable to the present case for a number of reasons. In the first place, that opinion speaks to the appropriate measure of damages to be applied after a determination has been made that a majority stockholder (and presumably any other fiduciary) has breached a fiduciary duty to minority stockholders. It does not establish the standards to be applied in determining whether there has been a breach of fiduciary duty. Obviously, therefore, the measure of damages determined by this Court to be applicable in a breach of fiduciary duty case simply has no relevance here. In this case, after an exhaustive analysis of the trial record, Vice Chancellor Brown properly concluded that none of the defendants had breached any fiduciary obligation owed to the minority shareholders of UOP. Thus, insofar as this Court's recent decision in Lynch establishes a measure of damages for breach of fiduciary duty, it cannot have any application in these proceedings. Moreover, even if Lynch were relevant to a liability determination with respect to a claim of unfairness, plaintiff offered no evidence upon which a "rescissory" calculation of value could have been based. In fact, plaintiff's expert made it crystal clear that he had attempted to value the shares of UOP as of the date of the merger, and not as of any later time:

> "[The Court]: What I'm leading up to is this: If we were here in court today because these same minority shareholders were dissatisfied with the price they got in the merger and nothing else, and had brought the

action here not for the reason we are here now today, but simply because they felt $21 a share was an unfair price to pay, and they asked you to come testify as an expert witness on their behalf to give a value as to what would have been in your opinion on their behalf a fair price on the date of the merger, would you have approached the valuation problem any differently than what you have done today?

"THE WITNESS: No.

"THE COURT: All right. I think that's basically all I wanted to ask. Maybe that ended a little too abruptly, but I just wanted to make sure of that.

"As far as you're concerned, your valuation applies to had you valued the stock at a given date regardless of what the purpose is.

"THE WITNESS: Legal purpose.

"THE COURT: Legal purpose, right.

"THE WITNESS: Yes, definitely.

"THE COURT: It doesn't have more than one value?

"THE WITNESS: Exactly.

"THE COURT: It doesn't have one value for appraisal purposes if your dissatisfied with what the merger gave you, and have another value for if your dissatisfied with the way the merger came about and are seeking damages?

"THE WITNESS: That's exactly my position. The value is the value, and I think we approached it from that financial viewpoint regardless of the legal implications.

"THE COURT: And one final thing. I suppose it's probably set forth in here.

"What is the date that you apply this valuation to? Is it February 28th [the date of the Signal Executive Committee meeting], or is it May 28th [the date of the UOP stockholders' meeting]?

"THE WITNESS: It's valid for the period.

"THE COURT: For the whole period?

"THE WITNESS: Yes. We could say February 28th, and I wouldn't change it from May; again, if we go with our terms of not less than 26.

"THE COURT: All right. So as far as you're concerned, under this approach the value that would have been a fair value to the minority shareholders would have been the same on February 28th when the idea was first conceived, apparently, or at least expression made of it, as it would be on May 27th, the day immediately before the merger?

"THE WITNESS: Right. And I might emphasize probably even more so come May 28th.

"THE COURT: All right. To that extent, it wouldn't have gotten any less?

"THE WITNESS: That's right."

A1042-1044. Thus, as in Poole, supra, the plaintiff in this case grounded his proof upon the difference between the $21 per share merger price and his perception of the actual value of the stock as of the date of the merger, and he is bound by that choice of proof.

In determining whether the $21 per share merger price was fair, Vice Chancellor Brown properly focused on the value of the UOP shares as of the date of the merger. The Vice Chancellor was not concerned with damages--rescissory or otherwise--because he properly concluded that none of the defendants had breached any fiduciary duty owed to the minority shareholders of UOP. Although he did not have to reach the issue of fairness, once he decided to do so, Vice Chancellor Brown properly considered the value of the UOP shares as of May 28, 1978, and correctly concluded that "...the merger price of $21 per share represented a price which was fair to the minority shareholders of UOP." Weinberger II, 426 A.2d at 1362.

(i) The Court Below Properly Rejected Plaintiff's "Proof"

Plaintiff's only expert, Kenneth Bodenstein, testified at trial that he relied principally on the discounted cash flow analysis in his attempt to evaluate UOP's shares as of May 28, 1978, the date of the subject merger. Interestingly, that methodology was not even mentioned in his written "Special Report" which was prepared prior to trial (B343).

In any event, although the discounted cash flow analysis may be a useful tool in certain evaluations (A1046-1056; B250), such an analysis "...has at its core the fortuitous selection of a discount factor which is not necessarily related to any objective standard." Weinberger II, 426 A.2d at 1358. See also, Frick v. American President Lines, Ltd., Del.Ch., C.A. 3766 (Letter Opinion dated June 18, 1975, a copy of which is attached hereto as Annex B), where Chancellor Marvel rejected the discounted cash flow analysis in an appraisal proceeding because it was "overly speculative" and "its validity rests upon the financial techniques of a few experts." Annex B, pp. 8-10.

In general, the discounted cash flow analysis is designed to reduce to present value a projected cash flow expected to be received in the future. In practice, such an analysis, especially when applied to a large publicly-held company, disregards the perception of the market place as to value and risk, and, as Vice Chancellor Brown noted, is subject to a fortuitous choice of discount factor unanchored by any objective standard. Thus, while the discounted cash flow analysis might have some reasonable applications with respect to a closely-held or wholly-owned company for which there is no reliable market data, or for estimating the present value of proven oil reserves or fixed-price contracts (B250), it is not an appropriate method to value a widely-traded stock which has already been evaluated by the market (B252). To hold otherwise would be to permit the evaluation of the market place, unaffected by litigation or positions of advocacy, to be replaced by a trial expert's choice of a discount factor.

For example, during the first two months of 1978 (prior to the first announcement of the merger negotiations) UOP's common stock had sold at an average price of slightly less than $15 per share (B590). UOP's 1977 earnings per share from continuing operations were $2.12, and UOP's price/earnings ratio was therefore approximately 7:1 ($2.12 x 7 = $14.84). This price/earnings ratio reflects a return of about 14%, i.e., the market place was willing to pay about $15 to receive a return (including dividends and retained earnings) of $2.12 (B225-226). This expected (or desired) rate of return reflects the market's perception of the risk factor inherent in the investment, and indicates that the market was, in effect, using a discount factor of 14% in valuing UOP's shares (B250-252).*

Bodenstein, however, in applying his discounted cash flow analysis to UOP's 1977 cash flow, used discount factors of 7.5% and 8.5%, thus coming up with per share "values" of $28.09 and $25.21, respectively (A1502). Even assuming, solely for purposes of argument, that Bodenstein then properly added excess liquidity and extraordinary items as part of his calculation, if a discount factor as low as 10% is used (as opposed to the higher 14% factor perceived by the market), the per share "value" would be $21.95. If a 14% factor is used, the per share "value" becomes $16.81.** Thus, assuming (once again for

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* Plaintiff argues that one should look only to dividends paid in determining the discount factor inherent in the market's evaluation, and that because UOP's shareholders received 80¢ in dividends as opposed to UOP's earnings of $2.12 per share in 1977, the real discount factor applied in the market place was only about 5.5% rather than 14% (PB, p. 107). However, this argument ignores the market's expectation of capital appreciation and the perception of risk which the market has attached to that expectation.

** Mr. Purcell, Signal's expert, testified that although he did not believe that the discounted cash flow analysis was a proper tool to be used in valuing UOP or its shares, if he had used such an approach, the appropriate discount factor would have been no less than 15% (B252).

purposes of argument) net free cash from operations of $20.8 million and the correctness of Bodenstein's "add-ons" for excess liquidity and extraordinary items (A1502), the per share "values", using the discount rates just mentioned are as follows:

Discount factor	7.5%	8.5%	10%	14%
Present value of net free cash	$277.3	$244.6	$208.3	$148.5
Excess liquidity	37.0	37.0	37.0	37.0
Extraordinary items	7.0	7.0	7.0	7.0
	$321.3	$288.6	$252.0	$192.5
Per share "value"	$ 28.09	$ 25.21	$ 22.01	$ 16.81*

With this graphic example of how, with just the choice of the discount factor, because of its compounding effect, one can so drastically change an evaluation (all other things being equal), we turn to the plaintiff's arguments based on Bodenstein's testimony.

