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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM B. WEINBERGER and EDWARD U. NOTZ, Plaintiffs,	)	
v.	)	No. 90, 1985
UOP, INC., THE SIGNAL COMPANIES, INC. and SIGCO INCORPORATED, Defendants.	)	APPEAL FROM A JUDGMENT ORDER ENTERED BY THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY OF FEBRUARY 20, 1985, IN CIVIL ACTION NO. 5642

PLAINTIFFS BELOW-APPELLANTS' OPENING BRIEF IN SUPPORT OF THEIR APPEAL FROM THE COURT OF CHANCERY'S JUDGMENT ORDER ON DAMAGES

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TABLE OF CASES AND AUTHORITIES

REFERENCES TO OPINIONS, EXHIBITS AND TRANSCRIPTS

The unreported opinions of the Court of Chancery will, after the initial full citation, be referred to by the date of the opinion, e.g., "Weinberger, supra, at 13 (January 30, 1985)". For the convenience of the Court, the Court of Chancery's January 30, 1985 opinion and other cited unreported opinions are attached to this brief. The Court of Chancery's April 24, 1984 opinion after the preliminary hearing on rescissory damages is also included in the appendix at 2A01713A.

Exhibits at the original trial will be referred to by their original trial exhibit numbers, i.e., ("PX5"), and, where incorporated into the original Supreme Court appendix, preceded by their original Supreme Court appendix numbers ("A1504-PX9"). For clarity, an exhibit may be briefly described, e.g., (PX 298 - Minutes of the Executive Committee of the Board of Signal 2/28/78). Similarly, the defendants' original trial exhibits will be referred to thus: "(B569-DX 40)". Deposition pages will be referred to by the deponent, thus: "(Crawford 39)". Where more than one deposition has been taken, the deposition will be further identified by date, e.g., "(Bodenstein (6/13/84) 17)".

The original trial transcript will be referred to by the transcript page number, e.g., "(TR 100)", or where incorporated in the Supreme Court Appendix on the prior appeal, thus: "(A100)".

Plaintiffs' damage trial exhibits will be referred to as, for example, "(PDX 25)". Defendants' exhibits at the damage trial will be referred to as, for example, "(DDX 13)". Material included in plaintiffs' appendix in this appeal will be designated by number beginning 2A_____. Thus, where incorporated into plaintiffs' appendix on this appeal, damage trial exhibits will be preceded by the second appendix page number ("2A4167-DDX 13").

The damage trial transcript is included in its entirety in plaintiffs' appendix on this appeal and will be cited thus: ("2A0001"). For clarity the witness's name may be included, i.e., ("2A0001 Corirossi").

NATURE OF THE PROCEEDINGS

After the initial trial of this class action on behalf of the former minority shareholders of UOP, Inc. ("UOP") challenging a cashout merger (the "Merger") of UOP with Sigco, Incorporated, a subsidiary of UOP's majority stockholder, The Signal Companies ("Signal"), the Court of Chancery entered judgment for defendants. Weinberger v. UOP, Del. Chan., 426 A.2d 1333 (1981). On the original appeal ("the original appeal"), this Court in a unanimous en banc opinion reversed, holding that Signal had failed to meet its burden of proving the entire fairness of the Merger and that the record did not establish that Signal's conduct satisfied any reasonable concept of fair dealing. Weinberger v. UOP, Inc., Del. Supr., 457 A.2d 701, 703, 712 (1983). The case was remanded to the lower Court with directions for a retrial on damages, including consideration of rescissory damages, in conformity with this Court's findings and holdings. Weinberger, Del. Supr., 457 A.2d at 714-715.

Over plaintiffs' objection, the lower Court, on defendants' application, stayed plaintiffs' discovery for over a year and scheduled and held a preliminary evidentiary hearing to consider the defendants' claim that rescissory damages were inappropriate. The lower Court denied the defendants' application. Weinberger v. UOP, Inc., Del. Ch., C.A. 5642, Brown, Ch. (April 29, 1984). After discovery and a full retrial on damages, including rescissory damages, the Chancellor issued an unreported opinion holding:

> "I conclude that entire fairness to the former minority shareholders of UOP requires in this case that monetary damages in the sum of $1 per share be awarded to the members of the class, together with interest thereon from February 1, 1983, that being the date of the finding by the Supreme Court that Signal, as majority shareholder, had breached the fiduciary duty owed by it to the UOP minority."

Weinberger v. UOP, Inc., Del. Ch., C.A. 5642, Brown, Ch. (January 30, 1985), p. 2. From a Judgment Order dated February 20, 1985, entered on this opinion (but reserving jurisdiction as to plaintiffs' claims for counsel fees and litigation expenses), the plaintiff class takes this appeal. Signal has cross-appealed as to the award of interest, but does not challenge the $1.00 per share damage award.

SUMMARY OF ARGUMENT

The Court of Chancery's January 30, 1985 unreported opinion is erroneous because:

(1) The Chancellor "interpreted" this Court's opinion to mean that the Court of Chancery could refuse to determine fair value or rescissory damages and instead make a minimal discretionary damage award;

(2) The Chancellor again placed the burden of proof on damages on the plaintiffs;

(3) The Court of Chancery refused to fashion any award of rescissory damages because, based on its own self-created standards, the Court believed the proof of rescissory damages was too "speculative" (though UOP had remained a stand alone division of Signal from 1978 through 1982);

(4) The Chancellor declined to make any determination of the fair value of UOP's shares;

(5) Despite this Court's recognition of the discounted cash flow method as a valid method of measuring damages, the lower Court rejected plaintiffs' discounted cash flow evidence for the same reasons set out in the earlier Chancery opinion this Court reversed;

(6) The Chancellor ignored plaintiffs' other evidence of fair value;

(7) The lower Court considered whether the defendants' damage evidence, based on the outmoded Delaware block method and containing such manifest errors as the continued failure to eliminate "noise" from its premium analysis, satisfied

defendants' burden of proving the $21.00 merger price was fair;

(8) The Court of Chancery improperly substituted an inadequate and unfair minimal discretionary award of $1.00 per share for the damages UOP's minority shareholders should have received as compensation for the wrong this Court found Signal had committed against them;

(9) The lower Court failed to award fair interest because the interest on the $1.00 per share award runs not from the time of Signal's breach of fiduciary duty nor the time of the merger, but from the time this Court reversed the lower Court and found liability.

(10) This Court should enter judgment or direct entry of a specific monetary judgment.

STATEMENT OF FACTS AS TO DAMAGES

A. Background of the Merger and Signal's Unfair Dealing

The factual background concerning the Merger and Signal's unfair dealing is set out in the lower Court's original opinion, Weinberger, 426 A.2d 1333, and this Court's opinion, Weinberger, 457 A.2d 701. These opinions constitute the law of the case. Accordingly, plaintiffs will not recount that background but, instead, will refer to and rely upon those opinions.

B. UOP's History From 1978 Through 1982

From the 1978 Merger until the end of 1982, UOP continued as a "stand alone" division of Signal with its own separate financial forecasts and reports (2A00059-00064, 2A00121-00122 Corirossi). Ownership of 100% of UOP has been a truly wonderful investment for Signal, just as the Arledge-Chitiea Report correctly, but conservatively, forecasted. Weinberger, supra (January 30, 1985). On remand, the Chancellor concluded that "it seems without question that achieving sole ownership of UOP has proven quite profitable to Signal." Weinberger, supra at 20-21 (January 30, 1985). Specifically, from 1978 through 1982 UOP generally exceeded its five-year forecast, as the following comparison of UOP's five-year forecast with its actual performance shows (2A03749-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	

UOP's ability to throw off vast amounts of cash to Signal is

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* Sources: Actual figures taken from The Signal Company's 1982 Annual Report, 2A002249-50, PDX 6. Plan figures taken from UOP 1978 Five-Year Business Plan dated April 28, 1978, (2A03400, PDX 69). Note: UOP's financial performance in 1982 was adversely affected by the severe recession, though the revenue and net income declines were modest (2A00794-95 Bodenstein).

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

shown in the UOP "advances" to Signal (2A03751- 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 [2A02558, PDX 26]).

"No Strings Attached" Cash Calculation Per 1980/1982 Board of Directors' Financial Reviews (DU000055 page 9, DU000056 page 17 [2A02927])

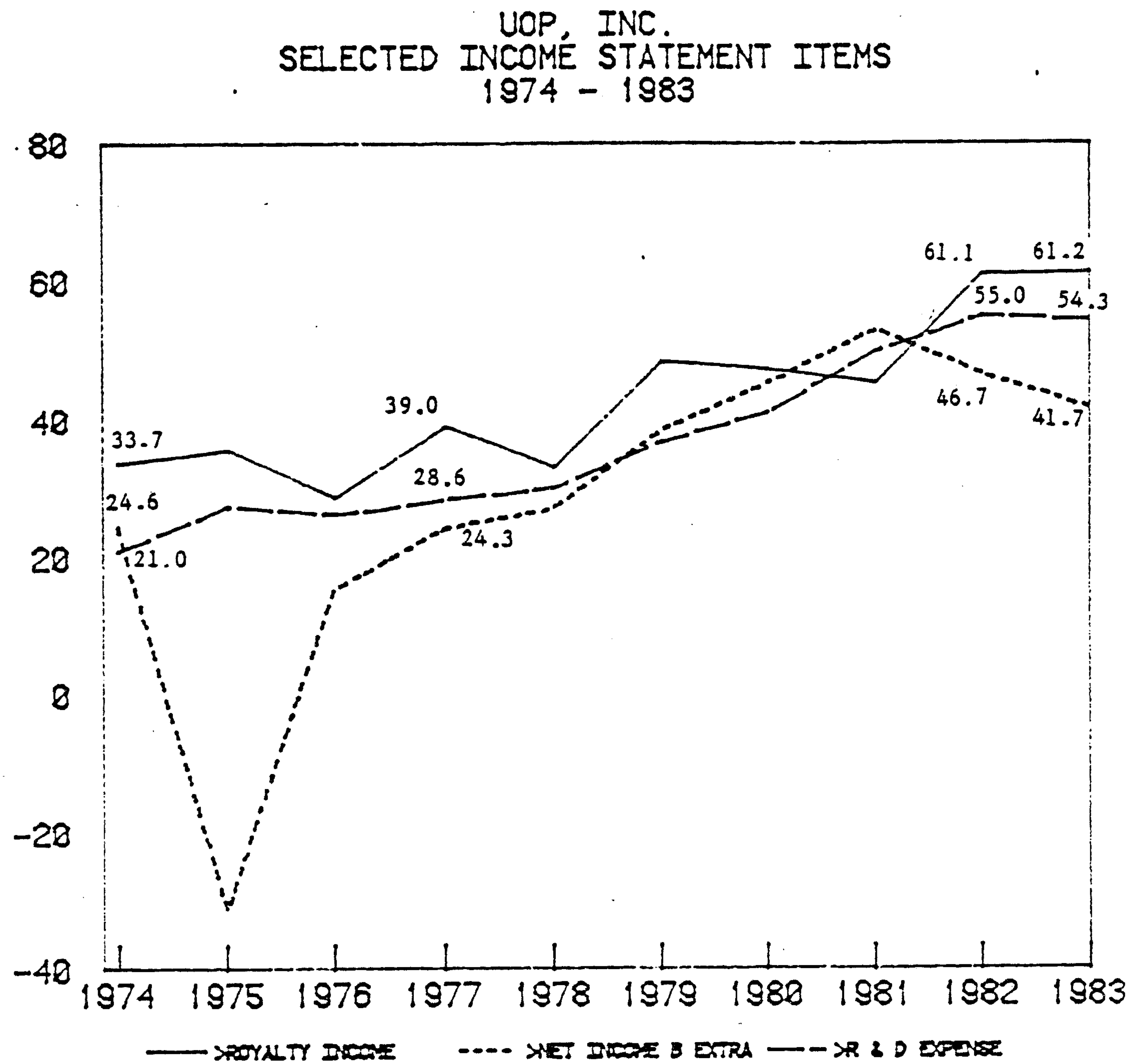
The Chancellor acknowledged the huge amounts of cash Signal was able to extract from UOP after the merger, finding:

> "In the time period between the merger and the continuation of trial on remand, Signal has received from UOP some $80 million in dividends and $157 million in cash advances (and the latter will not be repaid as such in view of the internal restructuring of UOP's operations into Signal), the sum of which considerably exceeds the total cost of the acquisition of the former minority interest.

