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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

EDITH CITRON, Plaintiff, v. E.I. DU PONT DE NEMOURS & CO., REMINGTON ARMS COMPANY, PHILIP H. BURDETT, JOSEPH A. DALLAS, ROBERT W. DIXON, RICHARD E. HECKERT, JOHN P. McANDREWS, ELDON M. ROBINSON, FREDERICK B. SILLIMAN and ALEXANDER L. STOTT, Defendants.	Civil Action No. 6219

POST-TRIAL BRIEF OF
THE DU PONT DEFENDANTS

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DATED: August 29, 1988

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MISCELLANEOUS

This post-trial brief is filed on behalf of Du Pont and Remington, and Messrs. Joseph A. Dallas, Richard E. Heckert, John P. McAndrews and Eldon M. Robinson, individuals affiliated with Du Pont who were members of the Remington Board of Directors at the time of the merger.

INTRODUCTION

Plaintiff's challenge to the merger rests upon a claim that each of the key players in the Du Pont-Remington transaction was acting out a charade. According to plaintiff, despite Du Pont's consciousness of its fiduciary duty as the majority shareholder of Remington and its renunciation of the legal right to compel a merger, Du Pont intentionally set about to short-change the Remington minority shareholders. Despite Du Pont's instructions to Morgan Stanley to err on the side of liberality in valuing Remington, plaintiff contends that Morgan Stanley intentionally prepared a skewed and misleadingly low valuation of Remington. According to plaintiff, the Merger Committee and Salomon Brothers, despite the advice of their counsel and although meeting numerous times in person and being in constant telephone contact, never considered the valuation of Remington. According to plaintiff, despite the fact that the Merger Committee extracted from Du Pont the most that Du Pont was willing to pay to acquire the Remington minority interest, there were no effective negotiations between the parties, but only an abandonment of duty by the Remington directors.

In fact, there is not a scintilla of evidence that any of the persons involved in the merger acted in bad faith, as alleged by plaintiff.

Plaintiff is forced to this extreme position by the facts and the law. One key fact is that Du Pont did not force a merger upon Remington by its voting control, its representation on Remington's board or any interference with the work of the Merger Committee. In fact, Du Pont's original merger offer was not accepted; it took further negotiations and an all-day meeting in which Du Pont had to agree to two significant modifications of its offer to secure the Merger Committee's approval. Another key fact is that the Remington minority shareholders overwhelmingly approved the merger on the basis of a proxy statement which plaintiff does not seriously contend was misleading.

In these circumstances, the burden is on plaintiff to show not simply that the merger terms were unfair, but that the merger was the result of palpable overreaching. This plaintiff has failed to do, notwithstanding the unwarranted assertions in her brief.

Even though the burden of proving the merger unfair rightly rested with plaintiff, defendants showed the merger terms to be fair when tested against a variety of standards. Remington shareholders received a premium, whether the merger terms are evaluated with respect to market value, earnings per share, dividend yield, book value or discounted cash flow. The premium over market value (48%) was fully comparable to premiums paid in other parent-subsidiary mergers. What is more, the merger enabled Remington shareholders to exchange their stock in a single line of business company in a mature industry with ever-increasing regulatory and social problems for stock in Du Pont, a diversified company with significantly better perceived growth prospects, which they had the option of selling or holding for investment.

STATEMENT OF FACTS

When the Du Pont-Remington merger transaction is considered from conception to consummation, the conclusion is compelled that defendants used their best efforts to assure, and in fact achieved, a fair result.

A. Background of the Merger

In the spring of 1979, Du Pont gave consideration to acquiring the minority interest in Remington. [Tr. II at 105-07 (Heckert)][1] Du Pont believed that acquisition of complete ownership could lead to certain benefits, including an increased ability for Remington to pursue diversification and also certain savings and economies. [DX 52 at 2-3; Tr. II at 106-07 (Heckert)]

1/ References to the trial transcript are "Tr. [Volume] at [page] ([witness]);" references to the exhibits admitted at trial are "PX-" for plaintiff's exhibit and "DX-" for defendants' exhibit. References to plaintiff's post-trial brief are "Pl. Br. at ____."

Du Pont had owned a majority interest in Remington since the 1930s, and over the years had considered whether it should acquire the Remington minority interest or instead dispose of its holdings. [Tr. II at 104-05 (Heckert)] Du Pont had, from time to time, received inquiries regarding the possible acquisition of its Remington stock at prices approximating Remington's book value, but no firm offers. [DX 52 at 3] These inquiries had always foundered on the issue of price. [Tr. II at 105-06 (Heckert)] With its low tax basis in Remington stock and the modest tax that was imposed on dividends from Remington, sale of Du Pont's holdings in the range mentioned in the inquiries would not have provided after-tax benefits equal to the benefits from continued ownership. [DX 52 at 3; Tr. II at 105 (Heckert)]

There is no evidence that any anticipated improvement in Remington's fortunes was a factor in Du Pont's interest in effecting a merger.

B. Formulation of Du Pont's Offer for Remington

Du Pont was mindful of its responsibilities as the majority shareholder of Remington from the outset of its consideration of acquiring the balance of Remington stock. [Tr. II at 113 (Heckert); Tr. III at 4-5 (Buxbaum); DX 40] Du Pont also recognized that litigation challenging the merger was highly likely, no matter what the merger terms and no matter how fairly it proceeded. [Tr. III at 8-9 (Buxbaum)] Du Pont accordingly was particularly solicitous to assure that the Remington minority shareholders would be treated fairly. [Id.]

1. Retention of Morgan Stanley & Co.

Although employees within Du Pont did some initial, exploratory work regarding possible merger terms, it was decided early on that Du Pont would not formulate merger terms on its own. Instead, Du Pont retained the investment banking firm of Morgan Stanley & Co. to recommend merger terms that would be fair to both Remington shareholders and Du Pont shareholders. [Tr. III at 6-7 (Buxbaum); Tr. VI at 6 (Gilbert); DX 13]

At a meeting on June 6, 1979, Du Pont provided Morgan Stanley with a memorandum discussing Du Pont's responsibilities as the majority shareholder of Remington and urged Morgan Stanley to seek such further guidance as it deemed appropriate. [DX 40] Morgan Stanley did so. It was counseled on its work on the Remington transaction by an experienced corporate lawyer, the late Peter Bator of Davis, Polk & Wardwell. [Tr. VI at 9 (Gilbert)]

Du Pont did not suggest any merger terms to Morgan Stanley. It placed no constraints on the terms Morgan Stanley might recommend, the valuation methodologies it might employ or the weight to be given to particular valuation methods. [Tr. III at 6-9 (Buxbaum); Tr. VI at 18-19 (Gilbert)]

Plaintiff's assertion that Du Pont retained Morgan Stanley to justify making an inadequate merger offer (Pl. Br. at 82) stands in stark contrast to the evidence, which shows exactly the opposite. Du Pont's Mr. Buxbaum urged Morgan Stanley to err on the side of liberality in valuing Remington. [Tr. III at 8-9 (Buxbaum)] Based on its discussions with Du Pont officials, Morgan Stanley understood that its assignment was to recommend merger terms that were not only fair to the Remington stockholders, but that would reflect the maximum premium to Remington shareholders justifiable from the standpoint of Du Pont shareholders. [Tr. VI at 16 (Gilbert); PX 47 at 1-2]

In response to these instructions, the Morgan Stanley team carefully investigated the business and prospects of Remington and Du Pont. Its internal report on the proposed transaction -- PX 47 -- and the talking points for its presentation to Du Pont on the matter -- PX 42 -- reveal that Morgan Stanley thoroughly considered all pertinent factors.

Morgan Stanley's analysis revealed that, although Remington's results compared well with those of other gun companies, it was in a low-growth business and that Du Pont, a broadly diversified chemical company, had better growth prospects. [PX 42 at 4-7] Morgan Stanley observed that the domestic gun industry was mature, that Remington, which already had a large market share, had only limited ability to improve its position in that industry, that Remington lacked major growth potential in the international market, and that the ammunition market, in which Remington also competed, was highly competitive and had low margins. [Id.] Further, Morgan Stanley noted the potential negative impact on Remington's business of gun control legislation and changing social attitudes towards firearms. [Id.]

