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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WILLIAM B. WEINBERGER,

Plaintiff,

vs.) Civil Action No. 5642

UOP, INC., THE SIGNAL COMPANIES, INC., SIGCO INCORPORATED, LEHMAN BROTHERS KUHN LOEB, INC., CHARLES S. ARLEDGE, BREWSTER L. ARMS, ANDREW J. CHITIEA, JAMES V. CRAWFORD, JAMES W. GLANVILLE, RICHARD A. LENON, JOHN O. LOGAN, FRANK J. PIZZITOLA, WILLIAM J. QUINN, FORREST N. SHUMWAY, ROBERT S. STEVENSON, MAYNARD P. VENEMA, WILLIAM E. WALKUP and HARRY H. WETZEL,

Defendants,

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Courtroom No. 7
Public Building
Wilmington, Delaware
Thursday, March 17, 1983
11:20 a.m.

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BEFORE: HON. GROVER C. BROWN, Chancellor.

APPEARANCES:

WILLIAM PRICKETT, ESQ. and
MICHAEL HANRAHAN, ESQ.
Prickett, Jones, Elliott, Kristol & Schnee
for Plaintiff.

APPEARANCES CONTINUED:

ROBERT K. PAYSON, ESQ. and
PETER M. SIEGLAFF, ESQ.
Potter, Anderson & Corroon
-and-
ALAN N. HALKETT, ESQ., of the California Bar
Latham & Watkins
for Defendant The Signal Companies, Inc.

A. GILCHRIST SPARKS, III, ESQ.
Morris, Nichols, Arsht & Tunnell
for Defendant UOP and Individual Defendants.

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P R O C E E D I N G S

MR. PRICKETT: Your Honor, we now turn to Weinberger v. UOP. There are two matters that come before the Court. One is a motion by the plaintiffs for an order under Rule 23 for notice to the class and the opt-out form, and the second is a motion by the defendants for a preliminary hearing in which the Court would hear evidence, as we understand it, on the scope of the damage remedy.

It is my motion under Rule 23 that notice go to the class. And therefore, I would propose to present our views on that and then let the defendants present and explain their motion, and I would reply to that, since there are no papers on it.

First of all, therefore --

THE COURT: Is that a satisfactory way to proceed, gentlemen; take up the class certification matter first?

MR. SPARKS: We are content to take up the class certification matter and the notice question first, and then we would move on to present our affirmative motion.

THE COURT: All right. Fine.

MR. PRICKETT: Your Honor, the plaintiff

has moved pursuant to the opinion of the Supreme Court that the Court enter an order under Rule 23 enlarging the class to include all former stockholders of UOP as of the date of the merger. Beyond that, to implement that order pursuant to Rule 23 and the requirement that at the earliest practicable time notice be sent to members of the class, we have proposed not only notice but also the opt-out form.

In our original motion we included forms addressed both to individual notice, publication and to opt-out. Following that there have been meetings and discussions between counsel for the parties looking to resolve the differences that we had both as to form and content on all of those items. We have, I think, fulfilled our responsibility to the Court to do ourselves what we could rather than making the Court decide things that could be resolved among us.

Specifically, the defendants have submitted to us counterforms of the notices that I have referred to. We met together. We have each drafted further forms of the notices and the opt-outs, and we are a lot closer now than we were. But to say we are closer does not mean that we have resolved it.

And this morning the defendants suggested

to us that they would be presenting an order in which the Court would not give any notice whatsoever at this time, and they suggest that they have a case in which that was done. Let me say that we totally oppose the concept that the Court with a direction from the Supreme Court to enlarge the class can now not give notice. As a practical matter, we are already getting inquiries from former stockholders, from nominees and others as to what is the status of this matter. It has not assumed the proportions of an avalanche or a deluge, but there is a good deal of interest in this. And therefore, we think that just for practical reasons alone, aside from what the rule requires, the Court should fix on the form of the order, so that those who are now members of the class do receive a clear, definitive, succinct word as to the status of the litigation and of their potential rights as former stockholders.

And we think that not only are the stockholders entitled to that notice but that the sooner it is done, the less peripheral correspondence there is going to be. There will undoubtedly be some to the Court. There always is. And that is going to assume major proportions if no notice is given.

But beyond that, we think that the suggestion that there be no notice flies in the face of the opinion of the Supreme Court and of the specific requirements of Rule 23. And that is, in a class situation the Court is required early on to give the best practicable notice to members of the class.

The opinion of the Supreme Court re-delineates the membership in the class, and those who are now included have never received any notice whatsoever of the existence of the suit. The original notice went only to those who had voted against the merger or who had not turned their shares in; admittedly, a very small number, less than five percent. The vast majority of the former stockholders, therefore, received no actual notice by publication or by first class mail of this suit, and, indeed, we think most of them didn't know anything about it. I mean, how would they? And therefore, it is incumbent at this point to get out notice to those people.

In this connection, we note that five years have gone by since the time of the merger and that all but a very small number of the former stock-holders have turned their stock in, have received $21. And therefore, in this particular situation notice is

important, but it is going to be difficult, because people, one, will have moved, died, married, come out of minority, a lot of other things. But in addition, they were given no basis or reason for supposing that they should hang onto their UOP evidence of ownership or other things. That is, they were cashed-out and they were paid off. It was the end of the matter, so far as they were concerned.

And therefore, assuming that the matter goes further than simply a notice, we envisage problems. But that is not our concern here.

Our concern here is complying with the rule that requires notice to the class at the earliest practicable time at the outset and requires the best notice possible under all the circumstances.

The rule also requires that, if possible, you have to give individual notice. And therefore, we start off with the proposition that the Court should issue an order for individual first class mailing to all of the stockholders. That will take care of some of them. We also provided in our form of order that the notice going to nominees and other legal holders carry an admonition to them -- that was the compromise -- where they should get

additional copies to send them on to the equitable owners.

In our form of notice we do explain the status of the case as it now stands. We tried to steer between a notice that is so elaborate and has so much fine print that the normal stockholder, put off by the verbiage and the recitations of stuff that are not germane, throws it away. At the same time we want to explain to them what the status of the case is. That is, there has been a determination basically of liability. There is no determination as to what I will call for shorthand damages. There has been no award of damages at all. There may never be one. But as members of the class they have certain rights. That is, they are members of the class unless they affirmatively opt out. They are not obligated to pay costs to date or future costs and the other things that are required. And we try and do that as succinctly as possible, because we are dealing with a class of stockholders who have had no notification for five years, who at best may or may not remember, may not recognize their rights.

We think the notice should take this form because of an affirmative obligation on our part

and on the Court's part to deal fairly with these people because of the lapse of time in getting them notice.

Now, in addition to that, we think that the requirement of the best practicable notice under these circumstances requires publication. In our original form of notice we had provided that the full notice plus the election or the opt-out form be published three times a week in the Wall Street Journal and in the Chicago Tribune.

Let me say why we included the Chicago Tribune. UOP was a Chicago-based company, and we were led to believe that a large number of the former shareholders were resident in that area. And therefore, we felt that perhaps a finding by the Court of the best practicable notice should include a regional paper, though I think the Chicago Tribune would take exception to that designation of that august paper, designed to get to those people. However, having met with the defendants, we have modified our position on the publication.

We now suggest that rather than printing the whole notice, we simply have a two-by-three notice in the Wall Street Journal published three times a week,

addressed to all former shareholders of UOP, suggesting that they write for a full copy of the notice to a post office box. That saves the cost of an elaborate notice and everything else, but it will pick up to those who are readers of that financial paper the fact that they can write and get notice. We think it will serve particularly to alert nominees, depositories, brokers, things like that that anybody who is a former shareholder of UOP has the right to get a notice form and can write in.

And therefore, so far as our notice position is concerned, we think our form of notice on review will comply with what the Court should be striving to achieve, and that is a succinct, clear notification to the stockholders of the present situation and of their rights, without any excess recitations about what happened before, et cetera.

Secondly, we think that publication is required in some form, but we have tailored it down to minimize the cost but at the same time to do something more than attempt by individual publication to get notice to the stockholders, five years having lapsed and the Court being aware that in that time there will be substantial numbers who have moved or otherwise will

not have current addresses on the list.

