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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM B. WEINBERGER, Plaintiff Below, Appellant,	)	
v.	)	No. 58, 1981
UOP, INC., et al., Defendants Below, Appellees.	)	

PLAINTIFF'S BRIEF IN REPLY
TO THE ANSWERING BRIEFS OF
(a) SIGNAL AND UOP,
(b) LEHMAN BROTHERS

Hand Serve
8-14-81
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August 14, 1981

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INTRODUCTORY NOTE

In their answering brief, Signal and UOP (hereafter at times referred to with Lehman Brothers as "the defendants") have not answered or even commented on many of the points made in the Plaintiff's Opening Brief. Moreover, Signal and UOP have studiously avoided any mention of certain findings and holdings found in the lower Court's opinion. Signal and UOP, in an effort to mask their avoidance of portions of the Plaintiff's Opening Brief on the one hand and portions of the lower Court's opinion on the other, have presented an answering brief that is not really an answering brief at all -- rather, it is simply a presentation of their case in the best light possible from their point of view, coupled with what amounts to a cross-appeal from the lower Court's holding that Signal and UOP had the burden of proving a proper business purpose for this cashout merger and the intrinsic fairness of all of its terms.

In an effort to simplify this complex case, the Plaintiff's Opening Brief followed the sequence found in the lower Court's opinion. However, Signal and UOP's answering brief does not follow the sequence of either the opinion of the Court below or the Plaintiff's Opening Brief. Nevertheless, the plaintiff will reply to Signal and UOP's comments and arguments in the sequence in which they appear in the Signal and UOP Answering Brief.

Though Lehman Brothers has filed a joint appendix with

Signal and UOP and has joined in their brief, Lehman Brothers has filed a separate answering brief. However, since the Lehman Brothers arguments also appear in the Signal-UOP Answering Brief, the plaintiff will file one Reply Brief. Where there is anything in Lehman Brothers' Answering Brief which merits a specific comment or response, the plaintiff will indicate that Lehman Brothers' Brief is being addressed either in addition to the points made in the Signal-UOP Brief or separately.

A R G U M E N T

A. PLAINTIFF'S RESPONSE TO "SUMMARY OF SIGNAL'S AND UOP'S ARGUMENTS" (DB-7) (Note)

1. Signal and UOP's Summary

> "This Court must accept the trial court's findings of fact unless such findings are not supported by any substantial evidence and are clearly wrong."

1. Plaintiff's Response: The above is a correct statement of the law. The defendants omit the corollary: that is, this Court, while accepting the lower Court's actual findings of fact, has the right and duty to draw its own conclusions, deductions and inferences that flow from the evidence. In addition, this Court has, of course, the right and duty to review the law that the lower Court has applied to the facts and correct it if, as in this case, the lower Court's view of the law is manifestly incorrect and at variance with the applicable rulings of law of this Court.

2. Signal and UOP's Summary

> "The trial court correctly concluded that Signal had *bona fide* purposes for the merger, and that all aspects of the merger were entirely fair to the minority shareholders of UOP, even though, as hereinafter discussed, defendants submit that the court did not have to reach those issues."

2. Plaintiff's Response: The Trial Court made a finding of fact that Signal's actual purpose in the cashout

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Note: The plaintiff will utilize the abbreviations used in his original brief. The answering brief of Signal and UOP will be referred to as "(DB-7)". Lehman's answering brief will be referred to as "(LB-7)".

merger was the advancement of Signal's economic advantage. The Trial Court then held as a matter of law, contrary to the holding of Singer and, based on an incorrect interpretation of Mayflower, that Signal's own economic advantage constituted a proper purpose for the cashout merger of the minority shareholders.

The lower Court also erred in finding that the terms of the merger were fair to the minority since the trial record shows that neither Signal, standing as it did on both sides of the transaction, nor the other defendants took any affirmative steps whatsoever to discharge their fiduciary duties to the minority in connection with the terms of the merger generally and specifically in regard to the price paid to the minority.

Finally, Signal and UOP are in effect seeking to reargue or cross-appeal the lower Court's holding that, even if there had been complete disclosure, the lower Court had to go forward and decide whether the defendants had proved that (1) there was a proper purpose for the merger, and (2) that the terms of the merger, including the price, were fair to the minority shareholders.

3. Signal and UOP's Summary

> "The trial court correctly concluded that the Proxy Statement made complete disclosure of all relevant facts upon which a reasonable stockholder could make an informed judgment concerning the proposed merger, and there was no evidence of fraud or misrepresentation that would warrant setting aside the affirmative vote of the minority stockholders of UOP for their own benefit.

> Therefore, in the light of the structure of the vote on the merger, and the overwhelming approval of the minority shareholders, the defendants submit that judgment should have been entered in their favor, without further inquiry into Signal's purposes for the merger or the entire fairness of the transaction."

3. Plaintiff's Response: When measured by the standard of "complete candor", the record shows defendants made numerous misrepresentations of material facts to the minority that led the minority into believing that the defendants had carried out all of their fiduciary obligations. When measured in the light of the requirement of complete candor, the proxy statement could not and did not expunge these original misrepresentations but, in addition, the proxy statement failed to disclose fully and correct the original misrepresentations made by the defendants. The failure on the part of the defendants to meet the standard of "complete candor" vitiates the purported ratification by a majority of the minority shareholders of the cashout merger. Finally, the lower Court correctly ruled that the applicable law required the defendants to prove that Signal's purpose was proper and the intrinsic fairness of the terms of the merger.

4. Signal and UOP's Summary

> "In light of the trial court's findings that none of the defendants breached any fiduciary obligation owing to the minority shareholders of UOP, and that the merger was entirely fair to those shareholders, the dismissal of the derivative counts and the issues relating to the size of the class are moot."

4. Plaintiff's Response: As to the size of the class, for the reasons set out in the plaintiff's original brief

and in this brief, this Court should reverse the lower Court's decision both as to liability and damages. This being so, the lower Court should also be instructed to enlarge the class to include as members all the minority shareholders.

As to the derivative count, for the reasons stated in the plaintiff's original brief as well as its briefs in the Court below and its petition for an interlocutory appeal directed to this Court, the derivative count should not have been dismissed and should be reinstituted.

B. PLAINTIFF'S RESPONSE TO "SUMMARY OF ARGUMENT OF LEHMAN BROTHERS" (B 3)

1. Lehman Brothers' Summary

> "The lower Court's detailed findings of fact as to Lehman Brothers are fully supported by the record and should not be accepted by this Court because they are not clearly erroneous."

1. Plaintiff's Response: (See plaintiff's response to Signal and UOP's Summary No. 1.)

2. Lehman Brothers' Summary

> "The Trial Court correctly concluded that there was no evidence of any conspiracy among Lehman, Signal and UOP contrary to the interests of the minority shareholders of UOP."

2. Plaintiff's Response: The Trial Court erred in focusing on Lehman Brothers' 1976 unrevealed memorandum to Signal in concluding that no conspiracy existed between the defendants. This Court could conclude, based on the record and on the applicable law, that there was in fact a conspiracy between the defendants to achieve Signal's purpose.

3. Lehman Brothers' Summary

> "Plaintiff has wholly failed to offer any authority in support of his claim of a breach of fiduciary duty on the part of Lehman Brothers."

3. Plaintiff's Response: As a matter of law, Lehman Brothers violated its fiduciary responsibilities to the minority stockholders of UOP.

4. Lehman Brothers' Summary

> "The Trial Court correctly concluded that there were no misrepresentations or omissions in the Proxy Statement regarding Lehman's opinion on the fairness of the merger price. The fairness opinion was that of Lehman Brothers, not Mr. Glanville personally. The basis for Lehman's opinion was contained in the letter and thus the requirements of Denison Mines, Ltd. v. Fibreboard, 388 F.Supp. 812 (D.Del. 1974) were fulfilled. There was no obligation on the part of any defendant to disclose the existence of the 1976 draft memorandum."

4. Plaintiff's Response: The Proxy Statement was misleading in that it omitted advising the minority stockholders of the existence of the 1976 opinion of Lehman Brothers that was contrary to the opinion Lehman Brothers was giving to the minority stockholders as part of the Proxy Statement.

The fairness opinion of Lehman Brothers specifically represented that Mr. Glanville was largely responsible for the Lehman Brothers opinion.

The basis for the Lehman Brothers opinion was in part based on what Mr. Glanville was supposed to know: it was not disclosed that Mr. Glanville's opinion was simply based on the fact that the cashout price was 50% higher than the market.

Since Mr. Schwarzman, a senior executive of Lehman Brothers, knew of and recognized the significance of the 1976 draft opinion, Lehman Brothers is liable for not having disclosed it to the minority shareholders.

C. PLAINTIFF'S RESPONSE TO SIGNAL AND UOP'S COUNTERSTATEMENT OF FACTS (D 8-25)

In Signal and UOP's "Counterstatement of Facts" (DB 8-9), Signal and UOP take the position that the plaintiff is completely precluded from stating the relevant facts by the opinion of the Court below in spite of the requirements of Rule 14(b)(v) which provides in pertinent part:

> "The statement [of facts] shall include a concise statement of all facts which should be known in order to determine the points in controversy..."

The plaintiff, in his opening brief, set out the relevant facts supported by citations to the record. Contrary to Signal and UOP's claim (DB 9), the plaintiff's Statement of Facts is not a motion for reargument: it was simply a statement of the relevant facts.

Signal and UOP do not state specifically or generally how or where the plaintiff is supposed to have misstated or overstated the record. More important, Signal and UOP do not state their version of the relevant facts. Rather, Signal and UOP simply reprint that portion of the opinion of the Court below (with some record citations) which Signal and UOP believe support their view of the facts. No useful purpose would be served by responding in detail in this reply brief to this novel approach of reprinting a portion of the opinion of the lower Court in place of a "concise statement of all facts" as required by Rule 14(b)(v).

The only original material in Signal and UOP's "Counterstatement of Facts" is found in the footnotes. The plaintiff will reply to the defendants' footnotes.

(a) The Plaintiff's Response to
Signal and UOP's Footnote on Page 12

Signal and UOP say (DB 12, Footnote):

> "An example of how plaintiff has mischaracterized the record is his statement that in 1975 '... UOP's Chief Executive Officer, Mr. Logan, was replaced by a long time Signal executive, Mr. Crawford' (emphasis added) (PB, p. 7), and his later reference to Mr. Crawford as '... the Signal executive who, as noted, had been made President and Chief Executive Officer of UOP by Signal...' (emphasis added) (PB, p. 12). In fact, Mr. Crawford was never an employee of Signal, nor did he serve in any other capacity directly for Signal until he became a member of Signal's Board in 1976 (B253-256, 258)."

Technically, Mr. Crawford had not been an employee of Signal itself but, during all of his working career, prior to the time that he was made President and Chief Executive Officer of UOP by Signal, Mr. Crawford was an employee of Garrett Corporation, a 100% owned subsidiary of Signal (Crawford Dep. 3-4). Signal and UOP are "nit-picking" since (1) Mr. Crawford had been specifically selected by Signal from the ranks of a company 100% owned by Signal and made the Chief Executive Officer and President of UOP (Crawford Dep. 14), (2) nothing in the record showed that, in his role as Chief Executive Officer and President of UOP, Mr. Crawford acted independently of Signal or in the interest of the

49% minority stockholders of UOP, and (3) that Signal, in making Mr. Crawford President and Chief Executive officer of UOP, also made Mr. Crawford a director of Signal (Crawford Dep. 37-38). Thus, Mr. Crawford was a "Signal man" prior to the time that Signal made him UOP's President and Chief Executive Officer and acted as a loyal "Signal man" throughout the transaction by which Signal cashed out the minority shareholders of UOP. (Note)

(b) The Plaintiff's Response to
Signal and UOP's Footnote on Page 14

Signal and UOP say (DB 14, Footnote):

> "While the Come-By-Chance disaster may have been unusual, it also reflected the risks inherent in certain of UOP's businesses (B576)."

The significance of the Come-By-Chance is misinterpreted by Signal and UOP. Come-By-Chance was "in the works" when Signal bought 50.5% of UOP's stock in 1975. By the time of the cashout merger in 1978, Come-By-Chance was a "disaster" of the past. There was nothing in 1978 by way of a potential disaster such as Come-By-Chance (Seegal Dep. 53; Pearson Dep. 9-12). Also, by 1978, UOP was a far stronger company than the UOP that Signal had bought a 50.5% interest in, in 1975; it did not have a lurking potential disaster

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Note: It is not without significance in evaluating the alleged independence of Mr. Crawford that he himself, in acknowledging a congratulatory letter after the cashout merger from Roger W. Mullen, Chairman of the Board of Mac Trucks, a Signal subsidiary, signed his letter "Your Blood Brother". (PX-U-49).

such as Come-By-Chance; UOP, in 1978, had had a needed infusion of capital, had the support of Signal itself and UOP had been turned around. Therefore, UOP in 1978 was a stronger, better and more valuable company than it was in 1975.

(c) The Plaintiff's Response to
Signal and UOP's Footnote on Page 15

Signal and UOP say (DB 15, Footnote):

> "We strongly disagree with the Vice Chancellor's suggestion that the report done by Arledge and Chitiea 'indicated' that acquiring the minority shares of UOP at any price up to $24 per share would be 'a good investment for Signal.' The study was only a comparison of the economic effects of a possible acquisition at different stock prices from $17 to $24 per share, i.e., at $17, $18, etc. In fact, the study showed that if Signal were to acquire the minority shares at $24 per share, the total investment of more than $136.5 million (5,688,302 shares x $24 per share) would generate only $7.8 million in additional income, or a return of only 5.7% (A1493). While a return on investment of 5.7% may not represent a negative yield, it is hardly a 'good investment' for a major industrial concern."

In the first place, the lower Court did not make a "<u>suggestion</u>": the lower Court made findings of fact. Findings of fact of the lower Court supported by competent evidence are not subject to review on appeal. (Note)

Specifically, the Vice Chancellor found as facts (1) that a feasibility study was made at the direction of Signal management (which consisted entirely of persons who were also UOP directors with the exception of Brewster Arms, Esquire, house counsel for Signal) (TR 1644-1677), (2) that the feasibility study was made by Messrs. Arledge and Chitiea, both of whom were UOP directors (A1888), and (3) that the results established such an acquisition would be a "good investment for Signal" at any price up to $24.00 a share. Mr. Arledge, who made the preliminary and in depth study, believed that UOP was a better acquisition for Signal than any others he had recently seen (B19). Signal obviously "disagrees" strongly with these specific findings of fact by the lower Court simply because the findings are so damaging to Signal's claim that Signal lived up to the joint standards of "complete candor" and fiduciary responsibility to the

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Note: Warren v. Goldinger Brothers, Inc., Del. Supr., 414 A.2d 507, 509 (1980); Levitt v. Bouvier, Del. Supr., 287 A.2d 671 (1972); H&H Poultry Co., Inc. v. Whaley, Del. Supr., 408 A.2d 289, 291 (1979); Turner v. Vineyard, Del. Supr., 80 A.2d 177 (1951); Application of Delaware Racing Ass'n., Del. Supr., 213 A.2d 203 (1965); and Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc., Del. Supr., 336 A.2d 211 (1975).