Morgan Stanley's qualitative assessment of Remington's business and prospects was confirmed at trial by former Remington directors Heckert, Stott and Dixon. [Tr. II at 108-10 (Heckert); Tr. IV at 171 (Stott); Tr. V at 117-18 (Dixon)] It was simply ignored by plaintiff's expert, Mr. Belfer.

After completing its analysis, Morgan Stanley advised Du Pont that an exchange ratio with a dollar value of Du Pont stock in the area of $22 per Remington share -- or .52 shares of Du Pont stock for each share of Remington stock -- would be fair and equitable to shareholders of both companies. [DX 1 at 1-2]

Morgan Stanley concluded, based upon its analysis, that the market prices of Du Pont and Remington common stocks were reasonable starting benchmarks of their fair values and that, based upon such prices, the proposed merger terms represented a substantial premium for Remington shareholders, that compared favorably with premiums paid in recent parent-subsidiary mergers. The conclusion that Remington's market price was a reasonable starting point for determination of Remington's value was based on a number of factors: (1) Remington was listed on the American Stock Exchange and provided regular and complete information to its shareholders. [Tr. VI at 24 (Gilbert)] (2) Review of the pattern of trading in Remington stock showed that the stock was consistently traded, sufficiently so that the market in the stock was efficient. [Id. at 24, 78-79] In fact, in the four and one-half year period before announcement of the Du Pont merger offer, a volume of Remington stock exceeding the entire minority interest had traded; during the same period, a slightly lesser proportion of Du Pont stock had traded. [PX 47 at Exs. II, III, XI, XII] (3) Remington's ownership profile showed some institutional interest and quite a number of individual holders. [Tr. VI at 24 (Gilbert); PX 47 at Ex. IV] (4) Remington's P/E ratio did not appear to be out of line with P/E ratios of other roughly similar companies. [Tr. VI at 24-35, 78-79 (Gilbert); PX 47 at Ex. XVII, XIX]

Plaintiff indulges in wishful thinking when she asserts (Pl. Br. at 18-19, 64) that Mr. Gilbert was of the view that the relationship between Remington's market price and true value was speculative. Mr. Gilbert clearly testified that, although Morgan Stanley recognized that the ownership profile and trading pattern in Remington stock created "an issue" as to the accuracy of the market value, he and Morgan Stanley resolved the issue by concluding that the market price was a reasonable benchmark and therefore an appropriate starting place for valuing Remington stock. [Tr. VI at 23-25, 33-35, 67, 78-80, 81-82, 88 (Gilbert)]

Although it concluded that market price was a reasonable benchmark, Morgan Stanley did not ignore other factors bearing on valuation. [Tr. VI at 23 (Gilbert)] It investigated book values, the historic P/E ratios of Remington and of companies deemed somewhat similar to Remington and Du Pont, earnings and dividend yields, and the present value of Remington based on a discounted cash flow analysis. [PX 47; PX 42] It observed that the recommended merger terms would slightly exceed Remington's book value; result in only minor dilution in dividend yield; represent a P/E multiple at the high end of Remington's recent historic P/E range; and could be justified on a discounted cash flow basis. [PX 42 at 1] Morgan Stanley concluded that the $22 price "is a maximum value (i.e., top end of the range of share values justifiable to [Remington]) and is very fair to [Remington] shareholders." [Id. (emphasis in original)]

Du Pont representatives met with Morgan Stanley to discuss the firm's analysis and conclusions and tested the results themselves. They found the analysis to be thorough and its logic persuasive, and they determined to accept and act upon Morgan Stanley's recommendations. [Tr. III at 10-11, 15 (Buxbaum)]

2. Structure of the Transaction

The proof at trial showed that Du Pont took three important steps to assure that the merger procedures, as well as its terms, would be fair to minority shareholders.

First, Du Pont decided to propose to Remington at the outset, and make public, the precise offer recommended by Morgan Stanley, rather than a "low-ball" initial negotiating offer. [Tr. II at 121 (Heckert); Tr. III at 20-21 (Buxbaum)] Du Pont's motive was not, as plaintiff suggests (Pl. Br. at 79-80), to place an artificial "cap" on Remington's stock price. Rather, Du Pont did not want Remington shareholders to be misled as to the extent of the premium that might be expected or by speculation as to the price Du Pont might be willing to pay for Remington. [Tr. III at 19-20 (Buxbaum); Tr. VI at 8-9 (Gilbert)]

Second, Du Pont determined that the merger would not be carried out unless it was approved by the vote of a majority of the minority shares of Remington. [DX 41 at 1] Du Pont had no desire to merge unless the transaction could be completed on a basis entirely satisfactory to the Remington directors and shareholders. It made this position known to Remington at the outset [*id*.], and it never wavered. [Tr. II at 132 (Heckert)]

Plaintiff makes the baseless assertion (Pl. Br. at 46) that Du Pont conditioned its proposal on the approval of Remington's minority shareholders so as to give the Merger Committee "an out" from exercising its independent judgment. Du Pont so conditioned its offer because it was advised and believed that this was the fairest way to proceed [Tr. VI at 7-8 (Gilbert)]; no such "out" was intended or created.

Third, Du Pont determined to offer the Remington shareholders Du Pont stock, rather than cash, in the merger. In a stock transaction, Remington shareholders would not be forced to incur tax liability and could continue as Du Pont shareholders, should they so desire, and participate in the future of both Remington and Du Pont. [Tr. II at 116-17 (Heckert); Tr. III at 17-18 (Buxbaum); PX 20 at 2051]

3. *The Initial Offer*

By a letter dated July 16, 1979, Du Pont proposed to Remington a merger on the terms recommended by Morgan Stanley as fair to both sets of shareholders: each share of Remington stock would be exchanged for .52 shares of Du Pont stock. [DX 41 at 2] Du Pont believed, based on the advice it had received from Morgan Stanley and its own analysis, that the proposed merger terms were eminently fair to Remington shareholders. [Tr. III at 20-21 (Buxbaum)]

C. Consideration by the Remington Independent Merger Committee of the Du Pont Offer

A committee of Remington directors was formed to consider the Du Pont merger offer. The committee consisted of the three Remington directors -- Messrs. Dixon, Silliman and Stott -- who were independent of Du Pont and had never been associated with Du Pont. [PX 59] The independent directors were substantial businessmen with extensive outside business experience and were not employees of Remington. [PX 71 at 44]

At trial plaintiff failed to substantiate her claim (Pl. Br. at 7, 45-46) that Du Pont operated on the assumption that the independent directors would simply rubber stamp any Du Pont offer. None of the outside directors was in any way beholden to Du Pont [Tr. II at 123-25 (Heckert)], and Du Pont had no expectation that its merger offer would be accepted without regard to its adequacy. [Id. at 121-23] To the contrary, the expectation was that Remington would hire sophisticated advisors and independently evaluate the Du Pont proposal. [Tr. VI at 19-20 (Gilbert)]

Du Pont cooperated fully with the Merger Committee. It made its senior executives available to Salomon Brothers for "due diligence" interviews, and it provided all documentary information requested by the committee and by Salomon Brothers, the committee's financial advisor. [Tr. III at 24 (Buxbaum); Tr. VII at 11-12 (Zimmerman); DX 53][2/]

No representative of Du Pont participated in the Merger Committee's deliberations or otherwise attempted to influence committee members. [Tr. II at 125-26 (Heckert)] Messrs. Heckert, Dallas and Robinson, the members of the Remington board who were affiliated with Du Pont, absented themselves from all Remington board discussions of the proposed merger [Tr. II at 125-27 (Heckert); Tr. V at 99 (Dixon)], and did not vote on any matters respecting the merger. [Pre-Trial Order, ¶ 12]

Plaintiff's description of the work of the Merger Committee and Salomon Brothers over the summer and early fall of 1979 totally ignores the relevant testimony and documents submitted at trial. In fact, as the post-trial brief of the Remington defendants shows, during this period the Merger Committee and Salomon Brothers carefully evaluated the merger proposal, meeting numerous times and being in constant contact by telephone. [Tr. VII at 152 (Zimmerman)] It simply makes no sense to assert, as plaintiff repeatedly does, that during all these contacts, the valuation of Remington was not considered.

