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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.

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PLAINTIFFS' ANSWERING POST-TRIAL BRIEF FOLLOWING THE DAMAGE TRIAL

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INTRODUCTION AND OUTLINE OF ARGUMENT

The first section of this, the Plaintiffs' Answering Brief, will point out certain fundamental omissions and flaws in Signal's arguments, including Signal's repeated reargument of issues previously decided by this Court and the Supreme Court,* that preclude a finding that Signal has met its burden of proof. The second section will give examples of the many errors and misstatements in Signal's brief. The third and final section will show that that Signal's positions are inconsistent with applicable Delaware case law on damages and particularly rescissory damages, and, indeed, not supported by the non-Delaware cases on which Signal relies.

In conclusion, the plaintiffs ask that the Court, having all the damage evidence and options now before it, fulfill its undertaking following the rescissory damage hearing that it would see that the minority shareholders of UOP are finally fairly dealt with by entering a judgment awarding damages that will fully compensate the minority for the wrong they have suffered and what Signal has taken from them.

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* But for the fact that the plaintiffs' prime objective at this point must be to obtain a judgment as promptly as possible for the minority shareholders of UOP, a motion to strike would have been presented in view of Signal's repeated arguments on issues previously clearly and definitely decided against Signal.

I. IN ITS CONTINUED EFFORTS TO AVOID PAYING THE MINORITY FAIR VALUE, SIGNAL TOTALLY IGNORES THE ONLY ISSUE BEFORE THE COURT

Signal's opening brief has avoided coming to grips with what this Court has recognized (Weinberger v. UOP., Del. Chan., C.A. 5642, Brown, Ch. (April 24, 1984) pg. 14), is the sole remaining issue in this case: what amount will fairly compensate the minority shareholders for the UOP shares Signal wrongfully took from them in 1978 and will now be permitted to retain despite its misconduct? Signal still fails to recognize that the Supreme Court has held that the burden of proving under careful judicial scrutiny that the minority has been treated with entire fairness is totally on Signal. Weinberger v. UOP, Supr., 457 A.2d 701, 710 (1983). Nor has Signal acknowledged that it has already "flunked" the fairness test and now has the burden of establishing that the minority should receive no compensation despite Signal's breach of fiduciary duty. Weinberger (April 24, 1984) pg. 14. Instead of trying to meet its burden, Signal ignores the bonanza it reaped from the merger and seeks to relitigate matters long since decided by this Court and the Supreme Court. Moreover, whereas Signal attempts to denigrate the plaintiffs and their expert witness, it offers no explanation for the glaring errors in its expert's opinion.

A. Denying the Minority Stockholders Any Recovery Cannot Be Entirely Fair Given the Huge Benefits Signal has Reaped From UOP

Signal's case fails first and foremost because it is based entirely on the wrongful assumption that a fiduciary guilty of unfair dealing pays no damages if its hired expert says the merger price arguably was adequate.* The Supreme Court and this Court have held that the test of entire fairness is not bifurcated and that Signal has already failed the fairness test since it engaged in a pattern of unfair dealing. Weinberger, Supr., 711-712; Weinberger, (April 24, 1984) pg. 13-14. Thus, the hearing on remand is to determine the amount of damages necessary to fully and fairly compensate the minority for the wrong they have suffered. Weinberger, (April 24, 1984), pg. 14. In other words, the function of the Court at this stage is to see that the minority receives an award of damages sufficient to insure they have been treated fairly in light of all the circumstances. Id. at 15.

Signal's position is premised on the erroneous belief that this Court can and will ignore the most important fact -- the tremendous financial benefits Signal has actually realized from UOP's outstanding performance since the merger. Nowhere in their 55-page brief do the defendants ever allude to the fact that (as UOP's 1978 Five-Year Business Plan predicted) UOP has contributed vast yearly earnings to Signal since the merger. From 1978 through 1982 UOP's net income before extraordinary items totaled $210,800,000.00. PDX 120, Appendix A, Table A. UOP's 1983 net operating income (before Signal's accounting adjustments) was an additional $41,680,000.00. PDX 90. Moreover, since the merger, Signal has received $80 million in dividends and $157,800,000.00 in other cash from UOP, as well as additional cash from selling

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* As shown in Plaintiffs' Opening Brief, the evidence in fact demonstrates that $21.00 was not a fair price.

off certain of UOP's divisions. And Signal will continue indefinitely to receive yearly net earnings and other benefits (i.e., cash throw off) from UOP, a wholly-owned subsidiary which has retained its profitable divisions and sold off or closed down its losing ones.

However, Signal maintains that, despite having been unfair to the minority, it is entitled to keep the vast sums it has realized as 100% owner of UOP and that the minority should receive not one penny. How can it be said that the minority has been treated fairly if the adjudicated wrongdoer gets to keep everything and the minority gets nothing? Signal also claims that, though it will get all the future benefits from UOP, the minority should get nothing to compensate them for the fact that, despite having no meaningful opportunity to consider the merger because of Signal's unfair dealing, they will not get their UOP stock back nor have the opportunity to share in UOP's future earnings and growth. How can this be characterized as entirely fair treatment of the minority?

Signal also asks this Court now to ignore Signal's glowing descriptions of UOP's record performances and excellent results found in Signal's annual reports from 1978 onward. Instead, Signal "poor mouths" UOP, even to the point of making a desperate claim at the end of trial that UOP's performance from 1978 onward was way below what was predicted because UOP's actual financial results must be adjusted downward for inflation. However, this bald attempt to pull the accounting wool over the Court's eyes is nothing more than a punctured trial balloon.

First, the sentence of the 1978 Five-Year Plan which defendants rely on as requiring that UOP's actual results be adjusted for inflation in fact states that:

> "All projections in these exhibits are ... not adjusted for inflation."

If the projections were not adjusted for inflation, neither should UOP's actual results be adjusted. Second, the comparison charts attached to the Five-Year Plan list actual figures for 1976 and 1977 (with no adjustment for inflation) alongside the projections for 1978 through 1982. Thus, it is clear that the projections were intended to be comparable to actual dollar figure results, not "inflation adjusted" actual results. Third, as this Court clearly saw when it forced Mr. Corirossi to compute the actual 1982 net income necessary to meet the plan under Signal's concocted inflation adjustment theory,* UOP's actual results would have had to be wildly beyond anything that could be reasonably expected in order to meet the projections. The figures below demonstrate the absurd results produced if Signal's "inflation adjustment" argument were to be accepted.

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* 5 Damage Corirossi 213-216.

	Actual 1977 Results (Millions)	UOP 1978 Basic Plan Projections for 1982 (Millions)	Inflation Adjusted Results Required to Meet Projections for 1982* (Millions)	Percentage Increase 1978-1982 Required to Meet Inflation Adjusted Results
Revenues	730	$1,321	$1,873	157%
Net Income Before Extraordinary Items	24.3	$55.7	$78.98	225%

If Signal's revisionist interpretation of the 1978 Five-Year Plan were true, UOP and Signal management would have to have believed that UOP's actual revenues in 1982 would be two and one-half times 1977's revenues (i.e., an average revenue growth of over 31% per year for five years) and net income more than three times 1977's figure (i.e., net income would have to average 45% growth per year for five years).** The plain truth is that Signal conjured up the inflation adjustment theory and DDX 17 during trial.

There is apparently no limit to the lengths which Signal will go in its attempt to convince the Court to disregard the reality that Signal has made a bundle from UOP after the merger. DDX 17 was not the only document that Signal had

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* 1982 Projection per 1978 Basic Plan multiplied by 1.418 (i.e., allowance for 41.8% inflation from 1978 through 1982.)

** If such phenomenal growth was expected, why did Signal not tell UOP's minority stockholders prior to the merger that management expected UOP's net income to increase 65% per year and its revenues 51% a year?

prepared solely for the damage trial. Certain accounting changes to UOP's 1983 results were prepared on May 14 and May 21, 1984 at the direction of Signal's general counsel. DDX 10 and DDX 11; 2 Damage Kavanaugh 34-37.* Signal even claimed that these documents were prepared in response to plaintiffs' request for production. 2 Damage Kavanaugh 37-38. DDX 10 and DDX 11 are in no way responsive to plaintiffs' request for <u>existing</u> documents: they were and are documents drawn up for the specific purpose of attempting to change the 1983 net operating income picture of UOP from a $41.68 million profit earner to a $55.1 million loser by charging against net operating income all sorts of one time discontinued items and merger related expenses. Signal imposes further on the Court by pretending that UOP vanished on January 1, 1984 along with $157 million of UOP cash. However, the reality is that Signal still owns 100% of UOP, Inc., which remains a highly profitable company with seven operating divisions (and without several divisions which had previously been a drain on UOP's earnings).

