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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WILLIAM B. WEINBERGER, Plaintiff,	)	
v.	)	Civil Action No. 5642
UOP, INC., et al., Defendants.	)	

BRIEF OF PLAINTIFF ANSWERING THE
MOTION OF THE SIGNAL COMPANIES, INC.
TO DISMISS AND TO QUASH

OF COUNSEL

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November 9, 1978

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I. NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff, a stockholder of UOP, Inc. ("UOP"), alleges in his complaint that a purported merger of Sigco, Incorporated ("Sigco"), a wholly-owned subsidiary of The Signal Companies, Inc. ("Signal"), into UOP, a 50.5% owned subsidiary of Signal, whereby the 49.5% stockholdings of the minority public stockholders of the surviving corporation (UOP) were purported to have been transformed "as a matter of law" solely into the right to receive $21 per share in cash from UOP, was illegal. The complaint also alleges that the attempted merger had no bona fide business purpose, and that the $21 price per share for the minority-held shares of UOP was "grossly inadequate". (Compl. Par. 13-14)

The complaint asserts individual, class and derivative claims seeking money damages for the injuries occasioned by the acts of the defendants. Damages are sought derivatively on behalf of UOP as well as for plaintiff individually and representatively on behalf of the minority shareholders of UOP similarly situated.

Signal has moved to dismiss plaintiff's derivative claims asserted on behalf of UOP and to quash service of process upon Sigco, in support of which motions Signal has filed its Brief dated September 8, 1978.

This is plaintiff's Brief in answer to Signal's motions to dismiss the derivative claims asserted on behalf of UOP and to quash service of process upon Sigco.

II. COUNTERSTATEMENT OF FACTS

On May 26, 1978, Signal owned approximately 50.5% of the outstanding common stock of UOP.

UOP, a Delaware corporation, was incorporated on October 21, 1958 as Universal Oil Processes, Inc. Its name was changed to Universal Oil Products Co. on February 11, 1959, and to UOP on July 15, 1975.

Upon the incorporation of UOP in 1958, the Delaware merger law provided that on a §251 merger the shares of the constituent merged corporation shall be converted into stock or securities of the surviving corporation. D.G.C.L. §151(b) then provided that only preferred or special stock of a Delaware corporation could be made redeemable at the option of the corporation.

By Chapter 186 of the Delaware Laws of 1967, §16, §251 of the D.G.C.L. was amended to permit the payment of cash "in lieu of" shares or securities of the surviving corporation, as the merger consideration. Section 33 of said Chapter 186 provided that:

> "All rights, privileges and immunities vested or accrued by and under any laws enacted prior to the adoption or amendment of this chapter, ...and all duties, restrictions, liabilities and penalties imposed or required by and under any laws enacted prior to the adoption or amendment of this chapter shall not be impaired, diminished or affected by this chapter."

As stated in Folk, The Delaware General Corporation Law, at p. 108, "Section 151 escaped revision in 1967 and was reenacted in substantially the same form as its predecessor except for minor linguistic changes".

As reenacted in 1967, §151(b) provided that:

> "(b) Any preferred or special stock may be made redeemable for cash, property or rights, including securities of any other corporation, at the option of either the holder or the corporation or upon the happening of a specified event...as shall be stated in the certificate of incorporation or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors as hereinabove provided."

In 1973, the Legislature enacted Chapter 106, which amended Chapter 1, Title 8, Delaware Code, relating to the General Corporation Law, in, among others, the following respects:

Section 1 amended §151, Title 8, Delaware Code, by striking subsection (b) of said section in its entirety and substituting in lieu thereof a new subsection (b) to read as follows:

> "(b) Any stock which is entitled upon any distribution of the corporation's assets, whether by dividend or by liquidation, to a preference over another class or series of stock may be made subject to redemption by the corporation at its option or at the option of the holders or upon the happening of a specified event. ..."

Section 3 amended §160 of Title 8, Delaware Code, by striking said section in its entirety and substituting in lieu thereof a new §160 to read as follows:

> "(a) Every corporation may purchase, redeem ...and otherwise deal in and with its own shares; provided, however, that no corporation shall -
>
> 3. Redeem any of its shares unless their redemption is authorized by Section 151(b) of this title and then only in accordance with such Section and the certificate of incorporation."