Weinberger, supra at 24 (January 30, 1985).

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 clearly be seen in the following graph (2A03753- PDX 120, Appendix A, Table E):

TABLE E



UOP, INC.
SELECTED INCOME STATEMENT ITEMS
1974 - 1983
80
60
40
20
0
-20
-40
$ MILLIONS
33.7
39.0
61.1
61.2
55.0
54.3
28.6
24.6
24.3
21.0
46.7
41.7
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 description of UOP's economic accomplishments in Signal's annual reports.* Indeed, even the Chancellor, who again refused to consider plaintiffs' discounted cash flow evidence, was forced to admit that the discounted cash flow analysis presented by plaintiffs' expert at the original trial based on UOP's own five-year forecast has proven to be basically correct. Weinberger, supra at 24 (January 30, 1985). This analysis demonstrates that the value of UOP's stock at the time of the merger was not less than $26.00. Weinberger, 457 A.2d at 712.

C. The Preliminary Hearing on the Appropriateness of Rescissory Damages

After discovery was stayed for a year to afford Signal a preliminary hearing on whether rescissory damages were appropriate, it turned out that all Signal really wanted was to reargue yet again the significance of the Arledge-Chitiea Report (A1472-PX 74), particularly this Court's finding (457 A.2d at 709) that the report shows that acquisition of the UOP minority at any price up to $24.00 per share would be a good investment. Not only had the defendants' position been previously argued three times and specifically rejected by this Court, but the two authors, Messrs. Arledge and Chitiea, had been listed by the

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* 2A02066- PDX 2, pp. 4, 14-17; 2A02112- PDX 3, pp. 2, 8, 12, 16, 24; 2A02163- PDX 4, pp. 2, 19-21, 28-30; PDX 5, pp. 2, 18-21, 31-32; 2A02223- PDX 6, pp. 22-23; 2A02278- PDX 7, pp. 14-19, 27.

defendants' as trial witnesses but had not been called by the defendants (2A01713e, 2A01329-2A01332).*

At the preliminary hearing, plaintiffs' expert showed, using the methodology of the Arledge-Chitiea Report, that acquisition of the UOP minority would have been profitable to Signal at any price up to $30.00 (2A03805-PDX 120, Appendix C, Duff & Phelps Preliminary Analysis, p.7). On April 24, 1984, the Chancellor denied the defendants' motion that rescissory damages be held inapplicable, holding, _inter alia_, that this Court's findings concerning the Arledge-Chitiea Report were the law of the case. 2A01713a- _Weinberger_, _supra_, at 13 (April 24, 1983).

D. The Signal-Wheelabrator Merger and the Restructuring of UOP

On February 1, 1983, Signal merged with Wheelabrator-Frye, Inc. ("Wheelabrator"). In April 1984, when the stay of discovery obtained by Signal was finally vacated, plaintiffs learned that during the stay, Signal, as part of a larger corporate reorganization precipitated by the Signal-Wheelabrator merger, had reorganized UOP, including closing, selling off and reassigning UOP's losing divisions (e.g., Procon, which had lost $72 million during 1979 to 1982) (2A00070, 136-38 Corirossi; 2A00324-24a, 328 Kavanaugh). While the stay was in effect, Signal never advised plaintiffs or the Court of Chancery that it

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* Mr. Arledge arrogantly stated repeatedly that this Court's findings were "totally wrong" though Arledge had never even read the opinion in its entirety. (2A01334, 2A01339-2A01349).

was in the process of restructuring UOP, which until then had been a "stand alone" subsidiary with separate financial reporting. At the damage trial, Signal attempted to exploit its private restructuring of UOP in arguing that rescissory damages were not susceptible of proof.

E. The Evidence at the Damage Trial

1. 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 fact witnesses, Mr. Corirossi and Mr. Kavanaugh, were not employed by Signal or UOP in 1978 and did not testify as to the fair value of the minority shares in 1978 or the rescissory value of the UOP minority shares.

Mr. Corirossi, Chief Financial Officer of UOP since 1980 (2A00058 Corirossi), was apparently called only to foster 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 (2A00121-2A00124 Corirossi). He also acknowledged that the tables prepared by plaintiffs' expert summarizing UOP's financial history from 1978 through 1982 were basically correct (2A00124-2A00127 Corirossi). He further admitted that UOP's 1982 and 1983 Year End Report, before certain

May 1984 accounting adjustments made by Signal, showed net operating income of $46 million and $41 million respectively (2A00151-2A00152 Corirossi).

On April 25, 1983, financial figures were submitted to Signal's Board reflecting the expected impact of the post Wheelabrator merger reorganization on UOP (2A02658-PDX 27). The effect on operating earnings was summarized as follows:

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)

2A02660. Thus, in spite of UOP's losing divisions, the recession and the costs of the post Wheelabrator merger reorganization, UOP continued to project $39 million of operating earnings for 1983. Moreover, as a result of the shut-down of Procon and the sale and reassignment of certain other divisions in the reorganization, UOP got rid of its "sick" businesses which had major losses. Signal was left with the Process Division, UOP's consistent big money-earner, as well as six other UOP divisions that generally made money (2A00109-110, 2A00138-140 Corirossi).

The report also delineated UOP's "Major Reserves":

UOP
MAJOR RESERVES
(Dollars in millions)

	Procon	Air Correction	Bostrom	Corporate & Other	Total
Credit Memos-ELF/ Chemocomplex	$ 5	$ -	$ 1	$ -	$ 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

2A02661. 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:

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* Though he prepared this list of UOP's Major Merger-Related Expenses, Mr. Corirossi claimed at trial that the expenses resulting from Signal's reorganization were not related to the Wheelabrator merger (2A00146 Corirossi).

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

2A02662.

The importance of the above figures is that (1) Signal in April 1983 believed the reorganization would cause only a modest decline in UOP's operating earnings, and (2) neither the "Major Reserves" nor "Major Merger-Related Expenses" were to be charged against UOP's operating earnings.

According to UOP, Inc.'s 1983 Year End Reports 2A02558, 2A02561-PDX 26), on December 31, 1983, UOP's 1983 income before income taxes was $82,786,000 (up from $77,362,000 in 1982) and 1983 net income was $41,680,000 (down from 1982's $46,682,000 because UOP paid almost $10,000,000 more in United States income taxes in 1983). After paying $10 million in 1983 dividends, UOP had retained earnings of $258,184,000. Neither version of UOP's year-end reports (2A02558, PDX 26; 2A02663, PDX 90) shows any reserves or charges under the columns entitled "Discontinued Operations" or "Extraordinary Items".

There is a contra account entry "Long Term Advances from Signal" (2A02559), which reads "(157,838)". The parentheses mean that the $157,838,000 was actually advanced by UOP to Signal. While Mr. Corirossi, though Chief Financial Officer of UOP, claimed he did not know what had happened to the $157 million that UOP had "advanced" to Signal from 1978 to 1983 between December 31, 1983 and January 1, 1984 (2A00117-2A00119 Corirossi), these "advances" to Signal were, in fact, permanently transferred to Signal on January 1, 1984 (2A00223-2A00224 Kavanaugh). The Chancellor found that Signal would simply keep this $157 million in UOP "advances" as well as the $80 million it had already received in dividends).* Weinberger, supra at 24 (January 30, 1985).

Signal's other lay witness was Mr. Edward F. Kavanaugh, who in the course of the Signal-Wheelabrator merger became Signal's Deputy Comptroller. Mr. Kavanaugh's sole function at the trial was to present the accounting "adjustments" Signal introduced as DDX-10 and DDX-11 (2A04154; 2A04126). These documents were prepared on May 14 and May 21, 1984, at the direction of Brewster Arms, Esquire, house counsel for Signal, for use at the June,

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* 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 (2A00120 Corirossi):

> "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."

1984 damages trial (2A00241-2A00246 Kavanaugh).* Mr. Kavanaugh testified that the accounting decisions on what to show as being charged off against UOP were made by Signal and that such specific accounting charges had not been made against the other divisions of Signal (2A00256-58 Kavanaugh).**

Through the documents it had had prepared for trial, Signal attempted, by charging extensive "reserve adjustments" against UOP's net operating income, to turn the $41,680,000 net income for 1983 shown in PDX 90 (2A002663-68) into a $55,151,000 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 (2A04154) does not charge them to discontinued operations or extraordinary items. Indeed, the line "Income from discontinued operations" is left blank. Rather, for trial purposes, Signal added these adjustments to UOP's cost of sales and general and administrative expenses in order to give the

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* Mr. Kavanaugh claimed that these exhibits were prepared in response to plaintiffs' request for production (2A00245 Kavanaugh). However, plaintiffs requested existing documents, not the production (literally) of documents by the defendants in connection with the damage trial.

** Another example of accounting charges made by Signal's financial people on the very eve of the damage trial in this case lies in the double handling of the Come-By-Chance Refinery: the Come-By-Chance accounting charge of $52 million was all charged against UOP's 1983 income, though, so far as Signal was concerned, the same charge was amortized over seven years (2A00265-2A00267, 2A00269 Kavanaugh).

misleading impression that UOP had an operating loss in 1983. Moreover, since the reserves Signal tried to charge against UOP's 1983 income are designed to offset expenses which are anticipated at some future time (2A00074-75 Corirossi), Signal will not have to make any charge against UOP's income when these expenses actually are paid.*

In sum, through artificial accounting changes, Signal attempted to make it appear that UOP suddenly became a loser. The facts are that, after the reorganization, (1) Signal still owned 100% of UOP, (2) had taken $157 million of UOP's cash for its own purposes, (3) had gotten rid of all of UOP's losing divisions and UOP's contingent liabilities (such as the Come-By-Chance claim), and (4) had retained UOP's profitable divisions. Thus, UOP was poised for the balance of the 1980's to make huge operating earnings entirely for Signal's benefit (2A04064- PDX 125; 2A00870 et seq. Bodenstein). Indeed, the Chancellor found these to be the facts:

> "In the time period between the merger and the continuation of the trial on remand, Signal has received from UOP some $80 million in dividends and some $157 million in cash advances (and the latter will not be repaid as such in view of the internal restructuring of UOP's operations into Signal) the sum of which considerably exceeds the total cost of the acquisition of the former minority interest. UOP's

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* Mr. Kavanaugh admitted that the $157 million that became a permanent advance to Signal from UOP was a net figure after paying off $24 million of UOP debts; that at year end 1983, UOP also had $15 million in cash and $18 million in short term investments and market securities and receivables of over $173 million, and that even after all losses, reserves and adjustments that Signal had imposed on UOP, Signal's equity interest in UOP was $263 million. (2A0036-323 Kavanaugh)

money-losing divisions have been sold off or closed down and the operating divisions which have proved profitable in recent years have been retained for Signal's future economic benefit."

2. Mr. Purcell

a. Mr. Purcell's Fatally Flawed Opinion on Fair Value

At the 1984 damage trial, Signal again called William Purcell as its financial expert. All Mr. Purcell did was restate his original 1980 opinion, which was based on little hard analysis, that the $21.00 merger price was fair (B569-DX 40; 2A04167-DDX 13). Mr. Purcell did not actually determine the fair value of the minority shares, but merely said that, in his opinion, $21.00 was in the range of fairness (2A00570-73 Purcell), and that any price above $21.00 would be fair to the minority (2A0565-66, 70-71 Purcell).