In short, this Court should reject Signal's transparent attempt to change UOP's superlative results, since its ex post facto accounting sleight of hand was never contemplated before trial, was never done in Signal's or UOP's published results and was never done for Signal's other subsidiaries. 5 Damage Corirossi 181, 185-187. Signal's effort to rewrite UOP's

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* Mr. Kavanaugh's attempt to recant his testimony at trial and claim that he, rather than Mr. Arms, ordered preparation of DDX 10 and 11 is just another example of Signal changing its story.

financial history is simply a desperate attempt by Signal to retain its ill-gotten gains at the expense of the minority shareholders. However, treating the minority fairly requires that this Court consider and permit the minority to share in the fruits of UOP's post-merger performance.

B. Signal Has Not Met Its Burden Because of the Fundamental Flaws in Mr. Purcell's Opinion

Signal contines to "stonewall" on Mr. Purcell's major errors. Signal nowhere addresses the fundamental error found in the only calculation of value in both Mr. Purcell's 1980 and 1984 opinions and testimony: Mr. Purcell's failure to eliminate "noise" in his comparative study of premium. 3 Damage Purcell 158-159, 163-166. Since he admits in both opinions that there is a "requirement for market value premium" (DX 40, pg. 17; DDX 13, p. 3), his failure to use unaffected market prices in his comparative premium analysis vitiates his only financial basis for opining that the 1978 $21.00 cashout price was fair. Mr. Purcell was in a dilemna: he could not correct the failure to eliminate noise in the 1980 calculation without admitting that his 1980 opinion was totally incorrect. He was therefore, in effect, "stuck" with his 1980 error in 1984.

This Court appreciated and noted the difference between Mr. Bodenstein's comparative analysis, which screened out noise, and Mr. Purcell's approach, Weinberger, Chan., 1356-1357, 1362, but rejected the premium over market approach as inconsistent with then controlling precedent for determining fair value under §262. Id. at 1359-1360. However, the Supreme Court has now held directly that comparative premium analysis is a generally accepted method of valuation in the financial community and must be considered in determining fair value in this case. Weinberger, Supr., 712-714.

At trial, Mr. Purcell was forced to admit that noise would artifically reduce the premium in the comparable transactions. 3 Damage Purcell 143-146, 152-154. He also acknowledged there had been no noise in the UOP merger. Id. at 157-158. Thus, the only thing that Mr. Purcell could do was to substitute an equally arbitrary 30-day measuring date for the arbitrary "day before the formal announcement" measuring date. Id. at 168-174. Even this crude effort to eliminate noise raised the average comparable premium from 47% to 59%. Id. at 174-175; PDX 123. Mr. Purcell never applied this revised percentage to the $14.00-$15.00 market and investment value.*

Signal also does not explain how Mr. Purcell's calculations of the rescissory value of UOP's stock in 1982-1983 can be correct since it is based on Signal's incorrect postulate that the minority shareholders will continue to hold their shares. Of course, the minority shareholders were cashed out in 1978 and their UOP shares are not going to be returned to them. Thus, a rescissory damage award must compensate the minority stockholders not only for the dividends and interest thereon from the date of the merger to the present, but also for the fact that they are in effect being forced to sell their shares (since return of the

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* A 59% premium over the $14.00-$15.00 value would yield a price of $22.26 to $23.85.

shares is not feasible) and give up their right to participate in UOP's future growth and earnings. Giving them only the estimated market value in 1982 or 1983 would make a mockery of rescissory damages. The purpose of rescissory damages is to put the shareholders economically in the same position that they would have been in had not the illegal act taken place. Thus, rescissory damages must include the amount the minority shareholders would get if they were cashed out in December 1982 or December 1983. As noted, Mr. Purcell agrees that, in a cashout merger, a premium above the market price is required. (DX-40, pp. 15-18; DDX 13, p. 3; 3 Damage Purcell 138, 198) If premium was required for the forced sale of the minority's shares in the 1978 merger, it should also be required in calculating rescissory damages, which amount to a forced sale in lieu of rescission.

C. The Court Cannot Rely on Mr. Purcell's Opinion In View of His Shifts in Position

The shifts in position by Signal's expert show that Mr. Purcell simply agreed to say that $21.00 was fair without first conducting any real evaluation. For example, one of the primary factors on which Mr. Purcell supposedly concentrated most heavily in forming his opinion in 1980 was the "structure of the transaction", (i.e., Mr. Purcell's assumption that there had been a meaningful vote by the stockholders). DX 40, pg. 3, 5-7. However, after the Supreme Court found that the structure of the transaction was unfair, Mr. Purcell stated in his 1984 report that the structure of the transaction, which he had testified was one of the most important factors underlying his 1980 opinion, now should be given no weight. DDX 13, pg. 1. Indeed, he even tried to claim at trial that the structure of the transaction "was not a consideration in value" in his 1980 opinion. 3 Damage Purcell 113-114.

In the 1984 report, Dillon Read's actual price earnings ratios of comparable companies for purposes of calculating rescissory damages yielded ratios resulting in a rescissory damage value far in excess of where Mr. Purcell's wished to come out. It turned out that Mr. Purcell arbitrarily eliminated companies which had incurred 25% or more earnings declines in order to bring the average and median price/earnings ratios down to where he wanted them. 3 Damage Purcell 219-222. However, at trial, he was forced to admit that even this arbitrary exclusion was not done properly, since he had eliminated Federal Mogul, which did not have a 25% decline in earnings. Id. at 227-229. Mr. Purcell testified that his copy had a handwritten change in the amount of Federal Mogul's earnings (from $2.82 to $2.92). Id. That important change was not contained in the copy of Mr. Purcell's report introduced in evidence, nor did it appear in the copy provided the plaintiffs' counsel. Id. Mr. Purcell was forced to admit that Standard & Poor's Stock Guide reflected the $2.82 earnings figure, not the $2.92 figure he claimed was written only on his copy of his 1984 opinion. Id.*

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* Mr. Purcell was also forced to admit that Braun Engineering, which he used as a comparable company in his 1984 opinion, was not the same company as C. F. Braun, which he used as a comparable in his 1980 study. (3 Damage Purcell 231-132.)

D. Signal Did Not Meet Its Burden Because Its Arguments Are Contrary to the Law of the Case

Since Signal's whole case rests on arguments that conflict with the prior rulings of this Court and the Supreme Court, Signal cannot be found to have met its fairness burden. Most insidious is Signal's suggestion that this Court disregard the Supreme Court's rulings and reaffirm what Signal claims this Court found in its original decision. In half a dozen sly ways, Signal implies that this Court has already considered and ruled on the issues presented at the damage trial, referring to the Court's earlier opinion as if it, rather than the Supreme Court's opinion, was the controlling law in this phase of the proceeding. (DB 6-9)

Among Signal's assertions that are contrary to the law of the case are (a) that the Supreme Court merely "suggested" that this Court rejected the discounted cash flow method "as a matter of law", (b) that this Court actually considered plaintiff's discounted cash flow evidence, but merely gave it little weight, and (c) that this Court did not rely upon the Delaware Block method in its initial opinion.* The Supreme Court's opinion flatly refutes each of these assertions. After noting that plaintiff's evidence included a comparative premium analysis and

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* Incredibly, Signal also claims that the defendants and Mr. Purcell did not rely on the Delaware Block method in the original trial. However, Signal's 1980 Post-Trial Brief spent 12 pages (pp. 129-141) arguing that the Delaware Block method was the appropriate valuation standard and said that Mr. Purcell had used that method (p. 123). Indeed, this Court and the Supreme Court found that Mr. Purcell's report used the Delaware Block method. Weinberger, Chan. 1361; Weinberger, Supr., 712.

a discounted cash flow analysis, the Supreme Court stated:

> "In this breach of fiduciary case, the Chancellor perceived that the approach to valuation was the same as that in an appraisal proceeding. Consistent with precedent, he rejected plaintiff's method of proof and accepted defendant's evidence of value as being in accord with practice under prior case law. This means that the so-called "Delaware block" or weighted average method was employed wherein the elements of value, i.e., assets, market price, earnings, etc., were assigned a particular weight and the resulting amounts added to determine the value per share.

