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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WILLIAM B. WEINBERGER
and EDWARD U. NOTZ,

Plaintiffs,

v.

UOP, INC., THE SIGNAL
COMPANIES, INC., and
SIGCO INCORPORATED,

Defendants.

Civil Action No. 5642

FILED
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REGISTER IN CHANCERY
JOHN D. KELLY III

PLAINTIFFS' OPENING POST-TRIAL BRIEF
FOLLOWING THE DAMAGE TRIAL

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NATURE OF THESE PROCEEDINGS (Note)

After a preliminary hearing requested by the defendants following which this Court refused to rule that rescissory

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Note: Pages of this Court's opinion, Weinberger v. UOP, Del. Chan., 426 A.2d 1333 (1981), will be referred to, thus: "Weinberger, Chan., 1268". Pages of the Supreme Court's opinion, Weinberger v. UOP, Del. Supr., 457 A.2d 701 (1983), will be referred to, thus: "Weinberger, Supr., 710". Pages of the preliminary hearing on rescissory damages will be referred to, thus: "(Rescissory 29)".

Exhibits at the original trial will be referred to by their original exhibit numbers, i.e., plaintiffs' exhibits emanating from Signal are referred to as, for example, "(PX 5)"; exhibits emanating from Lehman Brothers are referred to as, for example, "(PX LB 5"), and exhibits emanating from UOP are referred to as, for example, "(PX U-100-9)". In the course of the trial, the plaintiffs introduced eleven exhibits which will be referred to as "(PX 1, Trial)", "(PX 2, Trial)". At times, for clarity, an exhibit will be briefly described as, for example: "(PX 298 - Minutes of the Executive Committee of the Board of Signal 2/28/78)". The defendants collectively introduced forty-one exhibits at trial which will be referred to as, for example, "(DX 10)". Pages of depositions throughout will be referred to by the name of the deponent, thus: "(Crawford 39)". Where more than one deposition has been taken, the deposition will be further identified by date, thus: "(Bodenstein (6/13/84) 17)".

Pages of the original trial transcript will be referred to by the transcript page number, thus: "(TR 100)", or where incorporated in the Supreme Court Appendix, thus: "(A100)". Pages of the transcript of this damage trial will be referred to, thus: "([day] Damage [witness] [page])", for example "(3 Damage Purcell 73)".

Plaintiffs' exhibits at the damage trial will be referred to as, for example, "(PDX 25)". Defendamts' exhibits at the damage trial will be referred to as, for example, "(DDX 13)".

damages should not be awarded, this case was retried on the issue of damages between Monday, June 18, 1984, and June 22, 1984 (the "damage trial").

By agreement, the parties provided the Court with their respective experts' reports prior to the damage trial. Exhibits, depositions and testimony at the original trial of May 1980 ("the original trial") and the rescissory damage hearing ("the rescissory hearing") are deemed part of the record of the damage trial (Final Pre-Trial Stipulation, ¶5).

The parties agreed to, and the Court has ordered, a revised brief schedule in which there will be simultaneous service and filing of opening briefs on July 27, 1984, and reply briefs on August 24, 1984, on the issue of damages. (Note)

This is the Plaintiffs' Opening Post-Trial Brief.

Note: The issue of an award of plaintiffs' attorneys' fees and expenses was by agreement postponed until after the Court's decision on damages (5 Damage 224).

STATEMENT OF FACTS AS TO DAMAGES

A. The Fixing of the $21.00 Price

In January and February, 1978, Signal, having been turned down on two friendly mergers, decided to buy out the 49.5% of the stock publicly held by minority stockholders, Weinberger, Del. Supr., 457 A.2d 701, 705 (1983). Signal decided, in the words of the Arledge-Chitiea Report (PX 74), that the purchase of the minority's shares would provide "an outstanding investment opportunity for Signal (better than any recent acquisition we have seen)", Weinberger, Supr., 708. Mr. Arledge noted on the report "Future earnings potential is real key to value" (PX 74). The Supreme Court found: "Arledge and Chitiea concluded that it would be a good investment for Signal to acquire the remaining 49.5% of UOP shares at any price up to $24 each". Weinberger, Supr., 705.

Signal decided to cash out the minority at a price range of $20.00 to $21.00, Weinberger, Supr., 705-707. This price range was not based on any determination of the value of minority shares by an outside investment banker, chartered financial analyst or any internal study by Signal itself as to what a proper price would be for the acquisition of 100% of control, Weinberger, Supr., 705-706, 708. Instead, the $21.00 price was based in part, as this Court, Weinberger, Del. Chan., 426 A.2d 1333, 1354 (1881), and the Supreme Court, found, Weinberger, Supr., 705, on the fact that some three to four years before, a majority of UOP's then stockholders had voluntarily tendered their shares to Signal in a $21.00 tender offer. Indeed, the only justification for the $21.00 price in the Arledge-Chitiea Report and in the pages of that report given to UOP's directors was a comparison with the 1975 tender offer (PX 74, p. 4, "Why $21 per share"). Signal simply fixed on $21.00 because certain "numbers" in UOP's 1977 performance appeared to coincide with UOP's 1974 "numbers". (Note) As this Court found, Weinberger, Chan., 1354:

> "Moreover, I am satisfied that the primary factor considered by those concerned was the comparison of Signal's 1978 proposal with the situation prevailing at the time of the 1975 tender offer. ***
>
> "In early 1978 UOP was in substantially the same financial condition as it had been at the end of 1974 and was showing comparable earnings."

But, UOP, with Signal's leadership and financial backing and with Come-By-Chance behind it, was a far stronger company in 1978 than the UOP that had been forced by its own economic circumstances to surrender control to Signal: UOP had acquired an infusion of capital, new leadership and direction (DX 11). As this Court commented in connection with the Lehman Brothers 1976 report (PX-LB 40), Weinberger, Chan. 1347:

Note: Though cited in both the 1980 and 1984 Dillon, Read Reports, Signal's expert, Mr. Purcell, finally conceded at his deposition that the $21.00 price in 1975 had no bearing on the price in a cashout merger four years later to a different group of shareholders (Purcell (6/13/84) 55). See also 2 Damage Purcell 175, 193-94; 3 Damage Purcell 117-118.

> "Moreover, plaintiff observes that since this confidential analysis was performed in 1976, it was necessarily done hard after the 1975 Come-By-Chance disaster which caused UOP to suffer a $35 million operating loss for 1975. If it was the feeling of Lehman Brothers that UOP was a good investment for Signal in 1976 at $21 per share despite its poor 1975 performance, plaintiff wonders how Lehman Brothers could have seriously suggested in 1978 that $21 was a fair price to the minority in view of UOP's vastly improved performance in 1976 and 1977."

There was no attempt by Signal or UOP's management or board to negotiate the merger price through arm's length bargaining, Weinberger, Supr., 709-711. Rather, the $20.00-$21.00 price range was decided on unilaterally by Signal and was accepted by Mr. Crawford, President of UOP, and by the UOP Board, Weinberger, Supr., 705-706, 711.

B. Lehman Brothers' Fairness Opinion

To promote Signal's plan to cash out the minority, "Signal's man", Mr. Crawford, inquired of Mr. Glanville, a managing director of Lehman Brothers and a UOP director, whether Lehman Brothers could opine on the fairness of a $20.00-$21.00 cashout price. Weinberger, Supr., 706:

> "Crawford telephoned Glanville, who gave his assurance that Lehman Brothers had no conflicts that would prevent it from accepting the task. Glanville's immediate personal reaction was that a price of $20 to $21 would certainly be fair, since it represented almost a 50% premium over UOP's market price."

Intense bargaining followed, not over the cashout price but rather over what Lehman Brothers would charge for publicly stating what Mr. Glanville could opine so casually over the telephone, Weinberger, Supr., 706, 711.

The Supreme Court found that Lehman Brothers' fairness opinion was hurriedly prepared in only 3 business days and that the responsibility for the hasty way it was slapped together rests with Signal, Weinberger, Supr., 706-707, 712. Moreover, Weinberger, Supr., 712:

> "[The Proxy Statement] also advised the shareholders that Lehman Brothers had given its opinion that the merger price of $21 per share was fair to UOP's minority. However, it did not disclose the hurried method by which this conclusion was reached."

Thus, the Supreme Court concluded:

> "There was no disclosure of the circumstances surrounding the rather cursory preparation of the Lehman Brothers' fairness opinion. Instead, the impression was given UOP's minority that a careful study had been made, when in fact speed was the hallmark, and Mr. Glanville, Lehman's partner in charge of the matter, and also a UOP director, having spent the weekend in Vermont, brought a draft of the 'fairness opinion letter' to the UOP directors' meeting on March 6, 1978 with the price left blank. We can only conclude from the record that the rush imposed on Lehman Brothers by Signal's timetable contributed to the difficulties under which this investment banking firm attempted to perform its responsibilities. Yet, none of this was disclosed to UOP's minority." Id.

Actually, though the one-page letter opinion of Lehman did not reveal it, it turned out that Lehman Brothers' sole backup for opining that $21.00 was fair was simply because of the same coincidental similarity between some of UOP's "numbers" in 1974 and 1977 (PX LB-5, Table 1, p. 4), as compiled by a Mr. Pearson, a junior associate at Lehman Brothers (Pearson 4, 29-32; Seegal 80).

C. Events Between the Board of Directors' Meeting and the Merger Closing

The $21.00 merger price "capped" UOP's stock price, Weinberger, Chan., 1356, although the stock market generally had risen 13% between February 28, 1978 and May 26, 1978, the date of the stockholders' meeting, 426 A.2d at 1355-1356. (Note) During this period, Signal's stock rose from $28.00 to $39.00 (TR 374, 1230; A-903; A-1122). Neither the Signal nor the UOP Board considered the impact of the general market rise on the fairness of the merger price, Weinberger, Chan., 1353-54, 1355-56. Nor did Signal's or UOP's Board consider whether it was fair to the UOP minority that Signal would receive the entire second quarter dividend in view of the fact that the merger closing took place toward the very end of the second quarter, especially since the $21.00 price was not based in any way on the inclusion or exclusion of the second quarter dividend (Purcell (6/13/84) 51).

Note: Defendants did not dispute that UOP's beta factor (i.e., the sensitivity of its common stock to increases and decreases in the overall market) was 1.15 in 1978 (3 Damage Purcell 42-46, 62-63, 69-70). Thus, if the overall market rose 13%, UOP's stock could have been expected to rise approximately 15%. The fair inference is that UOP's stock would have behaved in accordance with its beta and, hence, the market price of UOP's stock would have been $16.70 at the time of the merger (excluding premium) but for the merger announcement (3 Damage Purcell 45, 69).

D. The Original Trial

At the original trial, Signal defended the $21.00 price on the ground that it was coincidental with the price of the 1975 tender and direct purchase (TR 1698; Ex. 298; Ex. U-7). Signal did not retain Lehman Brothers to defend the $21.00 cashout price. Indeed, though Lehman Brothers was a named defendant, neither Lehman Brothers, Signal or UOP called Mr. Glanville nor any other Lehman employee (TR 593; Plaintiffs' Opening Post-Trial Brief on Remedy, p. 7, et seq., August 18, 1980).

The defendants retained Dillon, Read & Co., who opined that the $21.00 merger price was fair (DX 40). Dillon, Read's opinion was based on four factors: the three elements of the Delaware Block valuation method (market value, investment value and asset value) and the structure of the transaction (DX 40, p. 3). One of the factors on which Dillon, Read concentrated most heavily in rendering its opinion was that the transaction was structured so that there was a meaningful vote of the minority stockholders (DX 40, pp. 3, 5-7). Dillon, Read also cited the success of Signal's 1975 $21.00 tender offer as an indication of the fairness of the $21.00 price (DX 40, pp. 5-6; Purcell 6/13/84 55).

Signal and UOP's Post-Trial Brief (pp. 11, 27, 125-127) noted also the success of the 1975 tender offer and acknowledged that Dillon Read's opinion was based on the Delaware

Block approach and the structure of the transaction. Moreover, the brief argued that fair value was to be based on the Delaware Block method, relying on Dillon, Read's report to establish value under that method (pp. 129-141). Thus, this Court concluded:

> "The Dillon, Read report, as presented at trial by William K. Purcell, its Senior Vice President, approached the task in the manner generally approved by the Delaware case decisions dealing with appraisal actions under 8 Del.C. §262. It considered market value, net asset value and investment value, including UOP's dividend record. It examined these elements for the five-year period prior to and including the merger and compared them against the performance of certain companies selected as being reasonably comparable to UOP in their business activities. Dillon, Read also considered the structure of the merger, i.e., the vote being left to a majority of the minority shareholders with its added requirement that a sufficient number of minority shareholders vote in favor of the merger so that, when coupled with Signal's 50.5 per cent vote, at least two-thirds of all outstanding shares gave their approval to the transaction. Dillon, Read also considered the so-called premium paid by Signal over the market price existing on the day preceding the announcement of the merger." <u>Weinberger</u>, 426 A.2d at 1361.

When all is said and done, Mr. Purcell, in his lengthy 1980 report and his trial testimony, simply found that the investment and market value of the minority shares was worth between \$14.00 and \$15.00. He then opined that the \$21.00 price was fair based solely on a comparison made by his juniors, Messrs. Daum and Read, of the percentage of premium in what Dillon, Read deemed to be comparable transactions (TR 1135-1140, 1168-69).

As appears in the above quotation, this Court noted that, in determining the percentage of premium, Messrs. Daum and Read in every case utilized the day before the formal announcement, making no attempt to screen out "noise" or find the unaffected market price. Weinberger, Chan., 1362.