Mr. Purcell's 1984 opinion on fair value fails to consider UOP's vast cash throw-off since the merger, including $157 million in cash "advances" and $80 million in dividends. Moreover, Mr. Purcell admitted that (1) in business schoool he learned the discounted cash flow method as a method of measuring value (2A00372, 2A00448-50 Purcell), (2) Dillon, Read and its clients utilize the discounted cash flow method (2A00497-502 Purcell), (3) future earnings potential is the key to the value of any company (Purcell (6/13/84) 74), and (4) this Court's opinion, (Weinberger, Supr., 710-714), approved the discounted cash flow method (2 Damage Purcell 164-166, 170). His reason for ignoring UOP's cash flow is obvious: the realistic use of the discounted cash flow method would necessarily turn out to be contrary to Signal's interest.* The ostensible reasons advanced by Mr. Purcell for not using the discounted cash flow method simply did not stand up (2A00450-462; 2A00513-518 Purcell; 2A00888 et. seq. Bodenstein).

(a) Mr. Purcell's use of the Outmoded Delaware Block Method and Miscalculation of Premium in 1980 and 1984

Both the Chancellor, Weinberger, 426 A.2d at 1361, and this Court, Weinberger, 457 A.2d at 712, 714, found that Mr. Purcell's fair value opinion was based on the "outmoded" "Delaware Block" method.** Using the block method, Mr. Purcell stated both in 1980 and 1984 that the market and investment price of the UOP stock was $14.00 to $15.00 (A1757; 2A00379, 576-77 Purcell; B569-DX-40; 2A04167 DDX-13).*** In both his 1980 and 1984 reports, he recognized that a premium over market price is always present in

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* Significantly, Mr. Purcell never checked Mr. Bodenstein's 1980 discounted cash flow analysis using UOP's 1978 Five-year Plan to see if Mr. Bodenstein's analysis had been proven correct by UOP's actual performance (2A00544-45 Purcell 103).

** At the damage trial, Mr. Purcell, contrary to the law of the case and Signal's own previous position (Signal's Post-Trial Brief, pp. 123, 129-147), testified he had used a different valuation method (2 Damage Purcell 163-164, 185, 218-221).

*** In 1980, Mr. Purcell included the "structure" of the transaction as a major reason for finding the $21.00 price fair (B569-DX-40, pp.3,5). Of course, in the light of this Court's opinion, Mr. Purcell had to say that even without relying on "structure", the $21.00 price was fair (2A04167-DDX 13; 2A00383-85 Purcell). He 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 (B569-DX 40; 2A0 4167-DDX 13; but at trial he said he gave no weight to the 1975 price (2A00383, 402-03 Purcell).

a cashout merger (B569-DX 40; 2A04167-DDX 13; pg. 3-40) and so stated at the damage trial (2A00640 Purcell).

Mr. Purcell attempted to justify the fairness of the $21.00 price based on the percentage of premium paid in comparable transactions (2A00580-81 Purcell). The premium comparison on which the 1980 and 1984 Dillon, Read fairness opinions entirely depend was done, not by Mr. Purcell but, by two juniors at Dillon, Read in 1980 (B569-DX-40 pp. 17-18; A106-62 A123841), who measured the percentage of premium based on the difference between the merger price and the market price <u>on the day before the formal announcement of the transaction</u> (B569-DX 40 Exs. 6,7; A1062, A1238-41, A1244; <u>Weinberger</u>, 326 A.2d at 1362; 2A00582-831 Purcell). However, as even Mr. Purcell agreed, "noise" can result in a run-up of the stock price (A1238-1261; 2A00585-92 Purcell; 2A00721-24 Bodenstein). When there is "noise", the price the day before the formal announcement is not the unaffected market price (A1238-1261; 2A00597-603 Purcell; 2A00719-21 Bodenstein). 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 (2A00588-92 Purcell). Nevertheless, Mr. Purcell did not analyze or revise the transactions contained in his list of comparables to eliminate noise, though he was given (even back in 1980) Mr. Bodenstein's analysis of Dillon, Read's comparative transactions with noise eliminated (A1504-PX 6; 2A00605, 629-30 Purcell).

Mr. Purcell's sole rationale for utilizing the day before the formal announcement was because "... Dillon, Read always did it that way..." (2A00583-84 Purcell). Even after the effect of noise was brought home to him a second time by cross-examination, Mr. Purcell doggedly claimed that Dillon, Read's computation of the percentage of premium was valid (2A00642 Purcell).* However, Mr. Purcell himself used a noise-screening analysis in some portions of his valuation reports. For example, his 1984 report (2A04167-DDX 13, pg. 3, 13), Dillon, Read's view that UOP's average high-low-close 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), 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" (2A04169). (See also B569-DX-40, pg. 4, Dillon, Read Report of 1980). Thus, Dillon, Read not only understood and approved the noise elimination principle but applied precisely the technique described and utilized by plaintiffs' expert (2A00724-25, 31-32, 41-42 Bodenstein).

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* Mr. Purcell did make a crude attempt at the damage trial to correct his long standing failure to eliminate "noise". He arbitrarily selected thirty days before the formal announcement as the measuring day (2A00609-618,630 Purcell; 2A03820-PDX 123). Mr. Bodenstein pointed out that arbitrary selection of a thirty-day cut-off period may or may not eliminate noise in any particular transaction (2A00748-51 Bodenstein) But even this mechanical selection pushed the average comparable premium up to 59% from 47% (2A00616). A 59% premium over Mr. Purcell's $14 to $15 market price would yield a merger price of $22.26 to $23.85.

b. Mr. Purcell's Incorrect Determination of Rescissory Value

Mr. Purcell, in 1984, augmented his opinion by presenting calculations to show what he claimed UOP's 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 (2A0651-52,56 Purcell; 2A04167-DDX 13, p. 16-17).

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's 1984 report appears to use the same comparables used in his 1980 report (B569-DX 40; 2A04167-DDX 13). However, in the middle of the 1984 report there is an almost casual indication that certain comparable companies have been eliminated (2A04181): "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%." In fact, Mr. Purcell eliminated seven out of the fourteen comparable companies because of such "depressed earnings" (2A00412-14 Purcell). With these seven companies eliminated, the price/earnings ratios used to compute the value of UOP's stock in 1982 and 1983 was 7.5, instead of 9.1 (2A04167-DDX 13, Ex. 7, pp. 1, 15; 2A04166-DDX 13A; 2A00403-05,412, 2A00663-67 Purcell; 2A00896-900 Bodenstein). Mr. Purcell also cut out 11 out of 32 on his second list of comparables (2A00675-76 Purcell). Mr. Bodenstein showed, when utilizing the Dillon, Read complete comparative figures, Dillon, Read's damage figure came out to be $38.69 to $48.36 for 1982 (2A03733-PDX 119, p. 12).*

No justification was presented for the arbitrary elimination of half the comparables. The real reason for eliminating the companies with a 25% reduction in earnings was to make the comparison "come out" (2A00896-900 Bodenstein). Furthermore, the point of using a collection of comparable companies is to determine what UOP's performance would have been based on the whole spectrum of comparables, not an arbitrary selection from that spectrum.**

(ii) Failure to Include Interest on Dividends

Mr. Purcell calculated the amount of the dividends that the

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* This is without considering errors in some figures Dillon, Read used, Dillon, Read's mistaken substitution of C. F. Braun for Braun Engineering or Mr. Purcell's "mistake" at trial as to Federal-Mogul (2A00896-900 Bodenstein; 2A0669-73 Purcell; 2A03733 PDX 119, p. 8-9). These further errors cast substantial doubt on the overall efficacy of Dillon, Read's work.

** Mr. Purcell's credibility is further undermined by his admission that even his arbitrary exclusion was not done properly, since he eliminated Federal Mogul, which did not have a 25% earnings decline (2A0669-71 Purcell). In an effort to conceal his error, Mr. Purcell testified that his copy of his 1984 report had a handwritten change in the amount of Federal Mogul's earnings (from $2.82 to $2.92). Id. That change was not contained in the copy of that report introduced in evidence, nor the copy provided to 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 (2A00672).

UOP minority shareholders would have gotten from 1978 to 1983 (2A04167-DDX 13; 2A00418-19 Purcell). However, Mr. Purcell did not include interest on the omitted dividends (2A04167 DDX 13; 2A03746-PDX119; 2A00835, 904 Bodenstein).

(iii) Omission of Premium

Mr. Purcell agreed that in transactions where control (particularly total control) is going to the acquiror, the price exceeds the unaffected market price being paid for minority interests (2A00640, 647 Purcell). The difference between the unaffected market price and the transaction price is called premium. (2A00647 Purcell; 2A00708 Bodenstein). Premium is what the buyer pays and the seller gets for the transfer of control (or 100% of control where 100% stock ownership is obtained by the acquiror) (2A00640, 644 Purcell; 2A00708-711 Bodenstein). Any calculation of rescissory value must assume the stockholders, after the date for which rescissory damages are calculated, will no longer have any interest in the company since they are receiving damages in place of having their stock returned to them (2A00644-648 Purcell; 2A00832, 2A00902-03 Bodenstein).

Nevertheless, Mr. Purcell did not include premium in his 1984 calculations: He merely calculated the price at which he believes UOP's shares would have traded on December 31, 1982 or December 31, 1983 (2A04167-DDX 13, p. 16; 2A00648, 656-58 Purcell). 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. 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 (2A00650 Purcell).

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 (2A04167-DDX 13, p. 16, 17). If the premium were only 40%, the rescissory value of UOP's stock using Mr. Purcell's own methodology would be:

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 ($23.00+40%)	$32.20	to	$33.95	($24.25+40%)
plus dividends of	7.38		7.38	
rescissory value	$39.58		$41.33	

(2A01784, 2A01800).

3. Mr. Bodenstein

Mr. Kenneth Bodenstein, a Chartered Financial Analyst and Senior Vice President of Duff & Phelps, was plaintiff's 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 (2A00689-693 Bodenstein). Duff & Phelps is a Chicago investment and valuation firm employing about 100 professionals (2A00696-97 Bodenstein). Valuation is one of the principal functions of Duff & Phelps but they also provide investment and securities research for the financial community, including Dillon, Read, Mr. Purcell's firm, (2A00696-99 Bodenstein). Duff & Phelps makes daily calculations of the percentage of premium in mergers, eliminating "noise" by analysis to determine the premium of the merger price over the unaffected market price, and compiles this research in Duff & Phelps' data bank (2A00718-20 Bodenstein).

a. Mr. Bodenstein's 1980 Report and Testimony

In 1980, Mr. Bodenstein made a conservative determination of the fair value of the minority shares at the time of the cashout merger based on a series of comparative analyses. Weinberger, 426 A.2d at 1356. (2A00774-771, 2A01105 Bodenstein). Based on that analytical work, he testified that the minority shares were worth not less than $26.00 per share. Weinberger, 426 A.2d at 1358. Mr. Bodenstein's 1980 report did not contain an evaluation of the minority shares based on the discounted cash flow method (2A03747-PDX 120, Appendix B). However, since defendants had raised questions about that technique at Mr. Bodenstein's deposition, he prepared two limited discounted cash flow analyses for trial 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 (2A00779-780 Bodenstein). These three discounted cash flow analyses confirmed that the value of the minority shares at the merger date was not less than $26.00 (2A00780 Bodenstein). On remand, Mr. Bodenstein testified (2A00778 Bodenstein) and the Chancellor found (Weinberger, supra at 24 (January 29, 1985)) that UOP's actual cash flow performance supported the cash flow projections Mr. Bodenstein presented at the original trial.

b. Mr. Bodenstein's 1984 Report and Testimony

Duff & Phelps' 1984 report (2A03747-PDX 120, p.3) first reviewed and described the effect of UOP's outstanding 1978-1982 results. The report then carefully delineated the methodology of the discounted cash flow analysis, including the appropriate method of determining the applicable discount rate (2A03747-PDX 120, Appendix A, Table G). This initial section of the 1984 report concludes with a full discounted cash flow analysis of UOP based on UOP's own 1978 Five-Year Plan (2A03400-PDX 69). The report states (2A03746A-PDX 120, p. 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 prospective 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 of the UOP stock. Ten separate analyses of the rescissory value of UOP from 1979 through 1984 were made and the results summarized in Table U (2A03769-PX 120, Appendix A):

TABLE U
SUMMARY OF UOP FAIR VALUES BY VARIOUS VALUATION METHODS

	1979	1980	1981	1982	1983	1984
		During the Spring of				
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

A R G U M E N T

I. THE LOWER COURT DISREGARDED THE SPECIFIC DIRECTIONS OF THIS COURT TO DETERMINE DAMAGES

A. Scope of Review

(For Arguments I Through VI)

This Court's opinion, 457 A.2d at 715, and February 15, 1983 mandate directed that the Court of Chancery determine damages in conformity with this Court's opinion. Therefore, the standard and scope of review on this appeal is whether the Court of Chancery has complied with the mandate and the Supreme Court's opinion. Blaustein v. Standard Oil Co., Del. Super., 54 A.2d 596, 605 (1947); Wife v. Husband, Del. Supr., 269 A.2d 214 (1970). The trial court's decision after remand is not "an exercise of discretion and must be reviewed for errors of law." Plumbago Mining Corp. v. Sweatt, Me. Supr., 444 A.2d 361, 370 (1982) (judgment of lower court vacated as being an error of law for failing to follow mandate). Moreover, the findings and holdings of this Court on the initial appeal are the law of the case on remand and the lower court cannot deviate from or ignore those findings and holdings. Lee Builders, Inc. v. Wells, Del. Chan., 103 A.2d 918, 919-20 (1954); Weinberger, supra at 13 (April 24, 1984). Furthermore, the lower court's damage determination on remand following this Court's liability finding cannot stand if the lower court applied the wrong rule of damages. Lynch v. Vickers Energy Corp., Del. Supr., 429 A.2d 497, 500 (1981).