On March 22, 1978, Sigco, a 100% subsidiary of Signal (both Delaware corporations), and UOP (a 50.5%-owned subsidiary of Signal), a Delaware corporation, executed a purported "Merger Agreement" which provided (Article I) that in accordance with Delaware's General Corporation Law, Sigco shall be merged with and into UOP, which shall be the "surviving corporation", and "the identity, existence, purposes, powers, objects, franchises, privileges, rights and immunities of UOP shall continue unaffected and unimpaired by the merger". Article IV of said Agreement, entitled "Conversion of Shares", provides:

> "(b) Each share of common stock...of UOP ...other than those shares then held by... Signal...or held in the Treasury of UOP, which shall be outstanding at the Effective Time of the Merger shall, at such time and by virtue of the merger without any action on the part of the holder thereof, be converted into and exchanged for the right to receive $21.00 cash, payable by the surviving corporation, and each holder of such UOP Stock, at the Effective Time of the Merger (except Signal and the shares held in the Treasury of UOP) shall, upon the merger,

> cease being a stockholder of UOP and shall by such merger be converted from a stockholder into a creditor of UOP for an amount equal to the product of the number of shares of UOP stock held of record by such holder at the Effective Time of the Merger and $21.00. There is no preferred stock of UOP outstanding. ...
>
> (e) ...Each holder of UOP Stock at the Effective Time of the Merger...shall be entitled upon surrender to the Exchange Agent of the certificate or certificates for his shares of stock of UOP Stock for cancellation to receive the cash into which such shares shall have been converted in the merger. Unless and until any such certificates shall be so surrendered, the holder of such certificates shall not have any right to receive the cash into which such shares shall have been converted..."

The Effective Time of the merger was May 26, 1978.

Neither on that date nor at any time thereafter has plaintiff surrendered his UOP certificates to the Exchange Agent, and plaintiff has never received the sum of $21 per share with respect to his stock.

III. QUESTIONS PRESENTED
(Stated Affirmatively)

A. THE ALLEGED MERGER OF SIGCO (SIGNAL'S WHOLLY-OWNED SUBSIDIARY) INTO UOP (SIGNAL'S 50.5% OWNED SUBSIDIARY) DID NOT MOOT THE DERIVATIVE COUNTS IN BEHALF OF UOP AGAINST SIGNAL, SINCE NEITHER UOP NOR SIGNAL WAS ABSORBED BY THE ALLEGED MERGER.

B. PLAINTIFF, WHO DID NOT SURRENDER HIS UOP SHARES FOR CASH, HAS STANDING TO SUE DERIVATIVELY ON BEHALF OF UOP. HIS STOCK INTEREST IN UOP WAS NOT, BY VIRTUE OF THE ALLEGED MERGER, "WITHOUT NEED FOR FURTHER ACTION ON" HIS PART "IMMEDIATELY CONVERTED INTO A DEBT OF THE SURVIVING CORPORATION" (UOP) "TO THE FORMER UOP SHAREHOLDERS IN THE AMOUNT OF $21.00 PER SHARE". PLAINTIFF DID NOT LOSE HIS STATUS AS A STOCKHOLDER OF UOP "AS A MATTER OF LAW" ON MAY 26, 1978.

C. SIGNAL HAS NO STANDING TO SEEK TO QUASH SERVICE ON SIGCO. IN ANY EVENT, IF SERVICE ON SIGCO'S REGISTERED AGENT IS TO BE QUASHED, IT SHOULD BE WITHOUT PREJUDICE TO SERVICE ON THE SECRETARY OF STATE.

IV. ARGUMENT

A. The alleged merger of Sigco (Signal's wholly-owned subsidiary) into UOP (Signal's 50.5% owned subsidiary) did not moot the derivative counts in behalf of UOP against Signal, since neither UOP nor Signal was absorbed by the alleged merger.

The moving party urges that in the light of the "square holding" in Bokat vs. Getty Oil Co., Del. Supr. 262 A.2d 246 (1970), plaintiff's derivative counts in behalf of UOP against Signal must be dismissed "because they are moot".