(a) The Discounted Cash Flow Analysis Applied to UOP's 1977 Figures

At pages 105-106 of his brief, plaintiff discusses Bodenstein's analysis based on UOP's 1977 operating figures (A1502). We have already shown how readily Bodenstein's totals can be radically affected simply by the choice of a discount

* The first two columns are taken from an exhibit prepared by Bodenstein (A1502). The discount factors used in the second two columns are taken from Financial Compound Interest and Annuity Tables (4th Ed. 1968). Copies of the relevant pages from those tables are attached hereto as Annexes C and D.

factor, and that Bodenstein, in choosing his discount factor, totally ignored the market's perception of an appropriate factor. Similarly, in arbitrarily adding $37 million in "excess liquidity" to his calculations as to the present value of the net cash flow, Bodenstein ignored the actual business decision of UOP's management to maintain certain cash and cash equivalent positions. As Crawford testified:

> "There are several reasons why it would be inappropriate to withdraw the cash balance from UOP at that or any other period of time. One is that the money would not be available to meet capital expansion needs. Another is that the very fluctuation that we have just discussed in accounts receivable could continue, that cash would be required to finance receivables or other items of working capital. Depending upon the future business in subsequent months, additional investment could be required in inventories. And if that cash were not available, such business expansion could not take place.
>
> "Another very important reason why that money was not available to be withdrawn and could not be withdrawn is that it would put UOP in violation of certain of its contracts. If you will notice, under the liabilities side of the balance sheet, it indicates billings on uncompleted contracts in excess of related costs of some $37.9 million. This represents a sum that has been advanced to UOP by its customers as advance payments on certain contracts. The title to that money rests in the hands of UOP's customers. And while UOP has custody of the cash, it has a fiduciary and legal responsibility to manage that cash only in accordance with the restrictions that are imposed upon it by contract.
>
> "A great deal of the money that is so advanced has been advanced in UOP's foreign units, and there are two additional reasons why that money could not be extracted from

> the foreign units and brought back to the United States and divested. One is exchange control restrictions of foreign governments, such as existed in England at that particular time. And the second, again, is that that money was prescribed by the contracts under which it was advanced to be spent only in pursuit of construction work for those companies. So it would have been illegal on two counts to use the money for any purpose other than that for which it was advanced or to return it to the United States."

B292-293.

Thus, Vice Chancellor Brown was fully justified in concluding, <u>based on the trial testimony</u>:

> "[T]he evidence indicates that there were reasons for UOP's cash status. Some $37 million of the cash accumulation reflected payments advanced on contracts by its customers and thus was not money that could be removed from the company. Also a great deal of it had been advanced to UOP's foreign units and thus was subject to exchange control restrictions of foreign governments. It was not necessarily free for removal at will by a 100 per cent owner as Bodenstein's analysis presupposed."

<u>Weinberger II</u>, 426 A.2d at 1358.

(b) <u>Plaintiff's Discounted Cash Flow Analysis Based On UOP's 1978 Budget</u>

Based on UOP's projected net income for 1978 (which was disclosed in the Proxy Statement, A28), and using estimates based on UOP's 1976 and 1977 balance sheets and sources and applications of funds statements (also disclosed in the Proxy Statement, A63-67), Bodenstein predicted that UOP would have net free cash from operations in 1978 of $24.9 million (A762, 1503). Bodenstein predicted UOP's gross cash flow from operations in 1978 as follows (A1503):

	(In Millions)
Income before extraordinary items (based on UOP's 1978 budgeted income)	$30.0
Depreciation (as predicted by Bodenstein)	16.5
Deferred income taxes (as predicted by Bodenstein)	3.0
	$49.5

Bodenstein also predicted UOP's cash requirements for 1978 as follows (A1503):

	(In Millions)
Additions for plant and equipment (as predicted by Bodenstein)	$17.5
Long-term debt payment (net)	7.1
	$24.6

Thus, according to Bodenstein's predictions, UOP's net free cash from operations in 1978 would be $24.9 million ($49.5 million less $24.6 million). He then projected that prediction into infinity when he assumed that UOP would have the identical free cash flow every year in the future to which he then applied a 10% discount factor and thus arrived at a present "value" (as of Spring, 1978) of that cash flow of $250 million (A1503).

In making his prediction of net free cash in 1978, Bodenstein assumed that UOP would require $17.5 million in 1978 (and each and every year thereafter) in order to maintain its plant and equipment in order to generate a gross cash flow of

$49.5 million in 1978 (and each and every year thereafter) (A773-774, 1503). Bodenstein made this assumption despite the fact that UOP's capital expenditures for the years 1973 through 1977 were $19.7 million, $40.6 million, $29.6 million, $13.4 million, and $16.3 million, respectively (an average of $23.9 million). During the same years, UOP had income (loss) from continuing operations of $15.6 million, $24.6 million, ($31.4 million), $15.4 million, and $24.3 million, respectively (A34). Thus, there was absolutely no historical correlation between UOP's capital expenditures and the maintenance of its income flow, nor was there any evidence at trial to support this assumption by Bodenstein. In fact, UOP's largest capital expenditure of $40.6 million was made in 1974, just one year prior to its loss of over $31 million. In short, there was no basis for Bodenstein's "guestimate" that it would require only $17.5 million per year in order for UOP to maintain its plant and equipment so as to provide the same revenues forever.

If Bodenstein _had_ used the five year historical average figure for capital expenditures of $23.9 million, his net free cash flow for 1978 (and each year thereafter) would have been $18.5 million. The present value of _that_ cash flow, using a 10% discount factor projected into infinity, is $185 million, or a per share value of $16.16. If the more realistic discount factor of 14% is used in Bodenstein's equation, and assuming a net cash flow of $18.5 million, the figure of $132.1 million, or

$11.54 per share becomes the present value of those shares at the time of the merger.

Apparently not satisfied with a $250 million present value (based on his predicted $24.9 million net free cash from operations), Bodenstein added on $50 million for "excess liquidity and timberland cushion" (A1503). As discussed in the preceding subsection of this brief, UOP had responsible business reasons for maintaining its cash and cash equivalents positions, and Bodenstein should not be permitted to second-guess the business judgment of UOP's management in that respect, especially when no evidence was presented in support of his assumption.

We turn then to plaintiff's contentions regarding UOP's timberlands. The Proxy Statement disclosed:

> "UOP owns approximately 220,000 acres of land in Houghton, Keweenaw and Ontonagon Counties in the Upper Peninsula of Michigan. Approximately 204,000 acres of this area are forested with hardwood and softwood timber and pulpwood. UOP owns an additional hardwood and pulpwood forest of approximately 70,000 acres in Wisconsin. These forests have been leased to Louisiana-Pacific Corporation for a term of 15 years for timber cutting and removal in connection with the divestment of the Goodman operations in 1974."

A48. The Proxy Statement also disclosed that UOP's land and timber holdings were carried on its balance sheet as of December 31, 1977 at $11,157,000 (A77), or about $38 per acre (A1072). Plaintiff stated in one of his post-trial briefs:

> "Mr. Bodenstein conservatively valued these vast timberlands. $100.00 to $200.00 an acre was in itself a conservative range of value to place on these timberlands based on his experience (TR 284-285). However, again to err on the side of caution, he included the timberlands at only $70.00 per acre for valuation purposes. Mr. Bodenstein concluded that a conservative but realistic range for the actual value of UOP's timberlands was between $30 million and $50 million."