Now, that brings me to the final item that we have included, and that is the form of election. Let me contrast the differences between our form and the form of the defendants.

Our form includes -- and its present form is in the back of the brief that was filed in support of this motion. As I say, our form includes clear warnings to the stockholders as to the effect of signing the opt-out. The defendants' form is simply a straight opt-out. That is, it simply says, "I elect to opt out of the class," with no warning in that document as to the effect of opting out.

We think that the Court has an obligation to the stockholders at this point to make sure that the unwary, the unsophisticated stockholder does not lightly waive the present rights that he has in this situation by simply scribbling his name on an opt-out sheet and sending it back, not understanding that by doing that he forever waives his rights to the possibility of sharing in an additional recovery. We think that the opt-out form may become separate from the notice or that the stockholder, faced with reading something that for many laymen is difficult at best,

though we have tried to make it as simple as possible, may simply think that he has to sign a form in order to get something. And therefore, our form carries with it as clear a warning as we can make to these stockholders that in signing this they are precluding themselves and their heirs and everybody else from any possibility of sharing in this, and we think that document should contain that fair warning.

Nevertheless, pursuant to the rule, it does provide the opportunity for the shareholder who, for whatever reason -- and it is difficult to imagine why a shareholder would opt out at this point. But there may be some who want to do it. It does contain that.

And therefore, we think that is the form that should be sent to the stockholders, because we don't think that the defendant should attempt to induce opt-out at a point when liability has been determined, because we can see no real reason why a shareholder would opt out at this point unless he did it through ignorance or confusion or something else. And that should not be the result in this case.

The equitable right, if you like, of the stockholder at this point to participate in the recovery

should not be defeated simply because the forms do not clearly spell out to those people their rights.

Now, let me turn to a small point but one that has divided us. The plaintiffs have provided in all of their notices and forms that it is our view that this notice should go to all former stockholders. Now, the Supreme Court has enlarged the class to include all former stockholders of UOP. It does not focus on the minute question as to what happens to those who opted out under the original notice. I believe there are 127 of those, and the amount of stock is relatively small.

We had suggested to the defendants that from an administrative point of view it probably was better to just start over again and have everybody opt out, because if you don't do that, you may have people who have opted out under the original concept and said, "Well, I wouldn't have done it if I had gotten the notice that you now have, though it told me that if I opted out, I waive forever, but I got a notice and a recitation that wasn't clear," et cetera. You may have something on that. You might win it, but you may eat up a lot of time disputing with former opt-outs as to whether their opt-out is good in view of

what has happened.

They did not buy that. And therefore, I think that we come down to the point that we think fairness dictates that where the Supreme Court said that the class shall include all former stockholders, that is, in fact, a direction obviating or superceding all the proceedings that went on before and that we should send it to all persons, all former stockholders, including, without regard, those who are within the former class and those who opted out.

Let me point out that those who opted out for some reason under the former procedure may well opt out again. If they had a good reason before, they may have a good reason again. And so they may pick up those who for bizarre reasons opted out before. But in any case, the notice pursuant to what the Supreme Court says should go to all of those, without regard to the former opt-outs.

So far, Your Honor, we have been dealing, I think, with the relatively easy matters. And it would be wrong of me not to say, as I always do, that I think we have the better of the argument on all these points.

I now come to a more difficult question

and one on which we have not moved any closer, and that is the question of who has the administrative responsibility for getting this notice out and who bears the cost of it.

I start off with the proposition that Rule 23 is discretionary. It grants the Court discretion as to how the obligation and cost is to be imposed. It would be less than frank of me if I did not concede that the vast weight of cases indicates that in the usual case the courts have imposed on the plaintiff seeking at the threshold or outset of the case the responsibility for both the cost and the administrative burden of getting the notice out.

The rationale generally is not hard to find. That is, you allege some deficiency on the part of the defendant, but it remains simply an allegation. And why should the defendant help to build the scaffold for the plaintiff by sending out a notice to recruit the other members of the class? And therefore, the courts have normally said that the burden and the cost lies with the plaintiff. He must assume that, though they have indicated that the defendant has the responsibility of providing him with the information on which to get the notice out to the class.

However, there are intimations throughout the decisions in this area that the matter is discretionary. And therefore, unless the Court is going to take the position that it is not discretionary, in derogation of the rule, there has got to be some case where the Court uses its discretion to impose costs and burden not on the plaintiff but on the defendant. And we suggest that if there was ever a case where the Court should, indeed, must exercise its discretion to impose the burden the other way, this is it.

Now, why? First of all, we applied originally for an order that would fix the class as all former stockholders of UOP except Signal. The motion was opposed. The matter was briefed, argued, decided and resolved against us. Our interlocutory appeal was denied, and we were then charged with the burden of preparing and disseminating the cost of the notice to that truncated class. And we had the responsibility of handling the administrative burden of the opt-out situation.

We have been, therefore, to this well before, and we have paid for it, and we have administered it. Now there is a second notice to be put out, and we

think that at this point the burden should be put on Signal.

Why? First of all, we have done it once, and the reason it has to be done again is not because of our lack of diligence or because our position was wanting but because after trial, et cetera, the Supreme Court has redetermined the matter. And therefore, it is not anything that it is our responsibility for. It comes about because of the change in the situation as a result of the appeal to the Supreme Court.

Secondly, we have already paid for the matter once. And while we have the responsibility at the outset of the case to do it, when we only have allegations which are unproved, at this point the liability case is resolved once and for all, and Signal has been found to be a fiduciary wrongdoer. As such, we think that the case has changed from one where there are allegations that are as thin as the paper they are printed on and that can be made by anybody. These are now allegations that have been determined by the Supreme Court. And therefore, we are more than halfway home in the sense that we have proved wrongdoing on the part of Signal. And the wrongdoing

is to the former owners of a company in which it was the majority owner.

And therefore, we think that this is the very situation that is referred to in the cases, where the Court indicates that where there are only allegations made and nothing proved, the burden lies on the plaintiff. Here is a situation where the allegations are proved and liability is established. And therefore, that should move the Court's discretion in this case or, if it does not, then we think there is no case imaginable where the Court will exercise its discretion.

Now, next, it seems to us that the Court should exercise its discretion in imposing this burden on the defendant because of the disparity between Mr. Weinberger and Signal. I don't say that simply to point up that this is a David and Goliath situation but because the cases indicate that the disparity in the economic means and administrative ability is a basis which the Court will consider in whether to exercise its discretion or not.

I think the Court is aware of the fact that Mr. Weinberger is an 86-year old man, a retired accountant who has means, maybe four to five hundred

thousand dollars, ample to defray the costs, and I think the Court is also aware of the fact that Signal is a substantial conglomerate recently merged with Wheelabrator that has literally billions of dollars in assets, income and earnings.

Just so that the record contains some documentation of that, we have included in the brief that was presented to Your Honor this morning several pages from the most recent available annual report of The Signal Companies that refers specifically to UOP, the company that was taken over. And its earnings exceed, I believe, a billion dollars. And it gives you some idea of the disparity.

Now, what is the task that is imposed? We are here talking about a notice to a large number of former shareholders. It is obviously impossible for Mr. Weinberger in his small apartment in New York to get this notice out. He would be here until the year 2,020 handwriting out these things. It is also difficult for our law firm to do it. Somebody has got to do this.

I suggest that Signal has the administrative personnel or UOP in its stockholders division or its transfer agent can do it or, as is more likely, it

can hire Delaware Trust to do this part of the job, as is not unusually the case in other situations. But I do stress that at this point to impose on a private elderly stockholder or his attorneys the responsibility and the cost for a second notice would, we think, in this situation represent not what is done under the usual cases but would represent an abuse of discretion in an almost punitive way in imposing on Mr. Weinberger, who has successfully carried his burden to the Supreme Court and back here, a task that has got to be done under the rules and that the cost and administrative burden of which is necessary pursuant to carry out the mandates of Rule 23.