In this connection, Signal and UOP say elsewhere in their brief (DB 35):

> "The Vice Chancellor's decision after trial, rendered after post-trial briefing and argument, contains a detailed and careful series of factual findings and discussion of the evidence presented at trial."

minority. This clandestine "financial analysis" of Signal and UOP (B27) was first a preliminary and later an "in depth study" (Chitiea Dep. 33; PX 74) by Signal-UOP directors. The results were given only to Signal management and directors (Chitiea Dep. 45) and concealed from UOP's so-called "independent" directors and minority shareholders. (Note) Signal seeks to denigrate this preliminary and in depth study by saying it was "only a comparison of the economic effects of a possible acquisition at different stock prices from $17 to $24...". (DB 15, Footnote) However, Signal's management and directors used the feasibility study in determining terms and price of the cashout merger. Likewise the minority shareholders and the "independent" directors of UOP should have been given access to this study in determining whether to vote for the cashout merger.

Finally, there is nothing in the record that provides a basis for the defendants' attorneys' assertion "While a return on investment of 5.7% may not represent a negative yield, it is hardly a 'good investment' for a major industrial concern."

Note: Mr. Crawford, President of UOP and the person who the defendants claim was representing the minority shareholders, was present at the meeting of the Signal Executive Committee on February 28, 1978 (A1899, Op.) when Messrs. Arledge and Chitiea presented the results of their "in depth" study of the benefits to Signal from the cashout merger at up to $24.00 per share (Arledge Dep. 15; Chitiea Dep. 34-35). However, neither the so-called independent members of the UOP Board nor the minority shareholders of UOP were given the benefit of this financial analysis of the worth of UOP.

The chief significance of the Chitiea and Arledge study in the context of the case lies in the fact that it was never disclosed to the minority shareholders. The minority shareholders were entitled to know the results of a feasibility study made by two of their directors, especially since the study was based on inside information on the financial affairs of UOP and was made available to the majority stockholder, Signal. The lower Court, though it specifically made the above findings, never ruled (or even commented) on why it was not a violation of the obligation of complete candor and fiduciary responsibility owed by Messrs. Arledge and Chitiea (and indeed the other "Signal" directors of UOP) not to disclose the existence and substance of this report to the minority shareholders of UOP (as well as the "independent" directors of UOP). (Note)

(d) The Plaintiff's Response to Signal and UOP's Footnote on Page 16

Signal and UOP say (DB 16, Footnote):

> "Crawford was only expressing his personal reaction to the proposed price range. Contrary to plaintiff's suggestion (PB, p. 12), Crawford did not 'agree', in the sense of committing UOP or its Board, to anything, nor could he have done so. See pages 106-108, *infra*."

The defendants claim that Mr. Crawford was only expressing his "personal reaction" to the proposed price range. However, the lower Court made a finding of fact that Mr. Crawford was asked to express his reaction as President

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Note: In *Lynch v. Vickers*, Del. Supr., 383 A.2d 278 (1978), this Court said:

> "If management believed that one of the two estimates was more realistic or accurate than another, it is free to endorse that estimate and explore the reason for doing so, but full disclosure, in our view, was a prerequisite."

of UOP. The lower Court made the following finding (A1889, Op.).

> "At that time, as a courtesy to Crawford, according to Signal, Crawford was advised as to what was happening and specifically he was asked as President of UOP for his reaction to the proposed price range of $20 to $21. Crawford stated that he thought that such a price would be 'generous' and that it was certainly one that should be submitted to UOP's minority shareholders for their ultimate determination."

The lower Court re-enforced the finding that Mr. Crawford was being asked (not for his personal reaction but) for his position as President of UOP, saying (A1890, Op.):

> "Later, at the Executive meeting, these same considerations were discussed with Crawford taking a similar position."

Signal and UOP would have this Court believe (contrary to the record) that when Mr. Crawford was summoned by Signal and asked both privately and at the Executive Committee meeting of Signal for his "reaction" to the proposed price range that Mr. Crawford only expressed his "personal" reaction. Signal was not casually asking some stranger or bystander for his "personal reaction": rather, Mr. Crawford, the man whom Signal had installed as the President of UOP, was being asked by Signal to express his opinion as President of UOP on the price range. Signal wanted to know whether Signal could count on the support of the President of UOP in its plan for the cashout merger of the minority. When Mr. Crawford replied that the price range was "generous" (Crawford Dep. 44), Signal knew from the outset that they had the President of UOP "in their pocket". Specifically, Signal knew (1) that it would not have to worry that Mr. Crawford might seek to negotiate a better price or a tax-free stock-for-stock exchange for the minority shareholders of UOP, and (2) that Mr. Crawford would fully support Signal (Crawford Dep. 46, 67; PX 278). As a matter of fact, Mr. Crawford demonstrated his loyalty to Signal: he says he polled the non-"Signal" members of the Board of UOP and assured Signal (before Signal is even supposed to have determined the final price of $21.00) that UOP's Board could be counted on to approve the merger at a $21.00 price (B281-283; 318, 339-340). The poll taken by Mr. Crawford was also taken in Mr. Crawford's capacity as President of UOP. While UOP as a corporation could only be legally "committed" by a formal vote of its Board of Directors, what Signal wanted, and needed, and got, was the privy assurance from the President of UOP that it need not concern itself that the President of UOP or the non-"Signal" directors might oppose the cashout merger of the minority at a price of $21.00. Mr. Crawford, as President of UOP, delivered that needed assurance both as to himself and, after checking, as to the non-"Signal" members of the UOP Board.

(e) The Plaintiff's Response to Signal and UOP's Footnote on Page 19

Signal and UOP say (DB 19, Footnote):

> "In light of the February 28, 1978 press release, trading in UOP common stock on the New York Stock Exchange was halted on March 1, 1978 (B319). Signal and UOP wanted the halt of trading to continue until final action had been taken by both Boards, but the Stock Exchange refused the companies' request for such action (Ibid.). Obviously, if trading had been halted as requested, speculation in UOP's stock in anticipation of the action to be taken by the Boards would have been avoided. It was therefore desirable to have the Boards meet as soon as possible in order to terminate such speculation."

The foregoing is the only reason advanced by Signal and UOP for the fact that the cashout merger was announced and brought before the Signal and UOP Boards for a vote within three business days. Nothing in the record remotely suggests that Signal might withdraw its $21.00 offer if it were not immediately accepted by UOP's Board. Signal's obvious interest in haste lay in the fact that it would preclude any opportunity for serious consideration by third parties, the Board of UOP, or the minority shareholders of UOP. The only justification tendered was to avoid "speculation" in UOP stock. But speculation in UOP stock would have redounded to the advantage of the minority shareholders, especially if other suitors had been given the opportunity to make a better offer. (Note) The minority shareholders' interests would have been best served by a substantial period in which the Signal proposal could be maturely considered by UOP's management and Board and the possibility of other offers explored. During any such period, the speculation in UOP stock would benefit the minority stockholders. There was no justification from the point of view of UOP's minority for Signal's haste in requiring approval by UOP's Board on "three business days notice" (A1936, Op.).

Note: In this connection, not only the Williams Act but State tender offer laws have as their primary purpose the prevention of just such haste by a would-be acquiror who seeks to preclude time for mature consideration of the terms of the offer and prevent others from making competing offers. Furthermore, the recent competing offers of Seagram, Mobil and DuPont for Conoco have resulted in "speculation" in Conoco stock but this "speculation" has redounded to the great benefit of Conoco stockholders.

(f) The Plaintiff's Response to Signal and UOP's Footnote on Page 20

Signal and UOP say (DB 20, Footnote):

"Glanville testified:

"'Q. --so that you did a calculation in your head that the premium was in the area of 50% and that sounded right to you based on what you knew?

"'A. That sounded appropriate, correct.

"'Q. And therefore, if they had said, at that time [March 1, 1978], the price is 21, you could have said, that price is fair at that time?

"'A. Correct, from that point of view.' (emphasis added)."

The above footnote stems from the following finding of the lower Court's opinion:

"Glanville also gave his personal reaction that a price in the range of $20 to $21 would certainly be fair since it represented almost a 50% premium over UOP's market price (B 69)." (Note)

At no time did Mr. Glanville (nor for that matter did any member of Lehman Brothers) make any analysis or calculations of the value or worth of the UOP shares (Glanville Dep. 117-118). In the Lehman Brothers opinion letter reprinted in the proxy statement (PX-U-7, pg. D-2), it was stated "Mr. James W. Glanville, a managing director of Lehman Brothers Kuhn Loeb, Incorporated, has been on the Board of Directors of UOP since 1972 and is familiar with the business and future prospects of UOP." But, it was

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Note: There is nothing in the record that substantiates that the foregoing was only Mr. Glanville's "personal reaction".

never disclosed to the minority stockholders that Mr. Glanville had based his opinion ("personal" or otherwise) on the fact that the cashout price was about 50% more than the market price. (Note)

(g) The Plaintiff's Response to Signal and UOP's Footnote on Page 21

Signal and UOP say (DB 21, Footnote):

> "In one of his most egregious mischaracterizations of the record, plaintiff states that 'Back in New York, they [representatives of Lehman Brothers] did "a cursory two day review of publicly available statistical data..." (A1927 Op.)' (PB, p. 23). Plaintiff has cited the opinion below to make it appear that the quoted language is a finding of fact by the Vice Chancellor. In fact, the Vice Chancellor stated: '[P]laintiff says that...in reality the Lehman Brothers team had done nothing more than a cursory two-day review of publicly available statistical data...' (emphasis added). *Weinberger II*, 426 A.2d at 1351. Plaintiff's citation of his own contention (which was rejected by the court below) speaks for itself."

Signal and UOP's high indignation is misplaced: when all is said and done, the fact remains that the Lehman "backup" work was done by Mr. Seegal and Mr. Pearson, two juniors at Lehman Brothers (Glanville Dep. 59-61). All they did was examine some statistical data that related to UOP as well as some publicly available information. Mr. Pearson, one year out of business school, on Sunday, March 5, 1978, prepared the Lehman "backup" by himself (Seegal 80; Pearson 4). He never purported to make a series of comparative

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Note: Actually, as Mr. Bodenstein's analysis of comparable mergers showed, the premium (the difference between the unaffected market price and the merger price) averaged between 70% to 80% (A836-891; 1943 Op.; PX 40; PX 6, Trial).

analyses to determine the value of the shares of the minority (such as Mr. Bodenstein actually did). The sole statistical comparison that was prepared by Mr. Pearson on Sunday, March 5, 1978, consisted of one page in which certain of UOP's financial results in 1975 were compared with 1978 results (PX LB 5, Table 1). Mr. Schwarzman did not participate: he was in Florida for the weekend (Schwarzman Dep. 34). Mr. Glanville did not participate: he was in Vermont for the weekend (Glanville Dep. 58). Mr. Glanville "thumbed" through the backup material or may have "glanced" at it while on an early morning flight to Chicago on March 6, 1978 (Glanville Dep. 73; Schwarzman Dep. 53). The paltry Lehman backup effort in New York remains "a cursory two-day review of publicly available statistical data": the only comparison consists of a single page prepared by a junior at Lehman Brothers on Sunday, March 5, 1978. (Note)

(h) The Plaintiff's Response to
Signal and UOP's Footnote on Page 23

Signal and UOP say (DB 23, Footnote):

> "Actually, the two-thirds voting requirement did not become part of the final merger agreement

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Note: The record also shows that after the vote of the UOP Board was obtained on March 6, 1978, no further work was done by Lehman (PX LB 9). Three working days was far too short a time to do an in depth analysis of the value of the minority shares. Lehman Brothers could and should have taken the time between March 6, 1978 and the May 26, 1978 stockholders meeting to have done a full analysis, including obtaining appraisal of UOP's undervalued assets, especially as Lehman Brothers were paid $150,000.00 for their fairness opinion.

until some time later. Compare, PX-74, Draft of Agreement Regarding Merger, p. 15 with A89."

Signal and UOP's statement is correct: the two-thirds requirement was inserted in the Merger Agreement at some point after the UOP Board had approved Signal's plan for a cashout merger of the UOP minority shares. But, the "two-thirds" requirement was not even considered, much less approved, by the Board of UOP. It was simply inserted later as "window dressing". Actually, the "two-thirds" requirement was an illusory safeguard. It simply meant that only as little as 16.6% of the minority shareholders had to vote to approve the merger. (i.e., if 16.1% was a majority of the minority, then that 16.1% added to the 50.5% owned by Signal would be sufficient to satisfy the "two-thirds" requirement. In point of fact, only 56% of the minority stockholders of UOP voted on the merger (A1897, Op.): 43.6% did not vote and 7.9% voted against the merger (A1897, Op.). The result contrasts sharply with the 78% oversubscription of the 1975 tender (A1885, Op.).

(i) The Plaintif's Response to Signal and UOP's Footnote on Page 24

Signal and UOP say (DB 24, Footnote):

> "The eight non-Signal directors on UOP's fourteen-member Board of Directors were George L. Clements, the retired Chairman of the Board of the Jewel Companies, Inc.; James W. Glanville, a Managing Director and Member of the Board of Lehman Brothers; Richard A. Lenon, the Chairman of the Board, President and Chief Executive Officer of International Minerals and Chemical Corporation; John O. Logan, Chairman of the Board of UOP; Frank J.

Pizzitola, a General Partner of Lazard Freres & Co.; William J. Quinn, Chairman and Chief Executive Officer of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Robert S. Stevenson, the retired Chairman of the Board of Allis Chalmers Corporation; and Maynard P. Venema, the retired Chairman of the Board of UOP (A49; B294-295)."

Signal and UOP set out the names and titles of the UOP Board because it sounds impressive: that is exactly the reason they were left on the UOP Board by Signal. Courts, in determing whether corporate directors have fulfilled their fiduciary responsibilities, make the determination based on the actual record of what the directors can prove they actually did rather than a parade of names with their past or present corporate titles. (Of course, one director, Mr. Glanville was a managing director of Lehman Brothers which was specifically retained for $150,000.00 to give an opinion that the merger was fair to the minority shareholders of UOP (Crawford Dep. 100-102) and Frank J. Pizzitola was a member of Lazard Freres, Signal's investment bankers (PX U-7).)

(j) The Plaintiff's Response to Signal and UOP's Footnote on Page 25

Signal and UOP say (DB 25, Footnote):

> "The March 7, 1978 letter to stockholders (B421), and a March 6, 1978 press release (B423) both made reference to unanimity among UOP's directors with respect to Signal's proposal. However, the Proxy Statement actually described the exact voting by the UOP directors at the March 6, 1978 Board meeting, including the fact that five directors abstained from voting due to their affiliation with Signal, but would have voted in favor of the merger had they voted (A22, 28)."

As made clear in the plaintiff's opening brief, the press release (B423) and letter of the defendants (B421) told the world and the minority stockholders that the Signal proposal had been approved unanimously by the UOP Board (PB 75-77). The defendants' purpose in saying the UOP Board was unanimous is obvious: to make the minority believe that their directors "to a man" thought that the terms of the merger were fair to the minority. The "Signal" directors were disqualified by their conflict of interest. They were precluded from making any representation to the minority shareholders due to the conflict of interest. This disqualification was not disclosed at the time: on the contrary, it was affirmatively represented that the UOP Board was unanimous. Furthermore, Mr. Crawford, also both a director of UOP and Signal, did not disqualify himself: if the other Signal directors were disqualified, so was he himself disqualified.

The plain truth was that the UOP Board was not unanimous as was represented because:

(a) Five directors of UOP were disqualified because they were also Signal directors.