2/ Plaintiff mischaracterizes the Burdett-Buxbaum communication at the outset of Remington's consideration of Du Pont's offer. (Pl. Br. at 45-46) Rather than showing that Remington "cleared" all matters with Du Pont, Mr. Buxbaum's reply unequivocally shows a "hands-off" attitude, as he confirmed at trial. [Tr. III at 22-24 (Buxbaum)]

Out of the Merger Committee deliberations, two concerns about the Du Pont offer emerged. First, there was concern that the dollar value to which .52 Du Pont shares equated under then-current market conditions fell short of a fair value for a share of Remington stock. [PX 55 at 1] Second, there was concern about possible fluctuations in the market price of Du Pont stock which might occur subsequent to fixing of the exchange ratio but prior to the exchange date. [*Id.*]

These concerns were communicated to Du Pont by Morgan Stanley, based on a September 25, 1979, meeting between representatives of Salomon Brothers and Morgan Stanley. [Tr. III at 24-26 (Buxbaum); Tr. VI at 50-60 (Gilbert); Tr. VII at 46-50 (Zimmerman)] As a result, a meeting of Du Pont and Remington principals and advisors was scheduled so the Du Pont offer could be discussed. [Tr. II at 128-29 (Heckert)]

D. Acceptance of the Remington Demands for Improved Merger Terms

Plaintiff's assertion that Du Pont and the Merger Committee did not engage in negotiations with respect to merger terms is inexplicable in light of the evidence regarding the meeting which was held on September 30 in Bridgeport. Present at the meeting for Remington were the Merger Committee members, outside counsel to the committee, Messrs. Higgins and Zimmerman of Salomon Brothers, and outside counsel for Salomon Brothers. [Tr. II at 129-30 (Heckert); Tr. VII at 48 (Buxbaum); PX 64] Present at the meeting for Du Pont were a number of senior Du Pont officials, including Mr. Shapiro, the then Chairman of

Du Pont, and Mr. Heckert, and also Messrs. Gilbert and Brodsky of Morgan Stanley. [Tr. II at 129-30 (Heckert)] Messrs. Burdett, McAndrews and Partnoy of Remington's management also were present. [PX 64]

The meeting began shortly after lunch and lasted well into the evening. [Tr. II at 132-33 (Heckert); Tr. IV at 108 (Stott)] There were presentations by each side, caucuses and face-to-face negotiations. [Tr. VII at 51-53 (Zimmerman)]

The concerns of the Merger Committee were fully expressed at the meeting. It was made clear that Salomon Brothers would not opine that the Du Pont offer was fair and that the independent directors would not recommend the Du Pont offer under those circumstances. [Tr. VI at 63 (Gilbert); Tr. V at 108 (Dixon); Tr. IV at 107 (Stott); Tr. II at 131 (Heckert)] On the Du Pont side, there was the belief that its original offer had been fair, the knowledge that some Du Pont directors thought that even the .52 exchange offer might be "rich," and the Morgan Stanley advice that an exchange ratio of approximately .52 was the maximum justifiable from the point of view of Du Pont shareholders. [Tr. II at 117-19 (Heckert); Tr. III at 30-31 (Buxbaum); Tr. VI at 62 (Gilbert); PX 42 at 1]

Late in the afternoon, the sides were close to breaking off without an agreement. [Tr. II at 134 (Heckert); Tr. V at 109 (Dixon)] Each side understood that it was under no compulsion to come to a deal, and that a combination of the two companies would be effected only if the minority shareholders -- and thus, as a practical matter, the Merger Committee -- approved it. [Tr. II at 112-13 (Heckert); Tr. VI at 63-64 (Gilbert)]

The first breakthrough was on the price issue. Based on the arguments of the Merger Committee and its advisors and their unwillingness to accept the .52 ratio, the Du Pont representatives offered to increase the exchange ratio from .52 to .55. [Tr. VII at 53 (Zimmerman)] Even with this revised offer the Remington Committee continued to be concerned about market fluctuations that could adversely affect the market value received by the Remington shareholders. [Id.] Ultimately there was a second breakthrough. At the suggestion of the Merger Committee, Du Pont proposed a "collar arrangement" under which the precise exchange ratio would vary, up to a maximum of .581, depending upon fluctuations in the price of Du Pont common stock. [Tr. V at 109 (Dixon)]

The meeting broke up at this point. The Merger Committee did not accept the revised Du Pont offer on the spot, but asked Salomon Brothers to consider all aspects of the offer and then submit a final opinion. [Id.; Tr. VII at 53-54 (Zimmerman)]

After Salomon Brothers evaluated the revised offer and delivered its opinion [DX 30] that the terms were fair, the Remington Board, acting without its Du Pont members, accepted the increased Du Pont offer on October 2. [DX 44] That offer spoke to each of the concerns that had been articulated by Salomon Brothers and the Merger Committee -- the absolute terms of the exchange ratio were improved, and a collar mechanism was developed to deal with possible fluctuations in the price of Du Pont common stock.

As a result of operation of the collar, the final merger exchange ratio was .574 shares of Du Pont common stock for each Remington share. [Pre-Trial Order, ¶ 30] This ratio represented more than a 10% improvement over Du Pont's initial .52 exchange offer. [DX 59; DX 75]

Plaintiff criticizes the negotiating strategy employed by the Merger Committee and Salomon Brothers, which was, in effect, to make Du Pont bid against itself, rather than putting a counteroffer on the table. Plaintiff's second guessing should not obscure that the strategy was highly effective. The final merger terms represented the most Du Pont was willing to give in order to acquire the minority shares in Remington. [Tr. II at 140 (Heckert)] The Merger Committee did not leave anything on the table.

The Merger Committee may not have gone about the matter in precisely the manner that plaintiff in hindsight demands, but the entire exercise, over two months, was devoted to determining how much Du Pont stock a share of Remington was worth. Their ultimate conclusion, reflecting the advice of their financial advisor, was that a share of Remington stock was worth from .52 to .581 shares of Du Pont stock, for a likely implied cash value of from $23.24 to $25.85. [DX 3] Had the Merger Committee demanded anything close to Du Pont stock with an implied cash value of $30 for each share of Remington, which plaintiff contends to be the fair value of Remington, the evidence establishes beyond doubt that there would have been no merger.

E. Implementation of the Merger

The definitive merger agreement was signed in November 1979, and a proxy statement [PX 71] concerning the proposed merger was mailed on December 3, 1979. [Pre-Trial Order, ¶¶ 19-20]

Plaintiff filed a purported class action challenging the merger in a New York court on December 28, 1979. Remington shareholders were notified of the New York action and plaintiff's allegations by a Supplement to Proxy Statement [PX 72], which was mailed on January 4, 1980. Plaintiff made no attempt to enjoin the merger, and the New York action was dismissed on forum non conveniens grounds on June 2, 1980. [Pre-Trial Order, ¶ 21]

On January 14, 1980, Du Pont received an inquiry from Allegheny Ludlum Industries as to the possible purchase of Du Pont's Remington holdings in the neighborhood of $26 per share. [PX 48] Du Pont recognized that Allegheny Ludlum was proposing a taxable transaction, and it had no interest in pursuing the matter. [Tr. III at 45 (Buxbaum)] After so informing Allegheny Ludlum, Du Pont issued a press release regarding the matter, and a supplement to the proxy statement [PX 73] disclosing the inquiry and Du Pont's response. To enable the Remington shareholders to review the information contained in that supplement, the shareholders' meeting, which had been scheduled for January 17, 1980, was adjourned.

The Remington special meeting to vote on the merger was held on February 1, 1980. Ninety-one percent of the minority shares which were voted were voted in favor of the merger. Approximately 72% of the total minority shares were voted in favor of the merger. Including Du Pont's holdings, 92% of the shares outstanding were voted in favor of the merger. The merger was consummated on February 1, 1980. [Pre-Trial Order, ¶ 29]

ARGUMENT

I. THE MERGER TERMS WERE FAIR TO REMINGTON MINORITY SHAREHOLDERS

The evidence at trial showed the merger terms to be fair when tested against any reasonable standard. Plaintiff's arguments to the contrary are based on her distorted view of the facts and mistaken legal premises.