I said at the outset that we were beginning to get some inquiries by phone and by mail. I think this matter has some urgency in the sense that we anticipate an additional amount of this individual correspondence and telephone inquiry. We think, therefore, that pursuant to the requirement that the notice be put out as soon as possible, that the Court should take a look at the alternate forms and decide on which one is applicable and should decide the question of burden, and the notice should go forward. We ourselves, as I say, have tried to resolve our differences.

We have narrowed them somewhat. But we have come up against the blunt, hard fact that we do not agree. And we, therefore, agreed that this motion would be presented at this time based on the submissions that are made. And we have, therefore, submitted our revised forms of order and the cases and authorities that support the position that we here advance.

Thank you, Your Honor.

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

Mr. Sparks.

MR. SPARKS: Your Honor, let me hand up to the clerk or maybe directly to the Court, with the Court's permission, a copy of a case I did provide to Mr. Prickett before the hearing today, to which I will make brief reference in my argument.

Let me state that to begin with I received this rather lengthy brief at 10:50 this morning, 10 minutes before we got here, and read it on the way over. I am really not in a position to respond line by line to it. But in looking through it, it appears that, as Mr. Prickett conceded in his argument, the question of the expense matter, which is largely dealt with in this brief, is a question in

the discretion of the Court. And in the vast preponderance of circumstances, indeed, in every case that I am aware of, the Court has required that at least the first notice to a class or an enlarged class be sent at the plaintiff's expense.

And the only other comment I have with respect to the brief that I have gotten out of it with one quick flip through is that the cases on the back all deal with settlement notices, and I would submit that those are completely inapposite.

We all know that when settlement comes about, as a matter of custom, tradition or what have you, defendants do bear the expense in those instances. I don't think those cases teach us anything on the issues that we are to address today.

Let me now turn to an attempt to respond in some organized fashion to the points that plaintiff's counsel has made.

First, Your Honor, we, of course, agree that the class must be enlarged in accordance with the direction given to this Court by the Supreme Court. So there is no issue about that. We do not, however, believe that at this time notice to the class is required, necessary or appropriate. We believe that

the next time the Court should properly consider whether notice should be given would be after the hearing, which we believe should be held and which is the subject of our next motion.

The timing of the notice is a matter which, contrary to the suggestion that there is a requirement in the rule dictating when notice must be sent, is within the discretion of the Court. The rule provides, if Your Honor gets a chance to look at it, that the class shall be certified at the earliest practicable moment. It does not state specifically when the notice must be sent.

The case that I have handed up to Your Honor, and particularly at Pages 805 and 806, does indicate that the timing of such notice is within the sound discretion of the trial court. And as we stand here now, we don't see the benefit to the members of the class or to anyone else in getting notice at this precise time. Indeed, for reasons that I will get to when I discuss the form of the notice and compare the forms of notice that we have submitted to that submitted by plaintiff, we believe that it may actually be misleading at this time to give this notice before we are all sure where we are going from here.

Now, in addition, on behalf of the defendants, we are willing to forego the advantage of any further opt-outs which would arise from giving notice now and to assume the risk of any other negative consequences arising from the absence of notice at this time. And as the Haas case, we believe, holds, where defendants are willing to bear that risk, it is clear that the Court has discretion to order that notice need not go out until further proceedings on the merits.

We are, of course, not saying that it would not be appropriate at some later time either at the conclusion of this proceeding or at some intermediate stage to direct that notice be sent. I think it will become clear as we go along here that this is the precise time that the notice should be sent.

Let me now turn to the question of the forms of the notice. If the Court does believe after all it has heard today that notice is required and should be sent now, nonetheless, it seems clear to us that it is the plaintiff who is the one who is pushing for that for his purposes and that at least at this juncture any expense of such a notice that would go out

now should be borne by the plaintiff. Of course, if the plaintiff prevails, this could later be taxed to the defendants as a cost.

That is the norm. That is the norm under the cases cited even in the plaintiff's brief. That is the norm under the Eisen case. And it appears that it is the norm under the Wood versus Coastal States case, which is the leading case in Delaware that is cited.

I also recognize, as Mr. Prickett does, that it is not the absolute. There is discretion, and those cases do recognize that the Court has discretion.

I would say, though, that I think we are in a unique circumstance. And I don't believe Mr. Prickett has cited any precedent for his position where there has been an interim ruling by a higher court and the case has been remanded for further proceedings with the express statement in the Supreme Court decision that this may be a case where there are no money damages ultimately -- it says, "Money damages, if any" -- that it is appropriate to assume, as Mr. Prickett would have the Court do, that somehow defendants are going to lose this case and his client

is ultimately going to prevail. That is why we have this mechanism for taxing of costs, et cetera.

Moreover, I at least am not persuaded by the argument that they have already sent a notice and, therefore, they should not have to bear the expense of sending another notice. The first notice that they sent was to a relatively small, limited class. I don't have the precise numbers in front of me, but my guess is it is somewhere in the vicinity of a tenth of the class that would be the enlarged class.

Obviously, had the earlier notice been as broad as plaintiffs had wished it would be and had the earlier class been as broad as plaintiffs wished it would be, they would have had the burden of that additional initial mailing. It is not as if this is a second mailing to the large class that we are talking about here. They are simply seeking to shift the burden which was initially theirs in the first place over to the defendants. So I find that to be unpersuasive. I would hope that the Court would also.

I don't think more time is merited with respect to the expense issue. It is a discretionary question. Certainly, the dominant and normal course is for plaintiffs to bear the burden of this. And I

don't believe that plaintiffs here have shown any reason for the Court to deviate from that precedent and adopt some other course.

Now, if the notice is to be sent now, as Mr. Prickett accurately stated to the Court, there are differences at this point irreconcilable between the parties as to the form that that notice should take. I think the bottom line is that we believe that the form of notice that has been proffered by the plaintiffs unfairly overreaches in terms of going beyond what is necessary and appropriate to describe to the stockholders and, in effect, in some subtle and skillful ways seek to create the impression, the total impression with the stockholders, that this is an action that plaintiffs have already won. We disagree with that, and that goes to the fundamental difference that is between us.

It literally reads almost like a claim form in many respects. And while plaintiffs refer in their brief to warnings, if you put the thing together, there are more warnings than there is content and more excerpts from the Supreme Court's opinion selectively pulled out -- i.e., the favorable language to plaintiffs -- that we just believe in the end that if

the Court reviews the forms of notice, the Court will find our form of notice to be a fair attempt at compromise and a fair notice of the pendency of this action at this stage of these proceedings.

In that connection, I can tell you that the things that we considered in drafting the proposed form of notice that we have placed before the Court was, first, the earlier notice which was approved by the Court and which was approved with opposition and, indeed, some rulings by the Court which emerged in the final form that actually went to the Court and the Court signed. It was not an agreed upon notice and form of order. There were some disputes. It has been supplemented to take into account the developments in the Supreme Court. But we haven't tried to quote isolated passages from a 34-page opinion.

We have also tried to take into account what we thought were the fair elements of plaintiff's form of notice. And I will concede that certain of the matters that we put in our initial drafts were picked up by plaintiffs, and I would think that plaintiffs would have to concede that, likewise, we have picked up what we thought were the meritorious elements of theirs. So we are closer together, but we

are still pretty far apart.

In short, what we have attempted to do is draft an informative document if notice must be sent at this time which does not prejudge the issues to be decided and does not overplay or underplay what the Supreme Court has decided.

We would ask that the Court review both forms. We are confident that the model we have submitted is the only one that the Court will find to be really fair notice, if notice must be given.

Now, I would like at this point to just turn to the two forms of notice and also the two forms of order and point out to the Court for the Court's assistance where I see at least the major differences in the parties' positions. And I also would point out that I believe some of the matters I am about to get into, which I will only touch upon, are inevitably matters which will come up in the next motion to be decided or to be argued to Your Honor, and Mr. Halkett will argue that on behalf of the defendants. But it goes to the question of the conception of the parties as to where we are and where we go from here.

As in any case where you have plaintiffs and defendants, I think each side perhaps has somewhat

of a different conception, although I think in this particular case, where we are breaking new ground, it is more substantive than it might be in some other types of cases. And in that connection, I would think that the Court may wish to defer final consideration of this motion until at least after hearing the presentation of the parties on the next motion.