Weinberger, Supr., 712.* Later the Court clearly indicated that fair value must be completely reconsidered on remand:

> "Although the Chancellor received the plaintiff's evidence, his opinion indicates that the use of it was precluded because of past Delaware practice. While we do not suggest a monetary result one way or the other, we do think the plaintiff's evidence should be part of the factual mix and weighed as such. Until the $21 price is measured on remand by the valuation standards mandated by Delaware law, there can be no finding at the present stage of these proceedings that the price is fair."

Weinberger, Supr., 714. In light of the Supreme Court's sweeping changes in the method of determining value and its remand for a redetermination of damages using its newly enunciated standards, Signal's claim that this Court has already decided the damage issue and may simply reinstate its prior opinion is patently incorrect.

Signal's assertions as to this Court's opinion also are inconsistent with what that opinion actually says. This Court,

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* The Supreme Court also said that "the Chancellor rejected plaintiff's discounted cash flow method of valuing UOP stock, as not corresponding with either logic or the existing law" (Weinberger, Chan., 1360).

having already decided the question of liability adversely to the plaintiffs, did not have to (and did not in fact) pass on the question of value of the minority shares. The Court did discuss some, but by no means all, aspects of the evidence on the value of the minority shares. For example, Mr. Bodenstein's comparative analysis was described, as was Mr. Purcell's similar analysis. Weinberger, Chan., 1356-1357, 1362. Mr. Bodenstein testified that his ultimate opinion that the value of the UOP shares was not less than $26.00 was based as much on the comparative analysis found in the report as on the discounted cash flow method. 5 Damage Bodenstein 88-90. The Court also recognized that Mr. Bodenstein's comparative analysis screened out noise, while Mr. Purcell always used the market price on the day prior to the acquisition announcement. Weinberger, Chan., 1356-1357, 1362. However, this Court's original opinion is silent on whether the Court found Mr. Bodenstein's comparative analysis correct or not, or whether Mr. Purcell's study was flawed by his failure to exclude noise.

Signal's contempt for Delaware's Courts is dramatically illustrated by its persistence in suggesting to the Court, in the face of the Supreme Court's detailed findings of unfair dealing, that Signal is totally innocent of all wrongdoing, claiming in effect that Signal is more sinned against than sinning. The fact of the matter is that, as the Supreme Court found, Signal deliberately embarked on a calculated course of conduct that has historically been prohibited by the Delaware Courts -- that is, Signal, the majority shareholder, owing the highest fiduciary duty to the minority, cynically and hastily pushed through a cashout merger that was totally conceived, orchestrated and carried out solely to promote Signal's economic advantage at the expense of the minority.

Signal even has the nerve to state that the Supreme Court's flat finding that Signal considered a price of $24.00 a good investment only "may" be the law of the case. (DB 29.) The Supreme Court's finding not only is the law of the case, but this Court directly so held that after a two-day hearing requested by Signal (Weinberger, (April 24, 1984), p. 5-8, 13-14).* Signal then argues that the Supreme Court's findings are binding as to fair dealing only, not on fair value, a legally and logically bankrupt position already rejected by this Court. Id. at 13.

While Signal still says that the $21.00 price was fair, that assertion is not credible since the $21.00 price was never based on any objective determination of the value of the minority shares. The $21.00 price was simply what Signal thought it "could get away with". First, Signal set the $21.00 price. Signal then quickly put in motion the corporate machinery of both Signal and UOP (which Signal controlled) in order to achieve the objective of getting UOP Board approval in three business days, thereby precluding any meaningful opportunity for the minority's interests to be fully and carefully represented. Despite the

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* Though this Court also rejected as contrary to the law of the case Signal's continued assertion that the information in the Arledge-Chitiea Report was disclosed to UOP outside directors and minority stockholders (Id. at 13), Signal defied the Supreme Court and this Court by rearguing this contention yet again in its opening brief (DB 29).

Supreme Court's findings, Signal still does not recognize the conflict of interest that exists as between the majority and the minority stockholders in a cashout situation.

Signal never thought of having an independent negotiating team to represent and negotiate for the minority shareholders. Harriman v. E. I. DuPont, D.Del., 411 F.Supp. 133, 142 (1975); Weinberger, Supr., 709-710, n.7. In fact, the plaintiffs continue to carry out the task that was clearly Signal's job as a fiduciary for the minority stockholders (i.e., ensuring that the minority shareholders were properly and effectively represented so that they could deal on an equal basis with the majority stockholder). Weinberger, Supr., 710-711; Harriman v. DuPont. Moreover, Signal, for six years the wrongful owner of 100% of UOP's funds, continues to be able to avail itself of what are in reality UOP's corporate funds to pay defendants' attorneys and experts to battle against the cashed out rightful owners of half of UOP. The representatives of the minority shareholders are forced to continue to wage this long uphill struggle (even after the finding of liability by the Supreme Court) without access to corporate funds. Of course, if the majority stockholder had carried out its fiduciary responsibility by appointing an independent committee of UOP directors staffed with able attorneys and a truly independent investment banker, payment for the cost for such representation would have been made (quite properly) by UOP. Harriman v. E. I. DuPont, supra.

II. A REVIEW OF SIGNAL'S OPENING BRIEF SHOWS THAT IT IS A MIXTURE OF REARGUMENT AND ERRORS, ACCEPTANCE OF WHICH WOULD LEAD THIS COURT INTO ERROR

Page limitations prevent the plaintiffs from providing the Court with a paragraph by paragraph review of all the factual errors and continued attempts to reargue previously decided issues contained in Signal's Opening Brief. Examples will have to suffice.

1. Signal says (DB 1):

> "In general, the Supreme Court found that the Signal Companies, Inc. ('Signal') had not met its burden of showing that it had dealt fairly (insofar as procedure was concerned) with the minority shareholders of UOP, Inc. ('UOP') with respect to the merger of UOP and a wholly-owned subsidiary of Signal in May of 1978. On the issue of damages, the Supreme Court stated that because the 1978 merger '... is too involved to undo and in view of the Chancellor's discretion, the award, <u>if any</u>, should be in the form of monetary damages ...' (emphasis added). Id. at 714."

As to fair dealing, Signal claims that all the Supreme Court did was simply to find that Signal had failed to comply with some technical procedural niceties. Actually, the Supreme Court summarized Signal's extensive pattern of unfair dealing by pointing out that Signal had not met its burden of proof because (<u>Weinberger</u>, Supr., 711):

> "Given these particulars and the Delaware law on the subject, the record does not establish that this transaction satisfies <u>any</u> reasonable concept of fair dealing. (Emphasis added.)

As to fair price, Signal suggests that the Supreme Court simply found that the situation was "too involved to undo". Not so: the Supreme Court said (<u>Weinberger</u>, Supr., 711):

> "However, the test for fairness is not a bifurcated one

> as between fair dealing and price... . Here we address the two basic aspects of fairness separately because we find reversible error as to both."*

2. In a footnote, Signal says (DB 4):

> "... The Supreme Court did not hold that Signal was guilty of fraud or intentional wrongdoing. At worst, the Supreme Court held that Signal did not deal fairly from a procedural point of view with the minority shareholders of UOP. See Section B, infra."

See also DB 30. The Supreme Court did not, but might well have, affixed the actual label of fraud on Signal's fiduciary derelictions. In any case, the Supreme Court's findings that Signal (a) timed, structured and disclosed the transaction in a manner designed solely for its benefit, (b) resolved all conflicts of interest in its favor without divulging them, and (c) gave information derived from confidential UOP data to Signal's directors because it was important in evaluating the merger, but withheld it from UOP's outside directors and minority shareholders, permit no other conclusion than that Signal's wrongdoing was intentional. Signal, desperate as it is, can hardly believe that this Court can be persuaded that the Supreme Court did not believe Signal guilty of intentional corporate wrongdoing (or that the Supreme Court was concerned only about a few procedural "no-nos").

3. Signal says (DB 5):

> "Plaintiffs' expert, Kenneth Bodenstein ('Bodenstein') utilized both a comparative analysis and a discounted cash flow analysis but he relied principally on the latter."

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* Later the Court stated that there could be no finding that the price was fair based on the record before it. _Id_. at 714.

See also DB 11. This Court (<u>Weinberger</u>, Chan. 1356-1358) and the Supreme Court (<u>Weinberger</u>, Supr., 712) have acknowledged that Mr. Bodenstein's opinion was based on and supported by both methods.* Recognizing the weakness of Mr. Purcell's comparative premium study, Signal obviously hopes that it can get this Court to totally disregard Mr. Bodenstein's correct comparative analysis.