In Bokat, the derivative counts were in behalf of Tidewater against Getty, Tidewater's majority stockholder. On the merger of Tidewater into Getty, Getty survived the merger, Tidewater's existence was terminated, and Tidewater's claims against Getty passed on to Getty, by virtue of the merger.

That is not the situation here.

Here, derivative claims are asserted in behalf of UOP against Signal, its majority stockholder. Upon the alleged merger of Sigco into UOP, wherein Sigco was absorbed by the merger and UOP was the surviving corporation, Signal remained as a viable and distinct legal entity, as did UOP. Neither Signal nor UOP was absorbed or merged out of existence by the alleged merger. Consequently there is no basis to moot the claims of UOP against Signal.

This precise situation was ruled on by Judge Inzer Wyatt of the United States District Court, Southern District of New York in Kramer vs. Becker (SDNY 71 Civ. 4491)(Mem. Op. June 16, 1975, a copy of which is attached hereto as Exhibit A). In Kramer, derivative actions had been brought in behalf of Glen Alden Corporation ("Glen"), a Delaware corporation, against its controlling stockholder, Rapid American Corporation ("Rapid"), an Ohio corporation. Rapid was then merged into Glen, and Glen's name was changed to Rapid. Judge Wyatt's opinion states (Exhibit A, page 4 et seq.):

> "C. Effect of the Merger.
>
> The movant argues that the fact of merger of Rapid into Glen bars any derivative action for the benefit of Glen. The argument has no merit.
>
> Glen is the surviving corporation and if it had claims against movants before the merger, such claims survived the merger. All property of a constituent corporation merged into a surviving corporation is, under Delaware law, upon merger vested in the surviving corporation. 8 Del. C. §259(a).
>
> Thus, had a derivative action by stockholder of Rapid, the Ohio corporation, been pending at the time of merger, such action could no longer be maintained because 'the derivative rights asserted passed to the surviving corporation'. Braasch v. Goldschmidt, 199 A.2d 760, 767 (Del. Ch. 1964). This was the situation in the cases cited for movants.
>
> But such is not the situation here because Glen is the surviving corporation.
>
> Movants raise the additional point that prosecution of the claim of Glen against Rapid after the merger would mean that Glen is both plaintiff and defendant, a situation which would be illogical. The argument, of course, has no application to the claims against the

individual defendants. As to the claims against Rapid, it is too early to decide how to solve the problem; ultimately, it may be that the argument will result in all damages to Glen being payable by the individual defendants or it may be that the solution suggested by Judge Tenney in Miller v. Steinbach, 268 F.Supp. 255, 266-269 (1967) will be adopted or some other solution."

See also: Miller vs. Steinbach, 268 F.Supp. 255, 266, 269 (1967, SDNY), and Dasho v. Susquehanna Corp., (CA 7 1972) 461 F.2d 11.

B. Plaintiff, who did not surrender his UOP shares for cash, has standing to sue derivatively on behalf of UOP. His stock interest in UOP was not, by virtue of the alleged merger, "without need for further action on" his part "immediately converted into a debt of the surviving corporation" (UOP) "to the former UOP shareholders in the amount of $21.00 per share". Plaintiff did not lose his status as a stockholder of UOP "as a matter of law" on May 26, 1978.

Movant urges that by virtue of the alleged merger of Sigco into UOP, plaintiff lost his status as a UOP stockholder "as a matter of law", and that his stock interest in UOP was, by virtue of the alleged merger, "without need for further action on" his part "immediately converted into a debt of the surviving corporation (UOP) to the former UOP shareholders in the amount of $21.00 per share."

Movant does not claim or prove that plaintiff's UOP stock certificates were endorsed and surrendered in exchange for the profferred cash payment of $21 per share.

The cases relied upon by movant are irrelevant to the issue here.