A. The Merger Terms Were the Product of Arm's Length Bargaining

"Theoretically, the best definition of 'fairness' in parent-subsidiary business dealings would be to require that the transaction between the two be reached as though each had in fact exerted its bargaining power against the other at arm's length." Getty Oil Co. v. Skelly Oil Co., Del.Supr., 267 A.2d 883, 886 (1970); Weinberger v. UOP, Inc., Del.Supr., 457 A.2d 701, 709-10 n.7 (1983) (hereinafter, "Weinberger"). This theoretical "best definition" was in fact the way the Du Pont-Remington merger terms were reached.

This was not a case in which the parent dictated the terms of a merger to its subsidiary. After receiving Du Pont's merger proposal, the Remington independent directors -- who were experienced businessmen in their own right -- retained sophisticated legal counsel and financial advisors and proceeded, over a period of months, to evaluate the Du Pont offer. The message that went back to Du Pont was that the Merger Committee could not accept it.

The next step was an all day negotiating session. It appeared for a time that the talks would fall apart. Nevertheless, Du Pont did not threaten or imply that it would force a merger if it could not negotiate an arrangement with the Merger Committee, nor did it intend to do so. [Tr. II at 132 (Heckert)] Ultimately an agreement was hammered out, but only after Du Pont had agreed to two modifications, which spoke to the two concerns that the independent directors and their advisors had identified with respect to the Du Pont proposal. These modifications represented the most that Du Pont was willing to offer.

The work of the independent directors and their advisors and these negotiations took place against the backdrop of Du Pont's renunciation of its power, as Remington's 70% shareholder, to compel a Du Pont-Remington merger. In this case, therefore, there was not simply an approximation of arm's-length bargaining but the reality.

Although plaintiff recognizes that the merger depended upon the approval of Remington's minority shareholders, she ignores that, as a practical matter, approval could not have been obtained without the recommendation of Remington's independent directors. Thus, the directors actually had bargaining power, and the record demonstrates that they exerted it. The result of their efforts "is strong evidence that the transaction meets the test of fairness." Weinberger, 457 A.2d at 709-10 n.7. The arm's length bargaining that produced the merger terms establishes, without more, their fairness and warrants rejection of plaintiff's claims.

B. Remington Minority Shareholders Received Value Equivalent to What They Exchanged

The "correct [test of fairness is] that upon a merger the minority stockholder[s] shall receive the substantial equivalent in value of what [they] had before." Sterling v. Mayflower Hotel Corp., Del.Supr., 93 A.2d 107, 114 (1952) (hereinafter, "Sterling"); Rosenblatt v. Getty Oil Co., Del.Supr., 493 A.2d 929, 940 (1985).

Here Remington shareholders received .574 shares of Du Pont stock for each share of Remington. Accordingly, the question for decision is whether the value of .574 shares of Du Pont stock was the substantial equivalent of the value of one share of Remington stock. The evidence shows that it was.

The question is not, as plaintiff suggests, whether a share of Remington stock was worth more than $23.46 -- the implied cash value of the merger terms.3/ That would be the

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3/ The merger exchange ratio was .574 shares of Du Pont stock for each share of Remington stock. On the day of the merger, (Footnote continued) question presented had the merger been a cash merger for that amount. It was not. Remington shareholders received Du Pont stock in the merger, and that stock paid a dividend and represented a proportional share of the company's earnings, assets and prospects for growth. There is no basis in precedent or logic for ignoring these attributes of Du Pont stock and focusing exclusively on the market price of the stock, as plaintiff urges. It would be particularly inappropriate to do so here, where plaintiff insists that Remington stock should be valued with reference to all of its attributes except market price.

When the attributes of the Remington stock given up in the merger are compared with those of the Du Pont stock received, the only credible conclusion is that Remington shareholders received at least the substantial equivalent of what they gave.

The annual dividend paid on Remington stock was $1.45/share for 1979. [DX 75] By virtue of the merger, Remington shareholders received .574 shares of Du Pont common stock, which was paying a dividend of $2.75/share, or $1.58 for each .574 shares. Thus, the merger terms resulted in an increase in dividend yield for Remington shareholders of 13¢/share or 9%.

Remington's earnings per share were $3.30 for 1979, and Du Pont's were $6.42 per share. [Id.] Thus, in the merger,

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(Footnote continued)

Du Pont stock closed at $40.87 [DX 75]. The implied cash value of the merger terms accordingly was $23.46, the product of .574 and $40.87, not the $23.24 figure used by plaintiff.

Remington shareholders received Du Pont stock representing earnings of $3.69 for each share of Remington exchanged -- an increase of 39¢/share or 12%.

Remington common stock had a book value of $22.61 as of December 31, 1979. [Id.] In the merger, Remington shareholders received Du Pont stock having an implied cash value of $23.46/share of Remington stock -- a premium of 4%. (The book value of the Du Pont stock received was $20.13, for a decrease of 11%. [Id.])

Equally significant in any assessment of value, the merger enabled shareholders to exchange their stock in Remington for stock in Du Pont, a company that was more diversified than Remington, that had better long-term growth prospects than Remington and whose earnings were more highly valued by investors than Remington's. [PX 42 at 3] Thus both the consideration received in the merger and the currency in which it was paid represented significant increases in value for Remington shareholders, which fully meets the test decreed in Sterling and Rosenblatt.

Plaintiff strenuously urges (Pl. Br. at 11-15) that the acknowledged superior investment value of Du Pont stock is irrelevant, but the evidence establishes that the Merger Committee and its advisors were fully aware that they served two constituencies: those shareholders who would promptly sell the Du Pont stock received, to whom the implied cash value of the stock was of prime importance, and those shareholders who would substitute an investment in Du Pont for their investment in Remington, for whom the investment characteristics of the Du Pont stock received were of prime importance. The Merger Committee faithfully served both constituencies.

II. MR. BELFER'S VALUATION OF REMINGTON DOES NOT WITHSTAND ANALYSIS

In concluding that Remington stock was worth $29-30.25/share, plaintiff's expert Mr. Belfer valued Remington stock using four different valuation methods. Each of his valuations of Remington was entirely subjective and based on unsupported assumptions.

In addition, there is a fundamental "apples to oranges" defect in Mr. Belfer's approach to determining the fairness of the merger terms. He insists that only the market price can properly be looked to in valuing Du Pont stock and that no other valuation factors can be taken into account. With respect to Remington, he is equally insistent that market price not be considered and that exclusive weight be accorded the very valuation factors that he excludes in valuing Du Pont.

A. Discounted Present Value

1. Mr. Belfer's Approach

Mr. Belfer testified that, based on an assumed $1.46 1979 dividend for Remington, an assumed 8% growth rate and an assumed 12% discount factor, the present value of Remington sto[ck] was $36.38, calculated as follows:

$$\text{value} = \frac{\text{annual dividend}}{\text{discount rate} - \text{growth rate}}$$

Although plaintiff seeks to leave the impression that Mr. Belfer independently calculated the present value of Remington based on his expertise, in fact all he did was pluck a figure out of PX 17.4/ [Tr. I at 87-89 (Belfer)] PX 17 is one of several documents containing calculations of the amounts that Du Pont would have to receive, under various assumptions, on the sale of its Remington holdings in order to "break even" or be as well off economically as if it continued to hold the stock.5/ [Tr. III at 164 (Brunner)] The "values" produced by these rough calculations varied all over the lot. [PX 16, PX 17, PX 22]

The purpose of these calculations was to determine whether there was any prospect of Du Pont selling its Remington shares on economically advantageous terms, not to value Remington stock for purposes of the merger. [Tr. III at 57 (Buxbaum)] PX 17 did not represent a conclusion of Mr. Brunner as to the