(b) The President and Chief Executive Officer, Mr. Crawford, was also a Signal director and, as such, was disqualified.

(c) Mr. Pizzitola, a member of Signal's investment banker, was also disqualified.

That Signal and UOP were intent on misleading the minority stockholders is plain not only from the false recitation of unanimity but also from the "gambit" of getting each disqualified director to state that he would vote for the merger but for his disqualification.

D. PLAINTIFF'S RESPONSE TO LEHMAN BROTHERS' COUNTERSTATEMENT OF FACTS (LB 4-24)

The plaintiff will not reply to all the errors and omissions in Lehman Brothers' Counterstatement of Facts. Rather, he will point out only some of the most important ones.

Lehman Brothers says (LB 7):

> "Sometime in the spring of 1976, Roger Altman of Lehman Brothers approached his colleague, Fred Seegal, and asked him to look at the considerations which might be involved in the possible acquisition by Signal of the remaining shares of UOP (B 129)."

Lehman Brothers is being less than frank: Mr. Glanville, though he denied having any recollection of it, was the Lehman Brothers executive who directed the preparation of PX LB-40 ("Confidential Draft Memorandum to Mr. Forrest Shumway - Considerations Relating to The Signal Companies' Investment in UOP - June 1976"). Mr. Seegal testified (Seegal Dep. 20):

> "My recollection is that Roger Altman said to me that Jim Glanville wanted to look at considerations relating to Signal's possible acquisition of the remaining shares of UOP."

Lehman Brothers says (LB 7):

> "Plaintiff has continually mischaracterized the draft as a Lehman Brothers opinion to the effect that Signal should purchase the remaining outstanding stock of UOP by means of a cash offer of up to $21 per share (see e.g., PB 7-8)."

The fact remains that (1) the 1976 opinion was prepared by Lehman Brothers personnel, (2) it was directed to the majority stockholder, Signal, (3) it expressed the opinion that it would be in Signal's best interest to cash out the minority stockholders at up to $21.00, (4) that this opinion would have had a material significance to the UOP minority stockholders in evaluating Mr. Glanville's (or Lehman Brothers') fairness opinion, (5) that the 1976 opinion was seen and its significance was understood by Mr. Schwarzman, the senior Lehman Brothers executive on the "backup" team. He claims not to have read it (Schwarzman Dep. 19-20) but he never disclosed its existence.

The Lehman Brothers brief says (LB 8, Footnote):

> "At the time of trial, neither Glanville nor Altman was associated with Lehman Brothers..."

There is nothing in the record to substantiate this assertion made for the first time in this answering brief. It was not disclosed at trial, particularly as to Mr. Glanville. This revelation, coupled with the representations made about Mr. Glanville's hospitalization, may explain why Lehman Brothers did not produce Mr. Glanville at trial but does not explain why no one at all from Lehman Brothers came to justify Lehman Brothers' representations in 1978 to the minority shareholders or try to reconcile their 1976 opinion with their 1978 opinion.

Lehman Brothers say (LB 10):

> "In fact, even if Lehman had used the draft memorandum in connection with its work on the 1978 transaction, there was nothing in the draft either prejudicial to the UOP stockholders or in any way harmful to their interests."

The point that seems to escape Lehman Brothers is that the 1976 opinion was a matter which, under the standard of "complete candor", should have been disclosed to the minority stockholders.

Lehman Brothers' brief continues (LB 10):

> "Thus, plaintiff's question why, if $21 per share was in Signal's best interest in 1976, the same price was in the best interests of UOP stockholders in 1978 (PB 52) is easily answered."

(This same question was rhetorically asked but not answered in the opinion of the Court below (A1917, Op.).) Lehman Brothers does not answer the question. The point is that the minority shareholders are entitled, not to the defendants' selection of some facts but, to all the material facts. Clearly, Lehman Brothers' 1976 report would have been of monumental significance to a minority stockholder of UOP in evaluating Lehman's independence and reliability in 1978 when Lehman Brothers unequivocally advised the minority that $21.00 was a fair price for the shares (precisely the same top dollar amount that Lehman Brothers advised Signal to pay back in 1976 when the fortunes of UOP were at a far lower ebb than they were in 1978).

Lehman Brothers says (LB 11):

> "On or about the next day, Wednesday, March 1st, Crawford personally spoke with Glanville. During that conversation Glanville gave his initial personal reaction that a merger price in the range of $20 to $21 per share would be fair (B 46)."

Lehman Brothers is misstating the record. What Mr. Crawford actually said in his deposition was (Crawford Dep. 119-120):

> "Q. No problem with $21 - no negotiation.
>
> Now, this being your note, what did that mean?
>
> "A. He said that his off-the-cuff reaction was that he would have no problem with $21 as a fair price. He didn't feel that it was necessary or proper to negotiate in order to increase that price. He was referring to the position he might take as a member of the Board of Directors."

Lehman Brothers then say (LB 14):

> "Upon conclusion of the due diligence visit, Schwarzman conferred by telephone with Glanville. He told Glanville that, in his judgment, a price range of $20 to $21 would be a fair price for the remaining shares of UOP (B 117)."

Thus, according to Lehman Brothers, Mr. Schwarzman, without having the benefit of the statistical work that Mr. Pearson had yet to do under the supervision of Mr. Seegal, could express an opinion on the fairness of the price range of $20.00 to $21.00 since the telephone call was supposed to have been made before the only written comparison of UOP in 1974 versus 1978 was done (PX LB-5, Table I, Pearson 4; Seegal 80). Thus, Mr. Schwarzman's opinion was not based on any analysis or comparison: like Mr. Glanville, he could express an opinion on the fairness of the range without having reviewed the one-page comparison that ultimately was the basis for the Lehman Brothers backup opinion. Furthermore, it should be noted that Mr. Schwarzman gives not an evaluation of the worth of the minority shares but simply notes that a comparison between certain UOP financial figures in 1974 show a similarity to the same financial figures as of the time of the 1978 offer.

Lehman Brothers say (LB 15):

> "Pearson prepared the statistical tables which were incorporated into the package of materials taken to the UOP Board meeting, entitled 'Summary Data Regarding An Offer By The Signal Companies, Inc. To Acquire The Remaining Common Shares of UOP, Inc.' (B 365-88) (B 92, 121). A key element of the statistical analysis was a comparison of the proposed transaction with the 1975 tender offer, set forth in Table I of the Summary (B 372) (B 88)."

An examination of Table I of the Summary shows that what was done was a simple comparison of some of UOP's numbers in 1975 versus 1978 (B 372). Furthermore, it is significant that this, the solitary comparison made by anyone in Lehman Brothers in written form, was prepared on Sunday, March 5, 1978, by Mr. Pearson, a junior one year out of business school, working alone (Seegal Dep. 80; Pearson Dep. 4). Such a minute bit of clerical work is neither worth $150,000.00 nor was it proper to represent to the minority shareholders that a prestigious New York investment bank has made a disinterested analysis of the fairness of the offer of the majority (Denison Mines, Ltd. v. Fibreboard Corp., 388 F.Supp. 812 (D.Del. 1974).

Lehman Brothers say (LB 16):

> "Glanville reviewed the assembled written information during the flight, including the summary and final draft opinion letter (B 121, 63, 66)."

Actually, Lehman Brothers grossly overstate what their former managing director, Mr. Glanville, really did. Mr. Glanville says he may have "glanced" at the paperwork (Glanville Dep. 70-71). Mr. Schwarzman says Mr. Glanville "thumbed" through the material (Schwarzman Dep. 70). There is nothing to suggest that in the early morning flight from New York to Chicago after the Vermont weekend that Mr. Glanville did anything that rises to the dignity of a "review".

Lehman Brothers say (LB 17):

> "The Lehman opinion letter to the UOP board, which stated that Signal's offering price was 'fair and equitable to the stockholders of UOP other than Signal' (B 409, PX U-7 at D-2) advised that the opinion was based primarily on two elements:
>
> > "(1) The familiarity of James Glanville 'with the business and future prospects of UOP;' ***"

Thus, Lehman Brothers admits that the fairness opinion recited that it was based on the familiarity of James Glanville with "the business and future prospects of UOP". What was never disclosed was that Mr. Glanville's opinion was not based on anything other than the fact that the cashout price that was fair in his opinion simply because it was 50% higher than the market. In terms of <u>Denison Mines v. Fibreboard Corp.</u>, <u>supra</u>, there should have been disclosure that the principal officer of Lehman Brothers, whose special qualifications and knowledge the minority stockholders were being invited to rely on, was basing his opinion on that simple immediate determination and not on any analysis of the financial affairs of UOP.

Lehman Brothers say (LB 18):

> "The evidence clearly showed that 'other qualified persons at Lehman Brothers worked on the project and that a great deal of information was reviewed' before Lehman rendered its fairness opinion (A1932)."

However, as Lehman Brothers admits, much of this so-called "information" was simply not in existence at the time but was prepared later by juniors. For example, Lehman Brothers say (LB 18):

> "Pearsons succinctly summarized these factors in a report he later prepared for Schwarzman."

Thus, the justification later prepared by Mr. Pearson was not in existence in any form nor was it available to Mr. Glanville.

* * *

Signal and UOP have not challenged the plaintiff's Statement of Relevant Facts, nor have they given this Court their own view of the relevant facts. Instead, they have taken a novel approach: they have simply reprinted a part of the opinion to which they have added some footnotes. The plaintiff has therefore limited his reply to the defendants' footnotes. Lehman Brothers' Coutnerstatement contains serious misstatements of the record.

E. PLAINTIFF'S RESPONSE TO THE SECTION OF SIGNAL AND UOP'S BRIEF ENTITLED "THE STANDARD AND SCOPE OF APPELLATE REVIEW--THIS COURT SHOULD ACCEPT THE LOWER COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW UNLESS THEY ARE 'CLEARLY WRONG'" (DB 27-28) (Note 1)

By citing a number of cases which hold that factual findings supported by evidence will not be reversed on appeal unless clearly wrong, the defendants try to make it appear that this proceeding is merely an attempt by the plaintiff to appeal the findings of facts of the Court below. That the foregoing is not correct is clearly established not only by the plaintiff's opening brief but because the defendants' briefs do not point out a single specific instance where defendants claim the plaintiff is appealing from a finding of fact. (Note 2) Furthermore, as will be pointed out hereafter and as has been pointed out heretofore in connection with the footnote appearing on page 15 of defendants' brief, the defendants are trying to do precisely

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Note 1: Section I of Lehman Brothers' Brief (LB 24) contains a similar argument and the plaintiff's replies to Lehman Brothers is contained in this section.

Note 2: The plaintiff does point out that the lower Court's finding that Mr. Bodenstein's rate of discount used in his three discounted cash flow analyses was based on a "fortuitous selection" is clearly wrong. That "finding" is not based on any evidence. On the contrary, as will be shown in section 3 of this brief, there was uncontradicted evidence supporting the different discount factors used in the discounted cash flow analyses made for 1977, 1978 and 1978 through 1983.

that -- challenging certain of the lower Court's findings of fact which are amply supported by the record.)

In addition, the defendants overlook that line of cases in which this Court has held that, while findings of facts supported by competent evidence and not "clearly wrong" are not subject to appellate review, the conclusions, deductions and inferences to be drawn from such facts are subject to review.

In application of Delaware Racing Association, Del. Supr., 1965, Justice Wolcott stated the full rule, saying:

> "In substance, the rule as to the scope of review is as it has always been -- that it is our duty to review the evidence to test the propriety of the findings below. When the evidence consists primarily of depositions, documents or the report of a master or appraiser, we can make our own conclusions if the requirements of doing justice require it and if the findings below are clearly wrong. Furthermore, when we are concerned with findings arising from deductions, processes of reasoning, or logical inferences, it is our duty to review them and, if the requirement of doing justice requires it, and if the findings below are clearly wrong, then to draw our own inferences and reach our own conclusions. That is not to say, however, that we may ignore the findings below. On the contrary, when they are supported by the record and are the product of an orderly and logical deductive process, we in the exercise of judicial restraint accept them even though independently we might have reached opposite conclusions. This, we think, is the rule this Court has followed in the past and it is the rule it will continue to follow for the future. See Sohland v. Baker, 15 Del.Ch. 431, 141 A. 277, 58 A.L.R. 693; New York Trust Co. v. Riley, 24 Del.Ch. 354, 16 A.2d 772; Blish v. Thompson Automatic Arms Corp., 30 Del.Ch. 538, 64 A.2d 581."

See Gebhart v. Belton, Del. Supr., 1952, aff'm. sub nomine; Brown v. Board of Education, 75 Supr. Ct. 573, 349 U.S. 294, 99 L.Ed. 1083; Nelson v. Murray, Del.Supr., 211 A.2d 842 (1965).

In Wife(JFV) v. Husband(O.W.V.J.), Supr., (1979), 402 A.2d 1202 at 1204, this Court restated the standard of appellate review:

> "Since the trial judge heard and observed the witnesses, we will not disturb the trial judge's findings of fact and make contradictory findings, unless they are clearly wrong and justice requires their overturn. When the determination of facts turns on a question of credibility and the acceptance or rejection of the testimony of witnesses appearing before him, those findings of the trial judge will be approved upon review, and we will not substitute our opinion for that of the trier of fact. Moreover, in our review of the inferences and deductions made by the trial judge, we will draw our own inferences and deductions only if we find they are not supported by the record and are not the product of an orderly and logical deductive process, in the exercise of judicial restraint even though independently we might have reached different conclusions. Levitt v. Bouvier, Del.Supr., 287 A.2d 671, 673 (1972); Nelson v. Murray, Del.Supr., 211 A.2d 842, 844 (1965); Lank v. Stiner, Del.Supr., 43 Del.Ch. 262, 224 A.2d 242 (1966). But if we are not satisfied with the explanations and reasons for the findings of the trial judge, we should be constrained to draw our own inferences and deductions without necessarily disturbing the findings below."

The plaintiff is not appealing findings of fact of the lower Court except in certain instances which are specifically referred to elsewhere in this brief. However, the plaintiff is appealing from the conclusions, deductions and inferences which the lower Court drew from the facts and, of course, the plaintiff is appealing from the rulings of law which the Court made.

F. PLAINTIFF'S RESPONSE TO THE SECTION OF SIGNAL AND UOP'S BRIEF ENTITLED "B. IN LIGHT OF THE MANNER IN WHICH THE VOTE ON THE MERGER WAS STRUCTURED AND THE FINDING OF THE TRIAL COURT THAT NEITHER SIGNAL NOR UOP MADE ANY MATERIAL MISREPRESENTATIONS OR FAILED TO DISCLOSE GERMANE INFORMATION, NO INQUIRY INTO PURPOSE OR ENTIRE FAIRNESS WAS REQUIRED" (DB 29-40)

The defendants quite naturally start off this section of their brief by saying, in effect, that the defendants are entirely satisfied with the results found in the Vice Chancellor's opinion and decision (DB 29). In reality, however, the defendants show rightful concern with the legal frailty of the lower Court's decision by taking what amounts to a cross-appeal from the lower Court's decision on the applicable law. Thus, the defendants say (DB 29):

> "However, defendants submit that the burden of proof and legal standards that they were required to satisfy exceed the burden and standards that are, or should be, required under Delaware law.
>
> "We believe that, under the facts of this case, the Vice Chancellor should not have considered in his Decision After Trial whether Signal had _bona fide_ purposes for the merger, or whether the terms of the merger were entirely fair to the minority shareholders of UOP."