In Heit vs. Tenneco, Inc., 319 F.Supp. 884 (D. Del. 1970), plaintiff was a Case stockholder. Case was merged into Tenneco, which was the surviving corporation. Plaintiff's Case stock was not redeemed for cash. This stock was converted

into stock of the surviving corporation ($5.50 Cumulative Convertible Preferred Stock of Tenneco) in accordance with plaintiff's vested right to a security interest in the surviving corporation. Such a merger conformed with all judicial precedents and state and federal constitutional requirements. Accordingly, plaintiff's Case stock was validly and legally converted into Tenneco securities, and plaintiff there lost his status as a Case stockholder.

In Bernstein vs. Somekh (SDNY, 77 Civ. 4135) Current CCH F.S.L.R. Par. 96,503, the question whether plaintiff there lost his status as a Parklane stockholder "as a matter of law" "without further action on his part" was not present. As appears from the opinion in Bernstein, "plaintiff surrendered his shares for cash payment when Parklane 'went private' pursuant to a plan of merger and stock repurchase." As stated further in that opinion, "the plaintiff has asked this Court to create in her favor a constructive trust of the shares she surrendered to Parklane, reasoning that she would be restored to status quo ante and thus qualify as a shareholder for purposes of maintaining this derivative suit."

Here, plaintiff did not surrender his UOP shares for cash payment, and does not seek to regain such shares in order to "qualify as a shareholder for purposes of maintaining this derivative suit." He has always retained his shares, and is therefore qualified as a shareholder for purposes of maintaining this derivative suit.

Plaintiff will now demonstrate that in the absence of such surrender for cash, plaintiff's common shares in UOP, the corporation surviving the alleged merger, were not validly converted "as a matter of law" solely into the right to receive $21 per share upon the filing of the alleged merger agreement "without further action on his part".

At the time UOP was organized in 1958, the Delaware merger law provided that on a §251 merger the stock of the constituent corporations could be converted solely into securities of the surviving corporation. These provisions were construed in 1962 by the Delaware courts as follows (Stauffer vs. Standard Brands, Inc. (Del. Ch. 1962) 178 A.2d 311, affirmed (Del. Sup. Ct. 1962) 187 A.2d 78):

> "Section 251 of Title 8, Delaware Code, provides for the consolidation or merger of domestic corporations to be accomplished by an agreement between the directors of the corporations proposed to be merged which shall, among other things, prescribe the manner of converting the shares of each of the corporations into shares or other securities of the resulting corporation..."
>
> "It is to be observed from the provisions of sections 251 and 252 that minority stockholders of corporations merging thereunder may not be summarily eliminated from the continuing enterprise, but are given the option of accepting securities in the surviving corporation or, alternatively, of demanding payment in cash for their holdings by an appraisal pursuant to §262. The difference in the rights of minority stockholders in merger proceedings under these sections and those conferred by §253 are immediately apparent. Since a majority stockholder may not under a §251 or §252 merger eliminate minority stockholders as participants in the

> continuing enterprise, it is obvious that the majority should not be permitted to force the minority stockholder to elect his appraisal rights and thereby enforce his withdrawal."

Vis-a-vis a stockholder of the surviving corporation, elimination of his stock for cash constituted nothing more than outright "redemption" pure and simple.

Prior to 1958, the Delaware courts construing statutes similar to present §151(b) of the General Corporation Law had already held that charter amendments or provisions purporting to authorize the redemption of previously irredeemable common stock were invalid. Thus, in Starring vs. American Hair and Felt Company, 1937, 21 Del. Ch. 380, 191 A. 887, affirmed Del. Sup. Ct. 21 Del. Ch. 431, 2 A.2d 249, the Courts held that by statutory enactments similar to §151(b) of the General Corporation Law, a Delaware corporation was inhibited from attempting to redeem its common stock although its certificate of incorporation contained a provision purporting to permit such redemption.

It follows from the foregoing that, until at least 1967, on a §251 merger the common stock of the merged constituent corporation could not be converted into the right to receive cash. It further appears that the common stock of the surviving constituent corporation could not be made redeemable for cash because of the restrictions of §151(b) D.G.C.L. and the vested property and contract rights provisions of the

state and federal constitutions. (Breslav vs. New York and Queens Electric Light and Power Co., 249 App. Div. 181, 291 N.Y. Supp. 932, aff'd 273 N.Y. 593 (1937); Yukon Mill & Grain Co., et al. vs. Vose, 206 Pac. 2d 206 (Sup. Ct. Okla. 1949).)