4. Signals says: (DB 4):

> "From all of the foregoing, as well as the supporting statistics and documentation provided in the Dillon Read Report, there is a reasonable basis for finding that the merger price of $21.00 represented a price which was fair to the minority shareholders of UOP."

Thus, Signal is again attempting to get this Court to impose the burden of proof as to value on the plaintiffs. The standard Signal must meet is proving entire fairness, not that their hired expert's flawed opinion provides a "reasonable basis" for finding $21.00 a fair price.

5. Signal says (DB 8):

> "Purcell also testified at the June 1984 trial that he did not use the Delaware Block method in his 1980 and 1984 evaluations of UOP's minority shares as of May 26, 1978. June 1984 TR, Vol. II, 162-64."

The reason for defendants' vehement insistence (contrary to the record and findings of this Court and the Supreme Court) that Mr. Purcell's method is totally different from the "Delaware Block"

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* The defendants agree (DB 6):

> "*Plaintiffs' evidence of value at 1980 trial was not premised solely on the discounted cash flow method. Indeed, the 1980 Duff & Phelps written report (PX 3) does not even discuss that method but is founded on the comparative analysis approach."

method is because Mr. Purcell's 1984 report and testimony consist of precisely the very same single "rigid" and "stylized" method that he presented in 1980. In other words, though specifically invited by the Supreme Court to present proof by "any techniques or methods acceptable in the financial community and otherwise admissible in Court ..." (Weinberger, Supr., 713), Mr. Purcell still stuck to his "very structured and mechanistic procedure" of weighting market, earnings and asset value to produce an "outmoded" valuation. Actually, affixing the "Delaware Block" label on Mr. Purcell's 1980 and 1984 work is guilding Mr. Purcell's single lily: all that Mr. Purcell really did was to determine that the combined market and investment value of the UOP shares was in the $14-15 range and then evaluate incorrectly the adequacy of the percentage of premium contained in the $21.00 price (3 Damage Purcell 137-138).

6. Signal says (DB 10):

> "For example, in 1980, Bodenstein calculated that the present value in 1978 of UOP's residual value was $229.7 million. PX-7. In his 1984 study, having available only the identical source of material, Bodenstein calculated that the present value in 1978, of UOP's residual value was $316 million PDX-120, App. Table I.

There are several comments. The difference lies in the fact that, as Mr. Bodenstein made abundantly clear, he was extremely conservative in his 1980 no growth approach to residual value (5 Damage Bodenstein 153-154) because he recognized that the discounted cash flow technique (while long familiar to the academic, business and financial community) was then novel to the Delaware Courts. (4 Damage Bodenstein 135; 5 Damage Bodenstein

43) Second, both the projected future cash throw-off and capitalized earnings approaches are generally accepted methods of computing residual value. 5 Damage Bodenstein 34-38. Third, Mr. Bodenstein's original discounted cash flow analysis of 1980 described the alternative method of capitalizing earnings and calculated the residual value using that method. PX 7; 5 Damage Bodenstein 35-38. Fourth, under either method, the fair value of the UOP stock greatly exceeds $21.00 per share.

7. Signal says (DB 10):

> "For example, in calculating the fair value of UOP's minority shares based on the comparative dividend yields, Bodenstein used a figure of $20 million for UOP's 1983 dividend (PDX 120, App. Table P) when he knew that UOP had actually paid only $10 million in dividends in 1983 (PDX 120, Rpt., pg. 5).

For two years UOP had paid Signal dividends at a $20 million per year rate and continued that rate ($5 million per quarter) for the first two quarters of 1983. PDX 33-34, 51-52. When Signal began taking all UOP's cash in mid-1983, Mr. Corirossi explained that the reason that the 1983 dividend was $10 rather than $20 million there was no longer a need to declare dividends because all UOP's money was going to Signal anyway. (1 Damage Corirossi 120).

8. Signal says (DB 11):

> "And, once again, Bodenstein showed that by using the discounted cash flow method, one can arrive at almost any 'value' one wishes merely by the choice of the discount rate and other data and the application of the selected discounted rate to various projected 'free cash flows' which the analyses themselves may determine."

Mr. Bodenstein showed that the selection of a discount factor in the discounted cash flow method is in no way arbitrary, as suggested by Signal (PDX 120, pp. 6-8, App. A, Table G), but is the result of careful financial analysis. (3 Damage Bodenstein 120-134; 5 Damage Bodenstein 17-20, 159-160) Mr. Purcell, in contrast, testified that Dillon Read, by coming up with a "range of discount factors", could justify any final result that it sought to establish. (3 Damage Purcell 58)

9. Signal says (DB 12):

> "UOP's actual earnings over the past thirteen years show wide and unpredictable swings."

Signal has gone to the extremes to try to find justification for the foregoing assertion. For example, Signal goes all the way back to the year 1971, fourteen years ago and four years before Signal first acquired an interest in UOP. Signal also concludes with its own May 1984 "adjusted" results for 1983.

10. Signal says (DB 14):

> "At the 1980 trial, Bodenstein's analysis of value was based on discount rates of 7.5, 8.5 percent, 10 percent and 12 percent which he used in the discounted cash flow method. Using those different discount rates, he arrived at present values of UOP's future cash flows using UOP's actual 1977 earnings, UOP's estimated 1978 earnings and, in part, UOP's 1978 five-year business plan."

Of course, as Mr. Bodenstein explained, he used those four discount rates in order to properly reflect the risk on a retrospective, contemporaneous, limited future, and full future basis of what the value of UOP was. TR 207-208, 478; 4 Damage Bodenstein 97-101, 134; 5 Damage Bodenstein 159-160.

11. Signal says (DB 15):

> "Bodenstein's explanation of why he failed in 1980 to reveal his use of the weighted average formulation at the 1980 trial was that it was too sophisticated a method for the Court and counsel to understand! (June

1984, TR, Vol. V, 43-44)."

This Court stated that Mr. Bodenstein was entirely correct in his assumption. (5 Damage Bodenstein 43-44):

> "THE COURT; Actually, I understood his testimony to be that he had to consider only the Court was unsophisticated enough to understand it in other than layman's language, and he was perfectly correct in that assumption."

12. Signal says (DB 17):

> "In effect, then, when Bodenstein used his calculated 'hurdle rate' of 12 percent as the 'appropriate' discount rate in his discounted cash flow analysis, he improperly ignored the element of future risk with respect to the acquisition of the minority shares of UOP in 1978."

Actually, Mr. Bodenstein showed that Signal's future risk in taking over the balance of UOP was minimal because Signal had had operating control of UOP from 1974 onward and, therefore, was simply acquiring the balance of a known quantity. 4 Damage Bodenstein 125-128. Messrs. Arledge and Chitiea had privately determined for Signal that there was little risk but great profit for Signal in taking over UOP. PX 74.)

13. Signal says (DB 19):

> "If one were to use consistently the applicable data from UOP's 1978 Five-Year Business Plan, and determine the residual value based on UOP's 1982 projected pre-cash throw off, using a discount factor of 14, the results would be as follows."

Where the "14%" discount factor comes from is nowhere stated: here truly is a "fortuitous" selection of a discount rate made only to arrive at a predetermined value. Signal itself points out that in 1980 Mr. Purcell testified that if he had used a discounted cash flow method (which he did not) he would have used a discount factor of at least 15%. The same footnote goes on to say:

> "At the June 1984 trial, Purcell testified again that the discounted cash flow method was inappropriate for an evaluation of UOP but that a discount rate of 18 to 20% should have been used if that method were utilized. June 1984 TR, Vol. 3, 97-105.)"

In suggesting discount rates of 14%, 15%, 18% to 20%, Mr. Purcell is simply throwing out discount rates without giving the Court any justification for such rate in the hope of creating the impression that discount rates are just picked out of the air. That is why PX 120, Table G, prepared by Mr. Bodenstein, showing the way a financial analyst determines the proper discount factor is important.

14. Signal says (in a footnote) (DB 23):

> "Significantly, Bodenstein himself did not use the discounted cash flow method in arriving at his opinions of value of UOP as of 1983 and 1984. PDX-120, Table U; June, 1984 TR, Vol. V, 92-94."

