IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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

MEMORANDUM OPINION

Submitted: February 22, 1979
Decided: April 5, 1979

William Prickett, Esquire, of Prickett, Ward, Burt & Sanders, Wilmington, for Plaintiff

A. Gilchrist Sparks, III, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, for Defendant UOP, Inc.

Robert K. Payson, Esquire, of Potter, Anderson & Corroon, Wilmington, and Alan N. Halkett, Esquire, of Latham & Watkins, Los Angeles, California, for the Defendant The Signal Companies, Inc.

R. Franklin Balotti, Esquire, of Richards, Layton & Finger, Wilmington, for Defendant Lehman Brothers Kuhn Loeb, Inc.

BROWN, *Vice Chancellor*

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This is a decision on the motion of the plaintiff William B. Weinberger to have his suit determined to be a class action pursuant to Rule 23, and to thereby have himself designated as representative of the class on whose behalf he purports to bring the action. The motion is opposed on the grounds that the class sought to be represented is too large and, also, on the grounds that the plaintiff is not qualified to be designated as the representative of any class that ultimately may be approved by the Court. The factual matters pertinent to a determination of the first of these issues are set forth hereafter.

As a result of a tender offer and a purchase of stock from the corporation itself during 1975, the defendant The Signal Companies, Inc. ("Signal") became the owner of 50.5 per cent of the outstanding shares of the defendant, UOP, Inc. ("UOP"). During 1978, the respective boards of directors of UOP and Signal agreed to a plan of merger pursuant to 8 Del.C. § 251 whereby UOP would be merged into Sigco, Incorporated ("Sigco"), a wholly-owned subsidiary of Signal, with UOP being the surviving corporation. Under this plan, the 49.5 per cent minority shareholders of UOP were to receive $21 per share for their stock interests. UOP was to end up as a wholly-owned subsidiary of Signal.

This plan was to be submitted to the vote of the stockholders of UOP at the annual meeting on May 26, 1978. The merger agreement required that the merger could not

proceed unless it was approved by the holders of a majority of the issued and outstanding shares of UOP stock (other than those owned by Signal) present and voting at the May 26, 1978 meeting. Further, the agreement required the approval of at least two-thirds of all UOP shares outstanding as of the record date of the meeting, including those held by Signal. A proxy statement and other documents were sent to UOP stockholders. Included was a copy of an opinion from an investment banking firm as to the fairness of the price per share to be paid to the minority shareholders.

The annual stockholders meeting of UOP was held on May 26, 1978. At that time there were 11,488,302 shares of UOP outstanding and entitled to vote. Of these 8,753,812 shares (76.2%) voted in favor of the merger; 254,840 shares (2.2%) voted against it. The balance of the shares were not voted. Of the 3,208,652 non-Signal shares which did vote, the vote in favor of the merger was overwhelming: 2,953,812 voted in favor, 254,840 against, a ratio of nearly 12 to 1 in favor of the merger. On the same day, the merger became effective and, pursuant to the terms of the merger agreement, each former UOP share was converted into a right to receive in cash the sum of $21. As of January 31, 1979, all of the certificates representing the former UOP shares had been surrendered and the former UOP shareholders paid $21 per share, with the exception of certificates representing 147,593 former shares, including those previously owned

by the plaintiff Weinberger.

During July 1978 Weinberger filed this action. The complaint alleged both class action and derivative counts.* To place this matter in proper perspective as I see it, I feel compelled to digress into a brief analysis of the somewhat sketchy allegations of the complaint.

To begin with, the complaint alleges that UOP's management and board of directors, together with Signal and the defendant Lehman Brothers Kuhn Loeb, Inc. (the investment firm which rendered an opinion as to the fairness of the $21 per share price) "all stood in a fiduciary relationship to the plaintiff and the outside or minority shareholders." It is further alleged that this fiduciary relationship imposed a duty upon the aforesaid defendants of (1) "affirmatively taking steps to prevent a merger without a bona fide purpose," (2) "of opposing a merger whose purpose was to eliminate the outside shareholders," (3) "of opposing a merger in which the outside stockholders could be cashed out at an unfair price," and (4) "of refusing to enter into a plan, conspiracy or scheme with others to accomplish any of the above."