On January 2, 1968, §251 was amended (chapter 186, Del. Laws of 1967) to provide, as a merger consideration, for cash "in lieu of" shares or other securities of the surviving corporation. At the same time, §151(b) was reenacted in substantially the same form as theretofore. Read literally, these amendments did not alter the situation vis-a-vis the common stock of the surviving constituent corporation. As stated in Vulcan Materials Company vs. United States, 446 F.2d 690 (1971) referring to a 1954 merger of a Delaware corporation under §251 (at 693):

> "A statutory merger effects a combination of two or more corporations in accordance with detailed procedures established by the corporation laws of a state, with one of the corporations continuing as the same legal entity it was before the transaction."
>
> (Underscoring supplied.)

Since the corporation surviving the merger is the same legal entity it was before the merger, it is metaphysical (and the antithesis of sound legal reasoning) to say that its shares outstanding before the merger are converted "into shares or securities of the corporation surviving the merger". Therefore, there is no legal basis to urge that the stockholders of such corporation may be required to accept "cash""in lieu of

shares or other securities of the surviving corporation", since these stockholders had the vested right to continue to hold their shares.

In any event, such miscontruction of the 1967 amendment was precluded by the specific provisions contained therein as §33 (of Ch. 186, Laws of 1967), which provides (now D.G.C.L. §393):

> "All rights, privileges and immunities vested or accrued by and under any laws enacted prior to the adoption or amendment of this chapter...and all duties, restrictions, liabilities and penalties imposed or required by and under laws enacted prior to the adoption or amendment of this chapter shall not be impaired, diminished, or affected by this chapter."
>
> (Emphasis supplied.)

The meaning of and effect to be given to such saving clause is well settled. (Sutton vs. Globe Knitting Mills, 276 Mich. 200, 267 N.W. 815, Mich. Sup. Ct. 1936; State ex rel. Swanson vs. Perkam, 191 P.2d 689, Wash. Sup. Ct. 1948.)

By the saving clause, amended §251 did not apply to pre-existing corporations or to issues of stock created prior to the amendment. The vested right of irredeemable common stock not to be made redeemable and the restriction against all redeemable stock except preferred or special stock were not affected.

That it was the legislative intent that the amendment of §251 did not change the public policy of Delaware (that common stock was not to be made redeemable) is evident from the

simultaneous 1967 reenactment of §151(b) without substantive change.

To remove any possible misconstruction of the legislative intent, the legislature enacted, in 1973, Chapter 106, Laws of 1973 (59 Delaware Laws).

Section 1 of Chapter 106 reenacted §151(b) to read as follows:

> "(b) Any stock which is entitled upon any distribution of the corporation's assets, whether by dividend or by liquidation, to a preference over another class or series of stock may be made subject to redemption of the corporation at its option or at the option of the holders of such stock or upon the happening of a specified event."

Section 3 of Chapter 106 (enacted simultaneously with Section 1) amended §160 of the Delaware General Corporation Law to specifically and unequivocally provide that:

> "(a) ...no corporation shall - ...
>
> 3. Redeem any of its shares unless their redemption is authorized by Section 151(b) of this title and then only in accordance with such Section and the certificate of incorporation."

Section 3(a)3 of Chapter 106, Laws of 1973, specifically precludes reliance on the 1967 amendments of §251 as empowering the redemption for cash of the common stock of the surviving corporation on a §251 merger.

This Chapter 106 §3(a)3 directly and specifically repeals and rejects the so-called doctrine of independent legal significance insofar as it may be invoked to support a cash-for-stock freeze-out of minority common stockholders of the surviving corporation on a §251 merger.

The specific provision of D.G.C.L. §160 that "no corporation shall. . .redeem any of its shares unless their redemption is authorized by Section 151(b)" forbids a Delaware corporation from achieving this result (redemption of shares) under any provision of the D.G.C.L., except §151(b), and therefore no other provision of the D.G.C.L. can have independent legal significance to authorize the redemption of the irredeemable common stock of the surviving corporation upon a §251 merger.