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4/ Mr. Belfer's sole reliance on PX 17 is confirmed by his use of the $36.38 figure, which appears in DX 17. Had Mr. Belfer calculated the present value himself, he would have come up with $36.50, as follows:

$$\frac{\$1.46}{.12-.08} = \$36.50$$

5/ PX 17 was admitted in evidence for the limited purpose of showing "that this was an analysis and study performed by Mr. Brunner of the Special Studies Department of Du Pont with t figures and the results shown therein. . . ." [Tr. II at 43-4 It accordingly does not constitute evidence that Mr. Brunner o anyone else at Du Pont was of the view that Remington stock wa worth $36.38 per share.

value of Remington stock, let alone an official position of Du Pont on the subject, and Du Pont did not rely on it for any purpose. [Tr. III at 52 (Buxbaum); Tr. III at 157-60 (Brunner)]

Even more significant, the critical assumptions on which the $36.38 figure was based -- an 8% growth rate for Remington and a 12% discount rate -- were at the time considered erroneous by Mr. Buxbaum, the Du Pont finance executive responsible for effecting the Remington merger. In the summer of 1979 when Mr. Buxbaum reviewed a memorandum that calculated the present value of Du Pont's Remington stock utilizing the same 8% and 12% assumptions, he wrote,

> "Both the projection of earnings and dividends and the 12% discount rate are questionable. The [resulting] figure [, which was adjusted to take account of Du Pont's low tax basis] should not be given significant credence." [PX 20 at 2050]

Mr. Buxbaum was of the opinion in 1979 that an appropriate growth rate for Remington would have been 6% and an appropriate discount factor at least 15%. [Tr. III at 59-67 (Buxbaum)] Inserting Mr. Buxbaum's figures into Mr. Belfer's formula yields a value of $16.22 for Remington stock, as follows:

$$\frac{\$1.46}{.15-.06} = \$16.22$$

Mr. Belfer conceded that his formula is "extremely simplified" and that it assumed that Remington earnings would grow at 8% forever. [Tr. I at 89 (Belfer)] In fact the formul is <u>over</u>simplified, because constant growth rarely occurs. [Tr. VII at 147-49 (Zimmerman); S. Cottle, R. Murray & F. Block, <u>Graham and Dodd's Security Analysis</u> 565-67 (5th ed. 1988).][6/]

Mr. Belfer asserted that an 8% growth rate for Remington was conservative, based on its recent performance. In fact, the seemingly high recent growth was a reflection of Remington's recovery from a severe slump. Over the 1969-78 period, Remington's growth in earnings was only 6% per year. [PX 22 at 2721; Tr. III at 165-66 (Brunner)] The assumption that Remington earnings would grow at 8% indefinitely also was suspect in 1979 because Remington was in a mature industry facing significant regulatory and social problems. [PX 42 at 4] Remington's sorry post-merger performance, which fell far short of its pre-merger projections [Tr. II at 110-11 (Heckert)], bears out the reasonableness of these pre-merger suspicions.

Mr. Belfer claimed that his use of a 12% discount factor was conservative because Du Pont's cost of capital was 12%. His reliance on the 12% figure was misplaced. Mr. Buxbaum, Du Pont's chief financial officer, testified that Du Pont's cost of capital at the time of the Remington transaction was 15% and that the 12% figure was out of date. [Tr. III at 61-68 (Buxbaum)] Similarly, Mr. Gilbert testified that in 1979, Morga

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<u>6/</u> Mr. Belfer is an adherent of the Graham-Dodd approach to securities valuation, which he testified is set forth in the various editions of <u>Graham and Dodd's Security Analysis</u>. [Tr. at 82-84]

Stanley reached the opinion that an appropriate discount rate for valuing Remington was 15%. [Tr. VI at 45 (Gilbert)] Mr. Belfer's use of a 12% discount factor is further undercut by the fact that in 1979 Remington officials were of the view that Remington's cost of capital was 20%, since it is Remington's cost of capital, not Du Pont's, which should be used to determine a discount factor to value Remington. [Tr. VII at 81-82, 140-46 (Zimmerman); Tr. IV at 74 (Stott); DX 53 at 16]

The unreliability of Mr. Belfer's valuation of Remington based on his discounted present value formula was vividly illustrated at trial when Mr. Belfer begrudgingly used the formula to calculate the value of Du Pont stock. Based on an expected 1979 Du Pont dividend of $2.60/share (drawn from PX 17, the document on which Mr. Belfer relies), an 8% growth rate (a conservative estimate for present purposes, as it was expected that Du Pont's growth rate would exceed Remington's [PX 20 at 2050], and the 12% discount factor Mr. Belfer testified was appropriate for Du Pont [Tr. I at 95-96 (Belfer)], Mr. Belfer arrived at a value for Du Pont stock of about $65. [Id. at 94-97] This was more than 50% in excess of the stock's market price of $40.50, which market price Mr. Belfer opined was a reliable indicator of the value of Du Pont stock. [Id. at 80-81]

The foregoing example demonstrates the extreme sensitivity of the Belfer valuation formula to the assumptions used to

Value of Remington Stock

$$\$36.25 = \frac{\$1.45}{.12-.08}$$

Value of Du Pont Stock

$$\$68.75 = \frac{\$2.75}{.12-.08}$$

Value Received by Remington Shareholders in Merger

$$\$68.75 \times .574 = \$39.46$$

Premium Received by Remington Shareholders in Merger

$$\frac{\$39.46-\$36.25}{\$36.25} = 9\%$$

Thus, rather than calling the merger terms into question, discounted present value analysis confirms their fairness, as Morgan Stanley advised Du Pont in making its recommendation of merger terms. [PX 47, PX 42]

2. The Morgan Stanley and Salomon Brothers Present Value Analyses Do Not Confirm Mr. Belfer's Valuation

Plaintiff purports to find support for Mr. Belfer's $36.38 valuation of Remington stock in the present value analyses that Morgan Stanley and Salomon Brothers performed in 1979 as part of their work on the proposed transaction. She does this by focusing on numbers she likes, criticizing numbers she does not like and ignoring limitations placed by the firms on the usefulness of all the numbers.

For example, plaintiff ignores that the Morgan Stanley and Salomon Brothers analyses were based on projections of Remington sales and earnings, respectively, which were considered optimistic by all concerned. [Tr. IV at 78-80, 139, 217-18 (Stott); Tr. VII at 22, 152 (Zimmerman); Tr. VI at 32-43 (Gilber

Tr. III at 62-63 (Buxbaum)] This is not after-the-fact rationalization. Studies done in 1979 demonstrated that Remington's performance tended to lag behind its projections and that the gap increased the farther out the projections went. [DX 49 at 2661; Tr. III at 166-67 (Brunner)] Indeed, at year-end 1979, Remington had earnings of $3.30 [DX 75], compared to its projection of $3.39 made only three months before. [PX 71 at 20]

Plaintiff's criticism of the Morgan Stanley discounted cash flow analysis rests on a misunderstanding. Morgan Stanley utilized Remington's sales projections in its discounted cash flow analysis, even though Morgan Stanley considered them extremely optimistic. [Tr. VI at 42-43 (Gilbert)] The projections went out for five years. Morgan Stanley assumed that sales growth thereafter would continue at 8% a year -- a rate of growth lower than the rate for the projected period, but higher than the long-term earnings growth rate.

Although accepting the sales projections as given, even though thinking them optimistic, Morgan Stanley did not accept Remington's projected improvements in operating margins. Morgan Stanley thought it unlikely that Remington could achieve improved productivity at the same time it achieved the sales increases, which the company rested on market share increases. [Tr. VI at 150-54 (Gilbert)] This was an entirely rational approach for Morgan Stanley to take, and there is simply no basis for plaintiff's assertion (Pl. Br. at 8, 66, 81) that it was the product of bad faith.

Plaintiff's criticism of the Salomon Brothers' discounted cash flow analysis is similarly based on misunderstanding. Plaintiff says that the multiples used by Salomon Brothers to calculate Remington's terminal value were too low, because Remington's historic P/E ratios typically were higher than these multiples. But as Mr. Zimmerman explained, the Salomon analysis was of Remington cash flows, not earnings, and since cash flows are generally higher than earnings, lower multiples ordinarily are used. [Tr. VII at 24 (Zimmerman)]

B. Book Value

Mr. Belfer derived what he called an "adjusted book value" of $28.92 for Remington stock by adding to Remington's book value ($23.07) at September 30, 1979 amounts he assumed to reflect the difference between the market and book values of two Remington assets -- Remington Farms and Remington's inventory.