In the opinion of January 30, 1985, the trial Court ignored the guiding principle that it must strictly comply with this Court's opinion and mandate. Furthermore, the lower Court's opinion is inconsistent with findings and holdings of this Court which were the law of the case on remand. Accordingly, the Court of Chancery's judgment order should be reformed to provide an award of damages which is in conformity with this Court's opinion.

B. The Lower Court Failed to Determine Damages or the Fair or Rescissory Value of the UOP Shares

This Court specifically directed that on remand the Court of Chancery was to determine damages, including rescissory damages, Weinberger, 457 A.2d at 714:

> "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. *** On remand, the plaintiffs will be permitted to test the fairness of the $21.00 price by 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 issues of fairness before him.'"

The lower Court totally ignored this Court's direction. After a full trial and briefing, the Chancellor, instead of making findings as to the fair value of UOP's stock and determining damages in accordance with fair value under 8 Del.C. §262 and/or rescissory damages, "interpreted" this Court's opinion as granting the lower Court plenary authority to make a purely discretionary award without any determination of fair value or rescissory damages:

> "Accordingly, I interpret the Supreme Court's finding of unfair dealing on Signal's part -- which I take to be a finding of misrepresentation -- and its direction with regard to an award, if any, of monetary damages on remand to mean that the Court is free in its discretion to award such monetary damages as it deems appropriate to the situation without being limited in arriving at a damage figure or the lack of one to a dollars and cents comparison between the $21 per share price paid to the minority and some other specific per share value of UOP stock either as of the merger date or at some subsequent time. In short, I do not deem it to be my function under the particular circumstances of this case to restrict my conclusion to the results of an appraisal of the value of a share of UOP stock either at the merger date or at some other later date."

Weinberger, supra, at 4 (January 30, 1985).

Having declined to follow this Court's directions to determine and award damages under "the principle applicable to an appraisal" and rescissory damage standards to compensate the UOP shareholders for being deprived of their stock, the lower Court merely made a discretionary award for the "wrong" Signal committed by depriving the minority stockholders of a meaningful vote:

> "I turn finally to that which I feel is required by an application of the entire fairness standard to this situation. And I start with the premise that it has been judicially determined by the Supreme Court that the former minority shareholders of UOP have suffered a wrong at the hands of Signal.[*] It is a wrong found to have been committed by one who owed to them a fiduciary duty of fair dealing as well as fair price. It cannot be denied that Signal has benefited

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* The phrasing suggests the obvious -- the lower Court still does not agree that there has been a wrong done by Signal to the minority stockholders of UOP: it is the lower Court's view that this Court has "judicially determined" that the UOP shareholders have "suffered a wrong at the hands of Signal".

from this breach of fiduciary duty regardless of whether or not it was intentionally committed. The approval of the minority secured in the face of the inadequate proxy information enabled Signal to get what it wanted at the price it wanted to pay, and it seems without question that achieving sole ownership of UOP has proven quite profitable to Signal.* Under these circumstances I feel that the minority should be compensated for the wrong done to them even though a damage figure cannot be ascertained from a comparison of selected stock values and hypotheticals with any degree of precision. Quite simply, equity will not suffer a wrong without a remedy."

Weinberger, supra at 20-21 (January 30, 1985). Thus, the UOP stockholders are only to be paid for the "wrong", not for their stock. The lower Court then ignores the extensive unfair dealing this Court found Signal committed against the shareholders, finding that the only wrong this Court found was that Signal deprived the minority of an informed vote. Weinberger, supra, at 21.**

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* The wrong being "quite profitable to Signal", the UOP stockholders were entitled to rescission and return of their stock or, at least, rescissory damages or the fair value of their stock, not just a token $1.00 penalty against Signal.

** The lower Court then further minimized Signal's wrongdoing by erroneously relying on two supposed mitigating factors in Signal's favor in fixing the damage award. First, the lower Court states that it was not necessary for Signal to structure the transaction to require a majority of the minority vote, Weinberger, supra, at 21-22. However, because there was no arm's length bargaining on behalf of the minority shareholders, Signal relied on the vote to insulate the transaction. Second, without any evidentiary basis, the Chancellor states his personal view that, even if Signal had been completly candid, the minority stockholders would have voted to approve the merger. This Court having found that Signal's nondisclosures were material, the Chancellor was not free to substitute his subjective speculation of how the minority shareholders would have voted given full disclosure.

Finally, the Chancellor awards $1.00 per share based on what he "feels" is fair compensation for the "wrong" to the minority, acknowledging again that this discretionary award was not based on the fair value or rescissory value of the UOP minority shares. Id.

In interpreting this Court's opinion as allowing the Chancellor absolute discretion in fixing the award to UOP's minority stockholders, the Court of Chancery was interpreting the following paragraph of the opinion:

> While the plaintiff's monetary remedy ordinarily should be confined to the more liberalized appraisal proceeding herein established, we do not intend any limitation on the historic powers of the Chancellor to grant such other relief as the facts of a particular case may dictate. The appraisal remedy we approve may not be adequate in certain cases, particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross impalpable overreaching are involved. Cole v. National Cash Credit Association, Del.Ch., 156 A.183, 187 (1931). 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 undue, 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.

Weinberger, 457 A.2d at 714. (Emphasis added). As the underlined portions above indicate, this Court was not granting the Chancellor absolute discretion to ignore plaintiffs' right to appraisal by failing to determine fair value. Rather, this Court was authorizing the Chancellor to grant additional relief where the appraisal remedy was not adequate to compensate the stockholders fully. Since this Court made findings amounting to fraud, misrepresentation, self-dealing and gross and palpable overreaching on the part of Signal, the Chancellor was free on remand to award damages in addition to the appraisal remedy, including a discretionary award for the wrong the minority suffered in being deprived of a meaningful vote. However, contrary to the Chancellor's interpretation, this Court's opinion did not permit the Chancellor to deny plaintiffs' right to appraisal and make a discretionary award in lieu of the appraisal remedy.

In sum, this Court remanded the case for a determination of damages under the quasi appraisal remedy described in its opinion, but the lower Court failed to follow this Court's direction. The lower Court mistakenly interpreted this Court's carefully chosen language protecting the historic discretion of the Court of Chancery in fashioning equitable remedies as granting absolute discretion, including the discretion to ignore plaintiffs' right to fair value, rather than the allowable and necessary discretion to fashion further damage remedies in equity cases where appraisal alone will not provide all the relief required. Therefore, this Court must remedy the Chancellor's failure to make the damage determinations required by this Court's opinion.

II. THE LOWER COURT ERRONEOUSLY PLACED THE BURDEN OF PROOF ON THE PLAINTIFFS

This Court held that the burden of proof was on the defendants as to all issues, including fair value and the amount of damages. Weinberger, 457 A.2d at 708, 714. However, on remand the Chancellor placed the burden of proof on the plaintiffs. For example, though this Court specifically encouraged the Chancellor to consider an award of rescissory damages, the lower Court ruled rescissory damages out, saying in effect that the plaintiffs had not proven rescissory damages "... by convincing and persuasive proof..." Weinberger, supra, at 15-16, January 30, 1985. In addition to placing the entire burden of proving rescissory damages on the plaintiffs, the lower Court made that burden impossible to meet by requiring the plaintiffs to prove (a) a resale or liquidation shortly after the merger, (b) there was one exclusive date for the determination of rescissory damages, and (c) a market value for the stock after the cashout merger. Id. at 8-9.

The Court's misplacement of the burden of proof was even more blatant on the issue of the fairness of the $21.00 price. The lower Court's original opinion focused on whether the plaintiffs had shown to his satisfaction that the $21.00 price was unfair. Weinberger, 426 A.2d at 16-17. The lower Court's present opinion simply reaffirms its original opinion, including placing the burden of proof on the plaintiffs:

> "In the original trial of this case plaintiff's expert, Mr. Bodenstein of Duff and Phelps, used a discounted cash flow analysis and a comparison of the premium over market in selected similar acquisition

> transactions to conclude that on May 26, 1978, the date of the merger, the value of the stock of UOP was not less than $26 per share. At the resumption of the trial on remand, Mr. Bodenstein used a similar updated analysis to adjust his earlier opinion upward so as to conclude that on the date of the merger the value of the UOP stock was between $28 to $30 per share.
>
> "Having reconsidered the plaintiff's evidence, I find that my reaction to it now is no different than it was earlier."

Weinberger, supra at 17 (January 30, 1985). Neither the lower Court's original opinion nor its recent opinion explain why Mr. Bodenstein's comparative analysis of premium over market is incorrect. The lower Court compounds the foregoing by declining to follow this Court's specific direction to reconsider plaintiffs' discounted cash flow and premium over market analyses in light of the standards in this Court's opinion. Instead, the Chancellor simply rejects plaintiffs' evidence for the same "reasons set forth in [his] earlier decision". Weinberger, supra at 18-19 (January 30, 1985). Accordingly, since this Court's opinion, 457 A.2d at 714, held there could be no finding that the $21.00 price was fair unless it was tested by the standards set out in that opinion, the Chancellor could not have found that the $21.00 price was fair.

If there were any doubt as to where the Chancellor put the burden of proof, his statement that he finds it "unnecessary" to review defendants' evidence of value or plaintiffs' evidence of why defendants' expert is incorrect conclusively demonstrates that he did not require the defendants to prove the $21.00 price was fair.* Weinberger, supra at 20 (January 30, 1985). The lower Court could not have determined that defendants had proven the fairness of the merger price when it did not even review defendants' evidence or plaintiffs' attack thereon. In short, the Chancellor's opinion cannot be accepted since it is based on a misallocation of the burden of proof.

* The Chancellor did state that defendants' expert used the same approach to valuation as at the original trial (i.e., the Delaware Block Method). Id.

III. THE LOWER COURT ERRED IN FAILING TO DETERMINE AND AWARD RESCISSORY DAMAGES

A. The Findings of This Court and the Lower Court Show Rescissory Damages Are Appropriate Under Delaware Law

1. The Findings of This Court and the Court of Chancery

Throughout his opinion, the Chancellor shows that he remains unconvinced that Signal is a wrongdoer, though he reluctantly acknowledges this Court's finding of liability. The Chancellor also minimizes this Court's extensive holdings of unfair dealing by Signal as being nothing more serious than a possibly innocent misrepresentation in failing to disclose the Arledge-Chitiea Report. Weinberger, supra at 1, 3-4, 21 (January 30, 1985). However, this Court found that the non-disclosure of the Arledge-Chitiea Report was only one aspect of Signal's unfair dealing and that Signal's wrongdoing was also shown by how the transaction was initiated, structured, negotiated and disclosed to UOP's directors and minority stockholders. Weinberger, 457 A.2d at 711-712.* Concluding that the transaction failed to satisfy "any reasonable concept of fair dealing", this Court strongly suggested that UOP's minority shareholders would ordinarily be entitled to rescission, but that, since this "long completed transaction is too involved to undo", the Chancellor could** award

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* In particular, this Court deplored the rushed fashion in which Signal forced UOP's Board and Lehman Brothers to consider the merger, the lack of any arm's length bargaining, and the failure to disclose to the minority the hasty and cursory manner in which the transaction was opined on and approved. Id.