The obvious reason for the defendants' concern is that one clear error in the lower Court's decision lies in the fact that the lower Court held that the proper purpose test of _Singer_ was satisfied if the record showed that Signal's purpose for the cashout merger of the UOP minority was simply because the cashout of the minority was in Signal's economic best interest. Likewise, the defendants are quite properly concerned about the lower Court's ruling of law on the question as to whether the terms of the merger were intrinsically fair to the minority shareholders of UOP. Thus, the defendants are attempting to get this Court to hold that the lower Court erred in requiring Signal and UOP to sustain the burden of proof on the foregoing two points.

Signal and UOP's basic argument is, because the vote on the merger was structured so that the decision on whether to accept the Signal merger was left up to the majority of the minority of the shareholders of UOP, Signal was therefore not on both sides of the transaction. Specifically, the defendants say (DB 31):

> "Although Signal, as the owner of 50.5% of the outstanding shares of UOP, could have effected the subject merger unilaterally, it voluntarily chose to let the minority shareholders decide whether the merger should be consummated. Unlike the mergers under consideration in Singer and Tanzer, the proposed Signal-UOP merger was expressly conditioned on the approval of a majority of the minority shares of UOP voting on the issue, and the approval of not less than two-thirds of all the outstanding shares of UOP.* Thus, because of the manner in which the merger was structured, Signal was not in control of the corporate process, nor did it stand on both sides of the transaction."

The defendants also say (DB 39):

> "In the first place, Signal never conceded that it stood on both sides of the transaction. The very purpose for making the merger contingent on the approval of a majority of the minority shares was to insure that Signal could not stand on both sides of the transaction, and Signal has consistently maintained that position in this litigation. See e.g., Signal's Post-Trial Brief, Docket Entry #178, pp.95-97."

The defendants are manifestly incorrect. The lower Court found that Signal had conceded that it stood on both sides of the transaction (A1915, Op.). On the one hand, Signal was seeking, as the lower Court also specifically found, for its economic best interest, to cash out the minority (A1920, Op.). On the other hand, as majority shareholder of UOP, Signal was a corporate fiduciary of the minority shareholders (A1904, Op.). As such, Signal had an obligation to protect the interest of the minority shareholders (Singer v. Magnavox, Del. Supr., 380 A.2d 969 (1977); Tanzer v. International General Industries, Inc., 379 A.2d 1121 (1977); Najjar v. Roland International Corp., Del. Supr., 407 A.2d 1032 (1979).) The fact that, as the very last step in the cashout merger, Signal provided for a "majority of the minority" vote does not magically expunge the fact that (1) Signal was the majority stockholder of UOP cashing out the minority, or that (2) Signal had fiduciary responsibilities to the minority during the course of the entire transaction that eventually lead up to the vote on the merger.

Based on the foregoing, the defendants make a pretense of not understanding the lower Court, saying (DB 36):

> "Defendants cannot reconcile the burden placed upon the defendants in Weinberger II with the Vice Chancellor's conclusion in Weinberger I ..."

The defendants, in another place, say (DB 39):

> "Weinberger II, 426 A.2d at 1347. We do not understand these holdings."

The lower Court's opinion in Weinberger II is not only clear, understandable and consistent with Weinberger I but, on this point at least, is in accord with Singer, supra; Tanzer, supra; and Najjar, supra. All the lower Court held in this connection was that, as one part of the fulfillment of Signal's fiduciary responsibility not to use Signal's dominant position in a cashout merger, Signal structured the vote so that it was a majority of the minority of UOP who could decide whether the terms of Signal's cashout merger would be accepted.

But Signal, as the controlling stockholder seeking to cash out a minority, had other fiduciary obligations which the lower Court correctly held Signal had to prove it had carried out (i.e., complete candor, a proper business purpose and intrinsic fairness). In short, there is nothing inconsistent between the decisions of the lower Court in Weinberger I and Weinberger II.

The defendants then try to begin to build their argument that the protections that Singer affords to minority shareholders are not necessary, saying (DB 37):

> "The doctrine set forth in Singer and Tanzer was quite obviously designed to give minority stockholders some protection against possible exploitation by a majority stockholder using the strict letter of the Delaware General Corporation Law while controlling both sides of a transaction."

The foregoing is a too restrictive reading of the thrust of Singer and Tanzer. Singer and Tanzer do more than protect minorities against merely technical compliance with the strict letter of the law. (Note) A majority stockholder has an affirmative fiduciary responsibility to the minority shareholder which the majority shareholder must establish has been satisfied by proof that the minority has been given (not "some" but) full protection against "exploitation by the majority stockholder" (i.e., full protection against abuses by the majority in a cashout merger).

The defendants continue (DB 37):

> "That protection was not needed here because Signal did not stand on both sides, or control, the transaction."

Signal did stand on both sides of the transaction and, hence, as the lower Court found, the protections provided by Singer and Tanzer were needed.

Finally, the defendants seek to have this Court truncate the protection that Singer and Tanzer afford to minority shareholders by limiting the entire case to one narrow issue (i.e., whether there was full disclosure), saying (DB 38):

> "Because the minority stockholders of UOP were given the right to approve or disapprove the proposed merger, the only question which the Vice Chancellor should have considered was: Were the minority shareholders of UOP given such information as a reasonable stockholder would consider

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Note: The record in this case shows that the defendants' interpretation of the Delaware law was that adherence to the letter of the law is all that was required of them in carrying out their fiduciary obligations. The difference between the observance of form and the fulfillment of substantive fiduciary obligations represents a fundamental divergence between the position of plaintiff and the defendants.

> important in deciding whether to approve or disapprove the proposal--i.e., did Signal and UOP disclose all information in their possession germane to the merger? Lynch v. Vickers Energy Corp., Del.Supr., 383 A.2d 278, 281 (1977). Having answered that question in the affirmative, we submit that the Vice Chancellor should have entered judgment in favor of the defendants, without going on to consider the issues of purpose and fairness."

In short, Signal, the majority stockholder of UOP, had the obligation of proving (1) a proper business purpose for the merger, and (2) the intrinsic fairness of the terms of the merger to the minority.

The defendants then say (DB 39):

> "Secondly, we do not know what the Vice Chancellor meant by the phrase 'superficially controlled' since there was absolutely no evidence that Signal exercised any control over the independent members of UOP's Board, who constituted a majority of the Board and all of whom voted in favor of the merger."

The Vice Chancellor has made a finding of fact -- that is, that Signal "superficially controlled" the UOP Board. This finding is supported by competent evidence. (Note) However, the Vice Chancellor's deductions and conclusions from that finding of fact were incorrect. The Board of UOP (1) never negotiated itself nor determined whether there had

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Note: In this connection, the lower Court made another finding of fact that established that Signal controlled UOP (A1936, Op.):

> "It [the UOP Board] did not seek an independent appraisal of the current value of UOP's shares [non-income producing assets(?)] before acting and the expedited scheduling of its meeting on March 6 was obviously within the control of Signal."

been "negotiations" on behalf of the minority, (2) never had any appraisal made of UOP's undervalued assets, and (3) never deliberated on the Signal proposal in depth. Thus, in the light of the requirements of Gimbel v. Signal Companies, Del.Ch., 316 A.2d 599 (1974), aff'd. per curiam, Del. Supr., 316 A.2d 619 (1974), the UOP Board failed to live up to that standard of care that this Court should require when a Board, supposedly independent, is purporting to act as corporate fiduciaries for a minority.

Thus, curiously, the positions of the plaintiff and the defendants are juxtaposed. The plaintiff's position is that the lower Court correctly held, in conformity with Singer, supra, and Tanzer, supra, that even if the record disclosed "complete candor" as required by Lynch v. Vickers Energy Corp., Del. Supr., 383 A.2d 278 (1977) (which there was not), the defendants still had to prove a proper business purpose and intrinsic fairness. The defendants on the other hand are, in effect, appealing from the lower Court's decision that required them to prove a proper business purpose and intrinsic fairness, even if the record shows "complete candor". The plaintiff's position is that, here at least, the lower Court's decision is correct: in a cashout of a minority by a majority, not only must there be full disclosure before ratification by a majority of the minority is effective but also Singer and Tanzer require that the majority stockholder prove both a proper purpose and intrinsic fairness.

Signal and UOP say (DB 34, Footnote):

> "Although it is not entirely clear, it seems that the plaintiff has now abandoned his conspiracy theory." (Note)

The defendants are wrong. Though the lower Court concluded that there was no conspiracy between the corporate defendants, the record in this case and the applicable law provide an ample basis for this count to conclude that there was from the outset a plan of "concerted action" between the corporate defendants to carry out Signal's plan for the cashout merger of the minority at $21.00 per share. The plaintiff alleged in paragraphs 9 through 16 of the complaint that there was a conspiracy between the corporate defendants as well as specific violations of the fiduciary duties owed by the corporate defendants to the minority shareholders of UOP. The lower Court first addressed itself to a non-existent issue -- that is, whether there could be a finding of conspiracy based on the non-disclosure of PX LB-40 -- "Memorandum to Mr. Forrest Shumway - Confidential Draft - Considerations Relating to The Signal Companies' Investment in UOP - Lehman Brothers, Incorporated - June 1976". The lower Court concluded in effect that there could be no conspiracy since there was no evidence that Signal or UOP had any knowledge of the above document (A1918-1919, Op.):

Note: Section 2 of Lehman Brothers' brief also attempts to refute the fact that their was a conspiracy between the three corporate defendants to carry out Signal's plan to cash out the minority at $21.00 (B25-30).

"Thus, even if Glanville and through him Lehman Brothers can be charged with some responsibility for knowing of the existence of LB-40 prior to the fixing of the merger price, the uncontroverted lack of knowledge on the part of anyone at either Signal or UOP undercuts the plaintiff's conspiracy charge. Quite simply, they could not conspire based on something about which they had no knowledge."

The lower Court went on and held that Lehman Brothers was not liable not only for its own non-disclosure of PX LB-40 but because it had no fiduciary duty to the minority shareholders of UOP, saying (A1919, Op.):

> "In addition, although Lehman Brothers has been lumped together with Signal and UOP in plaintiff's allegations of breach of fiduciary duty, plaintiff has offered no authority to indicate that an investment bank firm rendering a fairness opinion as to the terms of the merger owes the same fiduciary duty to the minority shareholders as does the majority shareholder who initiated the merger as a direct result of being retained by the management of the controlled subsidiary."

For the reasons set out in Plaintiff's Opening Brief, this Court should make it clear that investment bankers retained to give fairness opinions in cashout mergers must meet fiduciary standards to the minority shareholders (PB 49). (Note)

The lower Court also said (A1919, Op.):

> "Aside from this, there is nothing to show a conspiracy between Signal, UOP and Lehman Brothers. While there is apparently no Delaware case precedent on the point, it is stated as a general principle that in order to establish a civil conspiracy, it is necessary to show the combination of two or more persons for an unlawful purpose or a combination for the accomplishment of a lawful purpose by unlawful means. In addition, while the essence of the crime of conspiracy is the agreement, the essence of a civil conspiracy is damages. In other words, absent damages, there is no cause of action for civil conspiracy. 16 Am.Jur.2d, Conspiracy, §49; 15(a) CJS, Conspiracy, §1(1)."

Note: Since the plaintiff's brief was filed, <u>Sharp v. Coopers & Lybrand</u>, (3rd Cir.) 649 F.2d 1975 (1981) has come down.

In Tanzer v. International General Industries, Del. Supr., 379 A.2d 1121 at 1124, this Court alerted the lower Court to be on the alert for "subterfuges" in connection with claims as to the "purposes advanced to justify a cash-out merger". Likewise, this Court should now admonish the lower Court to be equally diligent in ascertaining whether a common course of conduct which promotes the objective of a majority stockholder can be discerned by judicial scrutiny behind the careful facade of ostensible observance of fiduciary obligations by subservient corporate defendants acting through their agents. In this connection, Vice Chancellor Hartnett observed in Tuckman v. Aerosonic, C.A. No. 4094, decided May 8, 1981 (a copy of which is attached):

> "Conspiratorial agreements are rarely made out in the open and proof of conscious complicity may depend upon the careful marshalling of circumstantial evidence and the opportunity to cross-examine hostile witnesses. Ferguson v. Omnimedia, Inc., 1st Cir., 479 F.2d 194 (1972)."

The Vice Chancellor went on to indicate that a finding of conspiracy may depend upon the interpretation which the Court put on the facts, saying:

> "For the defendant to be entitled to summary judgment on a claim of conspiracy, he must show that none of the facts are susceptible of an interpretation that might give rise to conspiracy."

Thus, this Court could conclude that, based on the facts in the record, there was a conspiracy or tacit understanding to accomplish, while observing technically the required procedures and formalities, the objective of Signal to cash out the minority for $21.00 per share. This Court which, in Singer, showed its awareness of the realities when a dominant stockholder seeks to cash out a minority, could conclude that it is up to the defendants (when the record reveals the hasty accomplishment of the objective of a dominant stockholder) to show more than mere technical compliance with fiduciary obligations in order to avoid a finding that there was a conspiracy to accomplish the objective of the majority shareholder. Since there is no Delaware case on the point, this Court should spell out the applicable law of conspiracy in the context of a cashout merger by a dominant majority. In this connection, Prosser, Law of Torts 2d, pg. 258, says:

> "Concerted Action
>
> "The original meeting of a 'joint tort' was that of vicarious liability for concerted action. All persons who acted in concert to commit or trespass in pursuance of a common design were held liable for the entire result. In such a case, there was a common purpose, with mutual aid in carrying it out; in short, there was a joint enterprise so that 'all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present. *** This principle somewhat extended beyond its original scope is still law. All those who in pursuance of a common plan or design to commit a tortuous act actively take part in it or further it by cooperation or request or who lend aid or encouragement to the wrongdoer or ratify and adopt his acts for their benefit are equally liable with him." (Citations omitted.)

Restatement of the Law, Torts 2d, §876, "Persons Acting in Concert", says:

> "For harm resulting to a third person from the tortuous conduct of another, one is subject to liability if he

"(a) Does a tortuous act in concert with the other or pursuant to a common design with him, or

"(b) Knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so as to conduct himself, or

"(c) Gives substantial assistance to the other in the accomplishment of a tortuous result and his own conduct, separately considered, constitutes a breach of duty to the third person."

The Comment on Clause (a) provides:

> "Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result. The agreement need not be expressed in words and may be implied or understood to exist from the conduct itself."

(Gould v. American-Hawaiian Steamship Co., 535 F.2d 761 (D.Del. 1976) cites the above section.)

G. THE PLAINTIFF'S RESPONSE TO THE SECTION OF SIGNAL AND UOP'S BRIEF ENTITLED "C. THE PLAINTIFF'S CHARGES OF MISREPRESENTATION ARE WITHOUT MERIT, AND, AS THE COURT BELOW FOUND, THE PROXY STATEMENT MADE FULL DISCLOSURE OF ALL GERMANE FACTS"

The parties and the lower Court agree that the applicable standard of disclosure is set out in the following cases: Lynch v. Vickers Energy Corp., Del. Supr., 383 A.2d 278 (1977); TSC Industries, Inc. v. Northway, 426 U.S. 438 (1976); and Kaplan v. Goldsamt, Del.Ch., 380 A.2d 556 (1977). The question is whether the defendants met that standard.