Accordingly, there is no validity to the assertion, at page 6 of Movant's Opening Brief, that:

> "The merger between UOP and Sigco became effective upon the filing of the Merger Agreement with the Office of the Secretary of State on May 26, 1978. The Agreement expressly provides that upon filing, the outstanding shares of UOP stock were, without need for further action on the part of the holders of that stock, immediately converted into a debt of the surviving corporation to the former UOP shareholders in the amount of $21.00 per share. Thus, plaintiff and all UOP shareholders other than Signal lost their status as stockholders of UOP, as a matter of law, on May 26, 1978. Obviously, therefore, plaintiff was not a stockholder of UOP when his complaint in this action was filed on July 5, 1978. Plaintiff's status since May 26, 1978 has been that of a creditor, not that of a stockholder."

See also: Petty vs. Penntech Papers, Inc., 347 A.2d 140 (Del.Ch.1975), questioning the validity of a selective redemption of stock held by the minority where the purpose and effect was to perpetuate (and augment) the control of the majority. This is the purpose and effect of the purported Sigco-UOP merger, as proposed and effected by Signal, whereby the minority-held shares of UOP were sought to be redeemed, and Signal sought to become the 100% stockholder of UOP.

C. Signal has no standing to seek to quash service on Sigco. In any event, if service on Sigco's registered agent is to be quashed, it should be without prejudice to service on the Secretary of State.

Signal, in moving to quash service of process on Sigco's registered agent, is presently a stranger to Sigco. Prior to the alleged merger, Sigco was Signal's 100% owned subsidiary. By virtue of the alleged merger, Signal claims that its shares in Sigco were converted into shares of UOP, and the separate existence of Sigco ceased. (§259, D.G.C.L.) Signal is therefore neither a stockholder nor the successor of Sigco, and has no standing to move to quash service upon Sigco. Only UOP, apparently, would have such standing, and UOP has not moved.

It appears from D.G.C.L. §321(b) that if process cannot be served upon a corporation in the manner provided by §321(a), "it shall be lawful to serve the process against the corporation upon the Secretary of State". International Pulp Equip. Co. vs. St. Regis Kraft Co., 54 F.Supp. 745, 748-749 (D. Del. 1944); 55 F.Supp. 860 (D. Del. 1944).

Accordingly, if service upon Sigco by service upon its registered agent is to be quashed, it should be quashed without prejudice to reservice of such process upon the Secretary of State of Delaware.

V. CONCLUSION

For the reasons stated, the derivative counts of the complaint should not be dismissed, and service of process upon the registered agent of Sigco, Incorporated should not be quashed. In any event, if such service is to be quashed, it should be without prejudice to reservice of such process upon the Secretary of State of Delaware.

Respectfully submitted.

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MARTIN KRAMER, Plaintiff,
-v-
I. A. BECKER, et al.,
Defendants.
71 Civ. 4491

WILLIAM B. WEINBERGER, Plaintiff,
-v-
LEONARD C. LANE, et al., Defendants.
71 Civ. 4980

JACOB H. HOFFMAN, Plaintiff,
-v-
ISIDORE A. BECKER, et al.,
Defendants.
72 Civ. 1328

This is a motion by certain of the defendants in these three actions, which were consolidated by order filed May 4, 1973. There are separate pleadings in each of the actions. It may be noted that in the federal courts, actions which are consolidated do not lose their separate identities and for this reason it may be doubted that in the federal courts consolidated pleadings are ever in order. See Johnson v. Manhattan Ry. Co., 289 U.S. 479, 496-97 (1933); 5, Moore's Federal Practice (2d ed.) 42-21 and 42-22

A fourth action, Voege v. Becker and others, 72 Civ. 2491, was consolidated with these three actions by order filed November 12, 1973. The Voege action has been dismissed as moot on consent of the parties by order filed May 20, 1975; for present purposes the Voege action may be disregarded.

This motion is by defendant Glen Alden Corporation (Glen) and by "all individual defendants who have been served other than Meshulam Riklis". It is not stated who of the individual defendants have been served, but this is not material. The eight individual defendants are the directors of Glen. Four of them are also directors of Rapid American Corporation (Rapid), also a defendant.