Really using the plaintiff's proposed form of order as the thing which I would like to direct the Court's attention to, first, in the first paragraph there is framed what I concede also is, I think, a minor point here but one which I feel duty bound to bring to the Court's attention, and that is this idea of, once a proceeding has started and someone got fair notice the first time around and opts out, then if something changes later on in the proceeding, whether they get a chance to take that decision over again and opt back in. It is not a great number of shares. I think it is 146 stockholders. And 14 of those stockholders we haven't been able to ascertain from the filing that was made and their forms how many shares they had. But the 132 stockholders held something a little less than 7,000 shares. And if you assume that the other 14 had a similar proportionate

amount, we are probably talking about seven or eight thousand shares and 146 stockholders.

And the only reason I really press this point is that I think to not do so would be to really lead the Court into error. It is my understanding of the class action rules that if you opt out, you get the benefits of opting out, but you can't have something happen in the proceeding and opt back in again through some procedure and, in effect, get back on the bandwagon after you have made a decision to get off it. Fundamentally, I think that goes to the root of the class action procedure. And I would perhaps not so much for this case, where we don't have so much at stake, but certainly as a principle would hate to see that become something that the Court ever permitted to happen.

Second, the expense issue, of course, is addressed in the form of order that has been submitted by plaintiffs. I have already touched on that, and I am not going to spend any more time on it. We don't believe there is any direction from the Supreme Court or in the Supreme Court's opinion or anything else that requires that the normal rule be deviated from here. Indeed, we are being asked to pick up an expense

that ordinarily would have been the plaintiff's, that he has never really had to spend yet, and that is giving notice to this enlarged class.

I will say in that connection that our initial proposal to counsel for the plaintiffs was that the additional notice need only be given to those people who didn't get the first notice. We have accommodated in one of our changes to say that it ought to go to everybody except the 146 who really are not in the proceeding anymore.

Next, turning to the publication, also in a spirit of compromise, while we don't believe it is necessarily required, and, indeed, the Court, we think, could soundly decide on the publication issue that it should wait and see how many returns there are of addresses, unreturned mail, unforwarded from the mailing from the list, we did put into our form a form of publication, short form, three times for three consecutive weeks in the Wall Street Journal, as did Mr. Prickett. We think the Court, if publication is necessary here, could either properly accept what we put in our alternate form or, indeed, could say, "Let us hold off on the publication until we see how well we do here with respect to the mailing to people on the

list."

With respect to Paragraph 3 and, indeed, Paragraph 6 of the proposed form of order submitted by plaintiffs, they seem to impose upon the defendants a rather elaborate system or an organization at this juncture, if you will, of how things are going to go on from henceforward. It really looks very much like the type of procedure one sets up for accepting claim forms after a case has been decided. They tell us that either we, Signal, I suppose UOP or their transfer agent or the Delaware Trust Company, which I gather is plaintiff's preferred person -- and I have no reason to believe that Delaware Trust Company is not perfectly adequate here. But there is an attempt to impose a particular choice of agents upon us were we to be ordered to adopt this rather elaborate scheme. We think that is all premature. It is something that may happen down the road. Even then we would think that the Court would allow the defendants to pick their own agents. And if we wanted to pick Wilmington Trust Company or Chemical Bank, we could do that. I suspect Mr. Prickett would agree that we could do that if we wanted to.

But the point is that this is the type of

order that looks like it is something building up a super structure to be used down the road for when Mr. Prickett believes he and his client will ultimately prevail. We think this isn't the time certainly for that type of structure.

Turning to the notice itself, we have resolved a lot of things, but there are areas where I just don't think we could come to an agreement, notwithstanding our efforts. I point in particular to Paragraphs 4 and 5. Without going into all the details, it is our view that the form that we have placed before the Court tells the stockholders what they need to know.

It is our view that Paragraphs 4 and 5 as placed before the Court by plaintiffs really seek to create an impression in the stockholders of multiple findings of conclusive wrongdoing and selectively really quotes from the Supreme Court's opinion here and there with language favorable to the plaintiffs. We think that to counter this, one would have to put in all sorts of other language in the Supreme Court's opinion. We really think it goes well beyond what is fair under the circumstances.

I would also make a couple of other

comments. While I hadn't made them to Mr. Prickett the first time around in our negotiations, the form that we submit today does not refer to by name Mr. Arledge or Mr. Chitiea but refers to it as, I believe, information prepared by Signal officers. Similarly, it does not refer by name to Lehman Brothers, whom, as we know, were dismissed from this case voluntarily at the Supreme Court level by plaintiff. I don't see where the identity of these people at this stage of these proceedings could be material or important to stockholders.

I think it really comes down to little more than an attempt to publicly embarrass people at a time when we submit there is no reason for that type of publication, if there ever were. And I am not going to go through all of the instances. The Court will clearly see in reading Paragraphs 4 and 5 that the tone is very, very different.

Also, I would refer to the top of Page 4, because I find it to be particularly indicative of the type of problem that I think we see in the plaintiff's form of notice. The last sentence there says, "Accordingly, the Court concluded that there could be no finding at present that the $21 price was fair and

remanded the case to the Court of Chancery for determination of damages based on entire fairness standards as to fair dealing and fair price." We start with the proposition that the Supreme Court never said that. Where it does talk about damages, it talks about damages, if any, and that doesn't appear here.

Moreover, this formulation of where we go from here is really plaintiff's formulation, we submit, not the Supreme Court's. And we don't believe that this type of document ought to really encapsulate one advocate's position of exactly what is going to happen at the next stage of the proceedings. And certainly, we would like the Court to hear and consider our views on that matter in conjunction with our next motion before we lock in language like this or like some of the language that precedes this particular sentence.

Finally, I would like to get to the question with respect to the notice and the form of exclusion of warnings. And I would point out to the Court that from this point on in this notice we become overwhelmed with large, large type warnings. Now, I am not saying that it isn't appropriate to give stockholders fair warning of the fact that if they

execute the form to exclude themselves, that they are going to, therefore, be excluded from the class. And, indeed, at Paragraph 7 of our proposed form we underline, which would be in capitals or bold type when it was printed, that if any member wishes to be included in the class, there is no need to take any action whatsoever at this time.

However, in the form of papers we get from plaintiffs, we see in Paragraph 7 in bold type the warning that "If any stockholder elects exclusion, he will forever forfeit his right and the rights of his heirs and assigns to receive any amounts which the Court may award to former shareholders who do not exclude themselves from the class," and then in small type, "There is no guarantee the Court will make such an award."

And then on the next page at Paragraph 9 we see in large type, "No action is required if you do not affirmatively want to exclude yourself from the class," and then flip over to the form of election, and it starts off, "Execute this document only if you want to be excluded from the class." And then you flip over to the next page of that same execution and there is in large type, "Former UOP stockholders

desiring to be a member of the class should not execute this document."

And we submit, Your Honor, it just overdoes it. It is in the notice. We would put it in the notice once with emphasis. But the cumulative effect of all this is to create an impression which we think is inappropriate for this stage of these proceedings.

Finally, I turn to the proposed publication notice. And in particular, I would ask the Court to compare the last sentence. Both notices, proposed notices, only have two sentences. But I would ask the Court to compare the last sentence of our publication notice and the last sentence of the other side's publication notice.

We would tell the stockholders that the Delaware Supreme Court recently reversed a post-trial judgment in favor of the defendants, enlarged the class of former UOP stockholders entitled to participate in any possible recovery of money damages and remanded the case to the Delaware Court of Chancery for further proceedings. We believe that is a fair description of the present status of these proceedings, gives fair notice to stockholders that something has happened that

is favorable to the plaintiffs, and alerts them that there might be possible money damages here and that there are further proceedings in this Court.

And I would contrast that to the excerpts from a 34-page opinion. I am not sure they even all appear this way in that opinion. It is sort of a piecing together, as I have looked at it, that would go out in the publication notice that has been proposed by the other side, where they would state that the Delaware Supreme Court recently held that the merger did not satisfy any reasonable concept of fair dealing and remanded the case to the Delaware Court of Chancery to determine the fair value of UOP shares. I don't believe that is what the Court said. I don't believe that it is necessary to get into that kind of a fight at the notice stage.