As Mr. Bodenstein has testified, his discounted cash flow analyses were based on UOP's own projections. Mr. Corirossi testified that no projections or forecasts for UOP of any kind exist beyond 1982. (1 Damage Corirossi 90) Though this testimony seems highly implausible, Signal's "no projections available" position precluded Mr. Bodenstein from providing this Court with what a discounted cash flow based on 1982-1983 projections would show.

15. Signal says (DB 24):

> "The specifics of how and why Dillon Read reached its opinion as to the fairness of the $21.00 price as of May 26, 1978, are set forth in detail in Dillon Read's reports (DX 40 and DDX 13) and Purcell's testimony which need not be repeated here."

All that Mr. Purcell did was find that $14.00 to $15.00 was the fair investment and the market price and then measure the percentage of premium by a fallacious method. Mr. Purcell's entire presentation, like his fellow investment banker, Mr. Glanville, when stripped to essentials, was simply that the $21.00 price was fair based on his "seat of the pants" guess that a 40% premium above the market price of UOP at the time of the merger announcement was fair.

16. Signal says (DB 25):

> "Finally Purcell testified that Dillon Read had noted the Come-By-Chance contingent liability on its report but that it has not discounted its valuation of UOP's minority shares because of that liability."

Now that the Come-By-Chance claim has been settled and it serves Mr. Purcell's client's objective, Mr. Purcell trims sail and attempts to modify his previous sworn testimony by claiming retrospectively that the Come-By-Chance claim should have resulted in a discount of the minority shares. (3 Damage Purcell 27-30) This is just another example of Mr. Purcell's total willingness to vary his testimony to suit the shifting convenience of Signal.

17. Signal says (DB 30):

> "Moreover, the evidence shows that there were no hidden assets in this case, and that Signal received no 'windfall' of any kind."

There were indeed grossly undervalued assets of UOP. Signal well knew that UOP was carrying its vast timberlands as well as all its other real estate at cost on its balance sheet. (TR 1199-1201; PX 360; 1 Damage Carirossi 173-174, 184-185) Since the minority shareholders were being cashed out, they were entitled to a fair share of these undervalued assets. Furthermore, the fact that Signal knew it was going to profit tremendously from getting 100% of UOP hardly seems like a good reason for letting it keep everything!

18. Signal says (DB 33):

> "At the 1980 trial, plaintiffs attempted to prove unsuccessfully that the value of UOP's shares was more than $21.00 at the time of the merger."

First, Signal still suggests incorrectly that the plaintiffs had and still have the burden of proof as to the fairness of the $21.00 price. Second, the Supreme Court has remanded for a fresh determination of fair value based on factual findings, legal standards and evidence not considered in 1980.

19. Signal says (DB 33):

> "Because of the speculation inherent in a rescissory evaluation of UOP more than six years after the merger, a balancing of the equities suggests that damages should be limited to the difference, if any, between the value of the minority shares as of May 26, 1978, and the $21.00 merger price."*

What Signal is telling the Court, in effect, is that since there is going to be an award, Signal would far prefer to have to pay the fair value of the stock they wrongfully took in 1978 than to be made to disgorge the rescissory value of the UOP stock as of December 31, 1982. Moreover, how Signal can claim the equities balance in its favor and against the minority stockholders it took unfair advantage of is beyond comprehension.

20. Signal says (DB 35):

> "Because of the highly speculative nature of a rescissory evaluation of UOP's minority shares at the time of the June 1984 trial, it would be inequitable to

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* This suggestion is repeated on page 35 of defendants' brief.

> the holders of Signal's 108,000,000 shares of common stock (including former shareholders of Wheelabrator-Frye who received Signal shares when the companies merged) to attempt to base damages on such an evaluation."

Signal attempts to use Signal's wrongful taking of the UOP minority shares to the advantage of the Signal stockholders, who for six years have shared in the benefits Signal has derived from owning 100% of UOP, and to the disadvantage of the wrongly ousted minority UOP shareholders, who have been deprived of any part of those benefits. Such a grotesque result would make a mockery of this Court as the dispenser of equitable justice.

21. Signal says (DB 38):

> "Given the requirement that rescissory damages are to be computed with reference to the date of the damage trial, only the December 31, 1983 conclusions of both experts will be analyzed in this brief."

There is no "requirement" found in Lynch v. Vickers, Del. Supr., 429 A.2d 497, 505 (1981) ("Lynch II"), or any other Delaware cases that rescissory damages must be computed "with reference to the date of the damage trial". Lynch II flatly states such damages may be calculated "as of or prior to" the damage trial. Hence there is no reason why "only December 31, 1983" should be considered. The real reason that the defendants seek to have rescissory damages computed as of December 31, 1983, is obviously because (1) calendar year 1983 was the most beneficial date to Signal because of the effects of the recession and and its own merger and (2) Signal seeks, by its own ex post facto May 1984 calculations, to convince the Court that UOP, by year end 1983, had suddenly turned into a big loser.

22. Signal says (DB 39):

"At trial, the defendants presented extensive testimony of Jerry Corirossi, Vice President - Finance of the UOP group, and Edward Kavanaugh, Deputy Comptroller of Signal, with respect to UOP's 1983 financial results on a stand alone basis and particularly the impact of certain losses and reserves which had to be included in those reserves. That testimony established conclusively that, had UOP issued year end financial statements as of December 31, 1983 comparable to those issued for prior years, it would have had a net loss for 1983 of $80,731,000.00 and a year end book value of $263,372,000.00."

Signal, solely for the purpose of defeating the minority's rightful claim to rescissory damages, persists in trying to make this Court believe that, based on accounting changes made at the direction of Signal's house counsel in May 1984 in preparation for this damage trial, UOP changed from a most profitable company to one with a net loss of $80 million. If nothing else, these accounting charges should have been made to "Discontinued Operations" or "Extraordinary Items", not all "socked" to UOP's net operating earnings. (DDX 10; DDX 11)*

23. Signal says (DB 40):

"Bodenstein, after listening to the trial testimony of Corirossi and Kavanaugh, concluded that the losses and reserves were 'appropriate, well taken and taken at a good time in Signal's development' and that he had 'no quarrel' with the amount of the losses and reserves. June, 1984, TR, Vol. IV, 175; Vol. V, 105."**

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* In the very same breath, Signal attempts to have this Court entirely overlook the fact that on December 31, 1983, Signal permanently upstreamed $157 million of cash advances in addition to the $80 million in dividends that Signal had received. (PDX 26, p. B9 Supp.)

** In all this ex post facto accounting, Signal, however, overlooks its own accounting "tracks". PDX 27 shows that, when UOP was not being creatively restructured specifically for the damage trial in this case, Signal quite clearly recognized the difference between the actual net earnings of UOP and the creative accounting changes and reserves that (Continued...)

This is a blatant misrepresentation of Mr. Bodenstein's testimony. He testified that (a) the "losses" Signal has fabricated were not appropriate, (b) the reserves were taken at an opportune time for Signal to clean up its balance sheet, and (c) PDX 27 showed that Signal, like Mr. Bodenstein, did not consider the reserves pertinent to UOP's operating performance. 4 Damage Bodenstein 173-178; 5 Damage Bodenstein 103-108. However, Mr. Bodenstein did make it clear that such accounting changes have no relevance in terms of determining the value of UOP's shares. Id. As Messrs. Arledge and Chitiea put it, the real key to value is future earning potential. The significant fact is that UOP, in spite of having its losing divisions, was still able to provide Signal with a $41.7 million net operating profit in calendar year 1983. (PDX 90)

24. Signal says (DB 41,):

> "Of the six remaining analyses for 1984, four ('Comparative P/E Ratios', 'Comparative Transactions' Ratio of Offer Price Earnings', 'Comparative Multiples of Book Value' and 'Percentage of Signal's Market Value') were fatally infected by Bodenstein's erroneous assumption."

Specifically, Signal is trying to say it was an error of Mr. Bodenstein's not to use Signal's May 1984 attempt to 'correct' UOP's 1983 results by creative accounting. However, Mr. Bodenstein (like the Signal Board looking at PDX 27) focused on UOP's actual net operating results for UOP, rather than Signal's trial inspired accounting adjustments designed to denigrate and disguise UOP's actual net earnings and earning potential.

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might be made in order to do an accounting housecleaning in 1983. (PDX 27)

25. Signal says (DB 47):

> "[Mr. Bodenstein's 1984 valuation is faulty because it is based) on the assumption that there would be a cash-out merger in the Spring of 1984 and conceded that if there were not such a cash-out, the premium would be inappropriate. June 1984 TR, Vol. 4, 150, 153; Vol. 5, 77-78."