** The word "could" was omitted in the original page and this correced page including this word is now included.

[corrected page]

rescissory damages if that remedy was appropriate and susceptible of proof.* Weinberger, 457 A.2d at 712, 714.

This Court's unfair dealing findings show, at a minimum, that Signal was guilty of misrepresentation (and plaintiffs contend outright fraud), self-dealing and overreaching which would justify rescission (if it was practicable) or rescissory damages in lieu of rescission. Eastern States Petroleum Co., Inc. v. Universal Oil Products Co., Del. Ch., 3 A.2d 768 (1939); Joseph v. Shell Oil Company, Del. Ch., 482 A.2d 335, 345 (1984); Lynch v. Vickers Energy Corp., 429 A.2d at 501-503. While the lower Court ignored most of Signal's wrongdoing, it nonetheless concluded that Signal was guilty of misrepresentation by inducing a vote approving the merger through nondisclosure of material information. Weinberger, supra at 3-4 (January 30, 1985). The lower Court also refused to accept Signal's argument that such misrepresentation, which Signal argued was unintentional, was insufficient to warrant an award of rescissory damages. Id. at 5, 16. Moreover, it was acknowledged that Signal's misrepresentation would ordinarily entitle the UOP minority to rescission and that rescissory damages are a substitute where rescission is impractical. Id. at 6. However, the lower Court declined to determine and award rescissory damages because, based on standards the lower Court itself created, it believed such damages were not susceptible of proof. Id. at 5-16.

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* The Chancellor acknowledged that this Court had encouraged the Court of Chancery to consider a rescissory damage award. Weinberger, supra at 2 (April 24, 1984.

2. The Delaware Law Standards for Rescissory Damages

Lynch, supra, states the Delaware law as to rescissory damages. This Court's decision in this case did not overrule Lynch as to the standards for determining the appropriateness or amount of rescissory damages, but simply said that Lynch was not to be interpreted as making rescissory damages the exclusive monetary formula for relief. Weinberger, 457 A.2d at 703-704, 714. Under Lynch and Joseph, supra, misrepresentation of material facts by a majority stockholder justifies the granting of rescissory relief. Rescissory damages, representing the increment in value the majority stockholder enjoyed as a result of acquiring and holding the minority's stock, is the norm when rescission, though appropriate, is impractical. Lynch, 429 A.2d at 501.

In discussing and quoting approvingly from Mansfield Hardwood Lumber Co. v. Johnson, 5th Cir., 263 F.2d 748, rehearing denied, 268 F.2d 317, cert. denied, 361 U.S. 885, 80 Supr. Ct. 156, 4 L.Ed.2d, 1959, this Court in Lynch, 429 A.2d at 502-503, established that deliberate fraud was not required for an award of rescissory damages:

> "Whether this relationship between officers and directors and their stockholders is termed fiduciary or quasi fiduciary or trust or confidence is immaterial and, likewise, it is immaterial whether its breach is described as constructive fraud, unjust enrichment, fraudulent breach of trust, breach of fiduciary obligation, gross negligence or otherwise, and whether the remedy is given by a constructive trust, restitution or accounting. They are all relative terms describing broad equitable concepts. The standard of a fiduciary to his beneficiary, depending upon the instant relation and the facts of the particular case

> lies somewhere between simple negligence and wilful misconduct or fraud with intent to deceive. The actual intent to deceive is not required where one party is so placed in such an advantageous position to the other."

263 F.2d at 754.

B. Rescissory Damages Are Susceptible of Proof

1. The Lower Court's Finding That Rescissory Damages Are Not Susceptible of Proof Results From Its Creation of Impossible and Erroneous Standards

The lower Court declined to award rescissory damages stating that such damages were not susceptible to convincing and persuasive proof. Weinberger, supra at 15-16 (January 30, 1985). The Court stated:

> "The problem that I have with this approach [i.e., rescissory damages] as applied to the facts of this case is that from the evidence presented I am unable to formulate a post-merger value for a share of UOP stock with sufficient degree of certainty so as to put the theory to work. There are simply too many intangibles or hypotheticals built on other hypotheticals to make the rescissory damage theory a realistic one here. To illustrate, I offer the following observations.

Weinberger, supra at 7 (January 30, 1985). The first reason given for rescissory damages being too speculative was that Signal did not resell the UOP shares or liquidate UOP within a short time after the merger. Id. In the first place, it would be incongruous and inequitable if Signal were able to retain the profits of its own wrong simply because it elected not to sell the wrongfully obtained stock. The entitlement to rescissory damages of the wronged stockholders cannot turn on the decision of the wrongdoer to sell or not to sell. Secondly, Lynch clearly shows that there is no resale or liquidation requirement for an award of rescissory damages. Lynch, 429 A.2d at 501 states:

> "The appropriate measure and extent of recovery is stated in 12A Fletcher Cyclopedia Corporations (Perm.Ed.) §5598:
>
> > "'Rescission calls for the cancellation of the bargain and the return of the parties to the status quo and hence where this is impossible because of the disposal or retirement of the stock involved, the proper measure of damages should be the equivalent value of the stock at the time of resale or at the time of judgment.'"

(Emphasis added by the Court.) The provision for rescissory damage awards based on the rescissory value "at the time of judgment" shows that no resale or liquidation is required.

Moreover, in Lynch, 429 A.2d at 505, where this Court directed that rescissory damages be awarded, there was no resale or liquidation shortly after the tender offer and rescissory damages were to be awarded as of or prior to the date on which the damages trial ended. The fact that Transocean had been merged into the parent company and that the stock was still held by the majority stockholder did not prevent an award of rescissory damages. Lynch, 429 A.2d at 501; 12A Fletcher Cyclopedia Corporations (Perm.Ed.) §5598 n. 5 (1984).

A third reason that no resale or liquidation is required is that certain of the financial benefits Signal has enjoyed as a result of its wrongful acquisition of the minority stock are known or readily ascertainable. There is nothing speculative about the $80 million in dividends and $157 million in other cash distributions the Chancellor found Signal had received from UOP -- it is hard cold cash and simple arithmetic can calculate the minority's 49.5% share. Similarly, the amounts Signal has received from selling off certain UOP divisions are readily ascertainable.

The lower Court then says that since UOP was not sold or liquidated the Court must "reconstruct" a value for UOP on a particular date:

> "This latter circumstance means that in order to consider rescissory damages as a possible remedy here, one must first pick out a date and then, through a stock appraisal type of approach, ascertain from the financial and business information relating to UOP as of that date the hypothetical value that a share of UOP stock would have had if the merger had not taken place on May 26, 1978. ***
>
> "Attempting to reconstruct that which does not exist as of one or more dates selected merely for reasons of practicality is worrisome enough."

Weinberger, supra at 7-9 (January 30, 1985). Here, the lower Court suggests that plaintiffs' claim for rescissory damages fails simply because the Court must select a date for determining such damages and reconstruct the value of UOP's shares on that date. However, the Court of Chancery is frequently called on to value stock on a given date (e.g., in appraisal actions, the Court must determine fair value as of the date of the merger) and Lynch, 429 A.2d at 505, authorizes selection of an appropriate date "as of or prior to the date on which the trial on damages ended". Moreover, "reconstructing that which does not exist" is precisely the task which faces courts and juries in every damage case, be it a personal injury case involving loss of a limb, a fire loss involving loss of a factory, or a death case involving loss of a child or spouse. While the ascertainment of damages is often not an easy task, in this particular case the lower Court had the advantage of five years of actual financial data, showing specifically what UOP's financial performance had been and just how profitable UOP had been to Signal. The problem was not that a rescissory value could not be determined, but that the lower Court declined to make the effort.

The lower Court next creates a "Catch 22" situation that totally precludes rescissory damages in cashout mergers, saying:

> "In addition, the approach engaged in by the parties asks the Court to make an appraisal of UOP's stock without the benefit of having an actual market value with which to work. This is because there has been no trading of UOP stock since Signal became the sole owner of UOP in 1978. Thus, the Court is deprived at the outset of a tool normally useful in stock appraisal matters, i.e., the actual market value of a share of stock as measured by the reaction of the investing public."

<u>Weinberger</u>, <u>supra</u> at 9 (January 30, 1985).* It was Signal's wrongful acquisition of the minority's stock in the cashout merger that terminated the market for UOP stock. Thus, the lower Court declines to find rescissory damages on the theory that Signal's wrongful act successfully precludes, in the lower Court's view, determination of such damages. This Kafka-like result contravenes, among other things, the familiar equity precept that "no man shall profit by his own wrongdoing".** Moreover, the Court of Chancery has frequently valued stock in

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* Later the lower Court suggests that "the rationale for the concept of rescissory damages breaks down in the cashout merger context". <u>Id</u>. at 15.

** Similarly, the lower Court did not consider that Signal, in arguing that rescissory damages could not be ascertained, relied on its own restructuring of UOP after it obtained a stay of discovery.

appraisal where no reliable market value existed.* Indeed, in Lynch, 429 A.2d at 504, 505, n.n. 6-7 and n. 8, this Court, in remanding for a determination of rescissory damages, noted the absence of a meaningful market after Vickers had acquired 88% of the outstanding shares and announced it intended to acquire the rest. Finally, this Court would not have encouraged the lower Court to consider an award of rescissory damages on remand if the mere occurrence of a cashout merger or absence of a market price automatically made determination of such damages impossible.

Having imposed the burden on the plaintiffs to hurdle three artificially created obstacles to rescissory damages, the lower Court then conjures up (but makes no effort to solve) further problems supposedly precluding rescissory damages. The Court bemoans the diversity of opinion between the parties' experts, but just as difference of opinion makes horse races, it also makes lawsuits. It is the Court's job to resolve those differences of opinion. Among the disputes the Chancellor declined to resolve was Dillon, Read's failure to include any premium in calculating rescissory damages as of December 31, 1982 and December 31, 1983. Weinberger, supra at 12-15 (January 30, 1985). The lower Court summarized plaintiffs' disagreement with Dillon, Read's approach:

> "Plaintiff's expert says, however, that such an approach to rescissory damages does not take into

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* E.g., Universal City Studios, Inc. v. Francis I. DuPont & Co., Del. Supr., 334 A.2d 216, 221 (1975); Felder v. Anderson, Clayton & Co., Del. Ch., 159 A.2d 278 (1960); Sporborg v. City Specialty Stores, Del. Ch., 123 A.2d 121, 124 (1956).

> account the fact that the former minority shareholders of UOP have still been eliminated from their equity position in the corporation because of the ultimate success of Signal's goal to own the entire company rather than to remain merely a controlling majority shareholder. He says that in such acquisitions of 100% ownership by a majority shareholder it is customary for a premium over market to be paid to the minority shareholders, and that to the extent that the defendants' approach fails to include this element in its rescissory damage computation, it is defective.
>
> "In other words, plaintiff says that it is not enough to pay the minority what would be a more current value of a share of UOP stock in their hands in lieu of returning to them a share of stock in kind. This is so, he says, because when you get done with that exercise the minority shareholder still does not have a share of stock -- for which thereafter an immediate acquiror of 100% ownership would be required to pay a premium over market in order to compensate the minority fairly for eliminating them from their equity interest in the corporation. Thus, plaintiff says that the theory of rescissory damages here requires that a premium be included so as to make the former minority whole. At $21 per share, the premium over market in the 1978 transaction was 44.8%. Even applying this percentage to the Dillon, Read opinion -- a percentage which the plaintiff feels to be far too low -- would result in an increase of $10 to $12 per share over the rescissory damage values estimated by Dillon, Read even after applying the investment credit advocated by it. Plaintiff, of course, applying the same rationale to his figures, comes up with a much higher rescissory damages valuation."