I think the form of notice we have suggested is more business like and more fair. I think what we are to determine next goes to questions such as the fairness of the price at a minimum and to other matters, and to say that the merger is unfair at this point I think is premature in light of what the Supreme Court has said.

That is our position. And I don't want

to take more time on this. We think it is important. All the issues that I have mentioned, I believe, have importance, some more important than others.

Certainly, the Court ought to take, we believe, a good, hard look at the two forms of notice. We think when that is done that the one we have submitted will commend itself as a reasonable attempt at compromise. And I, frankly, think we have gone into more detail than we had to to accommodate plaintiffs. Certainly, I believe it will commend itself to the Court if notice must be sent as being the one that is really the more fair form of notice.

Thank you, Your Honor.

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

MR. PRICKETT: Your Honor, I will be very brief, since we have Mr. Halkett waiting in the wings with his other motion.

THE COURT: Yes. Let's not go back over each and every item. I assume we don't have to do that.

MR. PRICKETT: No. I agree.

Your Honor, first of all, Mr. Sparks concedes discretion, but he says this is not the case

in which Your Honor should exercise discretion so far as the cost and burden allocation. He doesn't ever suggest to the Court what is the case when the burden is going to be shifted. And I suggest to you that until he can suggest a case where the discretion is shifted, this is the very case, because he can't think of a case in which there is more going for the plaintiff that the Court should exercise what they agree that it has; that is, discretion to do it.

The Wood case, sure, there they imposed the burden on the plaintiff. But the Court reiterated the fact that under Delaware law the Court has discretion.

Mr. Sparks suggests that his notice is fairer, and he suggests that ours overreaches. I suggest to you that a lot of the stuff that is found in that notice is garbage. That is, it relates to things that went on before.

What is Mr. Sparks trying to do? Is he genuinely interested in informing all of the stockholders now, or is he interested in perhaps justifying somewhat the positions that he has held and perhaps confusing these stockholders, who have not heard anything for five years? Is he really interested in

warning them as to the perils of opting out? I don't think he is. I think he wants as many to opt out as possible, and I don't think he wants to think about the small stockholder and really say be careful.

And I suggest to the Court that the Court take a look as to which is the set of forms that is fairest to the small stockholder of UOP, as to whom the Supreme Court, no matter what he says, has found was not fairly treated.

Now, so far as the suggestion as to how they utilize it, I don't care who they use, Chemical Bank or Delaware Trust or their transfer agent. But I do suggest that when you contrast the availability of administrative agents, that the disparity between Mr. Weinberger and his attorneys and that of Signal, Wheelabrator or UOP is more. They have a lot of options of the way to do this.

You know, I think Delaware Trust is at hand and close to both counsel. It has a lot of experience on this.

There is a suggestion that we are building up a structure before the time that we need to get into a claim procedure. Your Honor, let me be perfectly frank on that. I think that as in the Mendich

case, if we ever get to the situation where there are claims to be paid, this is going to be what the Vice Chancellor described as a nightmare. Why? Because five years have elapsed and no notice has been given. And therefore, looking forward to that, the Court should do what would facilitate the situation if there is the necessity of going forward with the claim procedure.

And it may never happen. It may not. Your Honor may be persuaded that $21 was fair. We think there is a problem with that in view of what the Court has said about $24, but that is not the time. But at least every step that can be taken to facilitate what will be a large burden if it ever happened should be done.

And I think that the procedure that we contemplate is designed not only to get fair notice to the stockholders but also is designed to obviate the problems. And we think that in this situation we come back again to what is the object of this exercise. The object is to get notice to the people who own that stock and that everything should be measured in terms of what is its ultimate effect.

There is a suggestion that it is unfair to name Arledge and Chitiea. Well, Your Honor, anybody

who reads the opinion is going to read that. And that opinion, after all, is the written word of the Supreme Court. It is going to be published all over. It may be embarrassing to Mr. Arledge and Mr. Chitiea. That is too bad. But that doesn't change the fact that the Supreme Court has made a decision that does utilize things that Mr. Sparks now thinks is unfair, and the same way to Lehman Brothers. I can't change that.

If they prefer that the notice to stockholders cut their names out, okay. But if they read the opinion, they are going to find that out. And it doesn't seem to me that the Court ought to struggle to protect them from something that Mr. Sparks now finds embarrassing, because the Supreme Court has found that. And it is published for all time to come in the reported cases on the thing.

And we certainly didn't put it in to embarrass them. That is a written fact of life which they are going to have to live with for all time to come. And whether it is in a notice or not doesn't seem to me to make much difference. It is published in the reports.

THE COURT: I agree. If that was the

biggest problem I had in this whole matter, it wouldn't be too difficult. But I really think we ought to get on to the other thing, Mr. Prickett. We have run out of time. We have been on this an hour and 10 minutes, and I really think I have the pros and cons of your position.

MR. PRICKETT: Thank you, Your Honor.

THE COURT: I guess it is just a matter in which I have to pick one side over the other on various points.

MR. PRICKETT: Yes, sir.

THE COURT: All right. Mr. Halkett.

MR. PAYSON: Chancellor, after five years of litigation I don't think it is necessary for me to reintroduce Mr. Halkett, but I will remind the Court he has been admitted for purposes of these proceedings.

THE COURT: The thought never crossed my mind that it was necessary, Mr. Payson, under the circumstances.

Mr. Halkett.

MR. HALKETT: Good afternoon, Chancellor.

THE COURT: Mr. Prickett, I didn't really mean to cut you off there, but I sensed that we

may have a lot of discussion on this particular aspect. And since we were short of time --

MR. PRICKETT: I quite agree, Your Honor. I think my position is on the record.

MR. HALKETT: My remarks are directed to the motion which we submitted a very short while ago. And as a preface to that motion and to put it into context, as all of us in this courtroom are aware, the Delaware Supreme Court has remanded this case to determine what monetary award, if any, should be given to the class members; namely, the former minority shareholders of UOP.

The Supreme Court has also indicated in its opinion that in arriving at the ultimate conclusion on any monetary award, there is a threshold question, which is, what standard or criterion is to be used in arriving at that determination: Either the newly articulated appraisal standard, which, if it is to be applied, is to be applied as of the date of the merger -- and I think that the Supreme Court opinion is quite clear as to that date, if that standard is to be applied -- or whether a so-called rescissory standard of measurement is to be applied. And if that standard is to be applied, it will require a

determination of value of shares as of some date subsequent to the date of the merger.

Before we all proceed further in our preparation for what might be described as the valuation or award, if any, hearing, we believe it would be helpful for all of us try to determine which standard or criterion we should be preparing to use or to meet.

The opinion of the Supreme Court is, I think, mentioned in part in our motion papers, and I would like to refer to them at the moment. And that is, at Pages 30 and 31 of the Supreme Court's opinion in this case rendered in February, 1983, the Court stated, "On remand the plaintiff will be permitted to test the fairness of the $21 price by the standards we herein establish in conformity with the principle applicable to an appraisal, that fair value be determined by taking into account all relevant factors," with a citation. "In our view, this includes the elements of rescissory damages if the Chancellor considers them susceptible of proof and a remedy appropriate to all the issues of fairness before him." In other words, this language taken together with other language in the opinion makes it clear to us that the

Supreme Court has remanded to Your Honor this question as to whether or not rescissory damages may be appropriate in this and, to use their language, "A remedy appropriate to all the issues of fairness before him."

The reason we suggest that what we have is a preliminary determination of that question goes to a matter of the utilization of the time of this Court, that of the time of the parties and a very substantial expense that may be involved in going forward from this point. Without trying to go through in great and elaborative detail, I would like to hit on those points.

One is the scope of discovery. The plaintiff has already in this action served us several weeks ago with a second request for production, a wave of interrogatories, a deposition schedule of six individuals, many of whom were previously deposed in this case. It is clear that the extent of much of the information being sought by the plaintiff is for data for a period of time after the merger; that is, after May 26, 1978.