Previously, this Court had carefully noted in its opinion that Duff & Phelps, plaintiffs' expert, had screened out "noise", saying, Weinberger, Chan., 1356-1357:

> "Bodenstein selected ten such comparable transactions. As to each, he found what he termed a prior market price. In some, this was the market price on the day preceding the first announcement of the transaction. As to others, he found price and volume figures for a period of time prior to the announcement so as, where appropriate, to factor out any distortion in the otherwise prevailing market price that might have been caused by leaks, market premonition of an impending acquisition, etc. -- 'noise' as described by Bodenstein.
>
> "From the merger or acquisition price paid, Bodenstein deducted the prior market price as found by him and then divided that market price into the difference. This gave him the percentage of premium per share over market paid in each transaction by the acquiring company in order to obtain 100% control. He then found the median rather than the average of these ten transactions so as to rule out any distortion that might be involved in averaging. The median premium thus found by him for these comparable transactions was 74%.
>
> "Bodenstein thus concluded that a reasonable premium for Signal to have paid so as to become a 100% owner of UOP would have been between 70% and 80%. Applying this to UOP's high of 14 3/4 on February 28, 1978, the last trading day before the announcement of merger negotigations (he said that using the closing price of $14.50 would have made no difference), a price which he found the market to be valuing UOP fairly, Bodenstein concluded that under this comparative analysis, the fair value of the shares of UOP was between $25.65 and $27.30."

Mr. Bodenstein, at the 1980 trial, analyzed in detail in PX 6 the comparable transactions selected by Dillon, Read for premium purposes and showed that if "noise" was factored out, the median and average premium for Dillon, Read's "comparables" was between 70% and 80% (TR 378-417; A906-A945; PX 6). Thus, the difference between the comparable analyses of Mr. Purcell and Mr. Bodenstein lies only in the selection of the appropriate date on which to measure the percentage of premium. If the Court agrees that Mr. Bodenstein's methodology is correct, Mr. Purcell's entire 1980 opinion on fairness evaporates since he only made one calculation.

Plaintiffs' expert was Kenneth Bodenstein, C.F.A., a Vice President of the securities research and appraisal company, Duff & Phelps. As this Court observed:

> "Bodenstein offered two basic approaches in support of his ultimate opinion that the value of UOP shares to its minority shareholders as of the date of the approval of the merger was not less than $26.00 per share. One approach was that of a comparative analysis; the other applied the discounted cash flow method."

Weinberger, Chan., 1356.

E. UOP's History From 1978 Through 1982

Ownership of 100% of UOP was a truly wonderful investment for Signal. UOP generally exceeded its Five-Year Forecast from 1978 through 1982, as the following comparison of UOP's Five-Year Forecast with its actual performance shows (PDX 120, Appendix A, Table A):

TABLE A
UOP INC.
1978 FIVE-YEAR BUSINESS PLAN
VERSUS ACTUAL PERFORMANCE
(In Millions)

	1978	1979	1980	1981	1982	Total
Revenues:						
- Actual	$ 829	$1,042	$1,008	$1,289	$1,184	$5,352
- UOP 1978 Basic Plan	845	1,006	993	1,110	1,321	5,275
Actual versus Plan	(16)	36	15	179	(137)	77
Net Income Before Extraordinary Items:						
- Actual	27.2	38.5	45.4	53.0	46.7	210.8
- UOP 1978 Basic Plan	28.2	28.2	37.8	45.7	55.7	195.6
Actual versus Plan	(1.0)	10.3	7.6	7.3	(9.0)	15.2
R&D Expenditures:						
- Actual	30.0	36.9	41.1	50.0	55.0	213.0
- UOP 1978 Basic Plan	33.9	34.8	35.8	36.9	37.9	179.3
Actual versus Plan	(3.9)	2.1	5.3	13.1	17.1	33.7
Capital Expenditures:						
- Actual	19.3	32.5	25.5	33.4	33.4	144.1
- UOP 1978 Basic Plan	33.5	55.0	28.2	26.3	26.1	169.1
Actual versus Plan	(14.2)	(22.5)	(2.7)	7.1	7.3	(25.0)
Long-term Debt*:						
- Actual	77.7	70.6	66.8	65.0	62.8	
- UOP 1978 Basic Plan	84.2	77.1	69.5	64.6	58.8	
Total Assets:						
- Actual	564.4	676.1	694.7	642.2	633.0	
- UOP 1978 Basic Plan	534.4	540.0	475.6	613.3	665.2	

* Includes current portion of long term debt and capitalized lease obligations for 1978 Basic Plan.

Sources: Actual figures taken from The Signal Company's 1982 Annual Report, pages 26 and 27. Plan figures taken from UOP 1978 Five-Year Business Plan dated April 1978, (DU000166).

UOP's ability to throw off vast amounts of cash to Signal in the form of advances is shown in Table C (PDX 120, Appendix A, Table C):

TABLE C
UOP INC.
CASH POSITION
(millions)

	1977	1978	1979	1980	1981	1982	1983
Total Cash	$73.0	$81.9	$114.0	$99.0	$133.9	$102.4	$189.6
Customer Advances	35.1E	38.0	52.0	33.0	31.0	30.0	68.6E
"No Strings Attached" Cash	$38.9	$43.9	$62.0	$66.0	$103.9	$72.4	$121.0
Advances to Signal	$ -	$ 5.0	$15.0	$34.0	$61.0	$79.0	$157.8

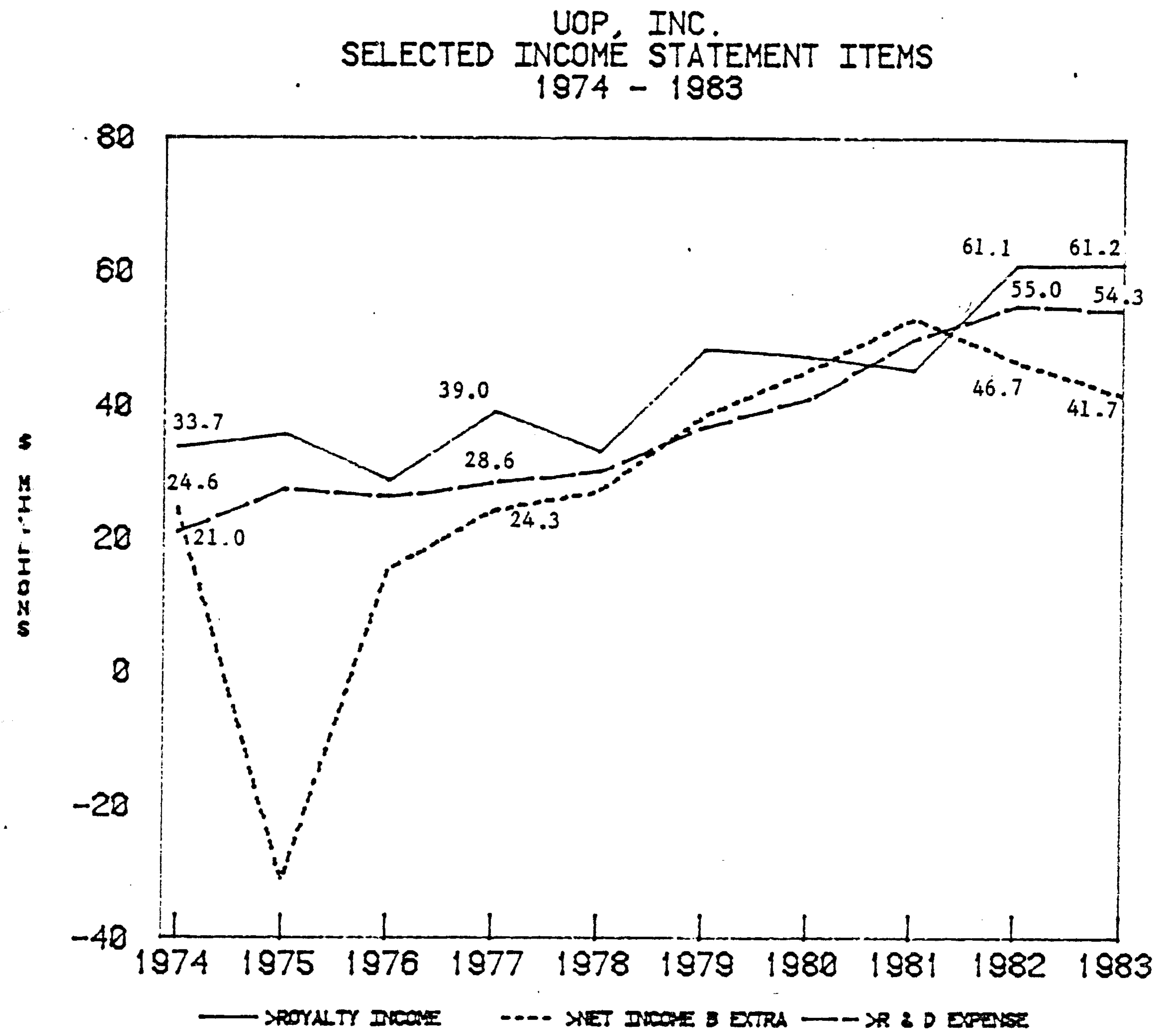
E - Estimate

Sources - UOP Board of Directors Financial Reviews and Trial Balance Sheets and UOP 1983 Year-End Report (S000836)

"No Strings Attached" Cash Calculation Per 1980/1982 Board of Directors' Financial Reviews (DU000055 page 9, DU000056 page 17)

In graphic form, the upward course of UOP from the 1975 nadir of its fortunes following the Come-By-Chance disaster to the end of 1982 can be clearly shown (PDX 120, Appendix A, Table E):

TABLE E


UOP, INC.
SELECTED INCOME STATEMENT ITEMS
1974 - 1983
$ MILLIONS
80
60
40
20
0
-20
-40
33.7
39.0
61.1
61.2
55.0
54.3
46.7
41.7
28.6
24.6
21.0
24.3
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
>ROYALTY INCOME
>NET INCOME B EXTRA
>R & D EXPENSE

Any doubts about Signal's satisfaction with its acquisition are dispelled by the glowing descriptions of UOP's accomplishments in Signal's Annual Reports. (Note) Also, Mr. Bodenstein's discounted cash flow analysis based on UOP's own forecast was proved to be correct so far as the value of UOP's stock at the time of the merger.

F. The Rescissory Damage Hearing

Following the Supreme Court's decision the plaintiffs promptly filed appropriate discovery on damages. However, defendants successfully applied for a preliminary hearing at which they claimed they would prove rescissory damages to be an inappropriate remedy. As a result of defendants' motion, there was a stay of all discovery for more than a year.

At the preliminary hearing a year later on April 4-5, 1984, it turned out that all Signal wanted was to reargue once again the significance of the Arledge-Chitiea Report. Not only had the defendants' position been thrice previously argued and specifically rejected by the Supreme Court but the two witnesses, Messrs. Arledge and Chitiea, had been

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Note: Plaintiffs invite the Court to review what Signal in its Annual Reports told the investing public about UOP's performance. PDX 2, pp. 4, 14-17; PDX 3, pp. 2, 8, 12, 16, 24; PDX 4, pp. 2, 19-21, 28-30, PDX 5, pp. 2, 18-12, 31-32; PDX 6, pp. 22-23; PDX 7, pp. 14-19, 27. Signal's analysis of UOP's performance in those reports stands in stark contrast to the revisionist history it concocted for purposes of this litigation.

listed by defendants as trial witnesses but, in the end, had not been called by the defendants (Rescissory 148, et seq). (Note)

In an April 24, 1984 opinion, this Court rejected Signal's attempt to relitigate, stating:

> "First, it appears that the same arguments that they are making here as to the purpose and materiality of the Arledge-Chitiea report were made to the Supreme Court, and were rejected. Thus, I think the conclusion is inescapable that the defendants are asking me to relitigate factual findings made by the Supreme Court and to reach a different interpretation of them for the purpose of determining fair price than that reached by the Supreme Court for the purpose of determining fair dealing. However, I am forced to agree with the plaintiff that the factual findings of the Supreme Court as to the effect of the Arledge-Chitiea report and the failure of the defendants to disclose it constitute the law of the case under the circumstances."

Weinberger v. UOP, Inc., Del. Ch., C.A. 5642, Brown, Ch. (April 24, 1984), p. 13. Mr. Bodenstein, utilizing the methodology of the Arledge-Chitiea Report, showed that Signal could in fact not only economically profit by acquiring UOP's shares at the $24.00 price suggested by the report but at any price up to $30.00 (Duff & Phelps Preliminary Analysis of PX-74; PDX No. 120, Appendix C). Mr. Bodenstein did not refer to the Arledge-Chitiea Report in his 1980 report

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Note: Both Signal's witnesses, Messrs. Arledge and Chitiea, had the arrogance to state at the rescissory hearing that, though they had never read the opinions of this Court or the Supreme Court, this Court and the Supreme Court were plainly wrong (Rescissory 151, et seq.). Their testimony shows that neither they nor Signal yet understands that Signal owed total fiduciary duty to treat UOP's minority shareholders fairly in the cashout merger.

and testimony (PDX 120, Appendix B). Mr. Bodenstein testified at the damage trial that his role in 1980 was to measure the value of the minority shares without regard to the price that Signal could or would pay for the shares (4 Damage Bodenstein 21-24). However, he testified that the calculations made by a willing and affluent buyer, such as Signal, as to what it could or would be able to economically pay for the shares is collateral evidence of their value (4 Damage Bodenstein 21-24). Thus, the fact that Signal's own methodology established that Signal could economically pay up to $30.00 is relevant evidence on the value of the minority shares, Weinberger, Supr., 711, 713. (Note)

This Court's April 24, 1984 opinion denied the defendants' motion that rescissory damages be held inapplicable, saying (pp. 13-14):

> "Stated simply, the test of entire fairness is comprised of two elements, fair dealing and fair price. The Arledge-Chitiea Report cannot be interpreted as meaning one thing for the purpose of evaluating one element and another thing for the purpose of evaluating the other. In the scheme of things, the Supreme Court's decision on the subject clearly controls. This leads to the second point. Since the test of entire fairness is comprised of two elements, fair dealing and fair price, the defendants have already flunked the test since they have not passed the fair dealing requirement. In other words, the Supreme

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Note: Lynch v. Vickers, Del. Supr., 429 A.2d 497, 505 (1981), held that on remand, the award should not be lower than the amount the defendant had paid for plaintiff's stock in the open market. Similarly, the Supreme Court, while leaving the determination of the amount of damages to this Court, strongly implies that $24.00 is the starting point as to the fair value of UOP's stock, Weinberger, Supr., 709, 712.