A1860. If, indeed, Bodenstein did value the timberlands "at only $70.00 per acre," it is difficult to understand the conclusion that a conservative range for the actual value of the timberlands was between $30-$50 million, because 274,000 acres times $70.00 per acre equals only $19.2 million. In any event, Bodenstein's speculation as to the value of the timberlands was properly disregarded by the court below. First, Bodenstein had absolutely no prior experience in evaluating such properties. As he admitted on direct examination, Bodenstein had never had occasion to make financial analyses of companies whose assets were in timberlands, both hard and soft, in the upper Middle West section of the United States (A799). Also, on _voir dire_, Bodenstein admitted that he did not look at the subject timberlands, did not determine what type of timber was involved, did not determine the quality of the timber, and did not even determine if the timber was harvestable (A805). In fact, Bodenstein did not even know the terms of the lease which covered part of the timberlands, the existence of which was disclosed in the Proxy Statement (A809-810). Bodenstein's only knowledge of the timberlands was his own unsupported speculation as to the value of the timberlands, and accordingly, the plaintiff failed to prove that the timberlands had any value materially in excess of that reflected in the Proxy Statement.*

When Bodenstein's exhibit (A1503) is restated to reflect historical averages and to eliminate mere speculation, the following results are obtained:

	(In Millions) Bodenstein	Restated
Sources:		
Income before extraordinary items	$ 30.0	$ 30.0
Depreciation	16.5	16.5
Deferred income taxes	3.0	3.0
Cash flow from operations	$ 49.5	$ 49.5
Uses:		
Additions for plant and equipment	17.5	23.9
Long-term debt payment (net)	7.1	7.1
Cash requirements	$ 24.6	$ 31.0
Net free cash from operations	$ 24.9	$ 18.5
Present value of net free cash streams discounted at 10%	$250.0	$185.0
Excess liquidity and timberland cushion	50.0	-0-
	$300.0	$185.0
Per share basis	$26.20**	$16.16

* The Vice Chancellor also properly concluded, as a matter of law, that the fair market value of UOP's timberlands (and certain other assets) was not relevant to the fairness of the price because "...the value of such assets had no material bearing on the fairness of the terms of the merger." Weinberger II, 426 A.2d at 1355.

** Bodenstein found an additional 96¢ add-on by including a non-operating cash flow which consisted of a $6.0 million tax loss carryforward and a $5.0 million "other" (A1503).

This comparison is not made to suggest a fair value for UOP's minority shares, but to show that the flaw in the discounted cash flow method of analysis is the ease with which the "bottom line" can be so substantially affected by the inclusion or deletion of a single figure. If, for example, one uses all of the assumptions and speculations contained in Bodenstein's exhibit (A1503), and changes only the discount factor from 10% to 14%, the "per share basis," even including the 96¢ add-on becomes $20.85. Thus:

	(In millions)
Present value of net free cash streams of $24.9 million discounted at 14%	$177.8
Excess liquidity and timberland cushion	50.0
	$227.8
Per share basis	$ 19.90
Non-operating cash flow	$ .96
	$ 20.86

The point is clear.

(c) The Discounted Cash Flow Analysis Based On UOP's 1978-1982 Five-Year Business Plans

Using the financial data set forth in the "basic" portion of UOP's Five-Year Business Plan (B531-555), Bodenstein calculated the present value of UOP's "free cash throw-off" to be $298 million, or $25.94 per share (A1562). In making this calculation, Bodenstein first assumed that the dividends projected by management would, in fact, be paid, i.e., $9.1 million in 1978; $9.1 million in 1979; $11.3 million in 1980;

$13.7 million in 1981; and $16.7 million in 1982 (ibid.), notwithstanding the very speculative nature of this assumption and notwithstanding the fact that this assumption is inconsistent with UOP's dividend history.* Thus, for the years 1973 through 1977, UOP paid dividends of $2,495,000, $6,986,000, $7,411,000, $2,583,000, and $7,174,000, respectively (A34). That history hardly justifies Bodenstein's assumption, whether or not based on management's projections,** that UOP's dividends for the years 1978 through 1982 would not only be substantial, but would also increase regularly and significantly.

Having thus speculated as to the actual future dividends, Bodenstein then added to these assumed dividends for the years 1980 through 1982, the sums of $6.5 million, $9.1 million, and $28.6 million, respectively, labelling those sums "Increase In Cash" (A1562). It is not at all clear as to how Bodenstein came up with these numbers (A1002-1004). Apparently, Bodenstein simply removed from UOP's projected working capital all cash and short-term investments for the years 1980, 1981, and 1982 (B553), and added those amounts to his projected dividends. How Bodenstein can, in effect, assume that any rational business man would strip all current working funds from an ongoing industrial concern defies imagination.

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* As noted in the Dillon Read Report (B569-606), UOP's historical dividend payments had been erratic, and the projected 1978 payments were no greater than the dividends paid in 1970 (B580-581).

** Obviously, in 1974, UOP's management did not project that UOP would lose almost $35 million in the following year. But it did.

Having piled nonsense on speculation, Bodenstein then assumed that the $45.3 million "free cash throw-off" reached in 1982 would continue indefinitely, thereby giving a 1983 "Residual Value" of $453 million (present value of $45.3 million per year projected into infinity, discounted at 10%) (A1562).

Once again, Bodenstein's unsupported choice of a 10% discount factor ignores the actual perception of the market and disregards the risks inherent in UOP's business as reflected in its financial history (B578-581). If, instead of 10%, a 14% discount factor is applied to the 1982 free cash throw-off figure of $45.3 million, the result is a "1983 Residual Value" of $323.4 million (the present value of $45.3 million per year projected into infinity, discounted at 14%), a difference of almost $130 million from the $45.3 million figure which results from the use of Bodenstein's 10% discount factor.

After he determined the free cash throw-off for the years 1978 through 1982, and the 1983 residual value, Bodenstein next calculated the present value of each of those figures by applying a discount factor of 12%. Thus, Bodenstein's exhibit (A1562) shows:

"Year	Free Cash Throw-Off	Discounted at 12%
1978	$ 9.1	$ 8.1
1979	9.1	7.3
1980	17.8	12.7
1981	22.8	14.5
1982	45.3	25.7
1983	453.0*	229.7
	TOTAL PRESENT VALUE ---	$298.0 or
		$25.94 per share

"*Residual Value in 1983"

If the 1983 Residual Value of $453.0 million (calculated by Bodenstein using a 10% discount factor) is replaced with the figue of $323.4 million (calculated by applying the more reasonable discount factor of 14%), the last line of his exhibit changes as follows:

Year	Free Cash Throw-Off	Discounted at 12%
1983	$323.4	$163.8

The totals then change to $232.1 million or $20.27 per share.

Even if all of Bodenstein's calculations are accepted, including the 1983 Residual Value of $453.0 million (calculated by Bodenstein using a 10% discount factor), but a 14% rather than a 12% discount factor is applied to reduce to present worth the free cash throw-off for the years 1978 through 1982 and the 1983 Residual Value, the following results:

Year	Free Cash Throw-Off	Discounted at 14% (instead of Bodenstein's 12%)
1978	$ 9.1	$ 8.0
1979	9.1	7.0
1980	17.8	12.0
1981	22.8	13.5
1982	45.3	23.5
1983	453.0*	206.4
	TOTAL PRESENT VALUE ---	$237.1 or
		$20.70 per share

*Residual Value in 1983

Once again, the point is clear.

(d) Bodenstein's Testimony--Some General Observations

Defendants have no quarrel with plaintiff's observation that UOP's financial condition improved after 1976 (PB, p. 8). In fact, UOP's financial condition improved substantially from 1975 to 1976, net income (loss) from continuing operations having gone from ($31,360,000) in 1975 to $15,441,000 in 1976. But what is plaintiff's point? The fact is that UOP's performance in 1977 was almost the same as it had been in 1974. Thus, the Proxy Statement disclosed, inter alia:

	1974*	1977*
Total Revenues	$781,003	$729,878
Income from continuing operations before extraordinary items	$ 24,603	$ 24,328
Retained earnings	$ 84,088	$ 87,081
Earnings per share from continuing operations before extraordinary items	$2.46	$2.12
Net income per share	$2.78	$2.74
Dividends paid per share	$ .70	$ .625

A34.

In light of these striking similarities, Bodenstein's testimony that the 1975 tender offer/direct purchase at $21 per share should have nothing to do with an appraisal of the value of the minority shares in 1978 (A849) makes no sense. Obviously, although the transactions were different, the free market

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* Figures in thousands except for per share figures.

provides one of the very best indications of "value," however tenuous that word may be. The tremendous oversubscription of the tender offer in 1975 reflected the market's belief that $21.00 per share was a fair price, based on UOP's performance in 1974. Because UOP's performances in 1974 and 1977 were almost identical, the 1975 market reaction to the $21.00 per share tender offer provided an important benchmark with which to test the fairness of the 1978 merger price.