Signal is attempting to make the Court believe that the UOP shareholders (who were cashed out in 1978) could be made whole if they were simply given the market value or trading value of their shares in 1982 or 1983. Signal is proceeding on the assumption that the Court does not understand that the trading or market value of the UOP shares as of the date of rescission would not reflect the fact that the minority is being forced to relinquish any opportunity to share in UOP's future. Just as the $14.00 to $15.00 market and investment price was conceded by Mr. Purcell not to be the appropriate 1978 cashout price, the 1982 and 1983 trading or market price would not be the appropriate figure: either all the minority shareholders should receive their stock back (rescission) or they should receive a rescissory cash equivalent (market or trading value plus premium).

26. Signal says (DB 47-48):

> "In point of fact, there is no justification whatever in the law or theory of rescissory damages to justify Bodenstein's hypothetical cashout merger assumption. In its pure form, rescission in this case would call for the restoration of the parties to the status quo before the sale of the shares to Signal in the merger. See Lynch v. Vickers Energy Corporation, Del. Supr., 429 A.2d 497, 501 (1981). Rescission is the act of voiding a prior relationship."

The fallacy in Signal's argument is that if rescission was granted and the minority's shares returned, the minority stockholders would be able to hold onto their UOP stock and receive future dividends and capital growth. However, because Signal will be allowed to keep the minority shares despite its breach of fiduciary duty, Signal, rather than the minority, will get all future benefits from UOP. Therefore, Signal should pay a premium for getting the minority's right to future benefits in what is, in effect, a forced judicial sale.

27. The defendants say (DB 48):

> "Signal already had control and as Bodenstein conceded, if Signal were to resell the full minority interest to a third party, it would have received no premium over the prior market from the buyer."

Signal's analogy is patently wrong. First, Signal is not a "forced seller", but can and so far has retained the minority shares. Second, if Signal were to sell the minority shares to a third party, the third party would not pay a premium because it would not be getting 100% control. What Signal got by forcing the minority to sell in 1978 was 100% of UOP's future earnings and growth. Therefore, a premium was appropriate in 1978 and would likewise be appropriate in 1982 or 1983 in the context of a rescissory damage award.*

28. Signal says (DB 51):

> "Dillon Read's report shows that the amount received by the minority shareholders in 1978 ($21.00 per share) plus a reasonable return thereon equals $43.14 to $43.54. (DDX 13, pg. 18). Accordingly, even if a rescissory evaluation were to be undertaken in this case, plaintiffs in fact have suffered no damages since the amount actually received in 1978 plus a reasonable return thereon substantially exceeds the 'rescissory value' as of December 31, 1983."

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* Conversely, if Signal were to sell 100% of UOP, Signal would receive (and the buyer would pay) a premium for 100% control.

Signal has now turned this case upside down. Though Signal cashed the minority shareholders out at a $21.00 price that bore no relationship to the value of the shares, Signal now has the audacity to suggest that the minority suffered no damages because all the UOP shareholders could theoretically have made a better equity investment than their investment in UOP shares.* Signal makes this assertion though Signal, since 1978, has gotten out $80 million in dividends from UOP, has permanently upstreamed $157 million of "loans" made by UOP to Signal, and still has 100% of UOP. Would Signal be willing to return all that it has taken out of UOP and sell UOP at $43.14 per share?

29. Signal says (DB 52):

> "However, in its analysis it [Dillon Read) adjusted those loss figures downward to give effect to its conclusion that certain of the reserves were related to the Signal-Wheelabrator-Frye merger.

Signal concedes that not all of its May 1984 accounting adjustments in preparation for the damage trial <u>at counsel's direction</u> were properly charged to UOP's 1983 net operating income. Mr. Bodenstein did not ignore "UOP's actual 1983 results": UOP's <u>actual</u> results in 1983 were net operating profits of $41.7 million.

The foregoing is simply a sampling of the mixture of errors, misstatements and rearguments which Signal has presented to the

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* To come up with this outlandish and grotesque claim, Mr. Purcell, Signal's expert, had to pull out "all the stops`: a price earnings ratio of between only 6.7X to 7X, a 15% discount, the recession and, finally, once again, a claim that UOP had "a very erratic record from 1978 to 1983". Moreover, as shown elsewhere in this brief, his calculations are incorrect.

Court in its Opening Brief in its elaborate effort to get the Court not to carry out its judicial responsibility -- that is, to see that the former minority of UOP are fairly treated.

III. THE APPLICABLE DELAWARE LAW SUPPORTS AN AWARD OF DAMAGES BASED ON FAIR VALUE AND RESCISSORY DAMAGES

A. Delaware Law Requires Payment of a Premium

In confirming that fair value includes "all relevant factors", the Supreme Court specifically identified elements of future value as such a factor. Weinberger, Supr., 713. In further explaining the scope of "all relevant factors", the Court stated:

> "When the trial court deems it appropriate, fair value also includes any damages resulting from the taking which the stockholders sustained as a class. If that were not the case, then the obligation to consider 'all relevant factors' in the valuation process would be eroded.

Id. The damages that resulted "from the taking which the [UOP minority] stockholders sustained as a class" was that Signal, by merging out the minority shareholders, aggregated to itself all the valuable attributes stemming from 100% of control of UOP, including the future value UOP has generated and will generate. Since all the UOP minority shareholders as a class were ousted in a cashout merger, the minority was entitled not only to the market value of their shares but also a premium compensating them for the involuntary loss of their right to share in UOP's future value. Including such a premium is consistent with the whole purpose of ensuring that stockholders receive fair value:

> "Clearly, there is a legislative intent to fully compensate shareholders for whatever their loss may be, subject only to the narrow limitation that one cannot take speculative effects of the merger into account."

Weinberger, Supr. 714.

Because Signal has the burden of proving fair value, it must show that the premium contained in the $21.00 merger price was fair compensation to the minority for being deprived of a share of UOP's future earnings and growth. As shown above, (see Section IB), Signal has not proven that the minority received a full and fair premium, particularly since Mr. Purcell, who concedes that premium is required, failed to screen out "noise" in his premium calculations.

B. Delaware Law Supports the Award of Rescissory Damages

While holding that Lynch v. Vickers Energy Corp., Del. Supr., 429 A.2d 497 (1981), should not be interpreted as limiting this Court's discretion in determining relief, the Supreme Court in no way overruled the principles contained in Lynch II concerning the principles for determining the appropriateness of rescissory damages.

> "The plaintiff has not sought appraisal but rescissory damages of the type contemplated by Lynch v. Vickers Corp., Del. Supr., 429 A.2d 497, 505-06 (1981) (Lynch II). In view of the approach to the valuation that we announced today, we see no basis in our law for Lynch II's exclusive monetary formula for relief. 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.] 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 it. To the extent that Lynch II, 429 A.2d at 505-06 purports to limit the Chancellor's discretion to a single remedial formula for monetary damages in a cashout merger, it is overruled. ..."

Weinberger, Supr., 714.

Thus, Lynch II's analysis of the factors this Court should use in determining whether rescissory damages are appropriate is still controlling law. As Plaintiffs' Opening Brief details (pp. 34-39), the Supreme Court's findings and Lynch II and other Delaware cases demonstrate that an award of rescissory damages is appropriate here. Signal has admitted (DB 48) that:

> "Rescissory damages are a substitute for rescission when rescission is not feasible."

Under Delaware law, material non-disclosures by a fiduciary entitle stockholders to rescind the sale of their shares,* and the Supreme Court has held rescissory damages are not feasible in this case. Weinberger, Supr., 714. Thus, the minority stockholders are entitled to rescissory damages as a substitute. Moreover, Signal has been given an opportunity to prove some overriding reason why this equitable remedy should not apply. However, Signal failed to make such a showing at the preliminary hearing and at trial, since all it attempted to do was relitigate liability findings that were already final.