Signal and UOP's first argument in the section entitled "Negotiations" is that the word "negotiation" is synonymous and interchangeable with the word "discussion" (DB 43-44). They cite Black's Law Dictionary (4th Ed.) but omit, as the Court below did (A1928, Op.), the first part of the definition of negotiation found in Black's Law Dictionary:

> "Negotiation is the process of submission and consideration of offers until an acceptable offer is made and accepted."

This omitted portion was cited in Plaintiff's Opening Brief (PB 68) as was its source (the opinion of Judge Sheraton in Gainey v. Brotherhood of Railroad & Steamship Clerks, D.C. Pa., 275 F.Supp. 292). Signal and UOP have not commented on to the Delaware cases cited at pages 71 and 72 of the Plaintiff's Opening Brief or the authority which showed that the word "negotiate" in the context of this case is not synonymous with "discuss". Nor do Signal and UOP make any attempt to refute what the plaintiff also pointed out in his Opening Brief: the standard is found in Lynch and requires complete candor. In the context of this phase of the case, this required disclosure that "negotiation" was being used in a restricted or special sense.

Signal and UOP's next argument is that there were negotiations as to price (DB 44-45). There are several answers to this argument. First, the record is perfectly clear that (though it was represented in effect to the minority repeatedly that there were negotiations as to price) the lower Court found as a fact the only time that price was even discussed was during one phone call between Mr. Crawford and Mr. Walkup in which Mr. Crawford stated that it was his feeling that if Signal wanted the adherence of the UOP independent directors, the price would have to be $21.00 (A1893, Op.). Second, though Signal and UOP claimed there were negotiations in their answer to the complaint (A321), Signal's counsel, in his argument made for a Rule 41 dismissal, reversed Signal and UOP's position. He stated that neither Signal nor UOP could negotiate in the sense of conducting arm's length bargaining (such as they both had done at the time of the 1975 acquisition) because they each had a conflict of interest. (Specifically, he said that both Signal and UOP management were wearing "two hats" (TR 998-1001).) Finally, there was a finding of fact by the lower Court that there had been no negotiation as to price.

The lower Court found (A1934-1935, Op.):

> "As Signal points out, its position with regard to the merger was completely different than its position in 1975 when it set out to acquire an interest in UOP. In the latter situation, it was in a position to bargain for the best possible deal from its point of view. In attempting to arrive at a price for the tender offer which would not be opposed by UOP, in addition to bargaining on a price for the direct purchase of a large number of shares from UOP, it was in a position to start as low as reasonably possible, and, through the give and take process, arrive at the best price possible from the standpoint of its own interest.
>
> "In 1978, however, as majority shareholder of UOP, it had no similar bargaining position. As Signal readily concedes, it wore two hats with regard to the acquisition of UOP's minority interest. As majority shareholder, it owed a fiduciary duty of fairness to UOP's minority. It could not start at a price below that which it truly felt to be the fair value of UOP's shares and bargain upward." (Note)
>
> "At the same time, Signal's Board owed a fiduciary duty to its own shareholders in dealing with Signal's assets. Thus, it had to take care that it did not propose to pay more than was fair and reasonable for the UOP shares."

Thus, by their own mid-trial admission and by a finding of fact, Signal and UOP are precluded from claiming that there was a "negotiation" as to the cashout price such as was repeatedly conveyed by news releases and the letter to the minority shareholders.

The defendants' next argument is that there was a negotiation that effectively raised the price from $20.00 to

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Note: Signal never made a determination of the fair value of the shares of UOP: all that it did was to determine what price it could profitably pay in cashing out the minority and then justify it by saying it was a consensus and justifying it on the basis that it was the same price as paid in 1975.

$21.00 (DB 45). The short answer to this is that Signal decided from the outset that it would voluntarily pay from $20.00 to $21.00. In view of the foregoing, it cannot be claimed that Mr. Crawford bargained for the minority shareholders of UOP. The best that can be said for him is that he said in one phone call, not documented, that it was his "feeling" that the cashout price had to be $21.00 if Signal was going to get the adherence of the outside directors of UOP. (Note)

The next argument that the defendants make is (DB 46):

> "Similarly, the Proxy Statement advised the minority shareholders that the cash price of $21 per share was reached after discussions between Crawford and officers of Signal on February 28, 1978, and in subsequent telephone conversations, and that is exactly what happened."

The defendants to this day have offered no explanation as to why, having initially claimed in the draft of the Proxy Statement that there were "negotiations", when the SEC demanded details that they changed the word to "discussion". Secondly, as is clear from the record, after February 28, there was only one telephone call between Mr. Crawford and Mr. Walkup in which the price was even mentioned. Finally,

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Note: The trial record abounds with other "telltale" signs that actually from the outset Signal was going to pay $21.00. For example, when Mr. Crawford first got in touch with Mr. Glanville, Mr. Crawford's note indicates that Mr. Glanville said "No problem with $21.00, no negotiation." (Crawford Dep. 119-120). The $20.00 to $21.00 range, this Court could conclude, was merely a blind. In any case, no one asked for one cent more for the minority shareholders.

in the light of the requirement of "complete candor", the Proxy Statement should have alerted stockholders that there had not been and indeed could not be "negotiations" on the cashout price because of the "two-hat" situation. At trial, the defendants first offered (and the lower Court accepted) the conflict situation as a complete explanation and legal justification as to why there were no negotiations as to cashout price. The minority stockholders were not told of the "two-hat" situation: at the time, they were told there were "negotiations". "Complete candor" required the disclosure of this important material fact to the minority.

Signal and UOP assert, in effect, that the Proxy Statement cleared away any misrepresentation that was made to the minority stockholders about negotiations. In doing so, they blandly overlook the three cases cited by the plaintiff on page 74 of his opening brief. Thus, Signal and UOP then say (DB 47):

> "It seems unrealistic to believe that a UOP stockholder would have decided to vote for the merger (i.e., sell his shares) because he read a press release three months earlier which said 'negotiation' while totally ignoring the word 'discussion' in the contemporaneous and more definitive Proxy Statement."

The answer is that "complete candor" is what is required.

Finally, Signal and UOP make the incredible statement that it can make no difference at all to a stockholder how price in a tender offer or a cashout merger is arrived at (DB 44). A tender offer is an offer to each individual stockholder which he is free to accept or decline. On the other hand, a cashout merger with a vote by the majority of the minority results in all of the minority being bound. Most important in a cashout merger, the minority is entitled to rely on the active help of its corporate fiduciaries in order to negotiate the best possible price. (See PB 86 and Toms, Compensating Shareholders Frozen Out In Two Step Mergers, Corporate Practice Commentator, Vol. 22, No. 4, Winter 1981 (Callghan & Co.), pg. 489, quoted in a footnote of page 73 of Plaintiff's Opening Brief.)

Signal and UOP then claim that Lehman Brothers made an independent evaluation of fairness (DB 47-58). During the cashout merger, Signal and UOP "paraded" Mr. Glanville, a director of UOP and a managing director of Lehman Brothers, to the minority stockholders as evidence that an independent opinion on the fairness of the offer of Signal had been obtained from a managing director of Lehman Brothers who was also a long time director of UOP and thus could be safely relied upon by the minority shareholders. Now, Signal and UOP are trying desperately to disassociate themselves from Mr. Glanville since it turned out that:

(1) Mr. Glanville directed the preparation of a draft study by Lehman Brothers in 1976 that advised Signal that it was in Signal's interest to take over the minority interest at any price up to $21.00;

(2) That Mr. Glanville's opinion was based simply on the immediate calculation that since the price was 50% greater than the market price, it was fair; and

(3) That Mr. Glanville's principal interest between February 28 and March 1, 1978, was the intense negotiations that he conducted with Mr. Crawford to maximize the fee that would be paid for this fairness opinion.

Signal and UOP did not rely on Lehman Brothers at the time of trial: instead, they hired an entirely new valuation expert to justify two years later for entirely different reasons, the fairness of the $21.00 cashout price. No member of Lehman Brothers' vast organization was called as a witness at trial (a) to justify or explain the Lehman Brothers fairness opinion nor (b) to try to explain the irreconcilable difference between Lehman's draft opinion prepared in 1976 to Signal advising that it was in Signal's best interest to cash out the minority stockholders for up to $21.00 per share with Lehman's opinion in 1978 to the minority shareholders that the very same $21.00 price was in the minority shareholders' best interest (even though the Court found as a fact that UOP had a "vastly improved performance in 1976 and 1977") (A1917, Op.).

The uncontradicted evidence shows that Mr. Glanville in fact directed the preparation of PX LB-40, "<u>Memorandum to Mr. Forrest Shumway - Confidential Draft - Considerations Relating to The Signal Companies' Investment in UOP - Lehman Brothers, Incorporated - June 1976</u>", (Seegal Dep. 19-20) and the Court below so found (A1917, Op.).

The Court below, however, said:

"But there is no evidence that its reasoning and conclusions were relied upon by the Lehman Brothers personnel in March 1978 when the fairness opinion was being formulated." (A1918, Op.)

There are several comments. In the first place, Mr. Pearson and Mr. Seegal knew of and reviewed PX LB-40 (Seegal Dep. 20; Pearson Dep. 45). Most important, Mr. Schwarzman, the senior Lehman executive (other than Mr. Glanville) who was in charge of the "backup" team, saw PX LB-40, recognized the conflict that it embodied and decided not to look at it and did not reveal its existence to either the "independent" UOP directors or the minority shareholders (Schwarzman Dep. 19-25). This deliberate suppression of PX LB-40 was a violation of the requirement of "complete candor". (Note)

The defendants conclude this section by saying (DB 52):

> "The draft memorandum is not relevant to the issue of Lehman Brothers' independence, nor is it otherwise material to the 'total mix' of information provided in the Proxy Statement. The Proxy Statement made full disclosure of all relevant facts concerning Lehman Brothers and its fairness opinion (as well as all other facts and information) necessary for the stockholders to make an informed judgment."

The plaintiff and the defendants differ: the existence of the opinion of Lehman Brothers, even in draft form, was

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Note: The defendants artfully say (DB 50):

> "The senior members of the Lehman Brothers team working on the UOP assignment never read the document (B110), or were unaware of its existence (B55)."

The foregoing is technically correct: Mr. Glanville claims that he forgot about it and Mr. Schwarzman claimed that he saw it but did not read it.

material information that a stockholder would want to know in evaluating the fairness opinion of Lehman Brothers. It should have been disclosed, especially in the light of the observation made by Judge Stapleton in Denison Mines, Ltd. v. Fibreboard Corp., D.Del., 388 F.Supp. 812 (1974), in which he said:

> "Because of the independence of Lehman Brothers as well as its reputation in the investment banking field, its opinion added persuasive support from management's view. In the context of this proxy statement, the Court believes the impact of the reference to Lehman Brothers' opinion on a substantial number of stockholders would be difficult to overestimate."

But Signal and UOP's embarrassment by Lehman Brothers is not confined to the concealment of a pre-existing 1976 report directly contrary to the fairness opinion at the time of the cashout merger. It turned out that Mr. Glanville, assiduously paraded to the stockholders as a long time director of UOP and a man knowledgeable about UOP and its future prospects, had made up a determination of the fairness of the price based on nothing other than the fact that the cashout price was 50% greater than the market price. Signal and UOP try now totally to disavow Mr. Glanville and make it appear that what was presented to the UOP directors and stockholders was the opinion of Lehman Brothers, not Mr. Glanville.

The letter opinion appeared on Lehman Brothers stationery (obviously because of the prestige that the name Lehman Brothers Kuhn Loeb carried). One reason presented to the UOP minority shareholders to convince them that they could rely on the Lehman Brothers fairness opinion was that Mr. Glanville had a special basis for being knowledgeable about UOP and its future because of his long association with UOP and his position on the Board of Directors. Thus, the minority stockholders were led to believe that Lehman Brothers had a special basis for their opinion that the price of the cashout merger was fair (i.e., that Mr. Glanville, himself a director and also a managing director of Lehman Brothers, had special insight into UOP affairs and its future prospects).

The lower Court accepted Signal and UOP's claim that the requirements of _Denison Mines Ltd. v. Fibreboard Corp._, D.Del., 388 F.Supp. 812 (1974) were fully met because Lehman Brothers' opinion letter was printed in full (A1931, Op.). The lower Court missed the point of Judge Stapleton's ruling. Judge Stapleton said:

> "I do not suggest that there is anything improper in this since Lehman's opinion letter reveals _the basis for the opinion expressed_. On the present record, however, I find the bare reference of the proxy statement to an opinion of an independent investment firm that the transaction was 'fair to the company and stockholders' without further reference to the basis for that opinion was misleading."

In the present situation, _the basis of Mr. Glanville's opinion_ was totally omitted. Mr. Glanville testified that his opinion was based simply on the fact that the cashout price was 50% better than the market price was not disclosed (Glanville Dep. 117-118). The elaborate letter opinion disclosed the things that Lehman Brothers had done but it did not disclose the all important basis of Mr. Glanville's opinion. (In this connection, it should be noted that nowhere in his deposition did Mr. Glanville testify that there was any other basis for his opinion, there was no cross-examination of him nor was he called at trial.)

The defendants say (DB 56):

> "In summary, because of its long-term relationship with UOP, Lehman Brothers was particularly well qualified to opine as to the fairness of the proposed merger."

Lehman Brothers itself did have a long-term relationship with UOP: the relationship was entirely through Mr. Glanville. The fact remains that the basis for Mr. Glanville's opinion was not disclosed to the minority stockholders.

The defendants' brief then says (DB 57):

> "In short, Vice Chancellor Brown was entirely correct when he concluded:
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> "'...I find no misrepresentations or lack of disclosure in the Proxy Statement reference to Lehman Brothers.'"

The plaintiff differs with the lower Court's interpretation as to what "complete candor" requires as applied to the non-disclosure of the basis for Mr. Glanville's opinion as to the fairness of the price of the cashout merger.

The defendants say (DB 59):

> "Thus, while there were not fourteen votes in favor of the merger, all fourteen members of the Board favored the merger, and it is clear that there was unanimity on the subject."

Again, the defendants and the plaintiff disagree on what is called for in terms of "complete candor". The plaintiff's view is that Signal and UOP are totally precluded from making misrepresentations on matters of importance to minority stockholders. Signal and UOP take the position that they were permitted to "shade" the truth to the stockholders as to director unanimity or, alternatively, they were entitled to misrepresent director unanimity at the outset provided that there was a correction when the Proxy Statement was sent out. (Note)

The defendants say in a footnote (DB 58, Footnote):

> "In his post-trial brief on liability, pliantiff argued that the Proxy Statement was misleading, (1) insofar as it represented that UOP's Board had evaluated the merger (A1632), (2) because it should have stated that the proposed merger was not referred for consideration to an independent group of directors (A1677), and (3) because it should have revealed that UOP's Board did not authorize the retention of Georgeson & Co. to solicit proxies in favor of the merger (A1682). These arguments have not been advanced in this Court, and therefore, have been abandoned by plaintiff. In any event, they were properly rejected by the court below."