Plaintiff's second request for production, which is quite extensive, for example, goes on and

requests all kinds of documentation and financial data from 1975 to the present in almost each case. They have even, for example, asked for such information with regard to the recently consummated transaction between Wheelabrator-Frye and The Signal Companies. Now, if it is necessary for us to get into that sort of discovery, it is going to be extremely extensive and expensive.

Number two, at this point at least I don't think any of us are really certain as to the date of the proof of value that is to be applied if some rescissory damage theory is applicable. There is also the question of expense. As we saw in the previous case, and I think our collective experiences are in cases of this kind, various experts will be required. They will need to be hired. They will need to get into this mass of data to respond to questions of value as to some subsequent periods of time. And there is also the question of the time of this Court that will be expended at the time of a valuation hearing in the future if we have to all go forward with that sort of an approach.

Now, having said all that, I think we would probably start with the premise that on the record

of a case of this kind it might not be necessary to hold the type of preliminary hearing that we envision. And, by the way, the scope of such a hearing, as we envision it, is not to begin at the beginning. We do not expect to try again the question of fairness. That has been tried. The Supreme Court has addressed itself to that subject.

However, because it is clear from the Supreme Court's opinion that their remand ties together for purposes of this question of rescissory damages or not some sort of quantitative or qualitative degree of fairness or lack of same that the Court should consider, there are a couple of points that we would like to make as illustrative of what sort of a hearing we are talking about. And as I said, I do not anticipate and I am not trying to anticipate what all would be involved in this hearing but rather to be illustrative.

On Page 19 of the Supreme Court's opinion the Supreme Court, speaking through Justice Moore, said the following: "The Arledge-Chitiea report speaks for itself in supporting the Chancellor's finding that a price of up to $24 was a 'good investment' for Signal. It shows that a return on the investment at $21 would be 15.7 percent versus 15.5

percent at $24 per share. This was a difference of only two-tenths of one percent, while it meant over $17,000,000 to the minority."

Turning to Exhibit 74, Trial Exhibit 74, to which reference is made here, the so-called Arledge-Chitiea report, the place in which these figures appear, there is one schedule entitled "Purchase at $21 a Share." The 15.7 percent figure comes from a line item entitled "Return on Equity," not "Return on Investment."

Second of all, it is clear from its content and from other evidence in the record that this was a return on equity of The Signal Companies as a whole, not a return on the investment to be made in UOP by The Signal Companies. Therefore, this statement by the Supreme Court is clearly in error.

Second of all, that error is pointed out by the further schedule that appears in that so-called Arledge-Chitiea report entitled "Summary of Additional Income," in which the schedule there does show what the expected return on the investment at $21 and $24 per share would be. The return on the investment at $21 a share is eight percent. The return on investment at $24 a share is six percent. And rather than being

a differential of two-tenths of one percent, there is a differential of 25 percent between one return and another return.

I use that, as I said, as illustrative of the fact that in this Court's determining the standards of valuation and degree of fairness, I believe the record should be amplified and all parties be given the opportunity to get clearly on the record further information with regard to this subject matter and with regard to this report. For example, I think that the Court can and should be informed. And I don't intend to testify here, but I am submitting that the evidence at such a hearing will, indeed, show where these figures came from and that anyone with access to, as they did, the UOP proxy statement, other published data and a pencil or a calculator could compile this report, looking almost exactly as it does in Arledge and Chitiea. Now, I say that because I think it is important to put that into context.

Further, there is, I think, an element in the Supreme Court's opinion on this subject, and then I will leave it for further proceedings, and that is at Page 8. The opinion reads at the top of that

page, "Arledge and Chitiea concluded " -- and I emphasize the word "concluded" --"that it would be a good investment for Signal to acquire the remaining 49.5 percent of UOP shares at any price up to $24 each." That is not the evidence in the record. There is no evidence to support that any such conclusion was ever reached by Messrs. Arledge and Chitiea. And I think that we ought to be given an opportunity and this Court ought to be given an opportunity to see both what the testimony in the record is and, if necessary, to take further testimony on it.

The other subject matter about which I will not go into detail now that I think ought to be the subject of further review, and only because it seems to have been the second prong of the Supreme Court's determination here of fairness, is the timing of the Lehman Brothers report; i.e., the shortness of time. And I think, again, the record perhaps needs some amplification on that subject matter as an assistance to this Court in going forward and deciding whether or not to apply the standards of rescissory damages.

If this Court does grant this motion, then what we envision is the following: That there

would be a hearing to be set in the near future and with any discovery limited to the issues to be considered at that hearing. The purpose of that hearing is to hopefully have the Court conclude after that hearing whether or not the Court will consider the application of the criterion of rescissory damages to this case. If the Court decides that no rescissory damages will be considered by reason of the nature and elements and degree of fairness or lack of same, then we would go to a further hearing to determine the fair value of the minority shares as of the date of the merger, applying the newly articulated appraisal standard, and any discovery that was considered necessary or preparation by either side would be conducted between that first hearing and the second hearing to determine that value.

If this Court were to decide that it would after the first hearing apply rescissory damages, then it would be important to determine what the appropriate date of value would be, and then both sides would go forward with discovery and other preparation to the evaluation hearing on the basis of a rescissory damage approach as of the established date of value.

It is, of course, I think, possible that the Court may after the first hearing determine or decide that it cannot determine one way or the other whether it wants to apply the standard of rescissory damages or not. If the Court were to so do, then what we would do is have a subsequent hearing. And I suppose we would do that which we are now seeking to avoid doing: Prepare for both dates of value, both the value of the shares as of the date of the merger, applying the newly articulated appraisal standard, and to prepare for evaluation testimony as of some subsequent date were the Court then to decide at the conclusion of that hearing to make his choice.

Now, obviously, as a part of this whole idea, but which I don't think is necessary to incorporate at this point, is that we would determine what our discovery on both sides would be based upon the Court's ruling. I suspect that the Court, having ruled on this motion which is before you today to establish such a preliminary hearing, I guess, or an initial hearing, would work out a discovery schedule as to scope and time. I would hope that we could work that out with plaintiff's counsel based upon your ruling here and only if we were unable to do that

perhaps to come back to the Court to talk about discovery. But clearly, what we feel, given the time that has been spent and the money that has been spent over the years on this case, it would be to everyone's, including the Court's, advantage to proceed in the manner in which we are asking the Court to do.

Thank you, Your Honor.

THE COURT: All right. Let me ask just a couple questions, Mr. Halkett, to make sure I understand your position on this. I am not sure I fully appreciate what you mean by discovery we might need hereafter. And I say that with reference to the fact that we did try the case, and I did hear what there was to be heard at that time.

You thus feel that there is some need to take further evidence or to take discovery, I guess, with regard to the sole issue for which the remand has been made; that is to say, the damage aspect?

MR. HALKETT: Well, let me respond.

THE COURT: I am not saying there is anything wrong with that. Don't misunderstand me. I am just trying to appreciate what it is you are suggesting.

MR. HALKETT: As is frequently the case

in trials, it seems that the issues, the material facts, the witnesses, the focus, if you will, of the trial as it starts out sometimes shifts, and those things which are deemed important become somewhat less and those which no one paid much attention to begin to stand out. I think it is unfortunate in this case that the issues on which the Supreme Court chose to focus, in fact, never arose to any degree of prominence during the course of the trial itself. And therefore, I think that neither side really focused very much on these questions, particularly this Arledge-Chitiea report. And as I mentioned, the discrepancies that we see I don't believe would have been a part of the record had we had the focus at the outset.

We certainly would propose, if necessary, to introduce either or both of the authors of that report so that they could explain number by number, item by item, what those items and numbers mean and how and where they came from and how they computed them and things of that kind.

Mr. Prickett did take the depositions of both Mr. Arledge and Mr. Chitiea. However, I reviewed them the other day, and the amount of time spent on them by Mr. Prickett is certainly not extensive and

does not go into much detail of the type that we are talking about. Having so said, it may very well be that Mr. Prickett may want to redepose those individuals on that subject matter prior to a trial on that issue, and we would not in any way seek to foreclose it.