The complaint goes on to allege that on February 28, 1978 James V. Crawford, president and chief executive officer of UOP as well as a member of Signal's board of

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* By a separate decision of April 3, 1979, the derivative counts have been dismissed due to a lack of standing to maintain them on the part of Weinberger.

directors, agreed with Signal's officers on a plan of merger of UOP into Sigco. It alleges that the agreed-upon, cash-out price for the outside shareholders was $21 per share. The complaint further alleges that this plan of merger was submitted to UOP's board on March 6, 1978, as was the opinion of Lehman Brothers as to the fairness of the $21 per share price.

It is alleged that on May 5, 1978 a proxy statement was mailed to the outside shareholders stating, among other things, that UOP's management recommended a vote in favor of the merger agreement. It is alleged that on May 26, 1978 the plan of merger as proposed and recommended "was approved by more than two-thirds of the majority of shares other than those owned by Signal" and that the merger was subsequently effectuated. Then comes the class action count.

On behalf of the class of minority shareholders of UOP, it is alleged that the "plan of merger was illegal in that it did not have a bonafide business purpose," and that "its purpose was to eliminate the equity interest of the outside shareholders." Secondly, it is alleged that the $21 price "forced on the outside shareholders was grossly inadequate."

The class action count goes on to allege that the $21 price was set by UOP's president, Crawford, in consultation with Signal, without an independent opinion as to the value of the shares, and without arm's length bargaining

on behalf of the outside shareholders. It is stated that the cash-out price was never raised after it was first agreed upon.

Finally, it is alleged on behalf of the class that the opinion obtained from Lehman Brothers was an opinion obtained after the $21 price was set by UOP's president and Signal, and further, that the opinion was not obtained from an independent investment adviser acting in the interests of the outside stockholders, but was obtained from a member of UOP's board who was elected to his position by Signal, the majority stockholder of UOP. (Other allegations in the derivative counts indicate that the opinion on behalf of Lehman Brothers was rendered by a Mr. Glanville, who was a member of UOP's board elected by Signal.)

Based upon these allegations, Weinberger asks that he be certified as the representative of the class composed of the entire 49.5 per cent minority shareholders as of the date of the merger, and that judgment be rendered for him and the class "for the losses incurred by the class as a result of the acts of the defendants." Otherwise, he seeks only "such other and further relief as may be just." This covers Weinberger's entire complaint insofar as it purports to allege a class action.

I have gone to this somewhat tedious length in summarizing the complaint in order to illustrate several things. First, the complaint at one place charges defendants with

certain fiduciary duties, i.e., to oppose a merger which has no business purpose and which is designed to cash-out the minority at an unfair price. At another, it simply charges, at best, that the defendants have violated their duty by not opposing a merger which had no business purpose and which eliminated the minority at a grossly inadequate price. To view this as pleading conclusions is to recognize the obvious. Under the decision of Singer v. Magnavox Co., Del.Supr., 380 A.2d 969 (1977), however, this appears to be sufficient to state a cause of action and to require the Court to hold a fairness hearing. See also, Tanzer v. International General Industries, Inc., Del.Supr., 379 A.2d 1121 (1977); Najjar v. Roland Intern. Corp., Del.Ch., 387 A.2d 709 (1978). Defendants have apparently recognized this, and have made no challenge to the complaint with regard to it stating a cause of action.

This leads to the other points of illustration. Such general allegations apparently being sufficient to state a cause of action, the complaint contains no specific allegation that the proxy statement was false or misleading. At best, this has to be assumed from the allegations that the Lehman Brothers opinion accompanying the proxy statement was not truly an independent opinion, etc. The complaint contains no specific allegation that the minority shareholders were deceived in any way into voting overwhelmingly in favor of the merger. Again, to the extent that the

complaint may intend to encompass this, it must be gleaned from between the lines of the actual allegations that have been made. Finally, it is difficult to nail down the type of relief that is sought on behalf of the former minority shareholders. In general terms, the complaint asks for "judgment" for "the losses incurred by the class" because of "the acts of the defendants."