> Court's finding as to fair dealing means that there is no way in which Signal as majority shareholder standing on both sides of the transaction can pass the test of entire fairness. Thus, the purpose of the remand, as I view it, is for this Court to determine what monetary amount, if any, is due to the minority shareholders in order to fairly compensate them for the wrong they have suffered from the improper manner in which the merger proposal was structured and presented to them by the defendants."

This Court then held (pp. 14-15) that the degree of culpability of the defendants is beside the point in determining whether rescissory damages will be granted, stating:

> "The key to the matter is that the finding of the Supreme Court means that the vote of the minority was tainted and of no effect. Since the defendants structured the transaction so as to give the minority the right to either approve or disapprove of it, the failure of the defendants to disclose material information germane to the decision to be made deprived the minority of information which might have persuaded them to vote down the proposal and thus remain shareholders of UOP. So found the Supreme Court. Thus, regardless of whether the wrongs of the defendants were deliberate or unintentional, they deprived the minority of the right to make an informed decision on whether or not they wanted to accept the $21 per share or remain shareholders of UOP. In view of this, I find it difficult to rule the possibility of rescissory damages out of the case at this juncture based upon the arguments put forth by the defendants."

G. UOP's Money Losing Divisions, the Recession and the Signal-Wheelabrator Merger

While from 1978 through 1982, UOP, led by its Process Division, showed generally consistent gains in all phases of its financial activity as shown above (Tables "A" and "F" to

PDX 120, Appendix A), UOP did have some divisions that were repeated money-losers. For example, the construction division (i.e., Procon), had operating losses totaling almost $72 million from 1979 to 1982 (DDX 13, Exhibit 4B), and there were other divisions that had an adverse effect on UOP's good net earning record (DDX 13, Ex. 4B). In addition to the foregoing, in 1982, the United States began to enter into a sharp recession. UOP, like the economy as a whole, was adversely affected by the recession though, in UOP's case, the decline was relatively modest (4 Damage Bodenstein 112-113).

After the February 1, 1983 merger with Wheelabrator, Signal decided it would reorganize in 1983, write off losses and set up reserves. As part of this general corporate housecleaning, UOP was reorganized in 1983. Its losing divisions, most notably Procon, and Air Correction were shut down, closed or reassigned (1 Damage Corirossi 70, 136-138; 2 Damage Kavanaugh 115-116, 120). PDX 27, a presentation to Signal's Board made in April, 1983, shows that, though UOP's 1983 net operating earnings were expected to decline slightly, Signal still anticipated that net operating earnings would amount to $39 million. Significantly, while PDX 27 shows $65 million in net reserves and $25 million net "Major Merger - Related Expenses" (Note) were to be assessed

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Note: Though he prepared PDX 27's list of UOP's Major Merger - Related Expenses, at trial, Mr. Corirossi claimed the expenses resulting from Signal's reorganization were not related to the Wheelabrator merger (1 Damage Corirossi 146).

against UOP, Signal did not plan in April 1983 to charge those items against UOP's net operating income. As a result of the shut-down of Procon and the sale and reassignment of certain other divisions, UOP got rid of its sick businesses which had major losses and was left with the Process Division, UOP's consistent big money-earner, as well as six other divisions that generally made money (2 Damages Corirossi 109-110, 139-141). Thus, Signal at that time continued to focus on the potential earning power of UOP as the "real key to value" (PX 74).

The income statement contained in UOP's 1983 Year-End Report package shows UOP's 1983 income before income taxes was $82,786,000.00 (up from $77,362,000.00 in 1982) and 1983 net income of $41,680,000.00 (down from 1982's $46,682,000.00 because UOP paid almost $10,000,000.00 more in United States income taxes in 1983). Thus, PDX 90 reflects that 1983 was another solidly profitable year for UOP. PDX 90's income statement does not reflect any charge for "Discontinued operations" or "Extraordinary items".

Supposedly in response to plaintiffs' request for production of documents, Signal, at the direction of Mr. Arms, its general counsel, created DDX 10 and 11 for use by Signal at the damage trial (4 Damage Corirossi 129-131; 2 Damage Kavanaugh 5-6, 34-37). In DDX 10, Signal attempted, by charging extensive "reserve adjustments" against UOP's <u>net operating income</u>, to turn the $41,680,000.00 net income for 1983 shown in PDX 90 into a $55,151,000.00 net loss. Though these so-called "adjustments" supposedly reflect one time charges associated with the shutdown of operations (e.g., Procon, Air Correction, etc.), other reorganization expenses triggered by the Wheelabrator merger and litigation reserves, DDX 10 does not charge them to discontinued operations or extraordinary items. Indeed, the line "Income from discontinued operations" is left blank. Rather, for purposes of this trial, Signal has added these adjustments to UOP's cost of sales and general and administrative expenses in an effort to convince this Court that UOP had an operating loss in 1983.

In sum, through accounting legerdemain, Signal is attempting to make a silk purse into a sow's ear. As our later detailed discussion of defendants' evidence shows, Signal's effort not only is unsuccessful, but casts doubt on its credibility. Moreover, since the reserves Signal seeks to charge against UOP's 1983 income are designed to offset expenses which are anticipated at some future time (1 Damage Corirossi 74-75), Signal will not have to make any charge against UOP's income when these expenses actually are paid.

At December 31, 1983, UOP had advanced to Signal a total of $157,000,000.00. However, because of the transfer of UOP's cash management function to Signal during 1983, Signal received all UOP's cash receipts and controlled the investment of UOP's cash (1 Damage Corirossi 67-68, 93-94).

As a result, Signal (a) stopped paying interest to UOP on the $157,000,000.00 of advances in the Fall of 1983 (1 Damage Corirossi 115), and (b) UOP's account reflecting the advances to Signal and Signal's account reflecting that it owed $157 million to UOP were simply "cancelled out", with Signal keeping the cash (2 Damage Kavanaugh 17-18).

QUESTIONS PRESENTED

I. HAS NOT THIS COURT, THE SUPREME COURT AND THE CASE LAW ESTABLISHED THAT THE DEFENDANTS HAVE THE BURDEN OF PROVING (1) THAT $21.00 WAS A FAIR PRICE IN 1978 AND (2) WHAT THE RESCISSORY VALUE OF THE UOP STOCK WAS AT SOME TIME SUBSEQUENT TO THE MERGER?

II. IN VIEW OF THE FACT THAT UOP REMAINED A STAND-ALONE DIVISION OF SIGNAL THROUGH DECEMBER 21, 1983, AND IN VIEW OF THE ADVISORY DIRECTIVE OF THE SUPREME COURT TO THIS COURT THAT IT COULD CONSIDER RESCISSORY DAMAGES, AND IN VIEW OF THIS COURT'S DECISION FOLLOWING THE RESCISSORY DAMAGE HEARING, SHOULD NOT THE COURT AWARD RESCISSORY DAMAGES?

III. IN VIEW OF THE FACT THAT THE DEFENDANTS' EXPERT WITNESS'S CALCULATION IS INCORRECT BOTH AS TO THE 1978 VALUE OF THE UOP SHARES AND THEIR RESCISSORY VALUE, HAVE NOT THE DEFENDANTS FAILED TO CARRY THEIR BURDEN OF PROOF AS TO FAIR PRICE?

IV. DOES NOT THE EVIDENCE PRODUCED BY THE PLAINTIFFS SHOW THAT THE FAIR PRICE AS OF 1978 WAS $29.00 PER SHARE AND THAT THE RESCISSORY VALUE AS OF 1982 WAS $32.13 AND THE RESCISSORY VALUE AS OF 1983 WAS $20.71.

A R G U M E N T

I. THE DEFENDANTS HAVE THE BURDEN OF PROOF

Both this Court and the Supreme Court have held that the defendants have the burden of proving that UOP's minority stockholders have been treated entirely fairly. Weinberger, Chan., 1347; Weinberger, Supr., 703. The Supreme Court stated that entire fairness has two aspects, fair dealing and fair value, held that Signal had breached its fiduciary duty by engaging in unfair dealing, and remanded for a determination of fair value. 457 A.2d at 711-712, 714. The Court made it clear that rescissory damages should be considered as an element of fair value. 457 A.2d at 714.

In denying defendants' request to exclude rescissory damages, this Court acknowledged that the fair value issue on remand includes both whether the $21.00 merger price was fair and whether rescissory damages should be awarded. Weinberger v. UOP, Inc., Del. Ch., C.A. 5642, Brown, Ch., (April 24, 1984) pp. 1-2, 10. This Court further stated that rescissory damages was one method available to the Court by which to ensure that the minority is treated fairly. Id. at 15.

Thus, the Supreme Court and this Court have both held that defendants have the burden of proof on fair value and that fair value encompasses rescissory damages. Moreover, the fact that defendants have already failed the entire fairness test heightens their burden. The defendants have not met their heavy burden on whether the $21.00 merger price was fair or whether rescissory damages should be awarded. Rather, the evidence at the original trial, preliminary hearing and damages trial shows:

(a) The $21.00 price was not based on any determination of the true value of the minority shares: it was principally based on the 1975 tender offer price and the alleged coincidence of certain UOP "numbers" in 1974-75 and 1978.

(b) The true value of the minority shares was in excess of the $24.00 price designated by the Arledge-Chitiea Report itself as being a price that Signal could afford to pay and still profit by cashing out the minority shareholders.

(c) Treating the minority fairly necessitates at least requiring Signal to pay the $24.00 price which the Arledge-Chitiea Report (PX 74) concluded would be a good investment for Signal, but which Signal unfairly failed to disclose to the minority. (Note)

Note: Signal's counsel stated that the Supreme Court's finding that it would be a good investment for Signal to pay up to $24.00 was the law of the case (Purcell 6/13/84) 63):

> "Q: In that Supreme Court opinion it says and I quote the Supreme Court: 'Arledge and Chitiea concluded that it would be a good investment for Signal to acquire the remaining 49.5% of the UOP shares at any price up to $24.' Do you agree with that finding?
>
> "Mr. Payson: I object. It's the law of the case. That statement is now the law of the case. We are all bound by it. Whether or not this witness personally agrees or disagrees with the statement has no bearing whatsoever on the litigation and I instruct the witness not to answer."

(d) The true value of the minority shares exceeds the "not less than $26.00" value that Duff & Phelps showed at the original trial by comparative analyses and three discounted cash flow analyses (even with the restrictions on damage proof that existed prior to the Supreme Court's decision).

(e) UOP's actual performance since the merger far exceeded expectations and confirmed Duff & Phelps' proof that the minority shares were worth not less than $26.00.

(f) Duff & Phelps showed at the preliminary hearing, using the methodology of the Arledge-Chitiea Report, that the acquisition of the UOP minority interest would have been a good investment for Signal at prices well up to $30.00.

(g) Based on comparative analyses and a full discounted cash flow analysis without restrictions, Duff & Phelps established at the damage trial that the fair value is in the range of $28-30.00.

(h) Mr. Purcell's <u>single</u> calculation that the $21.00 cashout price was fair is incorrect, <u>inter alia</u>, because of Dillon, Read's mechanical acceptance of the day before the formal announcement as the date to measure the percentage of premium for comparable transactions in both the 1980 and 1984 reports.

(i) Mr. Purcell's calculation of the rescissory damages measured as of the end of 1982 ($27.25 to $28.50) and 1983 ($23.00 to $24.25) is incorrect, _inter alia_, because it does not include any premium reflecting that UOP's minority shareholders are, in effect, being cashed out.

(j) Duff & Phelps' rescissory damage analysis shows that the UOP minority shares would have had a value of $60.00 at the end of 1982 and $50.00 at the end of 1983.

II. TO TREAT THE MINORITY FAIRLY, THIS COURT SHOULD AWARD RESCISSORY DAMAGES TO RETURN WHAT SIGNAL TOOK FROM THE MINORITY

The Supreme Court expressly directed that rescissory damages be considered as part of this Court's fair value determination:

> "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' [see 8 Del.C. §262(h), supra]. <u>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</u>.
>
> * * *
>
> "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."

<u>Weinberger</u>, Supr., 714 (emphasis added).

While the Supreme Court stated that <u>Lynch v. Vickers Energy Corp.</u>, Del. Supr., 429 A.2d 497 (1981) ("Lynch II"), should not be interpreted as requiring rescissory damages in every case, the Court did make clear that this Court could, in its discretion, grant rescissory damages in this case if they were susceptible of proof and appropriate to all issues of fairness. Thus, as this Court has said, the Supreme Court specifically encouraged this Court to consider rescissory damages. <u>Weinberger</u>, (April 24, 1984) p. 2.