The motion is for an order dismissing the actions because the pleadings for the plaintiffs fail to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)) or, in the alternative, for summary judgment (Fed. R. Civ. P. 12(b) and 56).

The motion relies in part on matters which may be outside the "pleading" in that answers by plaintiffs to interrogatories are cited in support of the motion. These answers are not excluded and the motion will thus be treated as one for summary judgment (Fed. R. Civ. P. 12(b)).

EXHIBIT A

A. The Claims

1. Kramer action

This action was commenced on October 15, 1971. The complaint had one claim, the averments of which are now summarized.

Kramer sued as owner of shares (number not given) of $3 Class B Senior Convertible Preferred Stock of Glen.

Kramer brought the action derivatively "in behalf of himself and all other Glen Alden shareholders similarly situated, and in behalf of and in the right of Glen Alden".

Glen had outstanding the following classes of stock:

(a) common stock;

(b) $2.25 Senior Convertible Preferred Stock;

(c) $3 Class B Senior Convertible Preferred stock;

(d) $3.15 Convertible Preferred stock; and

(e) Class C stock (also convertible into common stock)

Rapid owned 64% of the then outstanding shares of common stock of Glen. Rapid by its common stock ownership controlled Glen; the directors of Glen were controlled by Rapid.

Glen was a Delaware corporation. Rapid was an Ohio corporation.

Rapid determined that if all the conversions into common stock were made and all outstanding options on common stock were exercised, Rapid would then own fewer than 50% of the common shares of Glen and its control might be lost. Rapid realized, however, that if 4,000,000 shares of Glen were acquired by Glen itself there would be two benefits to Rapid: (a) after conversions and option exercises, Rapid would still own more than 50% of the common stock of Glen, and (b) until such conversions and option exercises Rapid might have as much as 80% of the common stock of Glen and thus be able to file consolidated tax returns.

The defendants therefore, in order to benefit Rapid, caused Glen to make a tender offer at $11 per share for up to 4,000,000 shares of its common stock. The tender offer was made on and dated October 8, 1971.

In connection with the tender offer, Glen arranged to borrow $75,000,000; of this amount, $30,000,000 was to be used to pay off a note of Glen in that amount held by an insurance company and $44,000,000 was to be used to pay for the 4,000,000 shares if tendered.

It is averred that this tender offer by Glen was for the benefit of Rapid but was damaging to Glen in that it was a misuse of the assets of Glen, increased Glen's debt, and weakened its equity debt relationship. Rapid and the individual defendants were said to be accountable to Glen for the $44,000,000 "dissipated" in the tender offer and for all other damages to Glen.

Federal jurisdiction was claimed in that defendants practiced fraud and deceit on Glen in violation of the ever present Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j; the "1934 Act") and Rule 10b-5 thereunder. Presumably the theory is that Glen was a purchaser of its own shares on the tender offer and in connection therewith was the victim of a fraud. Superintendent v. Bankers Life, 404 U.S. 6 (1971)

The prayer for relief was for an injunction against carrying out the tender offer and for an accounting to Glen "for all its damages". No preliminary injunction against the tender offer was sought or obtained.

2. The Weinberger action

This action was commenced on November 12, 1971. Weinberger sues derivatively as a stockholder of Glen but does not state what class of stock he owns. The complaint is substantially the same as that in the Kramer action. A statement is added that under the tender offer (which expired November 5, 1971) Glen had in fact purchased 4,000,000 shares of its common stock.

3. The Hoffman action

This action was commenced on March 29, 1972. Hoffman as a common stockholder of Glen sues derivatively on behalf of Glen and also on behalf of all stockholders of Glen as a class under Fed. R. Civ. P. 23. The complaint is substantially the same as that in the Kramer action, with the additional statement (as in the Weinberger complaint) about the consummation of the tender offer.

4. The amended and supplemental complaint in the Kramer action

In the Kramer action, after the tender offer had been

carried through to purchase by Glen of 4,000,000 of its common shares, an amended and supplemental complaint (the "amended complaint"$ was served on July 3, 1972. (For some reason this pleading was not filed until October 17, 1974.)