Signal and UOP are again incorrect. So far as the appointment of the independent committee to provide for an in depth review by directors untainted by conflict and aided by independent investment bankers, the Plaintiff's Opening Brief (PB 82, et seq.) cited inter alia, Harriman v. E. I. DuPont de Nemours, (D.Del.) 411 F.Supp. 133 (1975). The

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Note: The defendants have not responded to the plaintiff's citation (PB 74) of Mitchell v. Texas Gulf Sulphur, (10th Cir.), 446 F.2d 90 (1970), cert. denied, 404 U.S. 1004, rehearing denied, 404 U.S. 1064, cert. denied, 405 U.S. 42, which held that there is a duty to correct a false press release.

failure of a proper evaluation by UOP's Board is dealt with on page 84 of Plaintiff's Opening Brief. So far as the retention of Georgeson & Co. is concerned, it is correct that for reasons of space, the plaintiff did not urge that, as part of the general manipulation of UOP's corporate machinery in the interest of Signal, the UOP management had retained Georgeson & Co. to actively solicit proxies in favor of the Signal proposal. The fact is, however, part of the record.

Signal and UOP then claim that "The Proxy Statement Made Full Disclosure of All Relevant Facts" (DB 59). This section of Signal and UOP's brief begins with a very elaborate restatement of the material found in the Proxy Statement, most of which is not germane. All of this chaff is a prelude to the defendants' attempt to avoid the deadly fact that the Arledge and Chitiea financial analysis of UOP was not disclosed to the minority shareholders or even to the "independent" directors of UOP. The defendants state (DB 63):

> "The 'studies' to which plaintiff refers were documents generated internally at Signal in early 1978 to give Signal's management data on which to make a decision on a possible merger."

There are several comments to this. Even if the financial study (like PX LB-40, a Lehman document) was an "internal document", that does not mean that the minority shareholders were not entitled to know of its existence, its contents and conclusions. Second, the Arledge and Chitiea financial analysis was not really an "internal document": the information on which it was based was information that came from UOP to Signal and the two persons who made the analysis were UOP directors. Finally, this analysis was provided Signal management data on which to make a decision about the cashout merger. Since the analysis gave the majority stockholder the data on which to make a decision on the merger, the same analysis should have been given the minority shareholders to enable them to make an informed decision on whether to vote for the merger.

Signal and UOP continue (DB 64):

> "Apparently others in Signal's management felt the same because on Frebruary 28, 1978, Signal's Executive Committee after considering various data, including these 'studies', authorized management to proceed with the proposed merger at a price of $20-21 per share and not anything more."

Signal and UOP misstate the record: what Signal's Executive Committee did was to authorize Signal management "to negotiate" (PX 37, pg. 2 - "Minutes of the Regular Meeting of the Executive Committee of Signal Companies, Inc.). However, Signal's management did not negotiate with UOP for the cash acquisition of the minority interest in UOP. No negotiations were necessary since Mr. Crawford and the non-Signal directors of UOP so readily agreed to Signal's price of $20.00 to $21.00. Signal says that it authorized $20-$21 per share and "not anything more" (DB 64). Of course Signal never authorized anything more since neither UOP management, its Executive Committee nor its Board ever asked for "anything more" than Signal's management had originally decided to offer.

Signal continues (DB 64):

> "Especially when one considers that some members of Signal's management believed that $19 per share was more appropriate (B266), it is clear that, insofar as Signal was concerned, a price of $21 per share was the highest price regarded as acceptable and fair to Signal and its shareholders, and to UOP's minority shareholders."

There is nothing in the record that indicates that there was any basis for the determination that $21.00 was the highest price regarded as "acceptable and fair" to Signal: all that happened was that Signal decided (it having been determined that any price up to $24.00 would be profitable for Signal) that a price in the range of $20.00 to $21.00 was what it would pay. This decision was principally based on the $21.00 1975 tender offer and direct purchase price rather than any determination of the value of the shares held by the minority (B352 -"Minutes of Special Meeting of Board of Directors of Signal Companies, Inc., March 6, 1978).

The defendants continue (DB 64):

> "Later, on March 6, 1978, when the matter of the merger and the question of the price per share to be paid was presented to Signal's Board, there again was no approval of Signal paying under any circumstances more than $21 per share for the balance of the UOP stock. The fact remains that the only figure ever recommended to, or <u>authorized</u> by, Signal's Board was contained in the $21 per share merger proposal submitted to UOP's Board on March 6, 1978."

Of course, the foregoing is true, but it is also true that neither UOP's Board nor Mr. Crawford nor any member of UOP's management ever demanded anything more than what Signal itself had always been willing to pay.

The defendants conclude by saying (DB 64):

> "To suggest under these circumstances that the Proxy Statement should have stated some hypothetical 'profit' to Signal at per share prices never recommended or authorized by its Board, is completely unrealistic, and Vice Chancellor Brown was clearly correct in disregarding this argument."

"Complete candor" required disclosure of a financial analysis made by two UOP directors to the minority shareholders for their consideration. (It is again noted that the lower Court never made any ruling on whether in his view "complete candor" required that the Arledge and Chitiea report be disclosed to the minority stockholders.)

The defendants say (DB 65):

> "In summary, the press releases, the letter to stockholders, and the Proxy Statement all met the standards of disclosure articulated by this Court in Lynch v. Vickers Energy Corp., Del. Supr., 383 A.2d 278 (1977). Having in their possession all relevant facts with respect to the proposed merger, the minority shareholders of UOP, who had the right and power to approve or disapprove Signal's proposal, voted overwhelmingly in favor of the merger. Thus, we submit that Sterling, and Singer and its progeny have no application in this proceeding, and that the Vice Chancellor should have entered judgment for defendants without considering the purpose for the merger or whether it was entirely fair."

Issue is clearly joined: the plaintiff's appeal stems in large part from the fact that the record shows that the standard of "complete candor" was not met. The defendants, on the contrary, claim that they did meet the Lynch standard of "complete candor" in all of their dealings with the cashed out minority shareholders of UOP.

H. PLAINTIFF'S RESPONSE TO THE DEFENDANTS' SECTION ENTITLED "D. THE VICE CHANCELLOR PROPERLY CONCLUDED THAT SIGNAL HAD BONA FIDE PURPOSES FOR THE MERGER AND THAT THE MERGER WAS ENTIRELY FAIR TO THE MINORITY SHAREHOLDERS OF UOP" (DB 66-128)

The lower Court made a specific factual finding as to Signal's purpose in effecting the cashout merger of the minority shareholders of UOP, saying (A1920-1921):

> "The facts of the matter clearly indicate that Signal was motivated by its own economic interest, and thus of its own shareholders in determining to acquire the remaining 49.5% interest in UOP."

Later in the opinion, the Court made a second factual finding on Signal's purpose saying (A1924, Op.):

> "Its [Signal] primary reason for seeking the remainder of UOP shares was its conclusion that UOP, as a wholly-owned Signal subsidiary, represented at the time the best possible placement for a portion of Signal's surplus cash."

In this section of their brief, the defendants take on two impossible tasks. First, they seek to circumvent the factual findings of fact made by the lower Court. Second, they seek to sustain the Court's ruling of law that advancement of one's own economic advantage is in and of itself sufficient to satisfy the proper business purpose test of <u>Singer</u>, <u>supra</u>, and <u>Tanzer</u>, <u>supra</u>.

Signal and UOP first try to circumvent the lower Court's blunt finding of fact by trying to make it appear that the "primary" purpose for the cashout merger was for reasons other than the advancement of Signal's economic interest. They trot out all the minor ancillary reasons that Signal's counsel later conjured up to satisfy the _Singer_ test (DB 67-70). However, as was pointed out in the Plaintiff's Opening Brief (PB 36), and, as the lower Court twice found as a matter of fact, Signal's purpose was actually the advancement of its own and its stockholders' economic advantage. So far as Signal's ancillary reasons are concerned, the lower Court, in effect, rejected them by making no finding of fact as to their _bona fides_. The lower Court quoted plaintiff, saying (A1921, Op.):

> "Thus, plaintiff argues, Signal cannot bootstrap its position by knowingly and deliberately creating problems and expense because of the nature of its original acquisition and then rely on the removal of these objectionable features as the basis for claiming it had a valid business purpose for merging out the minority thereafter."

Signal and UOP next turn to the legal aspects of the question. The lower Court rested its legal decision on its interpretation of _Sterling_ (A1922-24, Op.). Signal and UOP tacitly concede that the lower Court was incorrect in attempting to base its decision on the _Sterling_ decision since the defendants do not even refer to _Sterling_ in this portion of their brief. Instead, Signal and UOP seek to sustain the lower Court's ruling of law on the "purpose" aspect of this case by their interpretation of _Tanzer v. International General Industries, Inc._, Del. Supr., 379 A.2d 1121 (1977) (DB 73-74). The plaintiff's view of this Court's decision in _Tanzer_ is that "_bona fide_" means "compelling" (i.e., the reason presented to the lower Court in _Tanzer_ and approved by that Court and approved by this Court is correct).

Signal and UOP suggest that a bona fide purpose means any purpose that advances the economic best interest of the majority stockholder. (Note) Thus, this Court must therefore either reaffirm the principles set out in Singer and Tanzer or abandon the proper purpose test.

Signal and UOP then claim that all aspects of the merger were entirely fair to the minority shareholders of UOP (DB 7). They begin this section of their brief by claiming that Lynch v. Vickers Energy Corp., Del. Supr., ___ A.2d ____ (1981) (Appeal No. 105, 1975; Decided April 3, 1981), hereafter referred to as "Lynch, supra, II", is not applicable, saying (DB 78):

> "This Court's most recent opinion in Lynch is not applicable to the present case for a number of reasons. In the first place, that opinion speaks to the appropriate measure of damages to be applied after a determination has been made that a majority stockholder (and presumably any other fiduciary) has breached a fiduciary duty to the minority."

The short answer is that Lynch, supra, II is applicable: it sets out the standard to measure whether the price of the cashout merger is intrinsically fair. To put it another way, Singer makes it clear that in determining the intrinsic fairness of a merger, a minority stockholders cannot be

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Note: It is noted that the defendants have not responded to plaintiff's analysis that to equate proper purpose with the dominant stockholder's best interest eviscerates the proper business purpose rule and means that any cashout merger is proper since the merger will obviously only take place where the best interest of the majority is advanced. (See PB 60.)

relegated to the measure of damages found in an appraisal proceeding pursuant to 8 Del.C. §262. Lynch, supra, II makes it clear that in a cashout merger the measure is what the defendant obtained -- that is, the value that it receives from becoming the 100% owner of the corporation. The rationale in Lynch, supra, II is that what is basically sought is rescission (i.e., the return of what was taken) and, if rescission is not possible, then rescissionary damages or the monetary equivalent of what the defendant obtained from the minority shareholders (and retains and will continue to retain). Thus, Lynch, supra, II sets out the standard for determining the value the majority has appropriated. It is this value that the defendant must show he paid in order to establish that the merger price was intrinsically fair.

The lower Court flatly rejected the principle that, in a cashout merger, the intrinsic value of the appropriated shares is different from the value as determined in an appraisal proceeding (A1951, Op.).

A circuitous argument runs through Signal and UOP's brief (DB 78). First, the defendants repeatedly assert that the Vice Chancellor determined that none of the defendants had breached any fiduciary duty to the plaintiffs. They then say that the $21.00 price as measured by the appraisal procedure plus a premium satisfies the test of intrinsic fairness. They thus disregard the fact that proof of the intrinsic fairness of the price is itself a separate fiduciary obligation -- that is, Signal had to show not that it paid a fair "appraisal" price (plus a premium) but that it paid what it was worth to become the 100% owner. An example of the foregoing is found on page DB 80:

> "The Vice Chancellor was not concerned with damages -- rescissiary or otherwise -- because he properly concluded that none of the defendants had breached any fiduciary duty owed to the minority shareholders of UOP."

The defendants then say (DB 78):

> "Moreover, even if Lynch were relevant to a liability determination with respect to a claim of unfairness, plaintiff offered no evidence upon which a 'rescissiary calculation could have been based.'"

The defendants then devote almost two pages of their brief to quoting verbatim a colloquy between the lower Court and Mr. Bodenstein: all that colloquy shows is that Mr. Bodenstein made a series of comparative analyses to establish the value of the minority shares to the majority (i.e., to Signal which became 100% owner). Basically, what Mr. Bodenstein did was to determine the value to Signal of the minority shares. In contrast, what Mr. Purcell did was to make an "appraisal" determination of the value of the minority shares and then make a simple calculation to see if the amount paid above the appraisal price was equal to the premiums paid in comparable mergers at the time (but Mr. Purcell had premium measured in other mergers without screening for "noise").

Mr. Bodenstein carefully explained that "the market" shows the market value of individual shares of a corporation. However, when 100% ownership is desired, a premium over market is required. Premium therefore represents the cost or value of becoming 100% owner (A864). Mr. Purcell never offered any explanation or rationale as to why a premium is paid above market in a cashout merger: he simply miscalculated the average of premiums being paid at the time. Mr. Purcell miscalculated premium by not screening out "noise". If a proper premium is applied to Mr. Purcell's calculation, that is, 70% to 80%, then he likewise agrees that not less than $26.00 was the fair price for what Signal acquired.

The defendants then say (DB 81):

> "Although he did not have to reach the issue of fairness, once he had decided to do so, Vice Chancellor Brown properly considered the value of UOP shares as of May 28, 1978, and correctly concluded 'the merger price of $21 per share represented a price which was fair to the minority shareholders of UOP.'"

What the lower Court did was to approve an "appraisal" determination of the value of the minority shares <u>as minority shares</u>: he did not determine the value of the minority shares on the basis of what their worth to Signal was in giving Signal 100% ownership (A1953, Op.):

> "Thus, to the extent that plaintiff is suggesting that in the context of a cashout merger the fairness of the price to be paid the minority is to be determined by reference to that which the former majority shareholder will have immediately after the merger as a result of being the 100% owner of the corporation. I reject that argument as being unsound and not in accord with the existing law."

<u>Lynch</u>, <u>supra</u>, <u>II</u> makes it clear that the standard for determining intrinsic fairness is a determination of what the majority obtained. The lower Court should be reversed since it clearly erred in refusing to apply a <u>Lynch</u>, <u>supra</u>, <u>II</u> measure of damages in determining intrinsic fairness. The evidence shows that the minority shares that Signal obtained were worth not less than $26.00 per share to Signal.

The defendants then say (DB 81):

> "In any event, although the discounted cash flow analysis may be a useful tool in certain evaluations (A1046-1056; B250), such an analysis '...has at its core the fortuitous selection of a discount factor which is not necessarily related to any objective standard.' Weinberger II, 426 A.2d at 1358. See also, Frick v. American President Lines, Ltd., Del.Ch., C.A. 3766 (Letter Opinion dated June 18, 1975, a copy of which is attached hereto as Annex B), where Chancellor Marvel rejected the discounted cash flow analysis in an appraisal proceeding because it was 'overly speculative' and 'its validity rests upon the financial techniques of a few experts.' Annex B, pp. 8-10."

There are several answers to defendants' position. Frick is not applicable. Frick was an appraisal case: what was held to be unacceptable as an evaluation method in a statutory appraisal is quite different from what should be an acceptable method of analysis in a fairness case. Second, in Frick, the Court of Chancery did not issue a blanket ruling prohibiting use of the discount cash flow method if based on proper evidence. Third, the bases of three analyses presented by Mr. Bodenstein in this case were totally different from the "speculative projections" presented by the expert in the Frick case. (Actually, the only similarity between Frick and this case lies in the fact that the method of analysis used in each case was denominated as the discounted cash flow method.) Specifically, in Frick, the Court of Chancery rejected the only calculations that had been made by the plaintiff's expert since his calculations were based entirely on projected income. The expert in Frick added up cash flows for fifteen years following the merger (that is, the years from 1972 through 1986). For the years from 1972 and 1975, the projections were based on figures appearing in the company's own five-year plan. However, for the years thereafter through 1986, the expert's projections were based entirely on extrapolations.