There were others who participated in the preparation of that report. They may wish to engage in some discovery on that score. I don't know.

But what we do think is, in fairness both to Your Honor as well as to the appellate court, to the Supreme Court, it might be to everyone's advantage in this case to have the opportunity to amplify the record on these two or three issues on which the Supreme Court has focused its attention.

THE COURT: And I take it you are advocating that position because you feel that that has a direct bearing on whether the damage investigation, if you will, is to be for rescissory damages or for the appraisal-type remedy.

MR. HALKETT: That's correct, Your Honor. That is the purpose.

Now, if this Court were prepared today to tell us on the basis of the record that you were

able to state to both sides that this is not a case in which you would apply a standard of rescissory damages, then I would sit down. If that gets to the --

THE COURT: I wish I could accommodate you, in the interest of judicial economy and that of the parties and all. Of course, I can't at this point.

MR. HALKETT: No. I say that obviously to simplify what the purpose, of course, of our motion is.

THE COURT: Right. Let me ask you one other thing. What is your concept or understanding of what is meant by "rescissory damages"?

MR. HALKETT: My understanding is that that would be a sum of money which would represent the then-value of the minority shares as of some subsequent date; for example, the date of judgment in this case or the date of trial in 1980. There are several possibilities, with the concept being that but for pragmatic reasons the Court would have awarded as of that date rescission, requiring that those shares be returned to their former owners and returned for a return quid pro quo. But practically being unable to do that, there should be an exchange or a net of dollars as of that date in lieu of the exchange of shares.

So that that is a shorthand of what I understand it to be. And my entire understanding of that subject and my statement now is derived from what I perceive to be the teachings of Lynch versus Vickers.

THE COURT: That is all I had reference to also. I guess I have never had to apply it, so I don't have any experience in the area. I guess, hopefully, I am not alone in that respect. I guess the other side of it is, I don't know who has, but maybe we will all find out.

I got the feeling from Lynch versus Vickers that we were talking about something as of the day judgment was entered in that area, but I see your particular point here, because, in effect, a judgment has been entered by the appellate court, not by the trial court. So that if there is to be rescissory damages, then we talk about the date of my decision, the date of the Supreme Court's decision or the date at which we are then exploring what the damages are. I think I see what you are saying.

All right. Thank you, Mr. Halkett.

MR. HALKETT: Thank you, Your Honor.

THE COURT: You no doubt wish to respond, Mr. Prickett.

MR. PRICKETT: Yes, though perhaps what I say is going to be a trifle obvious. And in view of the hour, I won't indulge myself and be unfair to the Court and say in perhaps as much strong detail as I would like to.

Let me make it clear that we oppose this motion lock, stock and barrel. Why? Let me take the most elementary reasons, first of all.

At least what I am hearing is a motion for reargument addressed to this Court on the decision of the Supreme Court. So far as I am concerned, the points that Mr. Halkett makes might well have been the subject of a motion for reargument of the Supreme Court's opinion, but they have no place in this Court. The Supreme Court has spoken. There was no motion for reargument. And that is fixed in concrete. And you can't reargue the case to the Court below simply because you disagree or because you didn't say something in the Supreme Court or you didn't say something in this Court which you might have said. That opinion stands, and you can't reargue it here, nor do I think can you reargue it in the form of saying you are going to amplify the record by saying something that you did not say at the time the matter was at issue.

The depositions of Arledge and Chitiea were taken. I explored to the extent it was necessary from the point of view of my case that point. Mr. Halkett was present. He had every opportunity to do it if he wasn't satisfied with what was there, or he could have brought them to trial, but he didn't do so. He now says that everybody would be well served by having Mr. Arledge or Mr. Chitiea or maybe some people under them come in and explain some more. I wouldn't be well served.

So far as I am concerned, the Supreme Court has examined it after full opportunity by both sides to make the record and has made certain determinations. And I at least would oppose any attempt at this point to amplify or reargue the points.

As I have indicated in my reargument on the other motion, the Supreme Court's opinion is now a given, and we are not free to reargue it, and we are not free to modify it. There are findings there.

But beyond that, we would oppose the motion, which in point of fact we have heard for the first time aside from the brief writing this morning, because what Mr. Halkett is proposing is two trials. So far as we are concerned, this case is remanded by

the Supreme Court for a determination of the fair value of the shares that were taken by Signal. That is what we have got to do. And to suggest that we are going to have some limited discovery to amplify the record on the points he wants to make, then a hearing, then a decision, and then some more discovery and then a hearing is not at all what the Supreme Court suggested, nor do I hear of any case in which that has ever been done, in which the Court would have a hearing to determine evidence points and then make a determination.

The usual case is that there is discovery. There may be points that are brought on by that. They are then solved by the Court, and then the Court goes forward and holds a hearing. We don't have two trials in which we are going to determine what we are going to hear at the second trial. So that we are seeking to impose an evidentiary burden -- that is, by a second hearing -- that I have never head of. And that doesn't mean that it doesn't exist, but at least I have never heard of it.

THE COURT: What do you perceive the case to be remanded back to me for from the viewpoint of the plaintiff? Is it to investigate the price, the

fairness of the price, or is it to investigate the amount of damages, or are the two indistinguishable? That seems to be the area we are in.

MR. PRICKETT: I don't think there is much question about what the case is remanded for. The Court has, in the first place, determined liability. That is not an issue. The question that is remanded by the Court is a determination of what was the fair value of what was taken from the stockholders by Signal in an illegal procedure. And it is measured by the standards set out in the Supreme Court's opinion; that is, the new concept of appraisal including rescissory damages. And that is what the Court has got to determine: What was the fair value of what was taken.

Now, Your Honor has asked Mr. Halkett what are rescissionary damages. I don't think that is difficult. If we had moved to enjoin this case and the Court had granted it, there would not have been a transfer of any property from the minority shareholders to Signal. Where the injunction is not granted but it is very close to that and then the Court determines that it was unfair, then the Court says, "We are going to backtrack that and we are going to give back

what you had and you give up what you have got," and that is essentially what goes on in rescissionary damages at this point.

Signal still has our shares. The Supreme Court has found, and we all know that because of the passage of time, you can't make Signal give back the shares that we had. In the first place, they have gone through the Wheelabrator thing. But there are a lot of reasons on both sides where that won't work. But that doesn't preclude the fact that what we are entitled to is not some theoretical value. We are entitled to what they took from us. And that is what they still have, only it is translated into money.

Now, Your Honor may not realize it, but what Mr. Halkett may be really angling for is a date that is prior to the present date. That is, there are some cases, the TransOcean case, where there comes a time where the Court determines that there should be a cut-off, the stockholders should have done something else, the date of the judgment or something like that; not this case at all.

They have our stock. They continue to have it. They are continuing to make a bucket of money out of it. And why they want to rule out

rescissionary damages is, they don't want anybody to look at what that stock has now become worth, you know. Their predictions of what it would do pale in significance compared to what it really did do. And there are cases, and at the appropriate time we will show them to the Court, that say that where a wrongdoer has taken the stock of somebody, they then either give the stock back or they give back what the stock has actually made. And that is what they want to preclude here, and that is what we are after.

We are going to show you that, in fact, the conservative approaches that Signal made for the value and the benefit that they got are insignificant compared to the startling performance that UOP has had and which until this opinion came down they published regularly to the Signal stockholders, saying "Look at the deal we made on UOP by grinding out the minority. We have gone gangbusters since then."

And, sure, they would like to have us go back and calculate theoretically what the correct price was. They don't want Your Honor to look and see that what they presently have is worth a lot more.

The cases on rescissionary damages say that the wrongdoer will be made to give back what he

has taken plus any speculative profits that he has made. Better the speculation with the profit of the person defrauded go to that person than that the wrongdoer keep it. So that is what we are really talking about. And what we are talking about is rescissionary damages as of the time they give it back, including everything they made from what they took from us.

THE COURT: Under that isn't it imperative that you then also have to determine what the value of the item was at the time it was taken?

MR. PRICKETT: You know that. They gave $21, and you have to give a credit for that. They paid $21, and they get a credit for that.