Bodenstein's calculation of "prior market value" used to determine the premium over market (PB, pp. 100-104) may be interesting, but it is without precedent or practical value since the investment community determines the premium over market in a merger situation by looking at the market price just prior to the first public announcement concerning the merger. This is the keystone used by the investment and financial community in determining the "premium" (B248). As recently held by the Court of Chancery:

> "the appropriate market value is $3.125 per share, _the closing price for the stock on the day before the announcement of the proposed merger_ and not a thirty day pre-announcement average of $2.77 per share." (emphasis added).

Tannetics, Inc. v. A. J. Industries, Inc., Del.Ch., C.A. No. 5306, Letter Opinion, pp. 14-15 (July 17, 1979) (a copy of which is attached hereto as Annex E). See also, Gibbons v. Schenley Industries, Inc., Del.Ch., 339 A.2d 460, 468 (1975).*

In summary, Bodenstein disregarded the risks inherent in UOP's business as reflected by its financial history. His analyses are all based on future speculation as opposed to historical earnings, market prices, dividends and the like. As the court held in Levin v. Midland-Ross Corp., Del.Ch., 194 A.2d 50, 57 (1963), an appraisal case:

> "[petitioner's expert's] estimate was based principally on long-range projections, a technique which has not met with approval in Delaware in proceedings having to do with the determination of the present value of assets."

Finally, Vice Chancellor Brown had the opportunity to observe Bodenstein's demeanor and to hear him testify. Bodenstein had no personal contact with anyone from UOP or Signal, nor did he inspect any of UOP's assets. His analyses were based solely on the information contained in the Proxy

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* Interestingly, Bodenstein determined the premium over market in the International General Industries, Inc./Kliklok merger to be 47%, using a "market value" of $7.50 per share instead of the $8.50 per share closing price immediately prior to the announcement of the proposed merger (B349). Dillon Read had calculated the premium to be 29% (B606). We assume that Bodenstein and plaintiff in this case were unaware of Vice Chancellor Hartnett's ruling that

> "the price of $11.00 per share recommended in the Dillon Read report represented a premium of 29% over the closing market price of Kliklok common stock on September 24, 1975, the day prior to the merger study announcement." (emphasis added).

Tanzer v. International General Industries, Inc., Del.Ch., 402 A.2d 382, 389 (1979).

Statement and UOP's Five-Year Business Plan. All things considered, the Vice Chancellor properly rejected Bodenstein's testimony.

(ii) <u>The Opinion Of Dillon Read--Purcell's Testimony</u>

Signal called as its expert, William H. Purcell, a Senior Vice President of Dillon, Read & Co., Inc. ("Dillon Read"). <u>See</u>, TR1049-1399, some of which testimony is set forth at A1046-1291; B233-252. During the course of Mr. Purcell's testimony, the Dillon Read Report was introduced into evidence (B569-606). As pointed out in that Report, "There are different ways to arrive at the concept of fair value in any transaction" (B571). The analysis used by Dillon Read to determine whether the merger price of $21 per share was fair to UOP's stockholders other than Signal included the examination of all relevant aspects of UOP, including its past history and future prospects. That is the method, we submit, which is appropriate in this case. This is not an appraisal proceeding and, contrary to plaintiff's repeated assertions (PB, pp. 96-99), neither Dillon Read nor the Vice Chancellor limited their analyses to a consideration of market value, historical earnings value, and net asset value. However, the general considerations which underly the method of analysis which has developed in the appraisal cases under 8 <u>Del.C.</u> §262 are applicable in determining the fairness of the merger price in this case. Perhaps the best statement of these general considerations is found in this Court's opinion in <u>Tri-Continental Corp. v. Battye</u>, Del.Supr., 74 A.2d 71, 72 (1950):

> "The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern. By value of the stockholder's proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock which has been taken by the merger. In determining what figure represents this true or intrinsic value, the appraiser and the courts must take into consideration all factors and elements which reasonably might enter into the fixing of value. Thus, market value, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of merger and which throw any light on future prospects of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholders' interest, but must be considered by the agency fixing the value."

Prior to rendering their opinion on the fairness of the $21 merger price, a substantial amount of work was done by Mr. Purcell and others at Dillon Read. They reviewed the Proxy Statement, the UOP annual reports for 1973 through 1977, SEC filings (including UOP's 10-K reports and 10-Q reports), Signal's annual reports and other publicly available information, and reports concerning UOP which Dillon Read had in its files. They reviewed the historical market prices and trading values of UOP's stock, together with the general nature of UOP's business and the industries in which it operated (B233). They reviewed the premium offered in relation to the market price prior to the first announcement concerning the proposed merger, and they reviewed historical market prices for securities of selected companies deemed somewhat comparable to UOP (Ibid.).

Dillon Read and Mr. Purcell then did something else--they spoke to people at both Signal and UOP and, in fact, Mr. Purcell made a personal visit to UOP's headquarters in Des Plaines, Illinois, where he met and spoke with Mr. Crawford, UOP's President, and asked questions about, among other things, earnings contributions and competing companies as to each of UOP's different lines of business (B234). Purcell also spoke to Crawford about the 1978 budget, as well as UOP's five year plan, and the accuracy of the projections, etc. (B235).

In his conversation with Mr. Arledge of Signal, Mr. Purcell asked and was told that Signal had had no intention to liquidate UOP or to dispose of any of UOP's major assets. He also asked and was told that Signal had had no intention of transferring control of UOP, and he obtained Signal's impressions of UOP and its future prospects as of the time of the merger (B236-238). Purcell also reviewed nearly "two crates" of documents relating to the litigation, including the pleadings and deposition transcripts (B239-240).

After receiving and reviewing these various materials, and after conducting their interviews, Dillon Read (including Purcell) analyzed the data, prepared their report, and arrived at their opinion. The opinion is that the $21 per share price was fair and equitable from a financial point of view to UOP's stockholders other than Signal (B585).

The specifics of how and why Dillon Read reached its opinion as to the fairness of the $21 price is set forth in detail in the Dillon Read report and in Mr. Purcell's testimony, both of which were carefully considered by Vice Chancellor Brown (Weinberger II, 426 A.2d at 1361-1362). Briefly, Dillon Read considered and analyzed "Market Value," which involved, among other things, reviewing the prices at which UOP's stock had traded during the period January 1, 1974 through May 26, 1978 (B571-572). This analysis showed that the highest price at which the stock had ever traded during this four and one-half year period was $18.625, and it had not traded in 1978 above $15.875 prior to Signal's merger offer. This analysis of market value was quite properly a part of an evaluation of the value of the shares. See e.g., Chicago Corp. v. Munds, Del.Ch., 172 A. 452 (1934).

They next considered the "Structure of the Transaction," meaning the mechanisms established to give the minority stockholders the opportunity to control the transaction (B573-575). Then "Investment Value" was analyzed, including such matters as UOP's financial position, its earnings and dividend growth and the consistency of that growth, the nature of UOP's business, and its future prospects (B575-583). Dillon Read noted, among other things, wide swings in the percentage of earnings contributions from the several lines of UOP's business; they noted the qualification to UOP's audited financial statements placed there by the outside auditing firm, Arthur Andersen & Co.; they noted UOP's "erratic and not overly impressive operating record for the five year period 1973-1977;" and that UOP's earnings per share were not only volatile, but included in many years items from discontinued operations, and/or extraordinary items. With respect to UOP's dividends, they noted that the growth and consistency of quarterly and annual dividends is one of the most important investment criteria and, on this score, UOP's history of dividends was very erratic. Indeed, as they pointed out, the annualized rate for the first quarterly dividend of $.80 in 1978 was still only equal to the annual dividend paid in 1970.

Dillon Read then considered "Net Asset Value," or book value, but determined that since there was no intent to liquidate or to dispose of any substantial assets, little weight should be given to this particular item in arriving at their opinion of fairness of the $21 price (B583-585). They did note, however, that the net asset value was $19.86 per share as of the end of 1977, and $20.69 as of March 31, 1978. They also considered other relevant factors not strictly within the confines of a statutory appraisal proceeding, including the results of the 1975 tender offer by Signal (B573-574), and the matter of a premium over market, and compared the premium in this transaction with those paid in other merger transactions (B585-586).