The amended complaint adds a second count, the first count containing the same claim as that averred in the original complaint.

The second count avers (a) that the tender offer dated October 8, 1971 was false in that it omitted to state certain material facts among which was the fact that, pursuant to the loan agreement for $75,000,000 mentioned above, Glen had agreed to sell its stock interest in Panacon Corporation; (b) that on April 19, 1972 Glen sold its Panacon shares for less than the cost to Glen and for less than their fair market value (this is said to have been a waste of Glen's corporate assets); and (c) that by the terms of a proposed merger announced "in or about the end of May, 1972" Glen was to be merged into Rapid "on terms highly unfavorable to Glen Alden and consequently to its shareholders." (the merger is said to be the "final stage" of the defendants' conspiracy to benefit Rapid to the damage of Glen).

B. Merger of Rapid and Glen

It may be gathered from the foggy papers that such a merger was accomplished, but no straight forward statement of the facts is made by affidavit or by exhibits. No agreement of merger was submitted.

The memorandum of law for movants seems to indicate (pp. 2, 10) that, effective November 3, 1972, Rapid, an Ohio corporation, was merged into Glen, a Delaware corporation, and that Glen was the surviving corporation. Presumably the merger was by agreement of merger under Delaware law. The name of the surviving Delaware corporation seems to have been changed to Rapid.

Thus, after the merger, the old Rapid, an Ohio corporation, ceased to exist, and there was a Delaware corporation which had been named Glen and which survived the merger and was named Rapid. The averment in the Kramer amended complaint (para 42) is that Glen was to be merged into Rapid; if this were ever the intention, such intention was not carried out. Glen, the Delaware corporation, was the survivor.

C. Effect of the Merger

The movants argue that the fact of merger of Rapid into Glen bars any derivative action for the benefit of Glen. The argument has no merit.

Glen is the surviving corporation and if it had claims against movants before the merger, such claims survived the merger. All property of a constituent corporation merged into a surviving corporation is, under Delaware law, upon merger vested in the surviving corporation. 8 Del. C § 259(a)

Thus, had a derivative action by stockholder of Rapid, the Ohio corporation, been pending at the time of merger, such action could no longer be maintained because "the derivative rights asserted passed to the surviving corporation". Braasch v. Goldschmidt, 199 A.2d 760, 767 (Del.Ch. 1964) This was the situation in the cases cited for movants.

But such is not the situation here because Glen is the surviving corporation.

Movants raise the additional point that prosecution of the claim of Glen against Rapid after the merger would mean that Glen is both plaintiff and defendant, a situation which would be illogical. The argument, of course, has no application to the claims against the individual defendants. As to the claims against Rapid, it is too early to decide how to solve the problem; ultimately, it may be that the argument will result in all damages to Glen being payable by the individual defendants or it may be that the solution suggested by Judge Tenney in Miller v. Steinbach, 268 F.Supp. 255, 266-269 (1967) will be adopted or some other solution.

STATE OF DELAWARE)
) SS.
COUNTY OF NEW CASTLE)

BE IT REMEMBERED THAT ON THIS 9th day of November, A.D. 1978, personally appeared before the undersigned, a Notary Public in and for the State and County aforesaid, the deponent, who, being by me duly sworn according to law, deposes and says that he is employed in the offices of Prickett, Ward, Burt & Sanders, 1310 King Street, Wilmington, Delaware, and that on November 9, A.D. 1978, he deposited in the mail at the United States Post Office at 11th and King Streets, Wilmington, Delaware, the attached paper addressed to:

R. Frank Balotti, Esquire
Richards, Layton & Finger
4072 DuPont Building
Wilmington, Delaware 19899

A. Gilchrist Sparks, III, Esquire
Morris, Nichols, Arsht & Tunnell
Wilmington Tower
Wilmington, Delaware 19899

Robert Payson, Esquire
Potter, Anderson & Corroon
350 Delaware Trust Building
Wilmington, Delaware 19899

_____

SWORN TO AND SUBSCRIBED before me the day and year aforesaid.

_____
NOTARY PUBLIC