Nothing even resembling the projections and extrapolations presented in Frick are found in any of Mr. Bodenstein's analyses. On the contrary, Mr. Bodenstein's first analysis of 1977 was totally retrospective: he did a discounted cash flow analysis based entirely on what had in fact already happened to UOP in the year 1977 (A728, 729, 743; PX 4, Trial). Thus, the analysis was not based on projections or extrapolations: the analysis was based solely on UOP's own report of what had already happened financially to UOP in 1977. The discount factors (7.5% and 8.5%) were not "fortuitously selected": contrary to what the lower Court said, they were, as Mr. Bodenstein testified, based on what the market had actually paid for such streams of income (A731-737). Clearly, the speculations that led to the rejection of the expert's analysis in Frick are not applicable to the discounted cash flow analysis that Mr. Bodenstein made on a retrospective basis for UOP for the year 1977. Based on this historical or retrospective discounted cash flow analysis, Mr. Bodenstein showed that the value of the minority shares was between \$25.21 and \$28.09 (PX 4, Trial at A728).

Similarly, Mr. Bodenstein's discounted cash flow analysis for the year 1978 was not based on speculation. Nor did it rest on extrapolations or projections of future income. Rather, as Mr. Bodenstein explained (A762-829) and showed in his diagram (A828; PX 5, Trial), the analysis was based in part on what in fact had already happened during the first half of the year 1978 (A828; PX 5, Trial; A762-829). As to the balance of 1978, the analysis was based not on Mr. Bodenstein's projections of what might happen in the balance of 1978 but was based on UOP's own in-house forecast of what the final six months of 1978 would hold for UOP (A766). Mr. Bodenstein did not speculate or extrapolate: he took UOP's own figures. The accuracy of this forecast was re-enforced by the fact that Mr. Crawford told the stockholders at the annual meeting that he believed that UOP was "on budget" (A770). Mr. Bodenstein's testimony showed that his discount factor was not a "fortuitous selection": on the contrary, it was based on what the market had paid for such income streams in 1977 plus an additional 2 1/2% to cover the possible risk of partial non-performance in the last six months of 1978 (A777). Mr. Bodenstein's discounted cash flow analysis showed that, when applied to 1978, the stock was worth not less than $27.16 (A828-PX 5, Trial).

The last of Mr. Bodenstein's three analyses using the discounted cash flow method was triggered by the defendants' pointed questioning at Mr. Bodenstein's pre-trial deposition (A971; Bodenstein Dep. 275). Mr. Bodenstein, after his deposition and in preparation for trial, made an analysis using the discounted cash flow method using "UOP's Cash Flow Analysis, 1978 Five-Year Business Plan (Basic) in Millions" (PX U-400). Thus, Mr. Bodenstein did not extrapolate or use his own projections in making discounted cash flow analysis of the future five years. He utilized UOP's own figures (A1013). In connection with the five-year projections, there were three forecasts made by UOP management: optimistic, pessimistic and basic. Mr. Bodenstein used only the projection that the defendant had designated as "basic" (A987; PX 7, Trial; A998). Mr. Bodenstein testifed that the discount factor of 12% was based on the prior discount rates with the addition of 2% to cover the risk that UOP might not achieve its own basic projection (A478). Based on UOP's projections, using the discounted cash flow method, Mr. Bodenstein calculated that the value of shares of UOP's minority shareholders was not less than $25.9 per share (A987; PX 7, Trial).

Signal and UOP quickly veer away from <u>Lynch</u>, <u>supra</u>, <u>II</u> and proceed to spin a labyrinth of mathematical equations, assumptions, formulas, examples and hypotheses, the acceptance of which would lead this Court to a series of erroneous conclusions (as they did the lower Court) (DB 81-98). A review of Mr. Bodenstein's trial testimony and the illustrative exhibits (A639-1045) is necessary in order to understand the discounted cash flow method generally and specifically how it applies in this case. Such a review shows that by the separate analysis using UOP figures, the value to Signal of the minority shares was not less than

$26.00. The lower Court, however, obviously not only did not fully understand the methodology of the discounted cash flow method but flatly rejected the correct valuation approach (that is, what was the value of the minority shares to Signal rather than what was the market value of the minority shares). In its opinion, the lower Court simply selected two or three points from the defendants' post-trial brief and advanced these as ostensible support for its rejection of the discounted cash flow method of analysis.

For example, in Plaintiff's Opening Brief, it was pointed out (PB 107):

> "The lower Court has mistaken (based on defendants' post-trial brief, page 106) earnings with free cash throw off. The stockholders of UOP did not receive $2.12 per share: rather, they received 80¢ in annual dividends (PB U-7). On a market price of $14.50, a dividend of 80¢ represents a 5.5% yield." (i.e., a discount factor of 5.5%.)

In response, Signal and UOP say (DB 83, Footnote):

> "Plaintiff argues that one should look only to the dividends paid in determining the discount factor inherent in the market's evaluation and that because UOP's shareholders received 80¢ in dividends as opposed to UOP's earnings of $2.12 per share in 1977, the real discount factor applied in the market price was only 5.5% rather than 14%."

No matter what the defendants say, the lower Court was led into the error of mistaking <u>earnings</u> with <u>free cash throw-off</u> by page 106 of the Post-Trial Brief of Signal Companies, Inc. and UOP, Inc. (Docket Entry 179). This was the source of the lower Court's statement (A1948, Op.):

"As defendants also point out, an adjustment in the discount rate to be applied can dramatically change the end result. For example, for the first two months of 1978, UOP's stock had averaged trading for just under $15 per share. For the year 1977, its earnings from continuing operations had been $2.12 per share. This equates to a price/earnings ratio of 7:1 which thus represents a return of about 14%. In other words, it could be argued that immediately prior to the merger announcement the market was willing to pay about $15 for a share in UOP in order to get a 14% return of $2.12 per share. If one selects this as the basis for using a discount rate of 14% and uses all the other figures contained in Bodenstein's 1977 cash flow analysis, the value per share becomes $16.81."

The lower Court also uses 14% in another example culled from page 11 of the Post-Trial Brief of The Signal Companies, Inc. and UOP on the next page of the opinion (A1949, Op.). (The lower Court picked up the very phrase "fortuitous selection" from page 105 of the Post-Trial Brief of The Signal Companies, Inc. and UOP (Docket Entry 179).) Based on this fundamental error in the difference between free cash throw-off and earnings, the lower Court used a discount factor of 14% for illustrative purposes. In Signal and UOP's present brief, the 14% discount factor crops up again and again (DB 82, 83, 84, 88, 92, 95). There is no evidence whatsoever in the record that substantiates that the market actually used a 14% discount factor in any transaction.

Beyond that, the lower Court says (A1947, Op.):

"In addition, as the defendants point out, the discounted cash flow analysis has as its core the fortuitous selection of the discount factor which is not necessarily related to an objective standard."

It has already been pointed out that Mr. Bodenstein did not make a "fortuitous selection" at all: he used discount ranges that the market was using at the time for comparable income streams (A731-737). In this connection, Signal and UOP say (DB 83, Footnote **):

> "Mr. Purcell, Signal's expert, testified that although he did not believe that the discounted cash flow analysis was a proper tool to be used in valuing UOP or its shares, if he had used such an approach, the appropriate discount factor would have been no less than 15% (B252)."

An examination of Mr. Purcell's cited testimony (B252) shows that his selection of 15% as the appropriate discount factor is indeed purely a "fortuitous selection" since Mr. Purcell gives absolutely no justification or reason for his selection of 15% nor did he testify to any particular transaction or series of transactions in which 15% as a discount factor was used.

In short, the lower Court picked up the 14% discount rate from Signal and UOP's Post-Trial Brief. Now, Signal and UOP, in turn, utilize 14% from the lower Court's opinion as if 14% had been established by evidence as an applicable discount rate. Furthermore, the record shows that Signal and UOP's expert did make a totally "fortuitous selection" of 15% as the appropriate discount factor.

Another illustration of where the lower Court was led into error by Signal and UOP is the following (A1948-1949, Op.):

> "Correspondingly, and again for purposes of illustration, in his 1978 analysis Bodenstein assumed a need of $17.5 million for UOP to maintain its plant and equipment in order to generate a cash flow equivalent to that found for 1978. However, a historical averaging for the prior five-year period indicated annual capital expenditures of $23.9 million for UOP. If this latter figure were used in the 1978 analysis, the net free cash flow would have been reduced by $6.4 million and, even applying Bodenstein's 10 per cent discount factor, the per share value would be reduced to $16.16. If a 14 per cent factor were used, the per share value would be even further reduced to $11.54."

The above is an almost verbatim quotation from page 110-111 of the Post-Trial Brief of The Signal Companies, Inc. and UOP, Inc. (Docket Entry 179), and Signal and UOP then restated the above almost verbatim in their brief (DB 87-88). What Signal and UOP (and the lower Court) overlook is that during the five-year period they suggest as the basis for an averaging of annual expenditures for plant and equipment is that the level of UOP's income during this five-year period doubled from about $15 million to $30 million. Mr. Bodenstein's conservative reason for using the $17.5 million (versus an average of $23.9 million) in his discounted cash flow analysis was based on the premise of no growth in income (A743). If additional funds are put into expenditures for plant and equipment, then corresponding increases in income would occur.

Next, Signal and UOP say (DB 89):

> "Apparently not satisfied with a $250 million present value (based on his predicted $24.9 million net free cash from operations, Bodenstein added on $50 million for 'excess liquidity and timberland cushion' (A1503)."

The lower Court declined to hold that it was a violation of UOP's fiduciary duty not to obtain an updated appraisal of UOP's timberland and patent and royalty assets, saying (A1939-1940):

> "Thus the failure of UOP's board to obtain and consider the updated value of UOP's timberland and patent and royalty assets does not constitute a breach of its fiduciary duty to the minority if the evidence presented on behalf of the defendants at trial reveals that the value of such assets had no material bearing on the fairness of the terms of the merger. For the reasons set forth hereafter, I find such to be the case and thus I find no impropriety chargeable to UOP's Board in this respect."

One has to turn to the lower Court's review of the testimoney of Mr. Purcell of Dillon, Read to find out why the lower Court concludes the undervalued assets of UOP had no bearing on the fairness of the terms of the merger. The lower Court said in discussing the Dillon, Read appraisal approach (A1957, Op.):

> "The net asset value or book value [of UOP] was $19.86 at year end 1977 and $20.69 at the end of the first quarter of 1978. Net asset value was given little weight, however, in view of the fact that Signal was acquiring UOP for its ongoing business value and since there was no plan for liquidation. I agree with this conclusion on the evidence. It corresponds with the finding in Sterling."

There are several responses. First, in Sterling, it should be noted that it was not a cashout merger: rather, it was a stock for stock transaction (albeit with a cash alternative). Thus, the stockholders could continue their equity participation that would reflect their share of any undervalued assets. Not so in the present case: Signal had cashed out the minority shareholders. Though Signal intended to continue the business rather than liquidate it, Signal had become the full 100% owner. It has gotten a windfall since it has not only gotten 100% of the going concern value of UOP but has also gotten the non-income producing assets without giving the minority shareholders their share of this asset. Once again, the lower Court's interpretation of Sterling is misplaced and its conclusion results in the deprivation of the minority shareholders of their share of the undervalued assets of UOP. Not only was the Court wrong but the directors of UOP (and indeed Signal as a fiduciary) should have had an appraisal made of the obviously undervalued assets of UOP so that the cashout price would include a fair share to those being forced out of the business for undervalued or non-income producing assets.

Significantly, Signal and UOP do not attempt to defend the basis of the lower Court's decision. Rather, they attempt at this point to "quibble" with the evidence that shows that UOP's vast timberlands and other lands as well as its patents and royalties were clearly undervalued and that nothing by way of a fair share of these assets was included in the $21.00 which Signal paid for these assets (DB 89-91).

Finally, the defendants attack Mr. Bodenstein's discounted cash flow analysis based on UOP's Five-Year Business Plan (B531-553). As previously noted, it was the defendants' pointed questioning of Mr. Bodenstein during his deposition that led him to make this analysis on a discounted cash basis of UOP's own Five-Year Business Plan (TR 456-462; PX U-400). The defendants' brief rings with cries of "assumption", "speculation" (DB 92-93). The fact of the matter is that Mr. Bodenstein has not made any speculations or assumptions: he has simply taken the UOP 5-Year Business Plan and applied the discounted cash flow method to it to see what it would produce. Thus, the defendants say (DB 92):

> "In making this calculation, Bodenstein first assumed that <u>the dividends projected by management would</u>, in fact, be paid, i.e., \$9.1 million in 1978; \$9.1 million in 1979; \$11.3 million in 1980; \$13.7 million in 1981; and \$16.7 million is 1982 (Ibid.) notwithstanding the very speculative nature of this assumption and notwithstanding the fact that this assumption is inconsistent with UOP's dividend history."

However, in the quotation, Signal and UOP admit that the projection of dividends is not only UOP's own management's projection: the projection is the UOP "basic" projection, not the UOP "optimistic" projection (DB 92).

The defendants next try (incredibly) to justify the \$21.00 cashout price because of certain similarities between financial figures of UOP in the year 1974 with comparable figures in 1978 as compared with 1974 or 1975. Though there is some superficial similarity between some of the "numbers" for UOP in 1974 and 1977 or 1978, still the fact remains that UOP's future was dismal in 1974 and was really bright in 1978. This fact is confirmed by UOP's own Five-Year Forecast (PX U-400). It is further confirmed by the

Arledge and Chitiea Financial Analysis that showed that the acquisition by Signal of the balance of the shares of UOP would be a "good investment for Signal". Finally, it is confirmed by Signal's own decision to do a cashout merger to acquire the balance of the shares of UOP (B 352). Signal and UOP apparently still do not believe that the applicable law on the value of minority shares in a cashout merger is as stated in Lynch, supra, II -- that is, the value of what the majority gets, not the value of the individual minority shares. Of course, the Answering Brief of Signal and UOP is the last in a series of the rationalizations made from the time the merger was first conceived -- that is, that the fairness of the 1978 cashout merger price could be justified because Signal paid $21.00 in the tender offer and direct purchase back in 1974. Even at this late date Signal and UOP are disregarding the question that should have been foremost in their minds as corporate fiduciaries from the outset -- that is, what is the value of the UOP minority shares to Signal as it seeks to become 100% owner of UOP.

Signal and UOP attempt to slide over the critical fact that the measurement of premium made by Mr. Daum and Mr. Reid for Mr. Purcell of Dillon, Read did not screen advances in price based on the market's premonition of an impending merger or leaks that had the same result (or "noise") (DB 97). As pointed out in Plaintiff's Opening Brief, this failure to eliminate noise where it occurred resulted in an inconsistent measure of premium (PB 100). Some times in the Dillon, Read calculation the difference was an unaffected market price and the cashout price. In other cases, it was a market price that was radically changed by advances caused by leaks or premonitions and the merger price. Signal and UOP avoid the unpleasant fact that it is only this error that makes Mr. Purcell's calculation based on comparative analysis differ from Mr. Bodenstein's comaprative analysis. Rather, Signal and UOP say (DB 97):

> "Bodenstein's calculation of 'prior market value' used to determine the premium over market (PB pgs. 100-104) may be interesting but it is without precedent or practical value since the investment community determines the premium over market in a merger situation by looking at the market price just prior to the first public announcement concerning the merger."