It was on the basis of such investigation and analysis that Dillon Read concluded:

> "In summary, on the basis of all the information set forth herein and considering factors we deemed relevant, it is our opinion that the offer of $21 in cash per share was fair and equitable from a financial point of view to the holders of common stock of UOP other than Signal."

B585.

After carefully considering the Dillon Read Report and Mr. Purcell's testimony at trial, Vice Chancellor Brown held:

> "From all of the foregoing, as well as the supporting statistics and documentation provided in the Dillon, Read report, there is a reasonable basis for finding that the merger price of $21 per share represented a price which was fair to the minority shareholders of UOP."

Weinberger II, 426 A.2d at 1362. That conclusion was obviously supported by substantial evidence and should not be disturbed by this Court.

In reaching his conclusion that the merger was entirely fair to the minority shareholders of UOP, Vice Chancellor Brown considered, in addition to purpose and price, (1) the fact that UOP's Board fulfilled its fiduciary responsibilities to UOP's minority shareholders, and (2) the structure of the merger vote. Weinberger II, 426 A.2d at 1353-1356, 1362-1363. Although defendants do not believe that the Vice Chancellor had to reach the issue of entire fairness, his conclusions were correct with respect to the foregoing considerations, and his conclusion as to entire fairness was supported by additional considerations which we will discuss below.

b. All Concerned With The Merger Recognized Their Fiduciary Obligations And Scrupulously Met Those Obligations In Connection With The Merger

(i) Signal and Its Directors

After Signal acquired its 50.5% stock interest in UOP in 1975, the directors or employees of Signal who also became directors of UOP recognized that they had dual responsibilities to both companies and their shareholders. As Mr. Walkup testified at trial:

> "[E]ver since the acquisition of the 50.5 percent, Mr. Arms, our general counsel, continuously advised us in the Signal management of our fiduciary responsibilities to the minority shareholders, to UOP, as well as our obligations to Signal. And it was my responsibility, as I understood it, to deal fairly with both companies and their stockholders."

B337. Arledge was also aware of his dual responsibilities (B13-14, 16-18), as were Chitiea (B23-24, 33), and Shumway. Shumway testified:

> "As I said, we wanted them [the UOP minority shareholders] to have a fair shake and we wanted the Signal shareholders to have a fair shake on the other side, so we tried to come up with a price that we felt was fair to both sides."

B176.

Because Signal had the right to obtain the minority shares without the approval of the minority, the fact that Signal conditioned the transaction on the prior approval of UOP's minority shareholders is a clear indication of the desire on the part of Signal and its directors to fully observe all fiduciary obligations owing to UOP's minority shareholders. As Walkup explained:

> "[I]n light of the fact that the price of the UOP stock was about $14.50 and we were going to tender at -- or offer the cash merger at 21 which represented a 45 percent premium, I felt it was certainly a fair deal to both Signal and to UOP, but especially to

> UOP because we had advised UOP -- Signal had advised UOP that we wouldn't proceed with the merger unless a majority of the minority UOP shareholders voting on it approved it. So even though I felt that it was a fair deal, I felt that the UOP shareholders should make that determination on their own. To me the ultimate test of fairness is shareholder approval, and those shareholders voting on it approved it 92 percent."

B342.

In short, in recognition of their obligations to UOP's minority shareholders, Signal's directors first considered a price range of $20-21 per share which they believed to be fair to the minority shareholders of UOP. After further consideration, the directors of Signal proposed a merger with a price at the high end of that fair range, subject to the approval of UOP's minority shareholders. Plaintiff characterizes the recognition by Signal's directors of their dual obligations as a "'pure heart' defense." (PB, p. 81). While an inquiry into whether a fiduciary has met his obligations does not require a court to test the purity of the fiduciary's heart, it is absolutely clear in this case that Signal and its directors acted fairly and responsibly with respect to UOP and its minority shareholders, and Vice Chancellor Brown correctly so held. Weinberger II, 426 A.2d at 1354.

(ii) Crawford's "Immediate Agreement"

Among plaintiff's charges is that Crawford "immediately agreed" to the merger which might be proposed by Signal

(PB, pp. 12-15). That allegation is based solely upon plaintiff's own mischaracterization of the evidence.

On February 28, 1978, Crawford attended two meetings at Signal: first, a short meeting with Shumway and Walkup, and then the Signal Executive Committee meeting to which he was invited. With regard to the first of these meetings, all participants were deposed by plaintiff's counsel, the deposition transcripts are part of the record of the trial, and Messrs. Crawford and Walkup were also present and testified at the trial. None of the testimony supports plaintiff's allegations that Crawford "immediately agreed" to Signal's proposal. With regard to the Executive Committee meeting, in addition to the testimony of Walkup, Crawford and Shumway, there are written minutes and also the deposition testimony of Charles Arledge who was also present at that meeting. None of that evidence supports plaintiff's assertions. It is indeed significant that plaintiff is unable to cite specifically to anything in the minutes, or to cite to any specific testimony given by anyone, to support his assertions; instead, plaintiff resorts to sweeping generalities and broadside references to portions of the record.

What actually happened on February 28, 1978 is set forth in The Relevant Facts As Found By The Trial Court, supra at pages 16-17, and therefore will not be repeated here, except that one of Mr. Crawford's answers given from the witness stand deserves restating:

> "Q. Now, at the morning meeting on February 28th did you purport to make any commitment on behalf of UOP with respect to the price range of $20 to $21 a share favored by Mr. Shumway?
>
> "A. No. It would have been inappropriate for me to make a commitment. I wouldn't have had the authority to do so in any event, and I made none."

B268-269. Crawford also testified that he would not have recommended the proposed merger to UOP's Board and its stockholders if Lehman Brothers had not opined that the price was fair (B288). He also testified at length about the fiduciary responsibilities which he owed to the minority shareholders of UOP, the employees of UOP, and the shareholders of Signal (B303-310). In summary, although Crawford expressed his personal reaction (as requested) to a merger proposal at $20 to $21 per share, it is clear that he did not (and could not) immediately agree to such a proposal. That was up to UOP's Board if, in fact, a proposal were forthcoming from Signal.

(iii) UOP's Directors

Plaintiff now argues: (1) that UOP's Board should have appointed an independent committee to negotiate with Signal and that UOP's Board did not give sufficient consideration to Signal's proposal; (2) that UOP's Board should have obtained an appraisal of certain UOP assets; (3) that UOP's Board should have required a provision in the merger agreement for an increase in the merger price if the stock market rose; and (4) that UOP's minority shareholders should have received some or all of the anticipated second quarter dividend (PB, pp. 82-95). As we will show, Vice Chancellor Brown properly rejected all of those contentions. Weinberger II, 426 A.2d at 1354-1356.

In the first place, there was no legal requirement that the proposed merger be referred to an independent committee for evaluation, further negotiation, or otherwise. Moreover, the fact of the matter is that Signal's proposal was considered and approved by the outside directors of UOP who were independent of Signal and who constituted a majority of the members of the Board who voted on the issue (A50-51; B504).

Signal not only abdicated its voting power with respect to the merger to UOP's minority shareholders, but also did not exercise its right to have its nominees elected as a majority of UOP's Board. Pursuant to the agreement between UOP and Signal in connection with the 1975 acquisition, after Signal acquired its 50.5% interest in UOP, Signal had the right to have its nominees elected as a majority of UOP's Board (B524, 565). However, Signal did not exercise that right. At the UOP 1975 Annual Meeting, only five directors or employees of Signal were elected to UOP's thirteen member Board (A50-51). A general partner of Lazard Freres & Co., which had represented Signal in the 1975 transaction, was also elected to UOP's Board as one of Signal's six nominees (Ibid.). In October, 1975, the UOP Board was expanded from thirteen to fourteen members, and Crawford, formerly an employee of a wholly-owned subsidiary of Signal, was elected to the Board (B301). Although Signal nominated seven

UOP directors, only six were also directors or employees of Signal. Plaintiff alleged, but utterly failed to prove, that Signal dominated and controlled UOP's board of directors. In fact, plaintiff presented no evidence at trial to show that Signal did anything to influence the independent majority of UOP's Board that evaluated and recommended approval of the merger. Thus, plaintiff fell far short of the well-established rule that a "...plaintiff who alleges domination of a board of directors and/or control of its affairs must prove it." Kaplan v. Centex Corp., Del.Ch., 284 A.2d 119, 122 (1971).