Incredibly, the defendants' brief on damages never refers to the portions of the Supreme Court's opinion that discuss rescissory damages, though the Supreme Court's rulings are not only the law of this case but state the Delaware law generally. The defendants also ignore Lynch II's discussion of rescissory damages. Instead, they once again reargue liability phases of the case already decided by the Supreme Court (and reaffirmed by this Court in its opinion on rescissory damages) by claiming that

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* Joseph v. Shell OilCo., Del. Chan, C.A. 7450, Hartnett, V.C. (May 8, 1984); Lynch II.

the issue as to whether or not rescissory damages are appropriate under Delaware law is governed by the factors Signal says apply to rescissory damage awards under Rule 10(b)(5) of the Securities Exchange Act. Specifically, Signal states that the following factors govern whether this Court shall grant rescissory damages or not (DB 31-32):

> "'Is the fraud collateral to the contract or, instead, is the contract for an illegal purpose? In which direction does a balancing of the equities point? What does the public interest suggest? How long before the judgment did the fraud occur? How many changes in position have taken place since the fraudulent transaction? Were those changes serious? What are the interests of third parties? Is the transaction difficult to rescind? Will rescission in a mismanagement case have an adverse impact on the corporation's stockholders? Was the fraudulent transaction fair? Are damages adequate relief?'
>
> " 5B Jacobs, The Impact of Rule 10b-5 §260.03 [c][vi], pp. 11-53 to 11-54. We will discuss such of these factors as are relevant, restated so as to apply to the facts of this case, *seriatim*."

Signal makes it appear that the quotation is from Jacobs. Actually, the quotation is not from Jacobs at all, but from a footnote in one of the cases cited by Signal, i.e.: American General Insurance Co. v. Equitable General Insurance Corp., E.D. Va., 493 F.Supp. 721, 756, n. 63 (1980). More importantly, the quote is not the Court's statement of the appropriate standards, but its listing of the unsuccessful defendant's contentions. *Id*. Signal misleadingly omitted the Court's introductory phrase, "The defendants cited ten factors".*

There are several other errors in Signal's legal analysis. First, Signal continues to assume the damage standards in a case involving a breach of fiduciary obligations are the same as in an action for fraud, though the difference in standards under Delaware law was made clear in Lynch II, 429 A.2d at 500-501. Second, Signal is telling the Delaware Courts that their Delaware law determination as to whether to grant rescissory damages is to turn on 10(b)(5) factors that Signal deems "relevant" as "restated [by Signal] so as to apply to the facts of this case." (DB 32) Third, what Signal plainly is attempting to do is to get this Court to erect federal barriers found (according to Signal) in 10(b)(5) cases involving fraudulent misrepresentation to the application of rescissory damages in Delaware breach of fiduciary obligation cases. This Court should not be led into engrafting into the Delaware law hurdles that Signal seeks to impose for its own special benefit in the particular situation in which it has put itself.

Citing a few federal cases, Signal argues (DB 37) that intentional fraud is required before rescissory damages are appropriate. Nothing in the Supreme Court's opinion or in Lynch

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* The Court may well find it impossible, or at least difficult, as the plaintiffs did, to obtain the actual Volume 5B of Jacobs cited by Signal (i.e., the 1980 edition). The 1980 edition has been superseded by the 1981 edition. The series is now not known as "Litigation and Practice Under Rule 10(b)(5)", but rather "The Impact of Rule 10(b)(5)". Finally, §260.03 cited by Signal in Volume 5B of the 1980 edition now appears in Volume 5C of the 1981 edition.

II provides any basis whatever for Signal's novel position. Indeed, Lynch II makes clear that a finding of "intentional fraudulent misrepresentation" is not a prerequisite for awarding rescissory damages. In Lynch II, 429 A.2d at 500-501, the Supreme Court refused to make the Poole v. N.V. Deli Maatschappij, Del. Supr., 224 A.2d 260 (1966) rule on out-of-pocket damages in fraudulent misrepresentation cases applicable to breach of fiduciary duty cases. Specifically, Justice Duffy stated, 429 A.2d at 501:

> "A rule derived from a case [Poole] in which the Court accepted a damage formula [i.e., out-of-pocket damages] for which the plaintiffs had specifically asked, may not, in fairness, be applied to limit the present plaintiff whose claim is based, not on a similar cause of action [i.e., fraudulent misrepresentation] nor on the same damage formula, but on the violation of a different standard of conduct. The difference is important because the appraisal approach adopted in Poole has a built-in limitation, namely, gain to the corporation resulting from a statutory merger is not a factor which is included in determining the value of the shares, and it was not considered by the Chancellor. But that limitation does not apply when a fiduciary has breached a duty to those to whom it is owed.
>
> "We do not overrule Poole, which remains appropriate for an action based on misrepresentation. But a claim founded on a breach of fiduciary duty permits a different form of relief, that is, an accounting or rescission or some other remedy afforded for breach of trust by a fiduciary."

The Supreme Court's emphasis in this case on full compensation of minority stockholders and the inclusion of elements of future value reinforces Lynch II's holding. Thus, under the law of this case and Lynch II, the controlling authorities in these proceedings, it is absolutely clear that rescissory damages are appropriate in a breach of fiduciary duty case. Furthermore, as our opening brief demonstrated (pp. 36-39), the support for an award of rescissory damages here is far stronger than in other Delaware cases granting rescissory relief.

Not only is Signal's attempt to inject an intentional fraud standard inconsistent with Delaware law, it is not supported by the cases Signal cites.* Janigan v. Taylor, 1st Cir., 344 F.2d 781, 786, cert denied, 382 U.S. 879 (1965), did not hold that intentional fraud is required to impose rescissory damages on a fiduciary, but that rescissory damages may be imposed for intentional fraud even though the Court "may accept defendant's position that there was no fiduciary relationship and he was dealing at arm's length."** Similarly, in American General Insurance Co. v. Equitable General Corp., E.D. Va., 493 F.Supp. 721, 740-41, 743-44 (1980), the Court expressly held the defendants were under no state or federal fiduciary duty to disclose the withheld information.

Mansfield v. Hardwood Lumber Company v. Johnson, 5th Cir., 263 F.2d 748, reh. denied, 268 F.2d 317 (1965), actually supports the award of rescissory damages for a breach of fiduciary duty, as Lynch II, 429 A.2d at 502-503, recognized. After noting that rescissory damages had been awarded in Mansfield, the Court in Lynch II quoted approvingly and at length Mansfield's statement

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* Signal's failure to cite to specific pages in the cases which purportedly impose such a requirement suggests it knows full well those cases do not in fact support its position.

** There can be no dispute that Signal was a fiduciary who made no effort to deal at arm's length with the minority. Weinberger, Supr., 710-711.

that proof of intent to defraud is not required where the corporate officers who purchased the minority's stock had breached their fiduciary duty. Id.

In summary, what the cases Signal cites actually demonstrate is that, while actual intent to defraud may be necessary for recovery of rescissory damages in an arm's length transaction where no fiduciary relationship exists, it is not required where there has been a breach of fiduciary duty.

Even if the Court were to examine the list of so-called "factors" which the defendant in American General unsuccessfully argued, this Court would find (as did the American General Court) that the factors do not militate against the imposition of rescissory damqages. First, the Court in American General, 493 F.Supp. at 756-574, n. 64, held that four of the "factors" Signal relies on (i.e., whether the fraud is collateral to the contract; the length of time before judgment the fraud occurred; the fairness of the fraudulent transaction; and the availability of adequate remedies other than rescissory relief) are irrelevant even in federal 10(b)(5) cases. It also found the other six factors do not weigh in favor of corporate insiders who purchased a stockholder's shares without full disclosure. Id. at 757-758.

Second, the factors Signal relies on are simply not applicable in this case:

1. Signal's breach of fiduciary duty in depriving the minority of a meaningful vote was not "collateral to the contract", since the minority vote was required by the terms of the merger agreement. Weinberger, Supr., 707. Moreover,

Signal's speculation as to the materiality of its non-disclosures and the effect they would have had on the vote is meaningless, since the Supreme Court has held that non-disclosures were material and that there was no meaningful vote on the merger. Id. at 709-712.

2. It is incredible that Signal, which has breached its fiduciary duty, can claim that the equities favor it over the minority stockholders that it wronged. This action was timely commenced and, as the Supreme Court stated (Weinberger, Supr., 714), the plaintiffs have sought rescissory damages, not an appraisal.

3. How can the public interest, including this Court's interest in protecting shareholders of Delaware corporations, favor allowing a fiduciary to keep benefits it obtained by breaching its duty?

4. The length of time between judgment and the breach of fiduciary duty is, as the Court held in American General, irrelevant. The plaintiffs have diligently prosecuted this action through trial, an adverse judgment, and a lengthy and difficult appeal ultimately resulting in a rejection of Signal's positions. Signal itself is responsible for more than a year's delay in the proceedings on remand. There is no reason that the necessity of a long uphill fight by the plaintiffs to establish Signal's liability should weigh in Signal's favor. Indeed, rescissory damages are more appropriate here since Signal has been enjoying the benefits of 100% ownership of UOP for more than six years.