A. Rescission is a Remedy Appropriate To All the Issues of Fairness

Analysis of the pertinent facts and applicable law demonstrates that rescissory damages are "a remedy appropriate to all the issues of fairness" in this case, Weinberger, Supr., 714.

1. Defendants' Failure to Satisfy Any Reasonable Concept of Fair Dealing

The Supreme Court's findings as to Signal's conduct throughout the merger should in itself lead this Court to exercise its discretion to impose rescissory damages. While the Arledge-Chitiea Report is utilized as a primary example of how egregious Signal's conduct was, the Supreme Court noted that:

> "The Arledge-Chitiea Report is but one aspect of the element of fair dealing."

Weinberger, Supr., 711. The Court went on to detail the numerous other factors demonstrating Signal's lack of fair dealing, including:

(a) The transaction was "entirely" initiated by Signal for its own purposes.

(b) Signal imposed "serious time constraints" solely for its own reasons, resulting in the entire transaction being presented and approved by UOP's Board within four business days.

(c) The structure of the transaction "was Signal's doing", including its use of UOP's confidential data to structure the merger, "the absence of any attempt to structure this transaction on an arm's length basis" and the lack of negotiations approaching "any concept of bargaining".

(d) The "wholly flawed" disclosure to UOP's outside directors, which "cannot but undermine a conclusion that this merger meets any reasonable test of fairness".

(e) The hasty and cursory preparation of Lehman Brothers' fairness opinion was Signal's fault.

(f) Signal deprived the minority of a meaningful vote by failing to discharge its duty of candor, including "the lack of any candid disclosure of the material facts surrounding establishment of the $21.00 price" and the failure to disclose the facts undermining the reliability of the fairness opinion.

Weinberger, Supr., 708-710, 711-712, 714.

The Supreme Court concluded:

> "Given these particulars and the Delaware law on this subject, the record does not establish that this transaction satisfies any reasonable test concept of fair dealing ..."

457 A.2d at 712.

While the Supreme Court focused primarily on the events leading up to the UOP Board meeting of March 6, 1978, Signal continued totally to disregard the interests of the minority thereafter. Though the $21.00 price gave no consideration to the second quarter dividend, Signal gobbled up the entire dividend for itself. As this Court noted, defendants have never offered any real argument or explanation for Signal's dividend gluttony. Weinberger, Chan., 1356. Further, Signal never reconsidered the fairness of the $21.00 merger price in view of the fact that during the three months between Signal's merger announcement and the stockholders meeting the stock market rose substantially (including Signal's stock) while the announcement had capped the price of UOP stock. Weinberger, Chan., 1353-54, 1355-56.

2. The Rescissory Damage Hearing

By requesting the preliminary hearing on rescissory damages, defendants delayed the damage trial for more than a year. During this delay, UOP underwent certain changes as part of the post-Wheelabrator merger reorganization. Now, Signal seeks to use to its own advantage in this litigation the revamping of UOP as an outgrowth of its decision to reorganize itself. As discussed below, the 1983 changes to UOP do not make rescissory damages inappropriate or incalculable. Certainly, Signal, an adjudicated wrongdoer, should not be permitted to keep its ill-gotten gains because of accounting changes it made during the period after it had secured a stay of these proceedings.

More importantly, Signal has had, via the preliminary hearing, a full opportunity to prove to this Court that rescissory damages should not be awarded. However, Signal's only "proof" was an attempt to relitigate the factual findings and legal rulings of the Supreme Court -- an effort this Court rejected as contrary to the law of the case. Weinberger, (April 24, 1984) p. 13. Thus, Signal has already failed once to meet its burden of proving rescissory damages inapplicable.

In denying defendants' request to eliminate rescissory damages as a possible remedy, this Court stated that the issue for decision at the damage trial is what amount is due the minority to fairly compensate them for the wrong suffered as a result of Signal's breach of fiduciary duty. Id. at 14. Moreover, the only issue as to the appropriateness of rescissory damages is that of value:

> "By so holding I do not mean to imply that I am inclined to award rescissory damages after a final hearing. I may or may not, depending on what the evidence of value may show."

Id. at 15.

The evidence at the damage trial shows that, when measured by rescissory value standards, there is a gross disparity between what Signal paid in its cashout of the minority and the value of the expropriated shares in 1982 and 1983. Thus, rescissory damages are appropriate to prevent Signal from reaping an undeserved profit by retaining the minority shares without paying the full amount these shares would command in a similar merger today (i.e., rescissory damages).

3. Rescissory Damages Will Not Be Punitive, But Will Restore to the Minority What Rightfully Is Theirs

Despite this Court's ruling that the sole issue as to applicability of rescissory damages was value, Weinberger, (April 24, 1984), p. 15, Signal counsel's opening at the damage trial suggested that rescissory damages should not be granted because they are punitive (1 Damage Halkett 12-13). Thus, incredibly, Signal continues to assert that it is totally innocent of any wrongdoing whatsoever. In fact, as noted, Messrs. Arledge and Chitiea arrogantly asserted at their depositions and at the rescissory hearing, with the apparent approbation of Signal's counsel, that this Court and the Supreme Court were totally wrong (Arledge (3/27/84) 9-11, 14-16, 36-37, 42-45, 52-56, 61-62; Chitiea (3/27/84) 5, 15-17, 42, 46-47; Rescissory 151, et seq.). The short answer to Signal's opening again lies in the Supreme Court's holdings as to Signal's wrongdoing, which this Court has recognized are the law of the case. If rescissory damages were to be awarded solely to punish an unrepentant wrongdoer and warn the wrongdoer and others against such reprehensible conduct, this is surely the case.

Mr. Halkett went on to plead that rescissory damages should not be granted because (1 Damage Halkett 19): "The burden of any judgment here is therefore to be borne by the public shareholders of the Signal Companies." As will be shown, rescissory damages are granted principally to prevent unjust enrichment by returning to those wronged (the UOP minority shareholders) what the wrongdoer (Signal) has wrongfully taken. Lynch II, 429 A.2d at 503; Guth v. Loft, Supr., 5 A.2d 503, 510 (1939); Bovay v. H. M. Byllesby & Co., Supr., 38 A.2d 808, 813 (1944). Rescissory damages simply forces the wrongdoer to disgorge that which never did belong to him. Garnatz v. Stifel, Nicholaus & Co., 8th Cir., 559 F.2d 1357, 1361 (1977); Green v. Occidental Petroleum Corp., 9th Cir., 541 F.2d 1335, 1342 (1976) (Sneed, J., concurring); Myzel v. Fields, 8th Cir., 386 F.2d 718, 742-43 (1967), cert denied, 390 U.S. 951 (1968); Mansfield Hardwood Lumber Co. v. Johnson, 5th Cir., 263 F.2d 748, 753-754 (1952); 12 A. Fletcher, Cyclopedia Corporations, §598 (Perm. Ed.).

The defendants have missed the real basis of rescissory damages. Such damages are awarded where the minority stockholders have a right to rescission, but rescission is not feasible. Delaware law is clear that disclosure violations by a fiduciary justify rescission. See Lynch II, 429 A.2d at 501-503. More recently, in Joseph v. Shell Oil Co., Del. Chan., C.A. No. 7450, Hartnett, V.C. (May 8, 1984) (p. 24), this Court found that the majority stockholders' tender offer materials failed to disclose material facts and, therefore, ordered that minority stockholders who had tendered their shares be permitted to withdraw shares which the majority stockholder had not yet purchased and rescind the sale of shares which had been purchased. Significantly, the Court, relying on Weinberger, Supr., 701, held that the failure to disclose the circumstances surrounding the presentation of the investment banker's fairness opinion, including the haste with which that opinion was prepared, was a breach of fiduciary duty warranting rescission.

Where, as here, rescission is impracticable, Weinberger, Supr., 714, rescissory damages are awarded to give the wronged stockholders the monetary equivalent of rescission -- that is, the amount the majority stockholder has and will enjoy as a result of wrongfully acquiring and retaining the minority's stock. Lynch II, 429 A.2d at 501. The purpose is not to punish the wrongdoer as much as to restore to the minority what is rightfully theirs. Thus, rescissory damages are not punitive damages, but restitutive damages. Signal will simply be required to pay over to the minority only what it has taken and enjoyed (and will continue to enjoy) as a result of appropriating the minority's shares in a cashout merger in breach of Signal's fiduciary duty. The evidence at the damage trial showed that there is a gross disparity between the $21.00 that UOP's minority was paid in the cashout merger and the huge dividends, other cash payments and increase in value that Signal predictably received from the illegally taken stock of the minority. Treating the minority fairly requires that they receive their share of these benefits and that Signal be forced to disgorge what it wrongly took from the minority shareholders and still retains today.

4. The Applicable Law Mandates Rescissory Damages

Both Lynch II and Joseph v. Shell Oil establish that rescissory damages should be awarded. In Lynch, the Supreme Court found the majority stockholder breached its fiduciary duty by failing to disclose to minority stockholders in its tender offer (a) an estimate by a vice president that the company's net asset value was significantly higher than the amount disclosed in the tender offer and (b) the majority stockholder's management had authorized open market purchases at $15.00 per share just prior to the $12.00 per share tender offer. Lynch II found that these non-disclosures warranted imposition of rescissory damages. (Note)

In Joseph v. Shell Oil, supra, the Court granted the minority stockholders the right to rescission based on the majority stockholder's failure to disclose (a) an estimate by Shell's management indicating that on a going concern basis Shell was worth $91.00 per share (i.e., more than the tender offer price) and (b) the circumstances surrounding the preparation of an investment banker's fairness opinion, including the haste with which it was prepared. Pp. 14-17.

Note: While Weinberger, Supr., 703-704, 714 overruled Lynch II to the extent it purported to limit the Chancellor's discretion to a single remedial formula for monetary damages, nowhere in Weinberger is there any indication that Lynch II was wrongly decided on its facts or that rescissory damages should not be awarded where a majority stockholder breaches its fiduciary duty by failing to disclose material information to the minority. Accordingly, Lynch II remains controlling precedent for awarding rescissory damages for non-disclosure of material facts.

The Court cited Lynch II for the first proposition and the Supreme Court's Weinberger opinion for the second.

Lynch II and Joseph v. Shell Oil establish that rescissory relief is appropriate where the majority stockholder has been found to have withheld (a) reports or estimates by members of the corporation's management which suggest a higher value than that being offered by the majority stockholder, (b) information suggesting that the majority stockholder was willing to pay a higher price, and (c) the circumstances surrounding the preparation of an investment banker's fairness opinion, including the time constraints under which the opinion was formulated. The non-disclosures found by the Supreme Court in this case place it squarely within these Delaware cases awarding rescissory relief.

The Arledge-Chitiea Report, which was prepared by individuals who were directors of both UOP and the majority stockholder, showed that, based on confidential UOP information, Signal had concluded that it would be a good investment to acquire the UOP minority shares at any price up to $24.00. Weinberger, Supr., 705, 708-709. The Supreme Court also found that none of the circumstances surrounding the preparation of the Lehman Brothers fairness opinion was disclosed to UOP's minority. Id. at 712. Indeed, the Joseph case cites Weinberger as authority for holding that it is a breach of fiduciary duty to fail to disclose with utmost candor circumstances surrounding the preparation of a fairness opinion, especially the fact that the opinion was hastily prepared.

Thus, under Lynch II (where rescissory damages were awarded) and Joseph (where rescission was still feasible), UOP's minority stockholders are entitled to rescissory damages. Indeed, the facts here are far more egregious than the conduct justifying rescissory relief in Lynch and Joseph. Arledge and Chitiea were not merely officers of the majority stockholder but were directors of both UOP and the majority stockholder. Furthermore, their report was withheld not only from the minority stockholders, but also from UOP's outside directors, while the information was made available to all Signal's directors, Weinberger, Supr., 709. In addition, unlike Joseph (p. 7), where the company's board recommended rejection of the tender offer, and Lynch v. Vickers Energy Corp., Del. Ch., 351 A.2d 570, 571 (1976), rev'd Del. Supr., 383 A.2d 278 (1977), where the company's board made no recommendation, UOP's proxy statement told the minority stockholders that UOP's Board had unanimously endorsed the merger and urged the minority stockholders to vote for the merger. Weinberger, Supr., 708.

As if the foregoing were not enough, there are further factors showing that the case for rescissory relief is far more compelling in this case than in Lynch and Joseph. Both of those cases involved tender offers where an individual stockholder could decide whether or not to sell his shares. Here, however, Signal effected a cashout merger: all UOP's minority stockholders were eliminated, including those who did not wish to sell. Lynch II, 429 A.2d at 498, 508 (Quillen, J., dissenting), rev'd Del. Chan., 402 A.2d 5, 11 (1979). Moreover, the Supreme Court in Weinberger did not just find that Signal had failed to disclose germane facts, but found, based on deficiencies in Signal's conduct as to all elements of fair dealing, that Signal had failed to satisfy any reasonable concept of fair dealing and that the merger did not meet any reasonable test of fairness. Weinberger, Supr., 712. Thus, the factual and legal support for an award of rescissory damages in this case is overwhelming.

B. The Rescissory Value of the Minority Shares is Susceptible of Proof

(1) UOP Was a Stand-Alone Division of Signal Through December 31, 1982

After the 1978 merger, UOP continued as a stand-alone subsidiary of Signal with separate financial statements through December 31, 1982 (1 Damage Corirossi 59-64, 121-122). It had net earnings in 1982 of $46 million (1 Damage Corirossi 123). Since UOP remained essentially the same operationally and financially as it had at the time of the 1978 merger (1 Damage Corirossi 124), the value of UOP as of the end of 1982 can be easily determined.