It is clear that the outside directors of UOP recognized their fiduciary obligations and independently determined that the merger was fair. For example, Lenon, who was also a member of UOP's Audit Committee (B70), testified at his deposition:

> "I went through the process which I described to you as my reasons and brought to bear the best judgment I could bring on the subject of the price being fair.
>
> "It was done with recognition of the minority. I contributed the best to it I knew how to do."
>
> * * *
>
> "I suppose you can make an argument that $20 was almost as good as $21. It was not as far as I was concerned.
>
> "Q. Did you ever consider whether $22 would be a fair offer?
>
> "A. Well, it obviously is better. I came down, though, on $21 because I felt it was fair.

"I went through the reasoning. I certainly felt that this was a good transaction for the minority. It was a fair price."

*　　　　　*　　　　　*

"Q. In this context, did you feel any responsibility towards Signal?

"A. None.

"Q. Did you make any determination as to what had been done to maximize the price as far as UOP stockholders were concerned, minority stockholders were concerned, or were you satisfied that $21 was fair and that was all you were interested in?

"A. I went through the reasoning that it was fair, that I had been a good Director here, hard working, knowledgeable about business.

"I came down to $21."

B72-74.

Pizzitola, an investment banker, recognized his obligation to the minority stockholders to determine whether the proposal was fair (B102). When asked the basis on which he voted in favor of the merger, Pizzitola responded:

"I think the basis on which I voted for the proposal lies in my background and experience and whatever knowledge I had of UOP and industry in general and the marketplace. There are a myriad of elements that constitute that judgment."

(Ibid.)

Clements believed his obligation to the minority shareholders required him "...to be sure that it was a reasonable offer." (B36). Clements independently determined that the price was fair based on the premium over market value, the relationship of the price to book value, and the response of the stockholders to the 1975 tender offer (B37). He also considered Lehman Brothers' opinion in forming his judgment that the offer was fair (B38). Logan determined that the price was fair, not only as a director, but also as a substantial stockholder of UOP (B80). Glanville, of course, signed the Lehman Brothers' opinion letter which was presented to the UOP Board on March 6, 1978, and which concluded that the "proposed merger is fair and equitable to the stockholders of UOP other than Signal." (A103).

We turn then to plaintiff's contention concerning the quality of the evaluation of Signal's proposal by UOP's Board. First, the evaluators. All of UOP's outside directors were experienced businessmen, all of whom had been on UOP's Board for a number of years prior to March, 1978. Indeed, several had been very closely associated with UOP's operating management for years: John Logan was then Chairman of the Board and a former President and Chief Operating Officer; Maynard Venema had been Chairman of the Board, and James Glanville had been the principal in the investment banking firm which had taken UOP public nearly 19 years previously, and had been on UOP's Board since 1972.

Logan and Venema were large stockholders of UOP* with obvious self-interest in the price and terms of any merger in

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* At the time of the merger, Venema owned 8,754 shares of UOP stock and Logan owned 7,200. Mrs. Logan also owned UOP stock. Crawford owned 6,500 shares as well as options to purchase an additional 20,000 shares. (A24, 49-50).

which they would be required to sell their shares. None of the outside directors had any ties to Signal or any other reasons not to evaluate fairly and thoroughly the merger proposal which Signal was presenting.

What did these evaluators have to evaluate? They had Signal's proposal; they had information about UOP's historical performance and its short (1 year) and long (5 year) range business projections; they were obviously aware of how UOP's stock was trading in the marketplace; they knew of the 1975 tender offer at $21 per share and of the then UOP stockholders' enthusiastic response thereto; they knew what UOP's assets were, and what had been done and proposed with respect thereto. In other words, they already knew a great deal about the company from their positions as directors, officers and stockholders of UOP. They also had a collection of financial and other data which Crawford had directed be prepared for the March 6 Board meeting (B289, 479-484, 486, 488). These were not people who had to start from scratch and review annual reports, etc.; they had been doing this for years as a part of their regular duties. They had Lehman Brothers' opinion letter to help them make their evaluation, and this opinion was presented to UOP's Board and considered before they voted.

Did these Board members then arrive at an evaluation? Of course they did. And this evaluation was properly communicated to UOP's stockholders. There is nothing in Gimbel v.

Signal Companies, Inc., Del.Ch., 316 A.2d 599 (1974), aff'd per curiam, Del.Supr., 316 A.2d 619 (1974), cited by plaintiff at page 84 of his brief, which is of any assistance to the plaintiff on this issue. In Gimbel, the directors of Signal had accepted the offer of Burmah Oil Incorporated to purchase the outstanding capital stock of Signal Oil and Gas Company, a wholly-owned subsidiary of Signal, for approximately $480 million. The plaintiff, a stockholder of Signal, sought a preliminary injunction against the proposed sale, contending that the assets of Signal Oil were worth approximately $300 million more than the agreed sale price. In considering plaintiff's application for preliminary injunction, then Chancellor Quillen had before him the affidavit of Signal's expert which valued Signal Oil's assets at $438 million, and the affidavit of one of plaintiff's experts which valued the same assets at $761 million. Faced with this huge disparity in valuations, the Chancellor agreed to grant the preliminary injunction, but only upon condition that the plaintiff post a $25 million bond (which was never posted and therefore the injunction never issued), stating:

> "The dollars involved are at such variance as to suggest that someone may be dead wrong."

316 A.2d at 617. Obviously, because of the tremendous differences between the asserted valuations of Signal Oil's oil and gas properties, the Chancellor wanted a complete record,

after a plenary hearing, before attempting to decide the merits of the controversy. In this case, of course, there has been a full hearing on the merits, followed by extensive findings of fact by Vice Chancellor Brown.

We have no quarrel with plaintiff's observation that Gimbel stands for the proposition that the directors of a Delaware corporation must act with "...that degree of deliberation and prudence that is commensurate with the importance of the transaction in question" (PB, p. 84). The Delaware cases have long required that standard of conduct.

In the instant case, all of UOP's directors had almost a full week to consider and reflect upon the offer which might be forthcoming from Signal on March 6, 1978. Indeed, all of the outside directors had spoken to Crawford about the proposal, and specifically about the possible price of $20-$21, by phone during the week prior to the meeting. They also knew that Lehman Brothers had been retained to review the transaction and render an opinion to the Board as to whether the terms of the merger were fair and equitable to the minority shareholders of UOP. As long-term directors of UOP, each of the outside directors (as well as the Signal directors) were well aware of the current market prices for UOP's common stock, the disaster which had befallen UOP in late 1975, UOP's historical and current earnings and other relevant financial data, as well as UOP's business and prospects. In light of the directors' respective experience and knowledge of UOP, coupled with the presentations made to UOP's Board on March 6, 1978, including Lehman Brothers' opinion as to the fairness of the proposed merger, there is simply no basis (much less support in the record) for plaintiff's contention that the directors of UOP did not have sufficient time or information upon which to make an informed evaluation. The facts are that the directors of UOP had ample notice of the meeting and its purpose, that they had all relevant information necessary to make an informed judgment, and that they made an informed judgment to approve the proposed merger, subject to final approval of the minority shareholders. Vice Chancellor Brown correctly so held. <u>Weinberger II</u>, 426 A.2d at 1354-1355.

Plaintiff's argument that UOP's Board should have required current appraisals for UOP's timberlands and patents is also without merit. Signal proposed to acquire the minority interest in UOP on an ongoing basis, <u>i.e.</u>, Signal had no intention of liquidating UOP or any of its assets (B237). Thus, the value of any specific asset of UOP had little, if any, relevance to the value of UOP as an operating business. <u>See e.g.</u>, <u>Gibbons v. Schenley Industries, Inc.</u>, Del.Ch., 339 A.2d 460 (1975). As stated in Graham, Dodd, Cottle and Tatham, <u>Security Analysis</u> (4th Ed. 1962) at p. 217:

"There is good reason for not taking the asset-value factor seriously. The average market price of a common stock over the years depends chiefly on the earning power and the dividend payments. These, in turn, usually do not bear any close or reasonably consistent relation to the asset value. (While such a relation may possibly be traced for corporations as a whole, the range in the case of individual companies is virtually unlimited.) Investors and speculators have found that the asset value is typically no guide at all to earning-power value or average market price. Hence they have gradually come to give the asset-value factor practically no weight."