5. Since Signal concedes that UOP was not substantially changed prior to mid-1983, it should not be permitted to rely on changes made well after the Supreme Court held Signal liable and remanded for consideration of rescissory damages as a basis for denying such rescissory relief. Signal made these changes for its own business purposes with full knowledge of the Supreme Court's opinion and during a period when Signal had caused a stay of the proceedings on remand.

6. Signal's stockholders are not being treated inequitably because Signal is simply being required to give back something it had no right to in the first place.

7. Signal's assertion that this Court should deny rescissory damages by finding that the transaction was fair "despite the finding by the Supreme Court" borders on the unbelievable.

8. As <u>American General</u>, a case Signal relies on, holds, the adequacy of out-of-pocket damages is irrelevant to the determination of whether rescissory damages apply. <u>Lynch II</u> expressly held that minority stockholders wronged by a majority holder's breach of fiduciary duty are not limited to recovery of out-of-pocket damages. Indeed, since out-of-pocket damages ordinarily will be available in cashout merger cases, acceptance of Signal's position would mean that rescissory damages would never be awarded.

In summary, rescissory damages are appropriate based on the facts, based on the applicable Delaware law, and based on principles of equity.

CONCLUSION

Once again, this case comes before the Court for ultimate decision at the trial level. Signal obviously hopes that the Court will conclude that its original decision already determined under the appropriate standards that $21.00 was a fair price for the minority shares and that the minority is entitled to no recovery. However, the circumstances now are far different than when this Court's prior opinion issued. The Supreme Court has found that Signal breached its fiduciary duty and has established new standards for determining the amount UOP's minority stockholders should recover. The Delaware Block method relied on by defendants has been discredited as outmoded and the comparative premium and discounted cash flow valuation techniques used by plaintiffs' expert have been held to be valid measures of fair value. A great deal of additional evidence, including the enormous amounts Signal has gained from being UOP's 100% stockholder, has been adduced. In short, there are new controlling factual findings, new controlling legal standards and new evidence to be considered. Moreover, the Court must now take a fresh look at the prior evidence of fair value in light of these changes. If this Court views all the evidence in the light of the findings and principles that now govern this proceeding and considers all the options available to discharge its stated judicial function -- that is, to see that UOP's minority shareholders are treated fairly -- this Court will award substantial damages to the class.

As previously shown, Signal has not and indeed could not sustain its burden of proving that the $21.00 merger price represented the fair value of the minority's shares. That price was not based on anything other than the coincidence of certain UOP 1975 and 1978 "numbers" used by Signal to justify the $21.00 cashout price. Though Signal and its expert now admit that the 1975 tender and direct purchase price ($21.00) was irrelevant to the fairness of the merger price,* and even claim they never relied on the tender offer in arguing that $21.00 was fair,** Signal in fact used the tender offer and direct purchase price to fix the cashout merger price.***

Significantly, in arguing that $21.00 was fair, Signal did not rely on Lehman Brothers, the supposedly independent investment banker whose "fairness opinion" was trumpeted to the minority as proof of the merger's fairness. The Supreme Court's findings concerning the preparation of that opinion establish that it was not worth the paper it was written on, much less the $150,000.00 Lehman Brothers was paid to render it. Signal instead retained Mr. Purcell who, despite defendants' recent efforts to "change his spots", essentially did a Delaware Block appraisal both in 1980 and again in 1984. Thus, the sole method Signal relies on to justify the $21.00 price is based on a single

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* 3 Damage Purcell 117-118.

** Id. This assertion is false since Mr. Purcell specifically cited the response to the tender offer as an indication of the fairness of the merger price. DX 40, pp.5-6.

*** E.g., pg. 4 of the Arledge-Chitiea Report (PX 74), the page, given to UOP's directors at the March 6, 1978 Board meeting, explains "Why $21.00 Per Share" solely by comparison to the 1975 tender offer.

outdated valuation technique. In addition, the evidence of value presented by Signal, Mr. Purcell's comparative premium analysis, has from the outset and continues to be flawed by the failure to eliminate "noise". Thus, quite apart from what the plaintiffs' evidence showed, Signal has failed to prove that the $21.00 1978 cashout price was fair. Indeed, Mr. Purcell's only calculation, when corrected for the elimination of "noise", sustains and confirms the plaintiffs' proof that a figure well in excess of $26.00 was fair.

The Arledge-Chitiea Report in and of itself is evidence that the minority should at least receive $24.00 per share. Why should Signal as a bare minimum not be required to pay to those it has wronged at least the price Signal secretly determined would be a good investment for itself? Indeed, the concrete result of the preliminary hearing was a showing, uncontradicted, that the methodology of Arledge-Chitiea sustains the ultimate plaintiffs' proof that the fair price was far in excess of $24.00.

The plaintiffs, while not having the burden of proof, have demonstrated that the value of the UOP minority shares at the time of the merger and thereafter warrants a substantial award of damages. Though this Court originally rejected certain of the methods relied upon by plaintiffs' expert because they were inconsistent with then governing law, it recognized that he was a competent financial analyst whose ability was obvious. Weinberger, Chan. 1358. After a thorough review of extensive financial data, Mr. Bodenstein has shown that the fair value of

UOP's minority shares was far greater than $21.00 per share. Moreover, the Supreme Court has enlarged the permissible techniques for valuing stock to include the discounted cash flow and comparative premium methods which Mr. Bodenstein used to support his opinion. In light of Mr. Bodenstein's expert opinion, this Court cannot conclude that Signal has met its heavy burden of proof on fair value.

The Court, after denying Signal's application to strike out rescissory damages, has heard testimony on the rescissory value of the shares as of 1982 and 1983. Signal attempts to exploit the changes it made subsequent to the Signal-Wheelabrator merger to say that UOP "disappeared" on January 1, 1984, with $157 million of UOP advances and $80 million in dividends, though Signal continues to retain the profitable divisions of UOP. Signal compounded the foregoing at trial by producing May 1984 accounting adjustments that retrospectively would convert UOP's 1983 net operating profit in 1983 from $41.7 million into a $55 million loss. The plaintiffs have shown that UOP's value could be calculated at the end of 1983. If this Court has any reservations as to what UOP's correct value was as of the close of calendar year 1983, the Court should utilize December 31, 1982, in fixing rescissory damages since there is no dispute as to what UOP's value was as of that date.

While Mr. Purcell attempted to calculate the appropriate rescissory damages, his opinion, aside from its other errors, would have the Court believe that the rescissory value should be the estimated minority trading price of the shares calculated as of a chosen date. However, this is inconsistent with the Supreme Court's admonition that the purpose in calculating fair value is to <u>fully</u> compensate the shareholders for what has been taken from them. 457 A.2d at 713-714. Because rescission is not feasible, UOP's minority stockholders are not going to get their stock back. What is being taken from them is not just the current market value of their stock, but all the attributes stemming from 100% ownership and control. As Mr. Purcell has all along agreed, a premium over market price is required. Accordingly, a premium over market to reflect fully what is being taken from the minority shareholders must be given to them.

The summary of various methods of calculating damages in the table on page 79 of the Plaintiffs' Opening Brief shows that, whether damages are based on a single method or on overall consideration of the various methods, Signal is facing a substantial monetary judgment. However, the Court should keep in mind that this is a situation entirely of Signal's own making -- the result of Signal's failure to ensure that the minority was treated fairly. If Signal had lived up to its fiduciary obligations and paid fair value at the time of the merger, it would not now be facing a situation of having to pay fair damages.

It should also be remembered that all Signal is being asked to do is to pay fairly for what it has taken and retained. Also, when all is said and done, Signal will still have UOP and its future earning potential, the real key to value. Signal is not being made to return the shares: it is simply being asked to fully and fairly pay for them. Finally, while the amount is substantial, it is a Lilliputian amount when one recognizes Signal's huge size at the time of the merger. Now, it has grown even larger: it is an immense conglomerate with more than $6 billion in annual revenues and $5 billion in assets, including over a billion dollars in cash. PDX 7, Signal 1983 Annual Report, pp. 1, 28-29. Thus, in perspective, while Signal cries for sympathy, this Court should have no hesitation in making a fair award to the minority shareholders who have been wrongfully deprived of their UOP stock by Signal.

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