Mr. Belfer conceded that his book value approach to valuation rested on the assumption that the fair value of Remington stock was at least as great as its book value. [Tr. I at 104 (Belfer)] Nevertheless, he was unable to point to any theoretical basis for valuing common stocks generally with reference to their book values, and he performed no analysis to support the assumption as it applied to Remington. [Tr. I at 104, 146-47 (Belfer)]

In fact, book value -- let alone "adjusted" book value -- is not a recognized basis of valuation [Tr. II at 119-20 (Heckert); Tr. III at 56 (Buxbaum); Tr. VI at 39-40 (Gilbert);

Tr. VII at 73-76 (Zimmerman)], and Delaware courts long have recognized the "unsoundness" in a merger case of assessing fairness by comparing the net asset or book value of one stock with the market value of another. Sterling, 93 A.2d at 113. Nevertheless, plaintiff seeks to prove the merger terms unfair based on just such an "apples to oranges" comparison here, as Mr. Belfer conceded that he did not value Du Pont stock using the same book value methodology he used for Remington stock, or even attempt to determine whether Du Pont had any assets with market values significantly in excess of their book values. [Tr. I at 106-07 (Belfer)]

Had Mr. Belfer investigated the subject, he would have learned that Du Pont had inventory with a replacement value of $632 million over its book value [PX 71 at F-21], plant with a replacement value of $10 billion over its book value [id.], patents generating $100 million/year in royalty income that were carried on the books at only $1/patent [Tr. II at 146-48 (Heckert)], enormously valuable "know how" that was carried on the books at no value [id.], and thousands of acres of land carried, like Remington Farms, at historic cost. [Id. at 146-47 Mr. Belfer's failure to consider such evidence deprives his adjusted book valuation of Remington stock of any probative value.

C. "Third Party Inquiries"

Mr. Belfer asserted that Remington stock was worth at least $26-27/share on the basis of evidence that some third parties had initiated feelers to Du Pont about the possibility of purchasing Du Pont's 70% interest in Remington at such a price. According to Mr. Belfer, had Du Pont pursued the inquiries, it might have negotiated the prices initially mentioned up 50-75% for its own shares and the minority shareholders might have received $26-27/share for their shares. [Tr. I at 67-68 (Belfer)]

This is speculation on top of speculation. The contacts with Du Pont were initial inquiries, not firm offers. They were contingent on review of Remington's non-public business and financial information and on negotiation of satisfactory acquisition agreements. [PX 44, PX 45, PX 65, PX 66, PX 48] Accordingly, there is no basis for the assumption that Du Pont could have sold its Remington stock even for the amounts mentioned in the inquiries, much less for the speculation that the stock would have been sold for 50-75% more. There is also no basis for Mr. Belfer's assertion that, in any such sale, minority shareholders would have received at least $26-27/share for their holdings. Furthermore, Mr. Belfer simply ignored the fact that Du Pont had no obligation to sell its Remington stock, Bershad v. Curtiss-Wright Corp., Del.Supr., 535 A.2d 840, 845 (1987), and that without a sale by Du Pont, Remington shareholders had no way to realize anything other than the market price of their stock.

In Bershad, the Supreme Court recognized that the relationship between prices mentioned in purchase feelers and fair value is speculative. The Court there held that the proxy statement issued in connection with a parent-subsidiary merger was not materially misleading for failing to disclose that the parent had received inquiries for the sale of its holdings in the subsidiary, which the parent had no interest in pursuing. According to the Court, the inquiries were immaterial to the question placed before shareholders -- whether to approve the parent-subsidiary merger -- in the absence of an agreement on price and structure for a sale of the parent's holdings in the subsidiary. 535 A.2d at 847. The holding in Bershad that, as a matter of law, inquiries, without more, do not bear on fairness, is equally applicable here.

Plaintiff's reliance on the third party inquiries to attack the fairness of the merger terms is flawed for another reason as well. The assumption implicit in the attack is that class members would have been better off with a sale of Remington to a third party for $26-27/share cash than with the merger, which gave them .574 shares of Du Pont stock for each Remington share.

This is another apples to oranges comparison. If Remington shareholders had sold their shares for $26 or $27 cash, they would have recognized gain under federal law and possibly also under state law, depending on their domicile. I.R.C. § 1001 (1979). For the many shareholders who had purchased within 12 months of the sale [PX 75], the gain would have been short term, taxed at ordinary income rates, which in 1979 went as high as

70%. I.R.C. §§ 1, 1222 (1979). In comparison, under the merger terms, tax on the gain would be deferred until the shareholder sold the Du Pont stock received in the merger. [Tr. I at 108-09 (Belfer)] (Of course, for a shareholder who held the stock for inclusion in his or her estate, tax would be avoided entirely. I.R.C. § 1014 (1979).) Because of these tax considerations, Mr. Belfer was unable to preclude the possibility that the merger terms were more advantageous to some class members than a cash sale for $26 or $27/share. [Tr. I at 107-10 (Belfer)] This admission is fatal to plaintiff's reliance on the third party offers to show that the merger terms were unfair.

D. Price/Earning Ratio

Mr. Belfer derived values of $26.25-$30 for Remington common stock by multiplying his $3.75/share estimate of 1980 Remington earnings by P/E ratios of 7 and 8. [Tr. I at 110 (Belfer)] This valuation is flawed in two principal respects.

First, use of the estimated 1980 earnings of $3.75/share had the effect of inflating the valuation result, because Remington's 1979 earnings were only $3.30.[8/] [PX 75] Based on the 1979 figure, the actual merger terms reflected a P/E of 7.1, within Mr. Belfer's range of appropriate P/Es for Remington.

8/ Use of the $3.75 figure also was inconsistent with Mr. Belfer's use of an 8% growth rate in his discounted present value analysis, as $3.75/share represents a 14% increase over Remington's 1979 earnings of $3.30/share.

Second, Mr. Belfer's comparables were no more comparable to Remington than the comparables considered by Morgan Stanley and Salomon Brothers and criticized by Mr. Belfer. Not one was a gun company or a single line of business company like Remington. [Tr. VII at 85 (Zimmerman)] Furthermore, while Mr. Belfer purported to find support for his opinion that Remington should be valued at a P/E of 7-8 in Browning's P/E of 21, he provided no explanation of why Browning's P/E justified a P/E of 7-8, rather than 6-7 or some other range, for Remington.[9/]

In addition, as in the case of his other valuations, Mr. Belfer did not attempt to value Du Pont by the same P/E methodology he used to value Remington [Tr. I at 120 (Belfer)], thereby depriving his testimony of any usefulness.

E. Mr. Belfer Improperly Gave No Weight to Market Value and Premium Over Market Value

In arriving at his valuation of Remington stock, Mr. Belfer took into account the values derived through the four methods discussed above, but not the market value of Remington stock. [Tr. I at 79-80 (Belfer)] According to Mr. Belfer, the market value was not an accurate reflection of value because there was insufficient institutional interest in and ownership

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9/ Indeed, Mr. Belfer displayed a certain schizophrenia on the subject of comparables. He had one list of comparables at his deposition and another in his direct testimony. [Tr. I at 71-73, 110-11 (Belfer)] By the time he was cross-examined, he was not sure there were any real comparables [*id.* at 219-20], but in plaintiff's post-trial brief, Mr. Belfer is portrayed as having relied on two comparables. Pl. Br. at 39-40.

of Remington stock. [Id. at 36-38] Mr. Belfer presented no empirical evidence to support his conclusion, and his hindsight evaluation is inconsistent with the conclusion reached on the subject in 1979 by Morgan Stanley, on the basis of careful consideration. [Tr. VI at 24-35 (Gilbert)]

Mr. Belfer's position is illogical. He asserts that a lack of institutional interest and analyst following depressed Remington's stock price, but there is no rational basis for the assumption inherent in his position, which is that institutions always would have been buyers of Remington stock and that analysts always would have recommended it. As Mr. Gilbert put it:

> [I]nstitutions, as we all know, are sellers as well as buyers, so the extent to which institutional participation can impact the price of the stock really depends upon the cycle that the stock is in and whether it is highly regarded by institutions. In other words, what I am saying is that, generally speaking, people love institutional interest when they are buying and don't care for it very much when they are selling.