On the same subject, Mr. Purcell testified:

"Q Why was it important for you to determine in connection with your assignment whether or not there were any plans to liquidate any or all of the company or whether there were any current fair market value appraisals or studies?

"A Well, to begin with, we were asked to opine on the fairness of the transaction, of the merger transaction, and as such we were valuing UOP Corporation as a going concern. So our first area of due diligence would be to, in fact, confirm that there were no major plans of liquidation being discussed at that time or major redeployment of assets in terms of sell-off.

"A second question, in terms of internal reports, valuing certain assets, many companies, despite the fact that they follow generally accepted accounting rules and regulations, may have on their books certain assets which are either fully depreciated or by their nature are worth significantly more than their cost basis or current carrying value, such as securities, which may be carried at cost but which have a much higher market value, oil properties or assets of that nature, which may have a significant value which could influence our opinion and our work if we did not know of those matters.

* * *

"Q In connection with your assignment in this case did you prepare or obtain any independent evaluations or appraisals of any of UOP's assets?

"A We did not.

"Q Why is that?

"A Well, in an assignment such as this we would not normally obtain any independent appraisal of assets unless we had reason to believe from our due diligence work that such an appraisal would be a requirement for our rendering a final opinion, in which instance we would tell the client that we felt we needed something in this area and wouldn't be able to continue without it. And in this instance nothing came to our attention which made us feel that we needed an independent evaluation of any of the company's assets." (emphasis added).

TR 1064-1065; B239. Of course, UOP's directors knew the amount of the income being produced from the patents (B386), probably the most important, if not the only, factor to be considered in determining the fair value of the patents, as well as the book values of both the patents and the timberlands (B387). In any event, Vice Chancellor Brown was correct when he concluded:

"Thus, the failure of UOP's board to obtain and consider the updated value of UOP's timberland and patent and royalty assets does not constitute a breach of its fiduciary duty to the minority if the evidence presented on behalf of the defendants at trial reveals that the value of such assets had no material bearing on the fairness of the terms of the merger. For the reasons set forth hereafter, I find such to be the case, and thus I find no impropriety chargeable to UOP's board in this respect.

Weinberger II, 426 A.2d at 1355. The Vice Chancellor was also correct when he agreed with Dillon Read:

"Net asset value was given little weight, however, in view of the fact that Signal was acquiring UOP for its ongoing business value and since there was no plan for its liquidation. I agree with this conclusion on the evidence. It corresponds with the finding in Sterling." (emphasis added).

Id. at 1362.

Finally, we turn to plaintiff's claim that UOP's Board should have made provisions for fluctuations in the stock market and the second quarter dividend. Although the market value of Signal's stock increased between March 6 and May 28, 1976, and the values of securities on the stock market as a whole increased by about 13% during that same period, there was absolutely no evidence that the value of UOP's shares would have taken the same course. Moreover, the second quarter dividend for 1978 would normally have been paid to stockholders of record as of June 2, 1978 (A1406). As of that date, Signal was the only stockholder of UOP. In short, the Vice Chancellor was correct when he held:

"It is true that the approval of the $21 merger price by the boards of UOP and Signal on March 6 put a 'cap' on the value of the UOP shares. But whether they would have otherwise increased or decreased during the two and one-half month period thereafter is a matter of speculation. At least there is no evidence that they would have increased in value at the rate of the overall market rise, and therefore I find no breach of duty on the part of UOP's board in failing to attempt to secure the inclusion of such a provision in the merger agreement.

"As to the fact that the merger agreement made no provision for UOP's minority to receive an aliquot share of any

> second quarter dividend, the defendants have advanced no real argument or explanation. I can only assume that in view of the price being offered and the right being given to the minority to reject the entire proposal, it was not considered by either board to be a necessary term or item for inclusion in the merger agreement. In any event, in view of the subsequent vote of approval by the minority shareholders, I do not view it to be an element of such significance, when considered with all other factors, as to brand the merger unfair.
>
> "Accordingly, on these and the other matters on which issue was joined, I find no dereliction on the part of UOP's board which would amount to a breach of its fiduciary duty to UOP's minority shareholders."

Weinberger II, 426 A.2d at 1356.

c. The Structure Of The Vote On The Merger

The Vice Chancellor held that the structure of the vote on the merger was a meaningful factor in his determination that the merger was entirely fair to the minority shareholders of UOP. Weinberger II, 426 A.2d at 1362. We have argued that conditioning the merger upon the approval of the minority shareholders should have been a controlling factor in this case (see pages 29-66, *supra*), but, in any event, the Vice Chancellor was certainly correct in attaching significance to that factor in his analysis.

d. Other Factors Not Specifically Considered By The Vice Chancellor In His Decision After Trial Also Show That The Merger Was Entirely Fair To The Minority Shareholders Of UOP

In Tanzer v. International General Industries, Inc., Del.Supr., 379 A.2d at 1121 (1977) (Tanzer I), this Court stated the general rule that a fairness hearing "...involves judicial scrutiny for 'entire fairness' as to all aspects of the transaction." Id. at 1125. In Tanzer I, the defendant IGI owned 81% of Kliklok Corporation's outstanding common stock and it caused Kliklok to be merged into a wholly-owned subsidiary, thereby freezing-out the minority shareholders of Kliklok. The merger was not subject to the approval of the minority shareholders and, because IGI had voting control, the consummation of the transaction was assured. The only reason advanced for the merger was that it would facilitate IGI's long-term debt financing. This Court held, as a matter of law, that IGI had established a bona fide business purpose for the merger. Id. at 1124-25. The Court went on:

> "This ruling, however, does not terminate the litigation because, given the fiduciary duty owed in any event by IGI to the minority stockholders of Kliklok, the latter are entitled to a fairness hearing under Singer. The Chancellor's opinion, announced at the preliminary injuction stage of this proceeding, discussed fairness only in terms of the price offered for the stock, but that was too restrictive. The test required by Singer, which applied the rule of Sterling, involves judicial scrutiny for "entire fairness" as to all aspects of the transaction.
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> *　　*　　*
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> "The order of the Court of Chancery denying injuctive relief is affirmed and the case is remanded for further proceedings consistent herewith."

Id. at 1125.

On remand, the Court of Chancery, after considering eight criteria of fairness, held that the merger was entirely fair to the minority shareholders of Kliklok as to all aspects of the transaction, and granted the defendants' motion for summary judgment. Tanzer v. International General Industries, Inc., Del.Ch., 402 A.2d 382 (1979) ("Tanzer II"). In addition to the previous discussions of full disclosure, *bona fide* purpose, price, and structure of the transaction, we will now discuss other criteria considered by the court in Tanzer II.

(i) Alternative to a Cash Out Merger

One element which may be relevant in reviewing the fairness of a cash-out merger is the possibility and desirability of giving to the cashed-out minority stockholders shares in the surviving company, or a combination of such shares and cash. Tanzer II, 402 A.2d at 390-391. In theory, at least, such an alternative may give the cashed-out stockholder the opportunity to continue his investment in the continuing, *albeit* changed, entity, and may also postpone immediate responsibility for a gain or loss for tax purposes.

(a) Participation in the Continuing Entity

The continuing entity in the present case is Signal, an entity whose stock was in 1978 and still is publicly traded on several exchanges, and in which the number of shares outstanding is more than adequate to assure a regular and available source for anyone wanting to acquire an equity interest. Any stockholder of UOP who was being cashed out, and who wanted to "stay aboard," had only to buy as many shares of Signal as his desires (and wallet) dictated.* This is not the case where the surviving corporation is not publicly held, or where an equity interest is otherwise difficult or impossible to obtain. Here, anyone could at any time have become a stockholder of Signal (and, for all we know, many former UOP stockholders may have done just that).

(b) Deferral of Tax Consequences

The minority stockholders of UOP received $21 cash for each share of stock which, at the time the possible merger was first announced, was trading at $14.50 per share. Whether some or all of the minority stockholders received a gain or a loss for tax purposes, and whether or not because of other gains, losses or offsets during the year 1978, such gains or losses imposed a tax benefit or detriment on those stockholders, we can only speculate.