Id. at 12-14. The lower Court then turns to the defendants' position:

> "Defendants do not feel this to be in keeping with the concept of rescission, since under that equitable theory a party is restored to his status as it existed prior to the wrongful transaction through which he was caused to part with some property interest, and in defendants' view rescissory damages can do no more than equate with the value that the property interest would have if restored."

Id. at 14. Of course, the fundamental fallacy of defendants' position that the minority should only get the hypothetical market value at which UOP stock would have traded is that in a free market a stockholder is free to retain his shares and participate in the future of the company. The UOP minority is not being given that option and any award of rescissory damages should compensate them accordingly.

Having stated the different positions of the parties, the lower Court "threw up its hands" and declined to make any determination whether the UOP stockholders would be entitled in 1982 or 1983 to a premium in addition to the hypothetical market price (like the premium over market reflected in the 1978 $21.00 price):

> "I must confess that I do not know what to make of this. Both sides of the argument have at least some theoretical merit. Perhaps the answer is that the rationale for the concept of rescissory damages as an appropriate remedy breaks down in the cash-out merger context wherein the measuring post-merger value must be hypothetically crafted in the absence of an actual event which would serve to establish a rescissory damage value."

Id. at 15.

In summary, the lower Court's denial of rescissory damages is erroneously based on:

(1) Its failure to impose the burden of proof on Signal to show rescissory damages were not possible to determine;

(2) Its unwillingness to decide the legal and factual disputes relating to rescissory damages in cashout mergers, in particular whether premium is appropriate; and

(3) Its fabrication of legal hurdles not found in, and inconsistent with, the law as set out in Lynch or this Court's opinion.

2. The Record Shows Rescissory Damages Are Susceptible of Proof

Contrary to what the lower Court concluded, the basic financial facts show that rescissory damages are clearly susceptible of proof. UOP remained a "stand alone" division of Signal from the merger in 1978 until the end of 1982 (2A00121-124 Corirossi). UOP had its own separate financial system, including financial forecasts (2A00121-124 Corirossi). Thus, if there ever is to be a case where rescissory damages could be determined, this is that case, especially since the record is undisputed: (1) as to UOP's earnings from 1978 through 1982, (2) that from 1978 through 1983 UOP paid $80 million in dividends and $157 million in other permanent cash distributions to Signal, an amount almost twice what Signal paid for the minority shares and (3) that UOP's unprofitable divisions have been disposed of and Signal retains the profitable divisions for its future economic benefit.* The foregoing facts come straight from the lower Court's own findings. Weinberger, supra at 24 (January 30, 1985). Thus, there was ample financial information available to make a rescissory damage determination. At the very least, the lower Court could and should have awarded the former UOOP shareholders 49.5% of the $80 million in dividends and $157.8 million in cash advances which Signal took out of UOP. While

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* Signal continues to own 100% of a UOP that will be even more profitable than prior to the reorganization (2A00136-38 Corirossi; 2A00324-24a, 2A00328 Kavanaugh). Signal has that which Signal considers the key to value: UOP's future earning potential.

this would give the minority nothing for the loss of the opportunity to participate in UOP's future earnings and growth, it would provide far more compensation than the paltry $1.00 per share the Court of Chancery awarded.* Under the Court of Chancery's judgment, Signal, a faithless fiduciary who has wronged the minority, will pay only a small nuisance fee while being permitted to keep its ill-gotten gains since the merger, the minority's stock and UOP's profitable divisions.

The plaintiffs and the defendants did not find that rescissory damages were not "susceptible of proof". On the contrary, they offered detailed evidence on their differing views of the rescissory value of the minority's shares in 1982 and 1983. Weinberger, supra at 9 (January 30, 1985). The different results the parties reached do not show rescissory damages are not susceptible of proof, but that they have differing views as to the correct amount of those damages. For example, Mr. Purcell's 1984 report purported to show what UOP shares would have traded for as of December 31, 1982 and December 31, 1983, plus the dividends that the minority would have received since 1978 (2A00390-91, 418-19 Purcell; 2A04167, DDX 13, p. 16-17). Dillon, Read's computation of the 1982 and 1983 trading value of UOP's shares does not correctly represent rescissory damage values for three main reasons. First, Mr. Purcell arbitrarily

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* As a bare minimum, the Court should have awarded the difference between the $21.00 merger price and the $24.00 price the Arledge-Chitiea Report said would be a good investment for Signal. Lynch, 429 A.2d at 505.

eliminated half the comparable companies used in his 1980 and 1984 reports (B-569 - DX 40, 2A04167 - 13) in order to lower the value calculation. When the complete Dillon, Read comparative figures are used (including Federal Mogul, which was mistakenly excluded even under Mr. Purcell's arbitrary standard), the Dillon, Read rescissory damage figures would be $38.69 to $48.36 for 1982 (2A03733 - PDX 119, p. 12). Second, Mr. Purcell failed to include interest on the dividends the minority would have received from 1978 to 1983 (2A04167 - DDX 13; PDX 119; 2A00418-19 Purcell; 2A00835, 904 Bodenstein).

Third and most important, Mr. Purcell calculated only what he thought the market price of the minority shares would have been as of December 31, 1982 and December 31, 1983. The comparable figure in 1978 would have been the $14.50 market price rather than the $21.00 cashout price. Of course, if rescissory damages are granted, the UOP shareholders are not going to receive back their stock. If for no other reason than consistency, Mr. Purcell should have calculated the rescissory value of the shares in the same way he would calculate the value of the shares as of the time of the cashout merger in 1978. If a 40% premium were added to Mr. Purcell's trading values, the rescissory values of UOP's stock even under his methodology would have been $44.66 to $46.41 at the end of 1982 and $39.58 to $41.33 at the end of 1983.

Mr. Bodenstein also found that rescissory damages were readily susceptible of proof by a number of different methods. In fact, Mr. Bodenstein calculated the rescissory values of UOP from 1979 through 1983 by ten separate analyses. Duff & Phelps 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." (2A03746A - PDX 120, p. 16)

Thus, the actual evidence shows that Signal profited greatly during the years 1978 to 1984 and will continue to profit in the future by the continued retention of 100% of UOP into the future. The lower Court, having a full record and full financial information on which to make a rescissory damage determination, failed to do so, though both parties were able to present detailed evidence of the rescissory value of UOP's stock.

For the reasons stated above, this Court should reverse the lower Court as to rescissory damages and, in doing so, should:

(a) Reaffirm that rescissory damages are a proper equitable remedy in appropriate cashout merger cases,

(b) Reaffirm that rescissory damages are a necessary equitable substitute when the preferable alternative of rescission is unavailable,

(c) Clarify that rescissory damages in a cashout merger context should compensate the wronged party for all that was taken from him and enjoyed by the wrongdoer instead and should include a premium compensating shareholders for the fact that their shares will not be returned to them and they will have no opportunity to participate in the company's future earnings and growth, and

(d) Make a finding as to the amount of rescissory damages the minority shareholders are entitled to receive.

IV. THE LOWER COURT FAILED TO DETERMINE THE FAIR VALUE OF UOP'S STOCK ON THE DATE OF THE MERGER OR CONSIDER PLAINTIFFS' PROOF ON DAMAGES

The opinion of this Court specifically required that on remand the Court of Chancery make a finding, under the applicable standards, of the fair value of the UOP stock as of the date of the merger. Weinberger, 457 A.2d at 714. The lower Court flatly ignored that direction: nowhere in its opinion does the lower Court make any determination as to what the fair value of the UOP shares was on the date of the merger. For this reason alone, the lower Court's opinion should not stand.

Beyond that, the lower Court again failed to consider the plaintiffs' damage evidence despite this Court's instruction to do so. The Court of Chancery's initial opinion rejected plaintiffs' discounted cash flow evidence as not corresponding to logic or existing law and ignored plaintiffs' comparative premium analysis. This Court reversed, recognizing that both the discounted cash flow method and comparative premium analysis were valuation techniques generally accepted in the financial community and plaintiffs' evidence must be considered. Weinberger, 457 A.2d at 712-714. On remand, however, the lower Court persisted in its view that the discounted cash flow method is not a valid valuation technique for the same reasons it had previously rejected that method:

> "Thus, it seemed to me then [at the time of the original trial] as it does now that the discounted cash flow approach did not provide a realistic measure for the value of that which was possessed by the minority shareholder prior to the merger and which was taken from him by the merger. Accordingly, for this and the

> other reasons set forth in my earlier decision, I again reject the plaintiffs' evidence of value of a share of UOP's stock on the date of the merger as being unconvincing."

Weinberger, supra at 18-19.

The lower Court's continued refusal to recognize the discounted cash flow method was erroneous for the following reasons:

(a) This Court specifically mandated consideration of the discounted cash flow method, noting, among other things, that the earnings potential of UOP was essentially the focus of the Arledge-Chitiea Report in evaluating the merger for Signal. Weinberger, 457 A.2d at 712.

(b) The lower Court erroneously suggests that because the discounted cash flow method is based on projections of anticipated earnings after the merger, it "amounts to a speculative element of value" arising from the merger. Weinberger, supra at 19 (January 30, 1985). However, this Court, in approving the discounted cash flow method, recognized that such a valuation method was not based on values arising from the merger and was not speculative.*

(c) The lower Court made a finding that the original Duff & Phelps discounted cash flow projections presented by Mr. Bodenstein at the 1980 trial "based on the data available at the time of the merger have proven to be of

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* The UOP 5 Year Plan projections used in Duff & Phelps' discounted cash flow analyses were not pro forma figures assuming a merger, but pre-merger projections concerning the expected performance of UOP.

considerable substance". Weinberger, supra at 24) (January 30, 1985)

(d) Finally, the lower Court's rejection of the discounted cash flow method continues to be based on the mistaken premise that, while Signal after the cashout merger as 100% owner could take 100% of UOP's cash flow, the minority would never have a right to its proportionate share of the cash flow. However, the minority would at least have had a right to 49.5% of the $80 million in post-merger dividends and $157 million in other post-merger cash distributions UOP has actually paid out. Moreover, to the extent such cash flow was not paid out but used to build UOP's business, the minority shareholders would have continued to participate in the appreciation in the value of the company. As it is now, Signal has not only obtained 100% of the huge dividends and cash distributions but has taken all the growth in UOP's value and will receive the benefit of UOP's excellent future earning potential.

At the original trial, the Court of Chancery accepted the defendants' Delaware Block evidence without considering plaintiffs' evidence, defendants' burden of proof or the manifest errors in Mr. Purcell's analysis. In particular, the Court never focused on whether the failure to screen out the "noise" factor rendered Dillon, Read's premium analysis totally inaccurate. On remand, the Court continued to ignore defendants' burden of proof and declined to consider the flaws in defendants' damage evidence, including Mr. Purcell's faulty premium analysis. The

Court also ignored Mr. Bodenstein's comparative premium analysis, which did screen out noise.

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., Del. Chan., 89 A.2d 862, 868; aff'd., Del. Supr., 93 A.2d 107, 111 (1952); David J. Greene & Co. v. Schenley Industries, Inc., Del. Chan., 281 A.2d 30, 34 (1971). For example, in reviewing the appraiser's finding as to a premium in light of the stock's market price, the Court of Chancery stated in the case of In re Olivetti Underwood Corp., Del. 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. [Citations omitted.] 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."

See also Nathan & Shapiro, Legal Standards of Fairness of Merger Terms Under Delaware Law, 2 Del.J.Corp.L. 44, 50-51 (1972).

The investment banking community also recognizes as crucial to accurate and meaningful valuation the elimination of noise. In Rosenblatt v. Getty Oil Company, 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. The Chancery Court noted that:

> "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).

Similarly, in Smith v. Van Gorkom, Del. Supr., No. 255, 1982, Horsey, J. (January 29, 1985), p. 32-33, 70, this Court recently held it was improper to assess the adequacy of a cashout merger premium using an artificially depressed market price.