Thus, rescissory damages are susceptible of proof through December 31, 1982. Lynch II, 429 A.2d at 505, permits this Court to award rescissory damages "as of or prior to the date on which the trial on damages ended." (Emphasis added.) Thus, this Court may assess rescissory damages as of December 31, 1982.

There are several reasons why December 31, 1982 may be an appropriate date for assessing the amount of rescissory damages. First, the Supreme Court's opinion finding liability and remanding for a determination of damages issued on February 1, 1983, just after the close of 1982. Second, the Signal-Wheelabrator merger also occurred on February 1, 1983, shortly after the end of 1982. Third, Signal caused the determination of damages to be delayed from the Spring of 1983 to June of 1984 by obtaining a stay of discovery and seeking a preliminary hearing at which it failed to prove rescissory damages should not be awarded. Signal should not be permitted to have rescissory damages excluded from the case or reduce the amount of rescissory damages because of corporate steps Signal took during the period when the plaintiffs were stayed from proceeding to the damage trial or because of Signal's successful application for a preliminary trial on the issue of whether rescissory damages should be awarded in the retrial on damages.

(2) Rescissory Damages Are Susceptible of Proof Through December 31, 1983

On February 1, 1983, the Signal-Wheelabrator merger took place (1 Damage Corirossi 121-122). Thereafter, in connection with the merger, Signal, for its own purposes, underwent a general corporate reorganization, including a reorganization of UOP (1 Damage Corirossi 67). However, UOP still exists as a very profitable company with seven operating divisions (1 Damage Corirossi 108-110, 113-114; 2 Damage Kavanaugh 20-22). Signal now seeks to capitalize on the accounting effects of the post-Wheelabrator merger reorganization for Signal's benefit vis-a-vis the ousted minority shareholders of UOP. Signal's witnesses take the impossible position that UOP vanished or ceased to exist at the end of 1983 (1 Damage Corirossi 90, 118; 2 Damage Kavanaugh 18, 20, 21). They also seek to claim that $157 million of UOP's earnings that had been upstreamed as loans to Signal, and $80 million of dividends Signal had received from 1978 through 1983, also somehow were made to disappear at midnight on December 31, 1983 (1 Damage Corirossi 118-119; 2 Damage Kavanaugh 17-18). They also say that the UOP that emerged in 1984, a company with seven generally profitable divisions (including the enormously profitable Process Division) and without those divisions which were major losers, had absolutely nothing to do with the UOP one-half of which belonged (and one-half of which still belongs) to the minority shareholders of UOP.

Signal should not be heard to claim that rescissory damages are not applicable simply because Signal, for its own purposes and during a delay in this litigation for which it was responsible, made certain corporate and accounting changes as part of the reorganization after the Signal-Wheelabrator merger. First, Signal had the burden of proof of proving that rescissory damages are not applicable: it did not do so. Second, as will be shown in detail hereafter, even after the reorganization it is quite possible to follow UOP, fix its value and determine what the UOP stockholders were deprived of as of December 31, 1983. Actually, as came out at the trial, what emerged on January 1, 1984, and what Signal continues to own 100% of, is a UOP that will be even more profitable than UOP was prior to the reorganization (1 Damage Corirossi 136-38; 2 Damage Kavanaugh 115-116, 120). Thus, UOP still has that which Signal considers the key to value: future earning potential. Third, if UOP was actually liquidated within Signal, the minority stockholders are entitled to 49.5% of UOP's liquidation value, including 49.5% of its net cash and current assets, 49.5% of the proceeds from the sale of its divisions and 49.5% of the value of those divisions which Signal has retained within UOP or other Signal subsidiaries. This liquidation value would be far greater than UOP's going concern value. Liquidation would be a fair measure of rescissory damages.

Accordingly, if this Court believes that December 31, 1983 is the appropriate date for measuring rescissory damages, this Court should not be hoodwinked into accepting Signal's accounting and reorganization sleight of hand. Rather, it should make such an award based on the evidence presented at trial of the value of the minority shares as of December 31, 1983.

III. DEFENDANTS FAILED TO PROVE THAT $21.00 WAS A FAIR PRICE OR THAT THEIR RESCISSORY DAMAGE FIGURES ARE CORRECT

A. Mr. Corirossi and Mr. Kavanaugh

At the damage trial, the defendants called no employees of Signal, UOP or Lehman Brothers who participated in the 1978 cashout merger. Defendants' only lay witnesses were Mr. Corirossi and Mr. Kavanaugh. Neither was employed by Signal or UOP in 1978 and neither was called to testify as to the fair value of the minority shares in 1978. Nor did they testify as to the rescissory value of the UOP minority shares.

Mr. Corirossi, Chief Financial Officer of UOP since 1980 (1 Damage Corirossi 50), was apparently called only to try to give the Court the patently incorrect impression that during 1983 UOP changed radically from a company with consistently favorable financial results from 1978 to 1982 into a company that suddenly had operating losses of $55 million in 1983. Mr. Corirossi agreed that from 1978 until December 31, 1982, UOP remained essentially the same -- a stand-alone subsidiary of Signal with a totally separate financial system (1 Damage Corirossi 121-124). Mr. Corirossi also agreed that Table A (PDX 120, Appendix A, Duff & Phelps June 14, 1984 Report on Fair Value), reflecting the Signal Annual Reports, together with Exhibit F, reflected correctly the financial history of UOP from 1978 through 1982 (1 Damage Corirossi 124-127). He also agreed that UOP's 1982 and 1983

Year End Report (PDX 90) before the May 1984 adjustments made by Signal showed net operating income of $46 million and $41 million respectively (1 Damage Corirossi 151-152). Mr. Corirossi, though Chief Financial Officer of UOP, claimed he did not know what had happened to $157 million that UOP had advanced to Signal from 1978 to 1983 as between December 31, 1983 and January 1, 1984 (1 Damage Corirossi 117-119). (Note-1) Actually, on January 1, 1984, what had originally been UOP advances to Signal were permanently transferred to Signal (2 Damage Kavanaugh 17). Thus, the obvious answer is that Signal, as 100% owner of UOP, decided to make this $157 million in UOP advances permanent (i.e., Signal upstreamed $157 million in addition to the $80 million in dividends). (Note-2)

Note-1: He also claimed he had no idea what UOP's 1984 financial results are going to be (1 Damage Corirossi 112) -- a curious statement from UOP's Vice President of Finance.

Note-2: Mr. Corirossi indicated that the UOP advances to Signal were the same as dividends. When asked why UOP's 1983 dividend to Signal was cut to $10 million from the $20 million paid in prior years, Mr. Corirossi explained (1 Damage Corirossi 120):

> "Q. And do you know why the dividend was cut from 20 to 10?
>
> "A. Yes. My understanding is that it was cut because again the treasury function was being moved to Signal, all cash was going to be coming to them anyway so it didn't matter whether it was an advance or a dividend."

On April 25, 1983, financial figures were submitted to Signal's Board showing UOP's earings, UOP's revised earnings, UOP's major reserves and UOP's Major-Merger-Related Expenses (PDX 27). The statement as to earnings is as follows:

UOP EARNINGS
(Dollars in millions)

	1979	1980	1981	1982	1983 Plan
Process Division	$ 22	$ 30	$ 47	$ 41	$ 38
Norplex	10	9	6	6	7
Wolverine	5	6	9	5	5
Automotive Products	7	2	4	6	4
Aerospace	3	4	5	4	2
Johnson	4	4	4	4	4
Other	(7)	(6)	11	10	5
Subtotal	22	19	39	35	27
Procon	7	5	(22)	(12)	(12)
Air Correction	(12)	(6)	(3)	(4)	(2)
Bostrom	(2)	(4)	(4)	(10)	(5)
Fluid Systems	2	1	(4)	(3)	
Subtotal	(5)	(4)	(33)	(29)	(19)
Total Earnings	$ 39	$ 45	$ 53	$ 47	$ 46

It should be noted (1) that Process produced more earnings than all other UOP divisions, and (2) that Signal had already segregated the UOP divisions that were losers and would be disposed of one way or another (i.e., Procon, Air Correction, Bostrom and Fluid Systems).

PDX 27 also stated UOP's revised projected <u>operating</u> earnings as of April 1983:

UOP
1983 REVISED OPERATING EARNINGS
(Dollars in millions)

	Plan	Operating Earnings	Change
Process Division	$ 38	$ 39	$ 1
Norplex	7	5	(2)
Aerospace	2	1	(1)
Johnson	4	3	(1)
Corporate & Other	14	15	1
Subtotal	27	24	(3)
Bostrom	(5)	(7)	(2)
Fluid Systems	-	(3)	(3)
Other	(14)	(14)	-
Subtotal	(19)	(24)	(5)
Total	$ 46	$ 39	$ (7)

Here it should be noted that Signal was concentrating on UOP's revised earnings. In spite of the "losers", the recession and the merger, UOP continued to project $39 million of operating earnings for 1983.

PDX 27 next delineated as a separate item UOP's "Major Reserves":

UOP
MAJOR RESERVES
(Dollars in millions)

	Procon	Air Correction	Bostrom	Corporate & Other	Total
Credit Memos-ELF/ Chemocomplex	$ 5	$ -	$ -	$ -	$ 5
Sonatrach Contract	5	-	-	-	5
Balance Sheet	6	-	-	-	6
Plant Consolidation	-	-	22	8	30
Litigation	18	11	-	7	36
Contracts	5	6	-	-	11
Other	-	-	-	5	5
Total, Pretax	$ 39	$ 17	$ 22	$ 20	$ 98
Total, Net	$ 27	$ 9	$ 18	$ 11	$ 65

Thus, "major reserves" other than those arising from the Signal-Wheelabrator merger were itemized in April 1983.

Finally, the UOP expenses relating to the Signal-Wheelabrator merger were set out:

UOP
MAJOR MERGER-RELATED EXPENSES
(Dollars in millions)

	Procon	Air Correction	Corporate	Total
Severance	$ 8	$ 2	$ 2	$ 12
Excess Lease Facilities, Relocation, Etc.	13	6	7	26
Pretax Expense	$ 21	$ 8	$ 9	$ 38
Net Expense	$ 16	$ 4	$ 5	$ 25

The importance of the above is that it shows that (1) Signal in April 1983 continued to focus on UOP earnings (and "future earnings potential") and (2) that neither the "Major Reserves nor "Major Merger-Related Expenses" were charged against UOP's operating earnings (as DDX 10 and DDX 11 prepared in May 1984 for this damage trial purported to do).

UOP, Inc.'s 1983 Year End Report Package (PDX 26, p. B-3) shows that on December 31, 1983, UOP showed Net Income of $41,680,000.00. After deducting $10,000,000.00 in 1983 dividends, UOP had retained earnings of $258,184,000.00. Again, no reserves or charges appear under the columns entitled "Discontinued Operations" or "Extraordinary Items" (as in DDX 10 and DDX 11); instead there is an asterisk to the note saying "Call Stephen P. McCafferey (d) TSC before Using."

There is an entry "Long Term Advances from (sic) Signal" (PDX 26, p. 2), which reads "(157,838)". The parenthesis means that the $157,838,000.00 advance was actually from UOP to Signal. (Note)

The only other lay witness called by Signal was Mr. Edward F. Kavanaugh. Mr. Kavanaugh was originally employed by Wheelabrator (2 Damage Kavanaugh 204-05). In the course of the Signal-Wheelabrator merger, he became and is now the Deputy Comptroller. (Mr. Kavanaugh, of course, knew nothing about Signal and its $21.00 cashout of the minority shareholders back in 1978.) His sole function at the trial was in connection with the accounting "adjustments" that appear as DDX-10 and DDX-11. At the specific direction of Brewster Arms, Esquire, house counsel for Signal, Mr. Kavanaugh had a Mr. Wills prepare DDX-10 and DDX-11 (2 Damage Kavanaugh 33-37). Mr. Kavanaugh, like Mr. Corirossi, claimed that these exhibits were prepared in response to plaintiffs' request

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Note: The foregoing is confirmed by backup (PDX 26, p. B9 supp):

UOP Inc.
Detail of Long-Term Advances From Signal
(Falcon Code 119)
($ in Thousands)

	B9 supp
Cash Transfers between UOP & SGN (includes interest payable & debt pay)	119744
Retirement & debt	(25259)
Other units	63353
	157838

for production (Kavanaugh 236-37). The plaintiffs requested existing documents, not the production (literally) of documents by the defendants in connection with the damage trial. The plain fact of the matter is that DDX 10 and DDX 11 were drawn up on May 14 and May 21, 1984, in connection with the upcoming damage trial (2 Damage Kavanaugh 34-38).

Mr. Kavanaugh testified that the accounting decisions on what to show as being charged off against UOP were made by Signal, the 100% owner of UOP (2 Damage Kavanaugh 48). He testified that such specific accounting charges had not been made against the other divisions of Signal (2 Damage Kavanaugh 49-50):

> "Q. So that I come back again that the exercise represented by page 1 of DX-10 and 11 was done in connection with the preparation for the trial of this damage case, isn't that right?
>
> "A. In response to that request for documents, these historical financial statements were prepared.
>
> "Q. But it would not have been done but for this trial?
>
> "A. Not necessarily true.
>
> "Q. Well it hadn't been done.
>
> "A. That's true.
>
> "Q. And you haven't done it for Garrett, have you?
>
> "A. Not at this time.
>
> "Q. And you haven't done it for any of the other divisions, have you?
>
> "A. I have not done it at this point, no.