[Tr. VI at 74, 147-48 (Gilbert)]

Mr. Belfer gave the market price of Remington stock no weight at all. [Tr. I at 79-80 (Belfer)] It would be erroneous for this Court to accept that position. Where market price can be established by free trading in an open forum -- as indisputably existed here with respect to Remington stock, whatever the level of institutional holdings -- it is "the most significant element to be taken into considera-tion in reaching a judgment on the overall fairness of a corporate merger." David

J. Green & Co. v. Schenley Indus., Inc., Del.Ch., 281 A.2d 30, 34 (1971). "Had there been an actual market value uninfluenced by the merger in existence, it would have been error to disregard it." Tri-Continental Corp. v. Battye, Del.Supr., 74 A.2d 71, 74 (1950).

Besides ignoring Remington's market value, Mr. Belfer also ignored evidence as to premiums paid in other parent-subsidiary mergers. This evidence is very significant, because in most, if not all, parent-subsidiary mergers it would be expected under Mr. Belfer's analysis that the level of institutional interest would be lower than in a stock where control is dispersed. Accordingly, premiums paid in other parent-subsidiary mergers constitute empirical evidence of fair merger consideration where the subsidiary's stock price is, by hypothesis, unreliable. Had Mr. Belfer examined this evidence, as Morgan Stanley and Salomon Brothers did, he would have seen that the premium paid to Remington shareholders was in line with premiums paid in other parent-subsidiary mergers. [PX 42 at Ex. XXI; DX 54 at Ex. VIIB] This is further evidence that the merger terms were fair.

F. Mr. Belfer Valued Remington Under Conditions That Did Not Exist

Du Pont long had been the majority shareholder of Remington; the fact of its ownership position and the impact, if any, on Remington's stock price was not a recent development. Anyone who bought Remington stock since 1936 could not fail to understand that Du Pont's controlling interest was a characteristic of his or her investment. [Tr. VI at 87 (Gilbert)]

Mr. Belfer conceded that, under his analysis, Remington's market price was depressed below its true value beginning at least by the mid-1960s, and that members of the class who purchased their stock subsequent to the mid-1960s purchased at prices below the true value of the stock. [Tr. I at 127 (Belfer)] This would appear to include a very large percentage of the class members, because in the period from 1975 to June 1979 alone, a volume equal to slightly more than 100% of the minority shares turned over. [PX 47 at Ex. III]

In these circumstances, any recovery for plaintiff would be a windfall. She and a large percentage of the class bought their stock when it was, under plaintiff's own view, undervalued, yet they now are asserting the right to be paid for their stock as though there had been no such undervaluation.

Plaintiff is asking for something she did not have and was not entitled to obtain before the merger -- valuation of her Remington stock as though there were no 70% shareholder and as though there were substantial institutional interest in holding that stock. There is no rationale for granting plaintiff such relief. Cf. Sterling, 93 A.2d at 111 (refusing to value plaintiffs' shares on liquidating basis, because that would "bestow upon [plaintiffs] something which [they] did not have before the merger and could not obtain"). Nor is there any reason in equity to do so, as no actions of Du Pont are alleged to have caused the hypothetical undervaluation of Remington stock.

III. THE MERGER WAS THE PRODUCT OF FAIR DEALING

Defendants proved at trial that they discharged their duty to deal fairly with Remington and its shareholders in all phases of the merger transaction, as they were required to do by Delaware law. Bershad 535 A.2d at 845-46; Rosenblatt, 493 A.2d at 937; Weinberger, 457 A.2d at 711.

A. The Structure of the Merger Was Fair to Remington Minority Shareholders

An important indication of fair dealing is that the "process by which the merger terms were arrived at involved procedural protections that . . . tended to assure a fair result." Sealy Mattress Co. of New Jersey v. Sealy, Inc., Del.Ch., 532 A.2d 1324, 1336 (1987). As shown in the Statement of Facts, the evidence at trial demonstrated that Du Pont took a variety of steps to assure such result.

First, Du Pont asked Morgan Stanley to recommend merger terms that would be fair to both Remington and Du Pont shareholders and placed no constraints on the terms that Morgan Stanley might recommend, the methodology the firm might use to arrive at its recommendation or the weight to be placed on particular valuation methods. Second, Du Pont's initial offer to Remington was based on the advice it received from Morgan Stanley; Du Pont did not present a low-ball offer to test Remington's negotiating mettle. Third, Du Pont renounced its ability to compel a merger, agreeing at the outset that the transaction would be carried out only if it were approved by the vote of a majority of the

This course of conduct is particularly strong evidence of fair dealing. Rosenblatt, 493 A.2d at 937-38.

There is no basis for plaintiff's untimely claim (not contained in her amended complaint, the pre-trial order or her pre-trial brief) that Mr. Heckert breached his fiduciary duty as a director of Remington by acting for Du Pont in the merger negotiations. In this case the parties acted to assure that precisely the procedures subsequently endorsed in Weinberger, 457 A.2d at 709-10 n.7 (1983), were followed: an independent negotiating committee of Remington outside directors was appointed to deal with Du Pont at arm's length. Neither Mr. Heckert nor Messrs. Dallas and Robinson participated in the committee's deliberations or sought to influence them in any way.

Furthermore, contrary to plaintiff's assertions (Pl. Br. at 9, 69, 85), Mr. Heckert did not act "against" the interests of Remington or its minority shareholders. The evidence shows that Mr. Heckert had little involvement in the Remington transaction until the negotiating meeting at Bridgeport. There he played a helpful role in bringing the two sides together on merger terms that spoke to the specific concerns that had been identified by the Merger Committee and its advisors. [Tr. II at 133-36 (Heckert)] Because the result of these efforts was merger terms that were eminently fair to Remington minority shareholders (and which were approved by Remington's independent directors and minority shareholders), there is no factual basis for plaintiff's last ditch effort to impugn Mr. Heckert's integrity.

C. The Proxy Materials Disclosed All Facts Germane to the Merger

Plaintiff's presentation of her proxy claims was half-hearted at best, befitting their pallor.

1. Disclosure of the $36.38 Discounted Present Value Calculation Was Not Required

Plaintiff asserts that the proxy materials should have disclosed Du Pont's calculation that Remington was worth $36.38/share based on the discounted present value of its expected future dividend payments. Plaintiff alleges that such a calculation was marked at trial as PX 17.

Plaintiff is mistaken, for at least three reasons. First, the $36.38 figure was not an estimate of Remington's value. Rather, as the document itself states, PX 17 was intended solely as an illustration of "one way to determine a proper break-even price" at which Du Pont could sell its Remington majority interest, and it depended on numerous assumptions, including that Remington's earnings would grow at 8% per year and that 12% was a proper discount rate. Du Pont did not rely on the figure for any purpose [Tr. III at 52 (Buxbaum)], and the assumptions on which the calculation was based were considered questionable by Mr. Buxbaum, the Du Pont executive responsible for the Remington transaction, at the time of the transaction. [Id. at 61-68] Thus, the figure was not sufficiently reliable to be disclosed. Weinberger v. Rio Grande Indus., Inc., Del.Ch., 519 A.2d 116, 128-29 (1986).

Second, the nondisclosure of the $36.38 figure must be evaluated against the backdrop of the disclosures contained in the proxy materials. Specifically, the proxy statement disclosed Remington's projections of sales, income and net earnings. [PX 71 at 20-21] With these data, analysts and Remington shareholders could have performed their own discounted present value analyses using whatever assumptions with respect to discount rate they thought appropriate. Accordingly, the $36.38 figure would not have "'assumed actual significance in the deliberations of [a] reasonable shareholder'" (Rosenblatt, 493 A.2d at 944 (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)), given the mix of other information made available, and therefore was not material.