When Mr. Bodenstein performed the analysis necessary to eliminate "noise" from comparable transactions selected by Dillon, Read, the percentage of premium, rather than having the 41% median and 48% average found by Dillon, Read, shows a median of 71% and an average of 75% (A1504, 2A04065 - PX 6; 2A00744 Bodenstein; 2A00601, 616 Purcell). 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 percentage premium is 75% and the average 77%, rather than the 51% and 54% found by the mechanical "day before the announcement" method of Dillon, Read (2A00746-46 Bodenstein). A 70% premium over Mr. Purcell's $14.00 to $15.00 market figures would yield a fair value of the minority shares of $23.80 to $25.00. Mr. Bodenstein's comparative premium analysis, which correctly screens out noise to get accurate premium percentages, supports his opinion that the fair value of UOP's stock on the date of the merger was not less than $26.00 per share.

Finally, Mr. Purcell (though he had Mr. Bodenstein's reports and the point-by-point critique of his own 1984 report) never refuted Mr. Bodenstein's evaluation of the true worth of the minority shares. In short, Mr. Purcell's 1980 and 1984 opinions as to the fairness of his client's $21.00 cashout of the minority are based on the supposed prestige of the investment banking house for which he works, rather than any financial justification of the fairness of the $21.00 price. As this Court found in Smith, supra at 42-43, impressive credentials are no substitute for hard analysis.

The lower Court did not place the burden on the defendants to prove the fairness of the $21.00 price or even consider plaintiffs' showing that the proof offered by the defendants was fundamentally defective. Rather, despite this Court's clear instructions, the lower Court said it was unnecessary to consider defendants' evidence or plaintiffs' criticisms of it or to make any finding on the fairness of the $21.00 price:

> "In addition, because of the approach that I take in deciding the monetary damage aspect of this case, I find it unnecessary to review again either the evidence as to the value of UOP shares as of the merger date that has been offered by the defendants or the several arguments of the plaintiff as to why the rationale of the defendants' expert is inaccurate. I note only that the approach to valuation used by Dillon, Read on remand did not differ basically from the approach used by it at the initial trial of the case and that it remained of the opinion that $21 per share was fair to the minority."

Weinberger, supra at 20 (January 30, 1985). Since Dillon, Read on retrial used the outmoded Delaware Block Method once again, the lower Court should have found that the defendants failed to sustain the burden of proof and should have accepted the plaintiffs' proof on the fair value of the shares as of the time of the merger. Instead, the lower Court refused to follow this Court's directions to fix a fair value as of the date of the merger.

V. THE LOWER COURT'S DISCRETIONARY AWARD OF $1.00 PER SHARE IS INADEQUATE AND INEQUITABLE

As shown above, the lower Court declined to follow the directions of this Court to determine fair value in accordance with appraisal principles, including rescissory damages. Instead, the lower Court erroneously "interpreted" this Court's language preserving the Court of Chancery's discretion to fashion equitable awards where appraisal damages are inadequate as giving the lower Court authority to substitute entirely its unfettered discretion for the quasi-appraisal remedy mandated by §262 and this Court. In effect, the lower Court threw out the window this Court's detailed discussion of a stockholder's right to fair value under 8 Del.C. §262 (here, under the quasi-appraisal remedy derived from §262), 457 A.2d at 713-714, in favor of its own subjective views. The lower Court awarded $1.00 per share, not as damages, but as a discretionary award for what it viewed as Signal's technical "wrong". This award of crumbs from Signal's corporate table is (1) wholly inadequate to compensate the stockholders fully for the wrongful taking of their stock, and (2) based on erroneous assumptions and a disregard for the evidence and this Court's findings.

In arriving at his $1.00 award conclusion, the Chancellor starts from the premise that the UOP minority stockholders are only entitled to be compensated for the insult of being deprived of an informed vote on the merger. Weinberger, supra at 20-21. Thus, there is no consideration for Signal's other wrongdoing, no award for the fair value of the minority's stock and no restitution of Signal's ill-gotten gains. This is not consistent with the intent underlying §262 and the quasi-appraisal remedy derived therefrom "to fully compensate shareholders for whatever their loss may be". Weinberger, 457 A.2d at 714.

The Chancellor, Weinberger, supra at 21-23 (January 30, 1985), next denigrates even the one wrong he reluctantly concedes this Court found, saying:

(a) The majority of the minority vote was not necessary,* despite Signal's duty of fair dealing and failure to require arm's length negotiations or any other meaningful measure designed to ensure fairness to the minority; and

(b) His "impression" of stockholder motivation leads him to the "suspicion" that the UOP minority stockholders would have approved the merger even with full disclosure, thereby substituting his personal subjective "but for" view of materiality for this Court's finding of materiality under the proper Delaware law standards.

Having voiced his impressions and suspicions, the Chancellor next expresses his "feeling" that this Court's opinion requires him to give the stockholders something:

> "Be this as it may, however, the taint of the vote for the reasons found by the Supreme Court and the

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* Incredibly, the Chancellor now considers the majority of the minority vote unimportant, when in the original trial the opinion of defendants' expert (B569 - DX 40, p. 3, 5-7) and the Chancellor, Weinberger, 426 A.2d at 1361-1363, that the merger was fair both relied heavily on Signal's structuring of the transaction to require such a vote.

> impacticality of undoing the transaction in favor of resubmitting the question to a fully informed minority forever relegates this suspicion to the realm of the unknown, and accordingly I feel that fairness to the former minority shareholders requires that they be given some measure of monetary damages to compensate them for being deprived of the opportunity to express their views on an informed basis."

Weinberger, supra at 23 (January 30, 1985). The lower Court's view that it is awarding token rather than full compensation is confirmed when it states that the minority should only receive "... some measure of monetary damages to compensate them for being deprived of the opportunity to express their views on an informed basis". (Emphasis added.)

The lower Court then goes on to state how it translated its "feeling" that the stockholders should be given "some measure" of monetary recompense into an actual figure saying:

> "The evidence indicates that at the time that the merger was proposed Signal considered that the acquisition of the minority shares at $21 per share constituted a good investment opportunity for it."

Id. at 23. The lower Court overlooks its original finding on the Arledge-Chitiea Report:

> "The report of Arledge and Chitiea indicated that it would be a good investment for Signal to acuire the remaining 49.5% of UOP at any price up to $24 per share."

Weinberger, 426 A.2d at 1335. That finding was confirmed in at least five different places by this Court's opinion after its own review of the evidence. Weinberger, 457 A.2d at 704, 708, 709, 711, 712). The lower Court, in its preliminary hearing opinion, acknowledged that this finding as to $24.00 per share representing a good investment was the law of the case and binding on the parties and the Court on remand. Weinberger, supra at 13 (April 24, 1984).

The lower Court continues:

> "The evidence also indicates that at that time the acquisition of 100% ownership of UOP at a price of $22 per share to the minority also looked to be beneficial to Signal, both economically and in other ways."

Weinberger, supra at 23 (January 30, 1985). Again, the lower Court is bound by the finding that ownership of 100% of UOP "looked beneficial" to Signal at $24.00 per share. The lower Court should not be permitted to revise such a critical finding after appeal.

Though the lower Court had already declined to determine rescissory damages, it inconsistently makes the following findings based on the evidence offered to prove rescissory damages:

> "The evidence offered with regard to the rescissory damages issue has tended to bear out the accuracy of this pre-merger outlook. In the time period between the merger and the continuation of the trial on remand, Signal has received from UOP some $80 million in dividends and some $157 million in cash advances (and the latter will not be repaid as such in view of the internal restructuring of UOP's operations into Signal) the sum of which considerably exceeds the total cost of the acquisition of the former minority interest. UOP's money-losing divisions have been sold off or closed down and the operating divisions which have proved profitable in recent years have been retained for Signal's future economic benefit."

Id. at 24. Thus, the lower Court awards no rescissory damages because rescissory damages are supposedly not susceptible of proof, but accepts and uses the financial evidence on rescissory damages to make findings for purposes of its discretionary award.

The lower Court then acknowledges the accuracy of Mr. Bodenstein's discounted cash flow analysis, though it has twice rejected the discounted cash flow method in toto:

> "Even the discounted cash flow projections offered by Mr. Bodenstein at the first trial as to the cash Signal would have been likely to draw out of UOP based on data available at the time of the merger have proven to be of considerable substance."

Id. at 24. The Court does not explain its inconsistency in refusing to award damages based on Mr. Bodenstein's discounted cash flow analysis, which UOP's actual performance has proven correct. Since Signal is an adjudicated wrongdoer, even if it was proper to confine the relief granted to an equitable award to compensate the former UOP shareholders "for being deprived of the opportunity to express their views on an informed basis", such an equitable award should be measured by what the wrongdoer has gained and what the person wronged has been deprived of, rather than allowing the wrongdoer to retain the full economic benefit of what it illegally obtained. However, the lower Court, solicitous for Signal, the wrongdoer, bases the award on what the lower Court finds Signal's paid expert six years afterwards says he could have opined was a fair price:

> "Mr. Purcell, the Dillon, Read expert offered by the defendants, indicated that based upon information available as of the time of the merger he could have issued an opinion on behalf of his firm that a price within the range of $20 - $22 would have been fair to the UOP minority."

Id. at 24. Actually, what the lower Court has reference to is one exchange between plaintiffs' counsel and Mr. Purcell, who had just testified that he was not asked to and did not value UOP's shares on the date of the merger, but was only asked to and only did opine that $21.00 was within the range of fairness (2A00571-72 Purcell). He agreed that any price above $21.00 (including specifically $22.00) would be fair (2A00571 Purcell).

The lower Court continues:

> "He [Purcell] further acknowledged that if a date 30 days prior to the announcement of the transaction was used as the date to measure the premium in his list of comparable transactions, the median and average premium reflected by such comparables would be in the vicinity of 50% or more. A 50%-plus premium applied against the market price of the UOP shares on the day prior to the announcement of the proposed merger would indicate that a price of $22 per share would not have been out of line for the acquisition of the 49.5% minority interest of UOP. Accordingly, all things considered, I feel that $1 per share represents a fair measure of compensation for the wrong done to the members of the minority."

Id. at 24-25. Having previously acknowledged that Mr. Bodenstein's discounted cash flow projections have proven correct, the lower Court now acknowledges that Mr. Purcell is wrong and Mr. Bodenstein right as to the need to screen out "noise" in assessing comparative premiums. Mr. Purcell, having failed to have "noise" factored out of his original 1980 computations made by his juniors (Weinberger, 426 A.2d at 1363; B569 - DX 40), and having again failed in 1984 to eliminate "noise" in his analysis (2A04167 - DDX 13; 2A00601, 605 Purcell), finally selected an arbitrary "30-day prior to formal announcement" cut-off and determined that this would result in a 50% premium (2A03820 - PDX 123; 2A00612-617 Purcell).

In summary, the lower Court has made a purely discretionary award that (1) is a token amount, (2) is not based on the evidence of damages, this Court's findings or the damage standards the lower Court was required to use, (3) is merely a minimal penalty for a fiduciary wrong the lower Court has mistakenly minimized, (4) is determined largely by what the wrongdoer's paid expert six years later said in passing might have been a fair price, and (5) is nowhere near adequate to fully compensate the minority for their losses. The $1.00 award is an almost whimsical response by the lower Court to this Court's finding that Signal had wrongfully deprived the minority stockholders of UOP of 49.5% of the UOP stock. The $1.00 award is totally inadequate and unfair: it effectively vindicates Signal (and the lower Court) on liability; it is not full and fair compensation for the UOP minority shareholders; it has nothing to do with fair value at the time of the merger; it flies in the face of the evidence on rescissory value; and it imposes only a token penalty on Signal, while allowing Signal to retain the minority's stock, $237 million in dividends and distributions and UOP's future earnings and value.

* * *

The ultimate award of $1.00 is ludicrous both in amount and in the manner in which the lower Court arrived at the amount. Fairness and the applicable law both require that this Court not allow this award to be the only recompense received by the minority stockholders.