"Q. So that the answer is that you had not done it for UOP and you had not done it for anybody else. That when this trial came up, you prepared DX-10 and 11 that by accounting changes, changes of profit from continuing operations, of $41,680,000.00 into a $55 million loss, is that right?

"A. It properly presents a historical income statement for UOP with a net loss of $55 million."

As for Come-By-Chance accounting charge of $52 million again made in May 1984 entirely against UOP's 1983 income, Mr. Kavanaugh admitted (2 Damage Kavanaugh 57-59, 60):

"Q. How did the number [52] come about?

"A. Mr. Cypres told me to book a $52 million liability and not against income but under the footnote under the purchase accounting theory it would be put on the balance sheet of Signal and amortized over a period of time spread over a number of years. The point about against UOP's income was never discussed.

"Q. Okay. *** So far as Come-By-Chance was concerned, it was put on the balance sheet of Signal as a liability of $52 million but net after taxes of $28 million?

"A. That's right.

"Q. And then it was shown -- it then amortized on Signal's income statement over a seven-year period?

"A. That is right. And the charge for 1983, the piece of that for 1983 that reduced Signal's net income was $2,500,000.00. I make reference to JE-5 on this exhibit."

Thus, what is a $2,500,000.00 amortized charge for seven years against Signal is, for purposes of this damage trial, set up in May 1984 as a $52 million charge against UOP's 1983 income.

Mr. Kavanaugh admitted that the $157 million that became a permanent advance to Signal from UOP over the years was a net figure, $24 million worth of UOP debts having been paid off (2 Damage Kavanaugh 107). He also admitted that, in addition to the $157 million advance UOP had made to Signal at year end 1983, UOP had $15 million in cash and almost $18 million in short terms investments and market securities (2 Damage Kavanaugh 108). UOP also had receivables of $173,071.00, in addition to the $157 million cash advances (2 Damage Kavanaugh 108-109). Mr. Kavanaugh also agreed that after taking all losses, reserves and adjustments that Signal had imposed on UOP, including Come-By-Chance, Signal's equity amounted to $263 million. Mr. Kavanaugh also reluctantly admitted that what Signal (still the 100% owner of UOP) would end up with even after all the reorganization adjustments, reserves and losses Signal had sought to charge against UOP in May 1984 were complete was substantially the profit-making divisions of UOP (2 Damage Kavanaugh 115-116, 120).

Mr. Kavanaugh was never asked to and never did calculate what the divisions remaining with UOP were going to earn (2 Damage Kavanaugh 118):

> "Q. Now, have you ever calculated what the divisions remaining with UOP are going to earn in terms of net operating during the year 1984?
>
> "A. No, I have not."

Mr. Kavanaugh agreed that UOP in 1984-1986 would be even better than UOP had been in 1982 (2 Damage Kavanaugh 120):

> "Q. Did you ever calculate what net operating income can be expected from UOP in 1984 or 1985, 1986?
>
> "A. No I did not because the UOP that you keep making reference to going forward in 1984, '85 and '86 is not the same UOP that was there prior to then.
>
> "Q. It was very different. It is very different isn't it?
>
> "A. It really is.
>
> "Q. It is a lot better than the one in 1983 isn't it? It has gotten rid of all the losers.
>
> "A. I certainly hope so."

Neither Mr. Kavanaugh nor Mr. Corirossi testified as to the value of the minority shares in 1978, nor did they testify as to the rescissory value of the UOP shares in 1982 or 1983. Rather, they were called in an attempt to convince this Court that UOP suddenly in 1983 became a dead loser. Actually, as the record clearly shows, the pro forma accounting sheets that were drawn up were designed to convince the Court that UOP, a company that had produced a $41 million operating profit in 1983 (even with losing divisions), had in fact a net operating loss of $55 million. However, the fact is that Signal still owns 100% of UOP that has gotten rid of all of UOP's losing divisions and UOP's contingent liabilities (such as the Come-By-Chance claim). UOP is now poised for the balance of the 1980's to make substantial operating earnings entirely for Signal's benefit (PDX 125; 4 Damage Bodenstein 188, et seq.). This Court could well make a rescissory damage award based on UOP's future earning potential -- "the real key to value" as of December 31, 1983. However, as previously pointed out, it is not necessary for the Court to do so: the Court may, if it deems appropriate, fix the date for the determination of rescissory damages as of December 31, 1982, before Signal and Wheelabrator merged.

The plaintiffs and the Court have been forced to go through all the foregoing accounting mumbo-jumbo because of an attempt by Signal at trial to pretend that, after the Signal-Wheelabrator merger, UOP was a loser. Signal, at trial, tried to "poor-mouth" UOP. The facts remain that UOP since 1978 (a) has produced $157 million in permanent advances to Signal, (b) has produced $80 million in dividends to Signal, (c) is a company with $263 million of equity owned entirely by Signal and, most important, UOP has great future earning potential since it now consists entirely of UOP's profitable divisions. (Note)

Note: In view of the fact that the evidence at the damage trial showed that the 1978 $21.00 cashout price was so grossly unfair and the rescissory values for 1982 and 1983 are almost twice the $21.00 cashout price, the Court does not have to rest its award on the fact that certain of UOP's assets, notably, its vast forestlands and patents and royalties, were undervalued in 1978 (1 Damage Corirossi 174-185) and not considered in the fixing of the $21.00 price. UOP's undervalued assets thus become simply another factor that the Court can and should consider (particularly if, as Signal claims, UOP was in effect liquidated following the Signal-Wheelabrator merger of 1983) (1 Damage Corirossi 65-71, 108, 112; 1 Damage Kavanaugh 16).

would be fair to the minority (3 Damage Purcell 123-124, 128-129).

Third, Mr. Purcell was furnished, prior to trial, with a written critique of his 1984 report by Mr. Bodenstein, which he read (PDX 119; 3 Damage Purcell 217; 4 Damage Bodenstein 204, et seq.). Mr. Purcell never did respond specifically in writing or orally at trial to the errors delineated in Mr. Bodenstein's review (3 Damage Purcell 235-239). For example, it was pointed out that any meaningful analysis of UOP's financial performance from 1978 through the present necessarily had to deal with UOP's continuing and monumental cash throw-off to Signal (PDX 119; 4 Damage Bodenstein 210). Mr. Purcell's 1984 report is virtually devoid of any mention of UOP's vast cash throw-off, including, of course, UOP's cash "advances" totaling, by 1983, $157 million to Signal, in addition to the approximately $80 million in dividends paid Signal since 1978. In this connection, Mr. Purcell, though he admitted (1) that he had learned the discounted cash flow method as a way of measuring value in business school (2 Damage Purcell 164; 3 Damage Purcell 6-8), (2) that Dillon, Read and its clients utilize the discounted cash flow method (2 Damage Purcell 55-60), (3) that future earnings potential is the key to the value of any company (Purcell (6/13/84) 74), and (4) that the Supreme Court specifically blessed its use (Weinberger, Supr., 710-714), did not utilize the discounted cash flow method (2 Damage Purcell 164-166, 170). The reason is obvious: the realistic use of the discounted cash flow method by Mr. Purcell would necessarily turn out to be contrary to Signal's interest. (Note) The ostensible reasons advanced by Mr. Purcell for not using the discounted cash flow method simply did not stand up (3 Damage Purcell 8-20; 71-76; 4 Damage Bodenstein 206 et seq.). Mr. Purcell did not prepare any similar document pointing out the errors, if any, he thought were present in Mr. Bodenstein's report, either in the calculations or methodology (2 Damage Purcell 217-218; 3 Damage Purcell 235). Finally, Mr. Purcell did not return as a rebuttal witness to point out to the Court what errors, if any, he thought there were in Mr. Bodenstein's testimony (5 Damage 173).

(1) Miscalculation of Premium in 1980 and 1984

Both Mr. Purcell's 1980 and 1984 reports as to the fairness of the $21.00 cashout price, while long, are basically very, very simple. The Supreme Court, Weinberger, Supr., 712, suggested that Mr. Purcell's only calculation was based on the "outmoded" "Delaware Block" method. At the damage trial, Mr. Purcell disagreed: he testified that he had used a different valuation method (2 Damage Purcell 163-

Note: Significantly, Mr. Purcell reluctantly admitted he had never checked Mr. Bodenstein's 1980 discounted cash flow analysis using UOP's 1978 Five-Year Plan to see if by UOP's actual performance Mr. Bodenstein's analysis had been proven correct (3 Damage Purcell 103).

164, 185, 218-221). Be that as it may, Mr. Purcell found and stated basically in both the 1980 and 1984 opinions that the market and investment price of the UOP stock was in the area of $14.00 to $15.00 (A1757; 2 Damage Purcell 175; 177; 3 Damage Purcell 134-136; DX-40; DDX-13). (Note) Mr. Purcell in both his 1980 and 1984 reports recognized that there is always a premium over market in a cashout merger (DX 40; DDX 13; pg. 3-40) and so stated at the damage trial (3 Damage Purcell 198).

Mr. Purcell then justified the fairness of the $21.00 price in precisely the same way Mr. Glanville had done so (Weinberger, Chan., 1338, 1341; Glanville 117-118). Mr. Purcell stated that the $21.00 price was fair based on the percentage of premium paid in comparable transactions (3 Damage Purcell 138). However, Mr. Purcell himself did not do the comparison on which both the 1980 and 1984 Dillon, Read fairness opinions depend. The premium comparison was done by two juniors at Dillon, Read in 1980 (DX-40; A-1062; 1346-1349; Purcell (5/8/80) 163-164; 3 Damage Purcell 140;

Note: In 1980, Mr. Purcell included the "structure" of the transaction as a reason for finding the $21.00 price fair (DX-40). Of course, in the light of the Supreme Court's opinion, Mr. Purcell stated that even without relying on "structure" in 1980, the $21.00 price was fair and the same thing was true in 1984 (DX 40; DDX 13; Damage Purcell 175-177). Mr. Purcell also stated in both the 1980 and 1984 reports that, because in 1975 Signal had paid $21.00 for its UOP shares, this had a "psychological" bearing on the fair price in 1978 (DX 40; DDX 13; (but said at trial he gave no weight to the 1975 price) (2 Damage Purcell 175; 193-194).

Weinberger, Chan. 1362). Messrs. Daum and Read measured the percentage of premium based on the difference between the merger price and the price on the day before the formal announcement of the transaction (Weinberger, Chan., 1362; TR 1352; 3 Damage Purcell 141). As was pointed out at the original trial, and agreed to by Mr. Purcell, "noise" can result in a run-up of the stock price (A-1238-1261; 3 Damage Purcell 143-150; 4 Damage Bodenstein 39-42). When there is "noise", the price the day before the formal announcement is not the unaffected market price (A-1238-1261; 3 Damage Purcell 155; 4 Damage Bodenstein 37-39; 3 Damage Bodenstein 169-172). In his trial testimony, Mr. Purcell never disputed that the existence of "noise" reduces the percentage of premium that a stockholder realizes in a cashout merger (3 Damage Purcell 146-150). Mr. Purcell only took issue with the "trilogy of events" (i.e., rumors, leaks or market premonition of the merger) that would give rise to such noise (3 Damage Purcell 150). Mr. Purcell did not analyze or revise the transactions contained in his list of comparables to eliminate the noise, though he was given even back in 1980 Mr. Bodenstein's analysis (PX 6; 3 Damage Purcell 163, 187-188).

The sole rationale for utilizing the day before the formal announcement was because "... Dillon, Read always did it that way..." (3 Damage Purcell 141-142). Even after the effect of noise was brought home to him a second time by cross-examination, Mr. Purcell doggedly claimed that the computation of the percentage of premium made by Messrs. Daum and Read was valid (3 Damage Purcell 200). (Note)

One reason that Mr. Purcell does not (and indeed cannot) take issue with the noise-premium analysis is that Mr. Purcell himself uses that very same principle in some portions of his own valuation reports. Specifically, in Mr. Purcell's 1984 report (DDX 13, pg. 3, 13), he utilized a noise-screening analysis in support of Dillon, Read's determination that UOP's average high-low-closed price of $13.87 was very close to UOP's closing price of $14.50 on February 28, 1978 (the last day of trading prior to the merger announcement). The report states: "<u>Excluding the trading prices achieved during the 1975 Signal tender offer</u>, the stock did not trade above $16.25 in 1975 nor above $15.75 in 1976" (DDX 13, pg. 3). (See also DX-40, pg. 4, Dillon, Read Report of 1980). This language makes it clear that Dillon, Read not only understood and approved of the noise elimination

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Note: Significantly, Mr. Purcell did make a crude attempt at the damage trial to correct his long standing failure to eliminate "noise" to get an unaffected market price by which to measure the adequacy of the percentage of premium. He arbitrarily selected thirty days before the formal announcement as the measuring day (3 Damage Purcell 167-176, 188; PDX 123). Mr. Bodenstein pointed out that arbitrary selection of a thirty-day cut-off period does not eliminate "noise" (4 Damage Bodenstein 66-69). But even this mechanical selection pushed the average premium up to 59% and the median up to 51%. Incredibly, Mr. Purcell never applied his "thirty day" percentages to the UOP minority price of $14.50-$15.00. Of course, there is no easy way: each transaction must be individually analyzed (as Mr. Bodenstein did in PX 6) to filter out "noise" and find the unaffected market price.

principle but indeed applied precisely the technique described and utilized by Mr. Bodenstein as appropriate in "a step transaction" (4 Damage Bodenstein 42-43, 49-50, 59-60). See also In re Olivetti Underwood Corp., infra.)