THE COURT: Well, I appreciate that. I guess my problem with that is, Mr. Prickett, I thought one of the main reasons we came to court was because $21 wasn't the right price.

MR. PRICKETT: That's right.

THE COURT: Maybe I am not making myself clear. Rescissory damages, it seems to me, as I understand what you are saying, means you are entitled to be put back in just the same position dollar-wise as if you had retained the stock and held it for the

past five years and enjoyed the benefits that you say --

MR. PRICKETT: Which they have enjcyed.

THE COURT: Yes. So that is the starting point. And to get back to that starting point, the stock was trading for one price. Another was offered in the cash-out merger, and you came to court saying it was worth still another at that time. But all I am asking is, before I can get to rescissory damages under your approach, do I also have to make a determination, an appraisal-type determination, as to was it worth $24 when it was taken, so that I can then compute the degree of deprivation of that value over the five-year period. I am not sure. It just occurred to me as you were making that argument.

MR. PRICKETT: Well, you know, Your Honor, I think it is very straightforward if you go to rescissionary damages. You don't have to determine what the fair price was then. You simply have to determine what is it worth now. And then you have got to say, just as was suggested in TransOcean, they paid 21. They get a credit for that. They get a credit for the interest on $21 forward to the present, and they pay the difference between that and what the wrongdoer continues to hold.

THE COURT: I am with you on that. It was just something that you said in your earlier argument about the value as of the time. Maybe I misunderstood your emphasis.

I see what you are saying now. As far as you are concerned, simply find what it is worth now and deduct $21.

MR. PRICKETT: Plus interest.

THE COURT: Plus interest.

MR. PRICKETT: That is the rescissionary approach.

I think the other approach is to determine then what the fair value was by the liberalized standard, including the actual future prospects, and measure it forward. But let's get back to what the motion is really about.

THE COURT: Fair enough.

MR. PRICKETT: Because that is where we stand. It seems to us that it should be denied. And what the Court should do is to indicate that it will do what the Supreme Court suggested; that is, retry the case on the issue of the fair value, and that under the liberalized approach delineated, mandated by the Supreme Court, all evidence on value except the value

that is attributable to the results of the merger will be entertained by the Court, and then the Court will determine what the damages are.

Now, in any case that I have ever tried the Court does not make a lot of preliminary rulings on evidence. The Court generally indicates that under the scope set out by the Supreme Court you go forward under the liberalized concept of discovery, what is relevant and what may lead to the discovery of evidence. You don't try and make rulings on all of that. You go forward and then you hear the case and you make a determination and you make a judgment. What is the practical effect?

We think this motion should be denied. We think we should go forward and do the discovery that we have already started on, and this case should then go to a hearing for what the determinations of values are. There is no motion to stay our discovery. It is outstanding. And as Mr. Halkett said, it was filed a couple of weeks ago, and it is pretty near due. And we think that the Court should deny this motion and should allow us to proceed with the discovery that gets this case ready so that it can be tried and a determination made as to what the value of the shares is.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Prickett. On that point, on the discovery, let me simply interject that, Mr. Halkett, from your standpoint, I guess it is up to you. Mr. Prickett says there is no application to stay discovery pending. I, quite frankly, would be prepared to stay it unless you want to go forward with it. I say that only for the reason that the Supreme Court decision says the matter is remanded for further proceedings consistent herewith. And I haven't determined what they are yet, so I haven't the faintest idea what discovery is all about.

MR. PRICKETT: Oh, Your Honor, let me concede. That is, I would concede that until Your Honor decides this motion, I am not going to go forward.

And furthermore, I indicated in our notice of deposition at least to Mr. Halkett that while we set out specific dates, we work out the dates with him. What I do oppose is a general holding of all discovery indefinitely.

And I would agree on the record here that Ms. Marino is taking down that we would agree that the discovery be held to a reasonable time after Your Honor has made a decision, so we don't specifically

need that.

THE COURT: On this motion.

MR. PRICKETT: On this motion. That's correct.

THE COURT: All right. Fair enough.

MR. HALKETT: To put the last little bit in what may be unnecessary to close that loop, the present motion on which we are appearing reads as follows: "Motion for preliminary hearing to determine appropriate standards to be considered at the fairness hearing on remand and to vacate discovery pending such determination."

THE COURT: All right. Good point. I didn't read it that closely.

MR. HALKETT: If I can just reply briefly to a few points made by Mr. Prickett, first of all, this idea that there has never been in the history of jurisprudence a suggestion such as this to bifurcate the issues obviously goes too far. There are obviously many examples of bifurcation as to liability and damages, with discovery on damages stayed until after determination on liability. There are cases on which certain issues have been tried first where there are certain defenses, such as statutes of

limitation, which may make sense to the overall utilization of judicial and other time, et cetera. So I don't think that this is that unique nor startling.

Mr. Prickett's point seems to get lost when he says that the reason that we are doing this is that we don't want anybody to know what the value of the stock has become when he follows that by telling us of all of the information that Signal has subsequently published, giving precisely that information. That is not our point at all.

Our point is the scope of the discovery, the nature of the discovery in terms of its depth and detail, plus the expense. And it is also, of course, the case, not unusual in this case but in similar cases as well, what you have is a non-reciprocity of the burden of discovery. Almost all of it runs to the defendants. And the brake that sometimes can be put on discovery where there are parties on both sides susceptible to it is not present in a case of this kind. It all lands on us.

I am still not at all clear, finally, on what Mr. Prickett's argument is with regard to the date of value. I gather that what he is saying is that his argument is that this Court should consider

as the date of value only the date to be set and to be held for the hearing on the value of shares and, presumptively, that both or all parties would be attempting to ascertain their economic value of the minority shares as of that date, presumably sometime in 1983.

I do not subscribe to what Mr. Prickett at least seems to suggest, that that is what is mandated by the Supreme Court's opinion. I think quite the contrary. To the extent that that seems to have been what the Supreme Court was saying in Lynch versus Vickers II, I think that this current opinion reverses that. And I think that although there are several references in the opinion, on Page 31 what the Supreme Court is saying is this: "Under such circumstances the Chancellor's powers are complete to fashion any form of equitable and monetary relief as may be appropriate, including rescissory damages. Since it is apparent that this long-completed transaction is too involved to undo and in view of the Chancellor's discretion, the award, if any, should be in the form of monetary damages based upon entire fairness standards; i.e., fair dealing and fair price," plus we have that other excerpt which I read before.

And it seems to me that what the Supreme Court is saying is that for the future it will be up to the Chancellor to consider all of the factors, including that of fairness, and to determine whether or not to adopt a rescissory element of damages or to choose not to, based upon two criteria. One is the so-called entire fairness, and the other is the question of whether or not they are too speculative -- I forget the exact words -- of determination, which gets us right back to the reason for this inquiry, because it is also clear that the Court does, indeed, say in its opinion that where the appraisal standard is to be applied -- and I gather that the appraisal standard is to be applied if the rescissory standard is not to be applied -- is to take place and be applicable as of the date of the challenged transaction.

And as the Court states in its opinion someplace in here -- I can't find it just looking quickly -- that certainly, as has traditionally been the case, one standing in the position of a party in May, 1979, might take into account those criteria which somebody as of that date might reasonably and nonspeculatively have contemplated for the future as an element of appraisal, if you will, as of that date,

which is a far different thing from saying that you apply the nonrescissory standard by taking current values.

And other than that, Your Honor, unless the Court has any questions --

THE COURT: No, I think not. It has been an interesting discussion, and we have been at it a long time. I really don't know of anything else I have to ask right now. Thank you.

MR. HALKETT: Thank you, Your Honor.

THE COURT: All right. Gentlemen, thank you all. I will take it under advisement, as usual, and see what I can do with it, see what further trouble I can get us into, I guess, or difficulty, as the case may be. Thank you very much for your presentation.

(Court adjourned at 1:10 p.m.)

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C E R T I F I C A T E

I, LORRAINE B. MARINO, Official Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 1 through 76 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above stated cause, before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this day of March, 1983.

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

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Typed by: Lucinda M. Reeder