VI. BASED ON ITS MISAPPREHENSION OF WHEN SIGNAL INJURED THE MINORITY SHAREHOLDERS, THE LOWER COURT HAS FAILED TO AWARD FAIR INTEREST

The lower Court awarded interest on its $1.00 discretionary award only from the date of this Court's reversal of the lower Court:

> "This is the final decision of this Court after the continuation of the trial on remand. Having now given consideration to all relevant factors of value that have been offered and argued by the parties, I conclude that entire fairness to the former minority shareholders of UOP requires in this case that monetary damages in the sum of $1 per share be awarded to the members of the class, together with interest thereon from February 1, 1983, that being the date of the finding by the Supreme Court that Signal, as majority shareholder, had breached the fiduciary duty owed by it to the UOP minority." (Emphasis supplied.)*

Weinberger, supra at 2 (January 30, 1985).

The Court reaffirmed the discretionary award at the conclusion of its opinion, including interest but only from the date of this Court's opinion on February 1, 1983 (Weinberger, Chan. Damages p. 26):

> "As a result, and as also indicated at the outset, it is my conclusion that the standard of entire fairness applied to the facts and circumstances of this case requires that judgment should be entered in favor of the plaintiff and against the defendants awarding to the class of former minority shareholders of UOP

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* The decision of this Court on liability, particularly the duty of the obligation of a corporate fiduciary or majority holder vis-a-vis a minority did not represent any reversal of prior cases or adoption of new principles: on the contrary, it was simply a reaffirmance of historical fiduciary principles stemming all the way back to Guff v. Loft, Del. Supr., 5 A.2d 503 (1939). Thus, there is no justification for claiming that the "wrong" stems from the time of the announcement of the reversal by this Court of the lower Court.

> represented by the plaintiff monetary damages in the sum of $1 per share, together with interest at the statutory rate of 5% above prime, see 6 Del.C. §2301(a), from February 1, 1983 to the date of payment."*

Id. at 26. While under Lynch, 429 A.2d at 505, the Court of Chancery could properly award interest at the post-judgment statutory rate from the date liability was determined, there is no basis for its failure to award a fair rate of interest running from the date of the merger.

The two quotations confirm dramatically that the lower Court still continues to adhere to its view that Signal did not commit any wrong against the minority shareholders. The lower Court finds that the injury or wrong to the UOP shareholders occurred, not as of the date when Signal is found to have breached its fiduciary duty -- that is, in February-March 1978 -- nor at the time of the merger itself -- but only on February 1, 1983, the date when this Court reversed the lower Court's decision which had totally exonerated all the defendants. This result is not only incredible on its face but also is inconsistent with the lower Court's own finding that the Supreme Court found Signal committed a wrong when it failed to make full disclosure prior to the majority of the minority vote: clearly, that occurred back in 1978 and not at the time of the Supreme Court's decision. The date that the lower Court fixes as the start for interest confirms that the $1.00 award is not a damage award since the

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* The lower Court subsequently corrected its error and altered the interest award to 5% above the Federal Discount Rate (as §2301(a) provides) rather than 5% above prime.

damage to the former shareholders occurred back in 1978.

The lower Court's failure to award interest running from the date of the merger also flies in the face of 8 Del.C. §262(h) which provides for stockholders to receive "a fair rate of interest". As this Court's opinion, 457 A.2d at 714, noted, the 1981 amendments to §262 repeatedly emphasized the reference to "fair". Among the places the term "fair" was inserted into the section in 1981 was to provide for "fair" interest. 1981 Delaware Laws, Chapter 25. Like the amendments to require payment of "fair value", the obvious intent behind the amendment providing for "fair interest" was "to fully compensate shareholders for whatever their loss may be". Weinberger, 457 A.2d at 714. To provide the UOP stockholders with fair interest compensating them fully for the wrong they suffered, interest must run from the date of the merger, not five years later.

In suggesting the amount of interest that should be charged against UOP's minority stockholders under a rescissory damage theory, Dillon, Read's 1984 report suggests various rates of return that could have been earned from the date of the merger (2A04167 - DDX 13, Ex. 9). Providing the minority shareholders, who are the victims of a breach of fiduciary duty, with fair interest on the $1.00 award necessitates that, at a minimum, they be awarded interest at the rates Dillon, Read contended were appropriate for reducing an award of rescissory damages. See: Lynch, 429 A.2d at 506.

The lower Court's limited interest award is clearly wrong and unfair since interest should run from the time the wrong occurred. Even if this Court were to hold that all the minority shareholders get is a $1.00 award as "smart money" for having been wronged, Signal has held that money since 1978 when the wrong occurred and the UOP shareholders should receive fair interest from that time.

VII. IN THE INTERESTS OF JUSTICE, FAIRNESS AND JUDICIAL EFFICIENCY, THIS COURT CAN AND SHOULD DETERMINE DAMAGES

A. Scope of Review

Since the lower Court has failed to carry out the directions contained in this Court's opinion and mandate and since there is a full record on damages, this Court can and should determine damages and remand with directions to enter a specific monetary judgment for the UOP shareholders. Wife v. Husband, Del. Supr., 269 A.2d 214, 215 (1970). To the extent the lower Court's errors are errors of law, this Court can render a final judgment or remand with specific directions to enter judgment. Knox v. George Pacific Plywood, Del. Supr., 130 A.2d 347 (1957).

Moreover, as this Court stated in Evans v. Gunnip, Del. Supr., 135 A.2d 128, 133 (1957):

> "This court has held in several cases that when the evidence does not support the finding of the court below, this court, sitting in review of an equity case, may, in proper circumstances, make its own factual findings and direct the court below to give effect to them by the entry of a judgment. Consolidated Fisheries Co. v. Consolidated Solubles Company, Del., 112 A.2d 30; Peyton v. William C. Peyton Corporation, 23 Del. Ch. 321, 7 A.2d 737, 123 A.L.R. 1482; New York Trust Co. v. Riley, 24 Del.C Ch. 354, 16 A.2d 772. Thus, since in this case no question of credibility of witnesses testifying orally is presented, and the record is complete, we may make our own findings and direct that they be given effect by the entry of a judgment."

Much of the lower Court's "error" consists of failure to make explicit findings on fair value and rescissory value. Absent such findings, this Court may make its own findings based on the record. Smith v. Van Gorkom, supra at 55. Moreover, since the lower Court on remand has already failed to exercise its discretion within the guidelines established by this Court, a further remand for the exercise of "sound" discretion is inappropriate. Cf. duPont v. duPont, Del. Supr., 103 A.2d 234, 241 (1954).

Finally, where the judge who decided the case below has left the bench, it is appropriate for this Court to enter judgment, rather than remand. Froedtert Grain & Malting Co. v. Woboril, Wis. Supr., 265 Wis. 456, 61 NW2d 855, 43 ALR2d 671 (1953):

> "Ordinarily after pointing out errors which we consider have been committed and suggesting corrections, we would remand the record for further proceedings before the same judge, but that judge is not now in office. Such proceedings before his successor would require his original study of the record which seems to us an unnecessary burden to impose on him since we have already been compelled to study it and feel as competent to handle here the questions of law and fact which the appeal presents as any trial judge would be who, like ourselves, does not have the advantage of hearing and seeing the witnesses."

B. Seven Years Having Elapsed Since the Merger, This Court Should Not Remand But Should Issue a Mandate Requiring a Specific Money Judgment With Interest In Favor of the Minority Stockholders

"Justice delayed is justice denied."

It has been almost seven years since the cashout merger when Signal wrongfully eliminated the UOP stockholders. Since that time, the plaintiffs have diligently prosecuted this case on behalf of the UOP stockholders. The defendants have had their full day in Court and on appeal as well.* Now, after full damage discovery, a full retrial on damages and extensive post-trial briefing, the lower Court has issued an opinion flatly contrary to the directions found in this Court's opinion and mandate. Thus, the plaintiffs' representatives are being forced once again go through a second appeal. If this Court finds that the lower Court has failed to carry out this Court's directions, but remands for another redetermination of damages, plaintiffs will face a third trial before a new judge unfamiliar with the record in the first trial, the preliminary hearing and the second trial on damages. A decision after a third trial would likely engender a third appeal. In short, the interests of justice, considerations of judicial economy and efficiency and fairness to the wronged stockholders militate in favor of this Court finally ending this bitter and lengthy litigation.

This Court clearly has the jurisdiction and authority to enter the appropriate mandate at this point in these proceedings. Blaustein v. Standard Oil Co., Del. Supr., 51 A.2d 568, 570-571 (1947). On the first appeal, this Court became fully familiar with the damage aspect of the case. This Court will of necessity become fully familiar with the second damage trial record as a result of this appeal. In such a situation, it is unnecessary to require that a new member of the Court of Chancery become familiar with the trial records of the two prior

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* The defendants also added a year's delay by their attempt on remand to reargue the question of the effect of the Arledge-Chitiea Report.

damage trials and then retry damages a third time. It is now time for this Court, with its familiarity with the factual and legal situation as presented in the record, to end this litigation by making a specific determination of the matters that have twice not been answered by the lower Court, including:

(a) The fair value of the UOP stock as of the date of the merger.

(b) The rescissory value of the stock in 1982 or 1983.

(c) An actual monetary damage award to the plaintiff class based on consideration of all elements of damages.

(d) A determination of the fair interest to which the UOP stockholders are entitled.

This Court should enter judgment or issue a special mandate to the lower Court directing it to enter a judgment in conformity with the final monetary determination by this Court.

CONCLUSION

This Court remanded this case to the lower Court for a redetermination of damages. The lower Court, after a preliminary hearing on rescissory damages, full discovery, a full trial and post-trial briefing, has handed down an opinion that fails to follow this Court's opinion and directions. Instead of determining damages, the lower Court interprets this Court's language as allowing it to substitute its subjective views for the fair value and rescissory damage findings it was instructed to make. The award of the lower Court is in the nature of a token penalty to Signal and is an insultingly small amount for the UOP shareholders. The amount of the award has nothing to do with damages based on fair value, rescissory value or otherwise.

Since UOP remained a stand alone division of Signal from 1978 until 1983, rescissory damages were not only appropriate (as even the lower Court found), but were susceptible of proof. There is no justification for the lower Court's contrary holding. If nothing else, rescissory damages can be based on a division of the $80 million in dividends and $157 in advances which Signal received from UOP from 1978 to 1983. Such a rescissory damage award would still leave Signal with UOP and its earning potential but would provide the minority with far more than just $1.00 per share. Rescissory damages were sufficiently susceptible of proof that both parties presented extensive proof of rescissory value. The lower Court was simply unwilling to state its legal conclusions on the standards for rescissory damages and, in the light of those standards, make a finding of the amount of rescissory damages to be awarded.

This Court charged the lower Court with determining the fair value of the UOP shares as of the date of the merger. The lower Court simply ignored this direction and made no such finding. Instead, it again rejected out of hand the evidence offered by the plaintiffs and, in effect, incorrectly found that the plaintiffs had not sustained the burden of proof the Court erroneously placed on plaintiffs instead of defendants. The lower Court also refused to address directly the manifest errors and incorrectness of the defendants' proof as to the fair value of the UOP shares. However, at the conclusion of its opinion, the lower Court is forced to admit that the analysis of plaintiffs' expert has proven to be correct, while that of defendants' expert is fatally flawed by the failure to screen out "noise".

The award of $1.00 makes a mockery of this entire damage redetermination. Signal, though found liable in a landmark decision, is the overwhelming economic victor, retaining for itself $80 million in dividends, $157 million in cash advances and 100% of UOP and its continued earning potential. The message to majority stockholders of Delaware corporations will be that breaching their fiduciary duty can pay off handsomely.

This Court should reverse the lower Court and determine the damages in this case, including damages based on fair value at the time of the merger and/or rescissory value. In doing so, plaintiffs respectfully suggest that the Court avail itself of the following chart provided to the lower Court by the plaintiffs showing the damage results that the record will support:

	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(
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 (2A02747 - 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 (2A03746A - PDX 120, p. 2).

(1) Interest based on Money Market Mutual Funds (2A04167 - DDX 13) Dillon, Read Report, June 7, 1984, Exhibit 9.

(2) Per Dillon, Read's report pages 16-17 (2A04183-83), 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 operating earnings 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.

The Court should then issue a mandate (1) directing the lower Court to enter the money judgment in the amount determined by this Court (including fair interest), and (2) directing the lower Court to determine the amount of attorneys' fees and expenses that Signal owes to the attorneys for the UOP stockholders.

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