Moreover, Delaware Courts have long recognized that market price may be distorted by extrinsic matters and that valuation should be based on unaffected market price. Sterling v. Mayflower Hotel Corp., Chan., 89 A.2d 802 (1952); 93 A.2d 107, 111 (1952); David J. Greene & Co. v. Schenley Industries, Inc., Chan., 281 A.2d 30, 34 (1971). This Court said in In re Olivetti Underwood Corp., (Chan.) 246 A.2d 800, 805 (1968):

> "First, it is undisputed that Olivetti Italy's offer on May 21 was to buy all of the publicly-held shares at $14.50 per share and its plainly announced purpose was to acquire all of the stock. In light of that, it is unrealistic to say that the announcement did not have an impact upon the market price. Compare Sporberg v. Cities Specialty Stores, supra, [Del. Chan., 123 A.2d 121 1956]; Swanton v. State Guarantee Corporation, 42 Del.Ch., 477, 215 A.2d 242 (1965); and Levin v. Midland-Ross Corporation, 41 Del.Ch., 276, 194 A.2d 50 (1963). Hence, I am of the view that the Appraiser, in fixing market value, correctly considered only the time prior to the date of the tender offer. This is not to say that there was not a 'free market' for all purposes after May 21. It is, however, to say that for appraisal purposes market value was so affected by the known position of Olivetti Italy that it does not provide a reliable guide for valuation purposes. Compare Swanton, in which the Court noted that there 'was a market here but it was influenced somewhat by the company's buying of its own stock.'
>
> "Second, the corporation contends that the value should be fixed at 13 3/8 because that was the closing price on the day preceding the tender. I do not understand Midland-Ross to hold as a matter of law that the last day of trading on an open market is the measure of market value. It is

true that the Court used the average of that day, but it stated quite specifically that its use was 'for the purpose of ... [that] proceeding.'"

See also Nathan & Shapiro, Legal Standards of Fairness of Merger Terms Under Delaware Law, 2 Del.J.Corp.L. 44, 50-51 (1972) (cited in Weinberger, Supr., 457 A.2d at 711).

The investment banking community also recognizes as crucial to accurate and meaningful valuation the elimination of noise. In Rosenblatt v. Getty Oil, Del. Ch., C.A. No. 5278, Brown, C., (Sept. 1983), 8 Del.J.Corp.L. 361, the investment bankers for Getty Oil and Skelly Oil (Smith Barney, Harris Upham & Co. and Blyth Eastman Dillon & Co.), in weighing the market value of the Getty and Skelly stock, chose a period two months prior to the death of J. Paul Getty "because the news of his death gave rise in the marketplace to immediate speculation that a merger between Getty and Skelly would be imminent, thus having a distorting effect on the market price of the stocks of the two companies". Slip Op. at 20. This Court held:

"The effect of the .5875 exchange ratio was to give the Skelly minority a 65% premium over the market price of their shares as it existed prior to the time of market speculation that there would be a merger because of the death of J. Paul Getty." Slip Op. at 58 (emphasis added). (Note)

Note: In the 1980 Dillon, Read Report, Mr. Purcell, contrary to the Delaware precedents cited above and the practice of Smith Barney and Blyth Eastman, (and recently confirmed by the opinion of this Court in Rosenblatt) urged that "[w]here exchange of common stock is offered, the equivalent value is determined based on the closing price of the acquiror's stock on the day prior to public announcement." DX 40, EX 6, pp. 1-5, Note A.

However, as discussed above, where elimination of noise supported their conclusions, Mr. Purcell and Dillon, Read accepted the benefits. DX 40, p. 4; DDX 13, pp. 3, 13.

The Court concluded that the exchange ratio, based in part on the elimination of noise, was fair. Slip Op. at 55.

As was pointed out without contradiction at the original trial and again at the 1984 damage trial, when an actual analysis of the comparable transactions selected by Dillon, Read was made by Mr. Bodenstein to eliminate "noise", the percentage of premium, rather than having a median of 41% or an average of 48% as found by Dillon, Read rather turns out to be to have a median of 71% or an average of 75% (PX 6; 4 Damage Bodenstein 62; 3 Damage Purcell 159, 174). When the list selected by Dillon, Read back in 1980 is restricted to the 38 acquisitions announced between June 1, 1977 through May 31, 1978, the median of percentage of premium is 75% and the average is 77% rather than the 51% and 54% found by the mechanical day before the announcement as found by Dillon, Read (4 Damage Bodenstein 63-64).

If, therefore, Mr. Purcell's $14.00 to $15.00 figure is multiplied by 70% (to err on the conservative side), the fair value of the minority shares is $23.80-$25.50.

(2) Mr. Purcell's Determination of the Rescissory Value for the Years 1982 and 1983 Is Incorrect and Omits Premium

Mr. Purcell, in 1984, augmented his opinion by presenting calculations to show what he thought the minority shares would have traded at as of December 31, 1982, and as of December 31, 1983 plus dividends that the minority would have gotten from 1978 if they had not been cashed out (2 Damage Purcell 182-183, 209-210; DDX 13, p. 16-17). (Note)

Mr. Purcell stated (2 Damage Purcell 183):

> "In other words, if the shareholders still had their shares today, they had not been taken away from them, 49.5 percent of UOP would be owned by public shareholders, and the stock would continue to trade on the New York Stock Exchange."

Specifically, Mr. Purcell's June 7, 1984 report states (DDX 13, pg. 16):

> "Given all of the above, including the fact that 50.5% of UOP's common shares would be owned by Signal, it is our judgment that UOP's common shares <u>would have traded at year end 1982</u> at a price earnings ratio of 6.7 to 7 times and at a market book value ratio of 85 to 95% or at $27.25 to $28.50 per share. *** The dividends per share which would have been received by UOP minority shareholders from the 1978 merger date through 1982 given the previous statements and assumptions was $6.51. Thus, the total estimated value to UOP shareholders at the end of 1982 would have been $33.76 to $35.01. ***"

So far as 1983 is concerned, Mr. Purcell says (DDX 13, (pg. 17):

Note: Mr. Purcell specifically did not try to determine the trading value of the UOP shares in 1984 (Purcell 6/13/84 123). Of course, as the trial record shows, this attempt by the defendants to make UOP "vanish" as of December 31, 1983, is patently transparent. UOP is alive and well; UOP continues to be 100% owned by Signal. It would be convenient for the defendants to have UOP vanish as of December 31, 1983 (taking with it the $80 million of dividends and $157 million of advances by UOP to Signal). Moreover, with 1983's losses and reserves charged off and UOP's sick divisions disposed of, UOP is in a position to continue to produce earnings for Signal in the years to come just as it has since 1978 significantly.

> "In any case, in our opinion, the UOP common stock would have traded at year end 1983 at least 15% below its price as of year end 1982 or at $23 to $24.25. *** The dividends per share which would have been received by UOP minority shareholders from the 1978 merger date through 1983 was $7.38. Thus, the total estimated value to UOP minority shareholders at the end of 1983 would be $30.38 to $31.63."

(See also 2 Damage Purcell 187.)

There are three principal reasons why Dillon, Read's computation of 1982 and 1983 trading value of UOP's minority shares does not correctly represent the rescissory damages value.

(i) Elimination of Companies With "Depressed Earnings"

Ostensibly Mr. Purcell, in his 1984 report, would appear to be using the same comparables that he had used in his 1980 report (DX 40; DDX 13). However, in the middle of the report there appears an almost casual indication that certain comparable companies have been eliminated, which results in lowering the final figures. Specifically, he says (DDX 13, pg. 15): "The 1982 averages did not include those companies in the group which reported losses in 1982 or whose earnings had declined by more than 25%." Mr. Purcell admitted that his juniors had done the statistical work on the comparable companies appearing in DDX 13, Ex. 7, p. 1; 2 Damage Purcell 196). Mr. Purcell himself went back and then eliminated seven out of the fourteen comparable companies with "depressed earnings" of 25% (2 Damage Purcell

202-204). With these seven companies eliminated, the price/earnings ratios used to compute the value of UOP's stock in 1982 and 1983 was much lower (DDX 13, Ex. 7, p. 1; DDX 13A; 2 Damage Purcell 203; 4 Damage Bodenstein 214-218). Specifically, the comparative price/earnings without Mr. Purcell's 25% elimination was 9.1: with half of the comparables eliminated, the price/earnings was 7.5 (DDX 13, pg. 15; 2 Damage Purcell 194-196; 3 Damage Purcell 221-225). There is no justifiable basis whatever for eliminating almost one-half of the comparable companies simply because of so-called "depressed earnings" (4 Damage Bodenstein 214-218). The United States as a whole was in a depressed state. (Note-1) Mr. Purcell also cut out 11 out of 32 on his second list of comparables (3 Damage Purcell 237). Once again, Mr. Bodenstein has shown that, when utilizing the complete comparative figures, the rescissory damage figure came out to be $38.69 to $48.36 for 1982 (PDX 119, p. 12). (Note-2)

Note-1: Mr. Purcell is inconsistent. If he was going to eliminate from his comparable companies those with "depressed earnings" of 25% or more, then he should also eliminate the divisions of UOP that were money losers. Mr. Purcell eliminates from his comparables those companies that do not support the result he is trying to achieve while at the same time he does not eliminate the UOP "depressed earning" divisions.

Note-2: The foregoing does not include the inclusion of some figures that are not correct or the inclusion of some companies that are not correct or Mr. Purcell's mistake at trial on a figure as to Federal-Mogul (4 Damage Bodenstein 214-218; 3 Damage Purcell 227-229; PDX 119, pp. 8-9).

There is no justification for such an arbitrary elimination of half the comparables: the only reason for eliminating the companies that are reflecting a 25% reduction in earnings is to make the comparison "come out" (4 Damage Bodenstein 216-218). Furthermore, the point of using a collection of comparable companies is to use the whole spectrum to provide a basis to determine what UOP's performance would have been based on the spectrum, not a selection from the comparables. Finally, why was 25% chosen rather than 50%, 66 2/3%, 10% or any other percentage? (Note)

(ii) Calculation of Interest on Dividends

Mr. Purcell calculated the amount of the dividends that the UOP minority shareholders would have gotten from 1978 to 1982 and from 1978 to 1983 (DDX 13; 2 Damage Purcell 209-210). However, Mr. Purcell does not include interest on the omitted dividends (DDX 13; PDX 127; 4 Damage Bodenstein 153, 222).

(iii) Omission of Premium

In transactions where control (particularly total control) is going to the acquiror, the price exceeds the

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Note: Mr. Purcell not only had no defensible rationale for eliminating seven out of fourteen comparables but his report also contained several significant factual "errors", all of which worked in his favor (i.e., C. F. Braun v. Braun Engineering; Federal Mogul; 3 Damage Purcell 230-231).

unaffected market price being paid for minority interests. The difference between the unaffected market price and the transaction price is called premium. Sterling v. Mayflower Hotel Corp., 93 A.2d 110-111; Weinberger, Chan., 1360-1361. Premium is paid for the attributes of control. Cheff v. Mathes, Del. Supr., 199 A.2d 548, 555 (1964); DX 40; DDX 13, pg. 3, 14; Weinberger, Chan., 1360-61; 3 Damage Purcell 202-205; TR 1139-1141). Premium is not altruism on the part of the buyer: rather, it is the price that the buyer pays and the seller gets for the transfer of control (or 100% of control where 100% of stock ownership is obtained by the acquiror) (3 Damage Purcell 198; 4 Damage Bodenstein 25-28). In any calculation of rescissory value, it must be assumed that the stockholders, after the date for which rescissory damages are calculated, will no longer have any interest in the company. By definition, they are being paid damages in place of having the stock returned to them (3 Damage Purcell 202-206; 4 Damage Bodenstein 150, 220-221).

In spite of the foregoing, Mr. Purcell does not include or add premium in his 1984 calculations: all he does is to calculate the price at which he believes the UOP shares would have traded on December 31, 1982 or December 31, 1983 (DDX 13, pg. 16; 3 Damage Purcell 206, 211-216). Mr. Purcell's report limits his task to calculating what the trading value of the UOP stock would have been on December 31, 1982 and December 31, 1983. (It would seem that defendants and Mr. Purcell were hoping that the necessity of adding premium would somehow be entirely overlooked.) When questioned on why premium was omitted, Mr. Purcell's only response was that it would take a fairness study to determine the appropriate percentage of premium that would have to be added (3 Damage Purcell 208).

As noted, Mr. Purcell's own (incorrect) calculation of the trading value of UOP for December 31, 1982 was $27.25 to $28.50 and for December 31, 1983 was $23.00 to $24.25 (DDX 13, p. 16, 17). If the premium were only 40%, the rescissory value of UOP's stock is as follows:

1982	($27.25+40%)	$38.15	to	$39.90	($28.50+40%)
	plus dividends of	6.51		6.51	
	rescissory value	$44.66		$46.41	
1983	($23.15+40%)	$32.20	to	$33.95	($24.25+40%)
	plus dividends of	7.38		7.38	
	rescissory value	$39.58		$41.33	

C. Mr. Purcell's Afterthought on Inflation

For the first time towards the end of his cross-examination at the damage trial, Mr. Purcell briefly attempted to denigrate UOP's outstanding financial performance further in the years 1978 through 1984 by suggesting in almost casual comment that UOP's actual performance did not meet (let alone exceed) its projections because of inflation (3 Damage Purcell 88-91). This late-blooming defense simply does not hold water. In the first place, neither Mr. Purcell nor anybody from Signal or UOP or Lehman Brothers ever raised this concept at the original trial or indeed at the rescissory hearing. Signal's Annual Reports and UOP's documents applaud UOP's performance as contrasted with what UOP projected (5 Damages Corirossi 202, 206). Mr. Purcell's reports of 1980 and 1984 do not even allude to this suggestion. Neither Mr. Corirossi nor Mr. Kavanaugh ever mentioned this concept in their depositions or in their direct or cross-examination at the damage trial.