As Vice Chancellor Hartnett said in Tanzer II:

> "To force a stockholder to accept an investment which he does not want may be just as unfair as it is to force him to divest himself of an investment he is happy with by requiring him to turn in his shares in a cash-out merger. Fairness is relative."

Id. at 402 A.2d 391.

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* As of the time of the subject merger there were approximately 19 million Signal common shares outstanding.

Since in this case the great majority of the minority who voted for the merger elected to take the full cash-out compensation for their shares, it seems reasonable to assume that the tax consequences of the transaction, when viewed in the context of the cash benefit received in the merger, were deemed to be fair by UOP's minority stockholders.

(c) Appraisal Rights

Pursuant to 8 Del.C. §262, any minority shareholder of UOP who was dissatisfied with the merger price could have sought the fair value of his shares in an appraisal proceeding in the Court of Chancery. Although this right was fully explained in the Proxy Statement, no minority shareholder of UOP instituted such a proceeding. As the court held in Tanzer II:

> "The availability of appraisal rights should be taken into account, however, as one factor in assessing whether a transaction between a parent corporation and its subsidiary's minority stockholders is entirely fair, even though its existence alone is insufficient to establish that the transaction was fair."

Id. at 402 A.2d 393.

If something other than a cash-out merger had been accomplished, the minority shareholders would have been deprived of their appraisal rights, since both Signal and UOP were listed on the New York Stock Exchange. See 8 Del.C. §262(1). See also, Tanzer II, 402 A.2d at 390-391. The loss of appraisal rights is relevant to whether a cash-out merger, rather than a stock-for-stock merger, is fair. Here, UOP's minority stockholders would have lost that right had a stock-for-stock transaction been involved.

(d) Feasibility

In his Tanzer II opinion, Vice Chancellor Hartnett suggested that stock of the surviving corporation, rather than cash, might be considered as the medium of exchange in a merger, "...if feasible under all the circumstances." Id. at 402 A.2d 391. In the present case, it would not have been feasible for Signal to have used its own shares to acquire the UOP minority shares. One of the primary purposes for Signal proposing the merger was to find a good investment for the cash which it had on hand and needed to put to use. To have kept the cash and used its stock would not have served that purpose. Also, Signal had been engaged in a program of buying its own shares in the market. To have then turned around and distributed its stock back into the marketplace would have been counterproductive. Although Signal had an obligation to treat the minority shareholders of UOP fairly, it did not have to sacrifice its own self-interest. Tanzer I, 379 A.2d at 1124.

Signal proposed a merger, including a cash price of $21 per share which its directors believed to be fair to all concerned, and which was subject to approval by the minority shareholders of UOP. In conclusion, there is nothing in this case to suggest any unfairness to the UOP minority stockholders because they received cash, rather than other securities, for the shares which they relinquished in the merger.

(ii) Independent Recommendations as to Fairness of Price

In Tanzer II, plaintiffs argued that the expert retained by the subsidiary to opine on the fairness of the proposed merger was not independent because it had a substantial fee at stake for assisting the parent in a financing program which was dependent on the outcome of the merger. Vice Chancellor Hartnett held:

> "The Tanzers also note that Dillon Read's 'independence' from I.G.I. was questioned by the Securities and Exchange Commission, and that Dillon Read had a $200,000 fee at stake for assisting I.G.I. in its long-term debt financing program which depended upon the outcome of the merger. The Tanzers also call attention to the fact that there was not a single person speaking for the minority Kliklok stockholders. It cannot be said, however, as a matter of law, that this lack of independent representation of the Kliklok minority, or the failure of defendants to act on the S.E.C's suggestion to obtain a second appraisal, necessarily caused the minority to not be treated fairly."

Tanzer II, 402 A.2d at 391.

In the instant case, as discussed at pages 48-58, supra, Lehman Brothers was entirely independent of Signal. Moreover, not only were the directors of UOP representing the minority shareholders, the decision of whether or not to approve the merger was given to those shareholders.*

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* In Tanzer II, the parent company had advised that it would vote its shares of the subsidiary (81%) in favor of the merger. Thus approval of the transaction was assured regardless of the vote of the minority shareholders. Id. at 402 A.2d 390.

(iii) Adequate Notice to the Minority Shareholders

We have shown in this brief that the Proxy Statement made full and complete disclosure of all relevant facts. Nothing material was omitted from the Proxy Statement, and the Proxy Statement set forth all information and facts upon which a reasonable shareholder could make an informed judgment concerning the proposed merger. Tanzer II, 402 A.2d at 392.

(iv) Public Issue at a High Price Followed By a Merger at a Low Price

One of the criticisms which has been leveled at a "going private" merger is that it may permit a majority stockholder to sell shares through a public offering at a high price, and, following a decrease in the market value of the stock, to repurchase those shares at a much lower price than was paid by the minority stockholders in the public offering. Tanzer II, 402 A.2d at 392. In the instant case, Signal never sold shares in UOP, and the merger was not a "repurchase" of shares. Indeed, Signal purchased its 50.5% interest in UOP in 1975 through a combined tender offer and direct purchase from UOP's treasury at $21 per share, the same price which it also offered in the 1978 merger. In short, Signal did not go "high public--low private," and that potential abuse in a cash-out merger is not present in this case.

(v) Use of the Subsidiary's Funds to Finance the Merger

As Vice-Chancellor Hartnett noted in Tanzer II:

> "Mergers have also been criticized where funds of the publicly held company are used to finance the merger."

Id. at 402 A.2d 393. In the instant case, UOP's funds were not used and Signal itself provided all funds necessary to consummate the merger (A26).

In summary, Vice Chancellor Brown's conclusion

> "...that the terms of the merger were legally fair to the plaintiff and the other minority shareholders of UOP"

(Weinberger II, 426 A.2d at 1363) was fully supported by the record below, including extensive live trial testimony, as well as the applicable law. If this Court finds that it was necessary for the Vice Chancellor to reach the issues of bona fide purpose and entire fairness, his conclusions should be affirmed.

E. Vice Chancellor Brown Was Correct In Dismissing The Derivative Allegations And In Refusing To Enlarge The Class

The merger which is the subject of this litigation became effective on May 26, 1978, and thereafter the former minority shareholders of UOP owned only the right to receive $21 for each of the shares they formerly owned (A88). Thus, plaintiff was not a stockholder of UOP when he filed his complaint on July 6, 1978. Because he was not a stockholder he could not maintain a derivative action on behalf of UOP. Heit v. Tenneco, Inc., D.Del., 319 F.Supp. 884 (1970); Dann v. Chrysler Corp., Del.Ch., 174 A.2d 696, 699 (1961); Weinberger v. UOP, Inc., Del.Ch., C.A. No. 5642 (Memorandum Opinion dated April 3, 1979) (A266-278). Moreover, when the merger became effective, Signal became the ultimate owner of the claims which were asserted against it in plaintiff's derivative count, and such claims became moot. Bokat v. Getty Oil Co., Del.Supr., 262 A.2d 246 (1970); Braasch v. Goldschmidt, Del.Ch., 199 A.2d 760, 767 (1964).

In all events, in light of the Vice Chancellor's findings that no defendant breached any fiduciary obligation or otherwise committed any wrongdoing in connection with the subject merger, plaintiff's contentions with respect to the derivative allegations and the class action determination are moot. Thus, this Court need not reach those issues.

V. CONCLUSION

The record is clear. The Vice Chancellor properly concluded (even after having imposed the burden of proof on defendants) that Signal had bona fide purposes for the merger, that the merger was entirely fair to the minority shareholders of UOP, and that there had been no misconduct on the part of any defendant. We do not believe that Vice Chancellor Brown had to reach the issues of purpose and entire fairness because he specifically found that there had been full disclosure with respect to the proposed merger and that the minority shareholders had absolute control over the transaction. There is nothing in the record which would justify setting aside the express wishes of the minority shareholders of UOP, upon which the merger was contingent, and judgment should have been entered in favor of the defendants without inquiry into purpose or fairness.

The Final Judgment Order entered by Vice Chancellor Brown on February 19, 1981, as well as all other Orders entered in this action, should be affirmed in all respects.

Respectfully submitted,

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Dated: June 11, 1981