Third, plaintiff wrongly assumes that a corporate parent has an absolute duty to share with minority shareholders of its subsidiary the parent's assessment of the subsidiary's value. Such a disclosure duty arises only where the parent's assessment is based on confidential information of the subsidiary obtained by the parent by virtue of its controlling position. Rosenblatt, 493 A.2d at 938-39. Here, since the only confidential information on which the $36.38 figure was based -- Remington's projected earnings -- was itself disclosed in the proxy statement, Du Pont had no duty to disclose its own calculations based on the information.[11]

2. Disclosure of the Remington Farms Appraisal Was Not Required

Plaintiff's contention that the appraised value of Remington Farms should have been disclosed rests on the unspoken premise that Remington Farms was surplus to Remington's business and could have been sold off and the entire proceeds added to the till. For if Remington Farms was not surplus, there would have been no more reason to disclose its value than the value of Remington's factories and major equipment, for example, as to which plaintiff makes no claim of nondisclosure.

The premise is incorrect because, as the evidence showed, Remington Farms played a very important role in the conduct of Remington's day-to-day business. [McAndrews Dep. at p. 105, l. 15 to p. 106, l. 13; Tr. II at 143-46 (Heckert); Tr. VII at 75-76 (Zimmerman)] Had Remington Farms been sold, there is every reason to think Remington's business would have

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11/ While plaintiff asserts (Pl. Br. at 79) that Du Pont withheld from the Remington negotiators its internal discounted present value calculations, she ignores that DX 52, the memorandum from Du Pont's Finance Department to its Executive Committee which served as the basis for Du Pont's decision to go forward with the Remington acquisition [Tr. II at 114 (Heckert)], was provided. [DX 56 at 2561] That document explicitly disclosed the bottom line of the Brunner discounted present value calculations, which was that "[c]omparison of the net proceeds from sale required to equate with the present value of the projected dividend flow from Remington stock indicates a selling price considerably in excess of what we might expect to obtain." [DX 52 at 10692] suffered. [Tr. II at 145-46 (Heckert)] In addition, Remington would have had to expend funds every year to replace the activities carried out so effectively at Remington Farms -- farmer education, customer entertainment, public relations and the like. [Id. at 146; Tr. VII at 75-76 (Zimmerman)] The increase in expenses and resulting decrease in earnings cannot simply be ignored, as plaintiff does by considering the entire appraised value of the Farms as an additional element of value of Remington. For these reasons, disclosure of the $5 million appraisal of Remington Farms to suggest extra value, which plaintiff contends was required, itself would have been misleading.

The immateriality of the appraisal is emphasized by the relative dollar amounts involved. The $5 million appraised value of Remington Farms amounted to only 1.7% of the book value of Remington's assets ($288.5 million) and only 1.5% of their replacement cost (approximately $335 million). [PX 71 at IV, F38] Had Remington Farms actually been sold for $5 million, the proceeds (after federal and state taxes, broker's commission and other transaction expenses) would have been substantially less. [Tr. II at 29-33 (Willis); DX 61 (having no loss carry forwards, Remington's effective tax rate in 1979 was 46%)]

3. The Proxy Materials Made Full Disclosure Concerning the Work of the Merger Committee and Salomon Brothers

Plaintiff asserts that the proxy materials should have disclosed the alleged inadequacy of Salomon Brothers' methodology and the Merger Committee's deliberations and negotiations with Du Pont.

No such disclosure was made because defendants did not consider anything about the work of Salomon Brothers or the independent Remington directors to be inadequate. "Failure to confess one's corporate wrongdoing is not a material omission in proxy materials . . . nor are corporate officials required to . . . engage in 'self-flagelation' [sic] . . . ." Fisher v. United Technologies Corp., Del.Ch., C.A. No. 5847, reprinted in 6 Del. J. Corp. L. 380, 386 (May 12, 1981); accord, Michelson v. Duncan, Del.Ch., 386 A.2d 1144, 1155 (1978), aff'd in pert. part, Del.Supr., 407 A.2d 211 (1979). Furthermore, as shown in the post-trial brief of the Remington defendants, there is no basis for characterizing the efforts of Salomon Brothers or the work of the Merger Committee as inadequate or the proxy disclosures about them as incomplete.

IV. PLAINTIFF HAS NOT BORNE THE BURDEN OF PROVING THE MERGER UNFAIR

Although defendants proved at trial that the merger was entirely fair to Remington minority shareholders, in fact the burden was on plaintiff to prove that the merger was unfair.

The Du Pont defendants do not question the authority of cases such as Weinberger and Smith v. Van Gorkom, Del.Supr. 488 A.2d 858 (1885), advanced by plaintiff in support of her claims. Pl. Br. at 69-70. But the facts of this transaction bear not the slightest resemblance to the facts in those cases.

A. Because Du Pont Did Not Compel Remington's Agreement to the Merger or Dictate the Merger Terms, Du Pont Does Not Bear the Burden of Proving the Merger Fair

The entire fairness standard is not called into play in every instance in which a subsidiary engages in a transaction with its majority shareholder. To invoke the standard, a plaintiff must show that the majority shareholder actually controlled the subsidiary's participation in the transaction, so that the majority shareholder was able to dictate the transaction's terms. Sinclair Oil Corp. v. Levien, Del.Supr., 280 A.2d 717, 720 (1971); Getty Oil Co. v. Skelly Oil Co., Del.Supr., 267 A.2d 883, 887 (1970); Jedwab v. MGM Grand Hotels, Inc., Del.Ch., 509 A.2d 584, 594-95 (1986); David J. Greene & Co. v. Dunhill Int'l, Inc., Del.Ch., 249 A.2d 427, 430-31 (1968).

Here, Du Pont did not compel the merger or unilaterally set its terms. The terms were the result of negotiations between Du Pont and an independent committee of Remington directors, and approval of the merger was left in the hands of the Remington minority shareholders.

Thus the business judgment rule is fully applicable to Du Pont as the majority shareholder of Remington. Sinclair, 280 A.2d at 720; Gabelli & Co., Inc. Profit Sharing Plan v. Liggett Group, Inc., Del.Ch., 444 A.2d 261, 264 (1982); David J. Greene & Co., 249 A.2d at 430-31. Under that rule, the majority shareholder's actions are presumed to be proper and are not subject to liability unless the plaintiff shows "gross and palpable overreaching," Sinclair, 280 A.2d at 720, or bad faith or a gross abuse of discretion. Warshaw v. Calhoun, Del.Supr., 221 A.2d 487, 492-93 (1966). No such conduct was shown here.

B. Since a Majority of Remington Minority Shareholders Approved the Merger on the Basis of Proxy Materials That Made Full Disclosure, Plaintiff Must Bear the Burden of Proving the Merger Unfair

Even if it is assumed that Du Pont controlled Remington's participation in the merger, the burden still would be on plaintiff to show the merger terms were unfair, because the Remington minority shareholders approved the merger on the basis of proxy materials that made full disclosure.

It is firmly established that approval of a parent-subsidiary merger by the informed vote of a majority of the minority shifts to the plaintiff the burden of proving the unfairness of the merger. Bershad, 535 A.2d at 846; Rosenblatt, 493 A.2d at 937; Weinberger, 457 A.2d at 703. Because the proxy materials disclosed all facts germane to the Du Pont-Remington merger, that was plaintiff's burden here. She did not carry it.

CONCLUSION

For the foregoing reasons, and based on the evidence introduced at trial, defendants request that judgment be entered for them and against plaintiff, and that plaintiff be taxed all the costs of this action.

Respectfully submitted,

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Dated: August 29, 1988

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

EDITH CITRON, Plaintiff, v. E.I. DU PONT DE NEMOURS & CO., REMINGTON ARMS COMPANY, PHILIP H. BURDETT, JOSEPH A. DALLAS, ROBERT W. DIXON, RICHARD E. HECKERT, JOHN P. McANDREWS, ELDON M. ROBINSON, FREDERICK B. SILLIMAN and ALEXANDER L. STOTT, Defendants.	)	Civil Action No. 6219

CERTIFICATE OF SERVICE

It is hereby certified that on this 29th day of August, 1988, copies of the foregoing Post-Trial Brief of the Du Pont Defendants were served on the following:

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