However, the defendants' attorneys seized on Mr. Purcell's comment and attempted to embroider on it.

Mr. Halkett devoted a considerable amount of time to questioning Mr. Bodenstein about "constant" dollars (5 Damage Bodenstein 66-70). Mr. Bodenstein explained that Table A showed that UOP met and exceeded "plan" because its results were in "actual" (i.e., inflated) dollars as opposed to "constant" (i.e., plan) dollars (5 Damage Bodenstein 70, 155-156).

An exhibit that elaborates on Mr. Purcell's passing thought was drawn up overnight at the directions of the defendants' attorneys (DDX 17; 5 Damage Corirossi 179, 208). Mr. Corirossi was called as a rebuttal witness and introduced the exhibit (5 Damage TR (Cororossi) 173, et seq.; DDX 17). However, the whole idea was quickly shot full of holes: Mr. Corirossi readily admitted that he knew of no

Signal or UOP document that considered or dealt with this novel concept (5 Damage Corirossi 185-186). Mr. Corirossi himself had never worked on such a concept for Signal or UOP or for any of the other companies that he previously worked for, including Peat, Marwick (5 Damage Corirossi 186). Except for 1982, the disparity was relatively slight (5 Damage Corirossi 189-190). The fact is that UOP's payout of cash in the form of dividends and advances to Signal were in "inflation" dollars. UOP's debts were paid off in "inflation" dollars (5 Damage Corirossi 191-197). Finally, the Court itself made Mr. Corirossi calculate what amount UOP would have had to earn in order to embody the concept suggested by Mr. Purcell's afterthought (5 Damage Corirossi 211-216). Thus, Exhibit 17 was another overnight trial strategy of defendants' counsel. There is nothing to Mr. Purcell's random remark: it was simply a further last ditch effort on the part of the defendants' attorneys to drag a red herring across the plain facts of the real value of the minority shares by once again trying to denigrate UOP's outstanding financial performance since 1978.

D. Conclusion as to Mr. Purcell

Actually, the defendants had every reason to be desperate. Mr. Purcell, in 1980 (and in 1984), presented only one calculation to justify his opinion of the fairness of the $21.00 cashout price. Mr. Purcell's $21.00 fairness determination is incorrect because the comparative analysis on which the entire opinion depends did not filter out "noise" in comparable transactions. If "noise" had been filtered out, then Mr. Purcell's single calculation would have come out substantially in accord with the various detailed analyses which Mr. Bodenstein made which showed that the value of the minority shares was not less than $26.00 per share. The one new item in Mr. Purcell's 1984 presentation is his calculation of what the trading value of the stock of UOP's minority shareholders would have been on December 31, 1982 and December 31, 1983, together with the dividends they would have received (assuming the minority had not been cashed out by Signal in 1978). Aside from the fact that by "tailoring" the comparables, Mr. Purcell has pulled the trading price down, Mr. Purcell has omitted the premium that would have to be added to the trading value to come up with the rescissory value. In addition, Mr. Purcell omitted the compound interest on the dividends that the minority are entitled to had they not been cashed out in 1978. Finally, Mr. Purcell (though he had Mr. Bodenstein's reports and the point-by-point critique of his own 1984 report made by Mr. Bodenstein in advance of the damage trial) never refuted Mr. Bodenstein's evaluation of the true worth of the minority shares. In short, Mr. Purcell seeks to persuade this Court as to the fairness of his client's $21.00 cashout of the minority on the basis of the prestige of the investment banking house for which Mr. Purcell works rather than any financial justification for cashout price or the rescissory value of the minority shares in 1982 or 1983.

The Court should reject Mr. Purcell's opinion in its entirety.

IV. SINCE THE $21.00 CASHOUT PRICE WAS GROSSLY UNFAIR, THE MINORITY STOCKHOLDERS ARE ENTITLED TO A FAIR VALUE AWARD OR RESCISSORY DAMAGES

The plaintiffs called Mr. Kenneth Bodenstein, a Chartered Financial Analyst and Senior Vice President of Duff & Phelps, as their expert witness in 1980 and 1984. Mr. Bodenstein was an executive in the financial sections of four large companies prior to joining Duff & Phelps in 1972 (Air Products, Armour & Company, Goodbody & Company, and CNA Financial) (4 Damage Bodenstein 5-9). Duff & Phelps (about to be acquired by Security Pacific Company) is a Chicago investment and valuation firm employing about 100 professionals (4 Damage Bodenstein 12-14). Valuation is one of the principal functions of Duff & Phelps but they also provide investment and security research for the financial community, including significantly Dillon, Read (4 Damage Bodenstein 13-16). As part of its ongoing research, Duff & Phelps makes daily calculations of the percentage of premium in mergers, eliminating "noise" by analysis in order to make the determination meaningful -- that is, to determine the percentage of premium as between the unaffected market price and the cashout price. Each analysis of the percentage of premium then becomes part of Duff & Phelps' data bank (4 Damage Bodenstein 36-38).

A. Mr. Bodenstein's 1980 Report and Testimony

In 1980, Mr. Bodenstein made a conservative determination of the fair value of the minority shares as of the time of the cashout merger based on a series of comparative analyses (Weinberger, Chan., 1356; 4 Damage Bodenstein 92-95; 5 Damage Bodenstein 153-154). Based on that analytical work, he testified that the minority shares were worth not less than $26.00 per share (Weinberger, Chan., 1358). Mr. Bodenstein's 1980 report did not contain an evaluation of the minority shares based on the discounted cash flow method (PDX 120, Appendix B). However, since the defendants had raised questions about that technique at Mr. Bodenstein's deposition, by the time of the original trial in 1980, he had prepared two three limited discounted cash flow analyses based on contemporary and historical data, and one discounted cash flow analysis based on a "no growth" assumption, limited to UOP's own projected dividends and cash throw-off (4 Damage Bodenstein 97-98). These three discounted cash flow analyses confirm that the value of the minority shares was not less than $26.00 (4 Damage Bodenstein 98).

B. The Rescissory Damage Hearing

Mr. Bodenstein was retained by the plaintiffs in connection with the defendants' request for a preliminary hearing on rescissory damages. Mr. Bodenstein, as noted above, had not used the Arledge-Chitiea Report in connection with his 1980 opinion on the value of the minority shares (4 Damage Bodenstein 21-27). However, as he explained at the damage trial, the Arledge-Chitiea Report and calculations were collaterally significant as to the value of the minority shares: they showed that a willing buyer had calculated that it could economically pay $24.00 for the minority shares (4 Damage Bodenstein 21-22). Mr. Bodenstein, using the methodology of the Arledge-Chitiea Report, showed that, in fact, Signal could profitably acquire the minority shares at any price up to $30.00 per share (4 Damage Bodenstein 23-24).

C. Mr. Bodenstein's 1984 Report and Testimony

Mr. Bodenstein then prepared a report in 1984 (PDX 120) and testified at the damage trial. The 1984 report was prepared after Mr. Bodenstein reviewed the defendants' production of documents delineating what had happened to UOP between 1978 and 1980 (4 Damage Bodenstein 103; PDX 120, p. 1). As the 1984 report and Mr. Bodenstein's damage trial testimony showed, the financial prosperity of UOP from 1978 through the present reinforced the conclusions of the 1980 report (4 Damage Bodenstein 95).

In his 1984 report, he first reviewed and described the effect of UOP's outstanding 1978-1982 results. Then, Mr. Bodenstein delineated the discounted cash flow method, including the appropriate method of determining the applicable discount rate (PDX 120, Appendix A, Table G). This initial section of the 1984 report concludes with a full discounted cash analysis of UOP based on UOP's own 1978

Five-Year Plan (PX-U-400). The report states (PDX 120, pg. 10):

> "Based on the above discussion and analyses, and on our 1980 Special Report and March 1984 Report, our opinion is that the fair value of UOP's minority shares at the time of the 1978 merger was $28.00 to $30.00 per share. *** The above conclusion is based on information available in 1978 concerning UOP and its future prospects. However, analysis of UOP's performance since 1978 bears out the accuracy of our opinion. Table L provides a 1978 present value calculation (at a 12% discount rate) of the actual dividend stream and cash advances made to Signal for the period from 1978 through 1982. *** They show on a historical rather than perspective basis that the 1978 value of the UOP minority shares was between $28-30.00 per share. Moreover, the additional $10 million in dividends and an additional $78.8 million of cash advances Signal received during 1983 further support our calculation." (Emphasis added.)

The second portion of the 1984 report deals with the rescissory value ff the UOP stock.

Mr. Bodenstein made ten separate analysis to determine the rescissory value of UOP from 1979 through 1984. The results were summarized in Table U (PX 120, appendix A):

TABLE U

SUMMARY OF UOP FAIR VALUES BY VARIOUS VALUATION METHODS

	During the Spring of					
	1979	1980	1981	1982	1983	1984
Discounted Cash Flow Analysis	$ 26	$ 37	$ 62	$ 65	**	**
Comparative P/E Ratios	31	44	69	49	$ 69	$ 61
Comparable Transactions' Ratio of Offer Price to Earnings	36	47	57	68	60	53
Comparative Multiples of Book Value (1.75 times)	38	43	47	52	54	59
Comparative Dividend Yields	33	40	88	50	64	64
Signal's Dividend Yield	37	65	84	75	87	74
Percentage of Signal's Market Value	30	32	81	48	87	56
Duff & Phelps' Reasonable Estimate	32	45	55	60	60	50
P/E Ratio to Prior Years' Earnings	9.9	12.0	12.3	11.2	12.7	13.7
Multiple of Prior Year's Book Value	1.46	1.85	2.04	2.01	1.93	1.48

** The 1983 and 1984 UOP five year annual plans have not been received.

On the basis of Table U, the 1984 report concludes:

> "Table U summarizes the results of various valuation approaches for the years 1979 through 1984 and presents our conclusion regarding the fair value UOP's minority shares would have had if the merger had not occurred. Our opinion is that the fair value of UOP's minority shares was $60.00 per share as of the Spring of 1983 and $50.00 per share as of the Spring of 1984." (PDX 120, p. 16)

CONCLUSION

The Court said in its rescissory damage opinion of April 24, 1984, pg. 15:

> "The object is to see that the minority is treated fairly in the long run and it is difficult to do so until all the options are put before the Court."

All of the options are now before the Court. It is up to this Court to see that the minority is treated fairly by rectifying the manifest corporate injustice of the 1978 $21.00 cashout by Signal that was so grossly unfair to the minority shareholders of UOP.

Based on all the evidence, the Court should determine what UOP as a whole was worth to Signal (or to any other willing buyer) either (1) at the time of the 1978 merger, (2) on December 31, 1982, (3) on December 31, 1983, or (4) at present. Having made the basic determination of the value of UOP as a whole, the Court should then allocate 49.5% of the amount that it finds as the worth of UOP on any of the foregoing dates to the minority shareholders of UOP.

The following is a table prepared by plaintiffs' counsel that sets out the evidence of the value of UOP on a per share basis, both as to 1978 and on a rescissory basis:

1978 FAIR MARKET VALUE

	Duff & Phelps 1980*	Duff & Phelps 1984**	Arledge/ Chitiea	Dillon, Read 1980	Dillon, Read 1984
1978 fair market value	$26.00	$29.00	$24.00	$21.00	$21.00
Less funds received in 1978	21.00	21.00	21.00	21.00	21.00
	$ 5.00	$ 8.00	$ 3.00		
Plus interest(1)	4.25	6.80	2.55		
Damages (per share)	$ 9.25	$14.80	$ 5.55	$ -0-	$ -0-

RESCISSORY DAMAGES

	Yearend 1982			Yearend 1983		
	Duff & Phelps	Dillon, Read	Dillon Read Adjusted	Duff & Phelps	Dillon, Read	Dillon Read Adjusted
Yearend per share price	$60.00	$41.25(2)	$48.00(3)	$50.00	$35.00(2)	$56.75(3)
Plus dividends plus interest (4)	7.94	7.94	7.94	9.59	9.59	9.59
Less $21 per share invested in money market funds since 1978(5)	35.81	35.81	35.81	38.88	38.88	38.88
Damages (per share)	$32.13	$13.38	$20.13	$20.71	$ 5.71	$27.46

* Duff & Phelps 1980 opinion was that the value was not less than $26.00 (PDX 120, Appendix B, p. 23).

** Duff & Phelps 1984 opinion was that the 1978 value was between $28.00-30.00. The $29.00 is the average (PDX 120, p. 2).

(1) Interest based on Money Market Mutual Funds (DDX 13) Dillon, Read Report, June 7, 1984, Exhibit 9.

(2) Per Dillon,Read's report pages 16-17, after applying a 44.8% premium.

(3) Dillon,Read's conclusion adjusted to reflect their Exhibit's P/E Ratio's and using UOP 1983 <u>operating earnings</u> before reserves and one time charges.

(4) Actual dividends paid by UOP plus interest calculated using Dillon, Read's Exhibit 9.

(5) Using Dillon,Read Exhibit 9.

Respectfully submitted,

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