No authority is given for the above general statement. The defendants continue:

> "This is the keystone used by the investment and financial community in determining the 'premium' (B 248)."

An examination of B 248 shows that there is nothing on that page that substantiates the foregoing statement.

Signal and UOP cite Tannetics, Inc. v. A. J. Industries, Inc., Del.Ch., C.A. No. 5306, Letter Opinion, pgs. 14, 15 (July 17, 1979), a copy of which was attached to Signal and UOP's Answering Brief as Annex E. The Tannetics case is not on point: the Chancellor was considering the value of stock in terms of an appraisal proceeding. He was not attempting to determine the percentage of premium for comparison purposes as both Mr. Bodenstein and Mr. Purcell were doing. It is, however, interesting to note that in the Tannetics case "noise" had driven the price of the stock up from $2.77 per share (the mean price for shares sold during the thirty days preceding the merger) to $3.125, the price on the day before the formal announcement of the merger. If one were comparing the percent premium paid in Tannetics with comparable situations, one would obviously have to base it on comparable starting points (i.e., the unaffected market price in each case).

Signal and UOP cite Gibbons v. Schenley Industries, Inc., Del.Ch., 339 A.2d 460, 478 (1975) (DB 98). In this appraisal case, the Chancellor held that for purposes of a starting point for an appraisal, the market price on the day before the formal announcement is the appropriate starting point. Gibbons has nothing to do with the measurement of the percentage of premium paid in a particular merger versus comparable mergers.

Signal and UOP then turn to their novel "pure heart" defense (DB 104-106). As indicated in Plaintiff's Opening Brief (PB 81), this novel suggestion is that one is relieved from any compliance with one's fiduciary obligations if one gets oneself into a conflict of interest simply by steering a middle course with a "pure heart". In addition to not being legally or morally sound, if this was in fact the course that the fiduciaries of UOP were steering, "complete candor" would have required them to alert the minority stockholders that they could not rely on their fiduciaries to carry out their fiduciary responsibilities which they would otherwise be obliged to do because of their conflict of interest. (The best that can be said is that the minority stockholders should have guessed that this was the situation in spite of the representations made to the contrary that were designed to lull and convince the minority that their fiduciaries were carrying out their obligations.) It is noted that Signal and UOP do not comment on Harriman v. E. I. DuPont de Nemours Co., (D.Del.) 411 F.Supp. 133 (1975), in which the conflict problem was squarely faced at the very outset and procedures were set up to handle a conflict of interest situation so that each fiduciary could fully carry out his fiduciary responsibilities. Finally, though Signal and UOP's brief contains general assertions by Mr. Walkup and Mr. Shumway (and incredibly even Mr. Arledge and Mr. Chitiea) of their awareness of their responsibilities (DB 104), Signal and UOP can not point to one instance where these gentlemen ever carried out their fiduciary responsibilities of getting the best possible price or terms for the minority stockholders of UOP who were being cashed out by Signal.

Signal and UOP next attempt to overcome the lower Court's finding that Mr. Crawford, as President of UOP, immediately agreed to the merger and the terms that Signal proposed (A1889,1890). Signal and UOP finally say (DB 108):

> "Crawford also testified that he would not have recommended the proposed merger to UOP's Board and its stockholders if Lehman Brothers had

> not opined that the price was fair (B288). He also testified at length about the fiduciary responsibilities which he owed to the minority shareholders of UOP, the employees of UOP, and the shareholders of Signal (B303-310)."

Mr. Crawford was in a conflict of interest. He did nothing to get out of the conflict. Furthermore, he did nothing to carry out his fiduciary obligations to the minority shareholders of UOP. On the contrary, he covertly worked to further the interest of his life long patron, Signal, in cashing out the minority at $21.00 a share.

Signal and UOP then try to defend the independence of the UOP Board, saying (DB 110):

> "Plaintiff alleged but utterly failed to prove that Signal dominated and controlled UOP's Board of Directors."

Signal and UOP overlook the lower Court's two specific findings of fact on the point. First, the lower Court found as a fact that Signal "superficially controlled" the UOP Board and, second, the lower Court said (A1936, Op.):

> "It [the UOP Board] did not seek an independent appraisal of the current value of UOP shares before acting, <u>and the expedited scheduling of its meeting on March 6 was obviously within the control of Signal</u>."

Again, Signal and UOP quote the pious assertions of UOP's outside directors about their awareness of their fiduciary obligations (DB 110, 111). However, Signal and UOP are silent since the record is devoid in actual deeds that demonstrate that these so-called independent directors of UOP did anything whatsoever in connection with the carrying out of their fiduciary obligations to the minority shareholders.

Attempting to avoid the thrust of Gimbel v. Signal Cos., Inc., Del.Ch., 316 A.2d 599 (1974, aff'd per curiam, Del. Supr., 316 A.2d 619 (1974), that stands for the proposition that directors of a Delaware corporation must act "with *** that degree of dliberation and prudence that is commensurate with the importance of the transaction in question", Signal and UOP say (DB 115):

> "In the instant case, all of UOP's directors had almost a full week to consider and reflect upon the offer which might be forthcoming from Signal on March 6, 1978."

That statement is just plain incorrect and the record is perfectly clear on the point: Signal's Executive Committee met on Tuesday, February 28, 1978. Thereafter, the UOP independent directors were informed on "the evening of February 28" by a telephone call from Mr. Crawford's secretary, Mary Foreman, of the necessity for a meeting first scheduled on Tuesday, March 7, and then rescheduled at Signal's request for Monday, March 6 (Crawford Dep. 166; PX U-49-24). The UOP independent directors who attended on March 7 had received no written information prior to the meeting itself (PX U-233, Minutes of Special Meeting of Board of UOP - March 6, 1978). To try to mislead this Court by saying that the UOP Board had "almost a full week to consider and reflect upon the offer which might be forthcoming from Signal" is going beyond the limits of advocacy. (On the other hand, the lower Court found as a fact that the so-called independent UOP directors had given Mr. Crawford their assurance - which he passed to Mr. Walkup of Signal - that they would vote for $21.00 even before the offer was made.)

Signal and UOP then attempt to defend the failure of the UOP directors not to obtain an appraisal of UOP's timberlands and patents and royalties. The basis of their argument is contained in the following sentence (DB 116):

> "Signal proposed to acquire the minority interest in UOP on an ongoing basis, i.e., Signal had no intention of liquidating UOP or any of its assets (B237). Thus, the value of any specific asset of UOP had little if any relevance to the value of UOP as an operating business."

While the plaintiff concedes that the foregoing may be true in an appraisal where liquidation is not contemplated and the measure is the going concern value of the business, in a cashout merger, the minority stockholders are entitled to receive their fair share of the value of their corporation's assets that are undervalued or are non-income producing even if the acquiror does not propose liquidating the company or selling off the assets in question. Lynch supra, II teaches that the true measure in a cashout is rescission (i.e., the return of what was acquired which in monetary terms is the value of what the acquiror obtained and retains). The fact that the acquiror has obtained the assets and thus has the unfettered choice of selling off the undervalued or non-income producing assets or retain such assets for future investment is irrelevant. (Note)

Signal and UOP cite (DB 116) Gibbons v. Schenley, Del.Ch., 339 A.2d 460 (1975), and repeated verbatim the quotation found in Gibbons from Graham, Dodd, Cottle & Tattum, Security Analysis (4th Ed. 1962), at p. 217. Neither the case nor Graham support Signal and UOP: they both deal with the non-significance of asset value in measuring "earning power value", not whether, in a cashout merger, the minority shareholders are entitled to their share of undervalued or non-income producing assets.

Signal and UOP quote Mr. Purcell at length (DB 117). But Mr. Purcell's rambling answer evades the question at issue -- why the minority shareholders were not given their share of the undervalued assets. Mr. Purcell says that (1) he heard of "no major plans of liquidation" and that (2) Dillon, Read just did not have an appraisal done "normally".

Note: To take a ridiculous example, suppose a company has a mousetrap factory that produces earnings of $10,000.00 per year but also had title to a million acres of land which is not farmed or timbered or used in any other way. Clearly, the minority stockholders of the company are only entitled in a cashout merger to be paid their share of (1) the going concern value of the company, and (2) their share of the value of the non-income producing million acres of land. The minority's right to their share of the value of the million acres is clearly not dependent on what the acquiror is going to do after the cashout merger either with the income producing factory or the non-income producing million acres.

Finally, Signal and UOP turn to the failure of the UOP Board to demand an escalation clause so that the minority shareholders would enjoy the 13% stock rise that occurred in the Spring of 1978 (A1940, Op.) or in the spectacular rise of Signal stock in that same period. (Note) Signal and UOP did not answer the Plaintiff's Opening Brief which pointed out that the lower Court's decision had boxed in the minority shareholders: the Signal offer, he found as a fact, put a "cap" on the market (A1940, Op.). However, the lower Court held that whether the UOP stock would have risen, just as Signal's did, was "a matter of speculation" (A1940, Op.).

Signal and UOP simply parrot the lower Court, saying (DB 119):

> "Although the market value of Signal's stock increased between March 6, and May 28, 1976 and the value of securities on the stock market as a whole increased about 13% during that same period, there was absolutely no evidence that the value of UOP's shares would have taken the same course."

Finally, as to the appropriation of the entire second quarter dividend by Signal, the lower Court said (A1940, Op.):

> "As to the fact that the merger agreement made no provision for UOP's minority to receive an aliquot share of any second quarter dividends, the defendants have not advanced any real argument or explanation."

Note: UOP stockholders were "locked in" between February 28 and May 26, 1978. They could not get $21.00 for their UOP shares until after May 26 and were thus precluded from investments that would have increased on an average of 13%.

Signal and UOP offer the following justification for Signal's appropriation of the entire second quarter dividend (DB 119):

> "Moreover, the second quarter dividend for 1978 would normally have been paid to stockholders of record as of June 2, 1978 (A1406). As of that date, Signal was the only stockholder of UOP."

This is just another example where UOP's directors and Signal preferred Signal's interests to those of the minority shareholders in derogation of their fiduciary obligations to the minority shareholders of UOP. Actually, all but seven days of the second quarter equitably belonged to the minority shareholders since (even under defendants' theory) the minority owned their shares until May 26, 1978.

The lower Court itself cavalierly said, in effect, that the second quarter dividend was not "an element of significance" and simply allowed Signal to keep the whole of the second quarter dividend (A1941, Op.). (Note)

For a reason that remains unclear to the plaintiff, Signal and UOP at this point in their brief (DB 120) run through a list of "criteria" that were significant in _Tanzer v. International General Industries_, Del.Ch., 402 A.2d 382 (1979) ("_Tanzer II_). Some of the criteria are totally

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Note: On the one hand, the lower Court said the defendants were "conveniently overlooking" the difference between \$20.00 and \$21.00 (A1929, Op.) but, on the other hand, inconsistently and without any justification whatever, allows Signal, the majority stockholder of UOP, to appropriate for itself the entire second quarter dividend, a sum amounting to approximately \$1,137,660.40 (5,688,302 shares x 20¢) (A1929, Op.).

irrelevant and other "criteria" have necessarily been covered in great detail in prior sections of Signal and UOP's brief. The plaintiff will confine his reply to what is _new_ and _significant_ to this case.

Signal and UOP first snidely say (DB 123):

> "Any stockholder of UOP who was being cashed out and who wanted to 'stay aboard' had only to buy as many shares of Signal as his desires (and wallet) dictated."

Of course, as Signal and UOP well know, the disastrous consequence of being cashed out are the capital gains. What was suggested in _Tanzer II_ was a stock-for-stock tax transaction, not simply that a stockholder take the cashout price (diminished by his tax consequences) and buy back into the company that has just merged him out.

Signal and UOP then say (DB 123):

> "Whether some or all of the minority stockholders received a gain or a loss for tax purposes, and whether or not because of other gains, losses or offsets during the year 1978, such gains or losses imposed a tax benefit or detriment on those stockholders, _we can only speculate_."

Of course, the answer is that UOP's directors as fiduciaries should have investigated the tax consequences for the minority owners of UOP before voting to approve a cashout merger rather than insisting on a stock-for-stock merger. In the absence of any such investigation by them at the time, Signal and UOP now take the haughty position "we can only speculate". In the real world, a tax-free stock-for-stock exchange is obviously preferable for all minority stockholders to a cashout merger. If by any chance some stockholder does not want to continue as a stockholder in the new merged corporation, he has the option of selling his merged share and taking the tax consequences that come with the sale. However, such a stock-for-stock exchange would not visit a draconian tax penalty on all minority shareholders. The optimum plan is a stock-for-stock transaction with a cash alternative (such as was offered in Sterling v. Mayflower Hotel Corp., Del. Supr., 93 A.2d 107 (1952)). Here again was a decison made by Signal and Signal-UOP directors that was motivated solely by Signal's own economic advantage. They never considered, as fiduciaries should, the advantages and disadvantages to the minority shareholders of a cashout merger versus a stock-for-stock transaction. (Note)

* * *

The lower Court's numerous errors require correction and reversal by this Court.

Note: It will not do to say that the minority stockholders voted for the cashout merger. In the first place, the merger price was presented to them as "fair". Second, they had a right to assume that their corporate fiduciaries had totally fulfilled their duty to the minority by negotiating the best deal possible (including not only price but, if at all possible, a tax-free stock-for-stock transaction. Finally, the minority were entitled to "complete candor".

I. PLAINTIFF'S RESPONSE TO THE SECTION OF SIGNAL AND UOP'S BRIEF ENTITLED "VICE CHANCELLOR BROWN WAS CORRECT IN DISMISSING THE DERIVATIVE ALLEGATIONS AND IN REFUSING TO ENLARGE THE CLASS" (DB 128-129)

(No new arguments having been advanced by Signal and UOP, and no response having been made to Plaintiff's Opening Brief, no useful purpose would be served by any further reply to this section of Signal and UOP's brief.)

CONCLUSION

The Final Judgment Order entered by the lower Court on February 19, 1981, as well as all other Orders appealed from, should be reversed for the reasons stated in the Plaintiff's Opening Brief and in this Reply Brief.

A mandate should issue to the lower Court reversing generally the lower Court's decision and specifically ordering:

(1) That the Court enter an order enlarging the class to include all of the minority shareholders of UOP as of May 28, 1978.

(2) That the lower Court enter judgment in favor of the plaintiff and the class on the issue of liability as against all three of the corporate defendants.

(3) That the lower Court determine under equitable principles what form of relief should be granted to the minority shareholders of UOP, including:

(a) A determination as to whether rescission is possible,

(b) Alternatively, a determination as to whether Signal should be ordered to issue Signal's stock to replace the UOP stock of the minority,

(c) Alternatively, the amount of rescissionary damages as measured by the standard as set out in Lynch, supra, II.

(4) That the lower Court determine plaintiff's costs and attorney's fees.

(5) That the lower Court grant such other and further relief as may be necessary to make the minority shareholders of UOP whole.

Respectfully submitted,

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August 14, 1981