I tend to agree with counsel for Signal that the complaint, which apparently is conceded to state a cause of action under Singer v. Magnavox Co., supra, due to its employment of the magic language concerning lack of a proper business purpose, etc., is in reality a document (perhaps artfully drafted as such) possessing certain chameleon-like characteristics which enable it to change its appearance when under scrutiny or attack. Thus does Weinberger argue for the purpose of this motion that the class to be represented should consist of all 49.5 per cent of UOP's former minority shareholders because, he says, the complaint alleges that the defendants misrepresented and concealed facts from the stockholders——even though no such specific charge appears anywhere in the complaint, as I read it. Weinberger also suggests that the basic, underlying relief sought by the suit is that of equitable rescission, with money damages or some form of stock interest in the surviving corporation to be awarded to the class in view of the likelihood that it would

now be impossible as a practical matter to unscramble a merger that has long since been consummated with thousands of former shareholders. He says that rescission has always been a part of the case. Yet the word "rescission" nowhere appears in the complaint and there is no suggestion therein that Weinberger seeks to have the merger voided.

I have gone to the trouble to point out these factors to illustrate the problem to which this type of complaint gives rise. It may be that under Singer a recitation of undisputed events coupled with general allegations of a lack of business purpose, a purpose designed solely to eliminate the minority and an inadequate price constitutes a sufficient statement of a cause of action to require the Court to hold an evidentiary hearing as to the entire fairness of the merger. The problem is that such a cause of action, by its very nature, gives rise to an application for class action certification on behalf of minority shareholders, and the generality of the allegations and prayers for relief breeds argument on matters not set forth in the complaint, thus making the important decision on the proper composition of the class a difficult one for the Court. It has occurred in the Singer case itself; and it has occurred here. Having thus digressed, I turn to a determination of the composition of the class in this action.

Weinberger takes comfort in my memorandum opinion of December 14, 1978 in which, despite certain logical

arguments by the defendants, I nonetheless held that the class to be represented in the Singer v. The Magnavox Company litigation was to be comprised of all minority shareholders of Magnavox as of the effective date of the merger which eliminated their equity interests in the corporation, regardless of when or under what circumstances the members of the minority acquired their holdings. Weinberger suggests that this case presents an identical situation. However, this is not entirely so.

In the Singer application, I had the benefit of the Supreme Court's earlier landmark decision. I considered it to be the law of the case to the extent applicable. In its opinion the Supreme Court agreed that the complaint in Singer stated no cause of action for fraud. It held, however, that it did state a cause of action to the extent that it alleged that the majority shareholder had violated a fiduciary duty owed to the minority shareholders by using its majority position to eliminate the minority for an unfair price through the mechanism of a merger which served no business purpose of the corporation. I understood the Supreme Court's interpretation to mean that by charging the majority shareholder with misuse of its controlling position in bringing about the cash-out merger, the complaint alleged a violation of a fiduciary duty owed to all minority shareholders of record as of the time that the majority shareholder acted, through its controlling voting power, to approve the

merger. Thus, I felt, in the Singer application, that the class to be represented had to consist of all minority shareholders as of the date that the merger was approved.**

Here, however, the situation differs. As the defendants point out, the merger agreement here was structured so that it could not be approved unless it received the favorable vote of a majority of the 49.5 per cent minority shares. It could not be approved solely by the majority of UOP's outstanding stock controlled by Signal as was the case in Singer. As such, under the terms of the merger agreement, Signal lacked the capacity to use its voting position as majority shareholder to bring about a cash-out merger in violation of a fiduciary duty owed to the minority. Rather, the decision was left to the minority shareholders, and they voted overwhelmingly in favor of the merger and its cash-out terms.

In his deposition, Weinberger has conceded that he brought this suit based upon his knowledge of the 1975 tender offer price paid by Signal, the information contained in the proxy statement and accompanying documents, including the Lehman Brothers fairness opinion and his consideration of a Standard & Poor's Guide. Thus, it would seem obvious

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** It should be noted, however, that even this decision is not yet final in this Court. A motion for reargument is pending. Action thereon has been deferred by stipulation of counsel while settlement possibilities are being explored.

that Weinberger finds a basis for his suit in the same information that was sent and available to all other minority shareholders of UOP. Yet by far the majority of these other minority shareholders have voted to approve the merger, turned in their shares and received their payment. Under these circumstances, I agree with the defendants that it would be improper to include these persons in the class sought to be represented.

Despite Weinberger's assertions for the purpose of this motion as to what the complaint says, it seems clear to me from its language that it seeks the recovery of money damages against the defendants for an alleged breach of a fiduciary duty owed to minority shareholders in the context of a merger proposed by the defendants. It is a "Singer complaint." It does not charge fraud or deceit on the part of the defendants nor does it allege that approval of the merger was obtained by fraud or deceit. It charges the defendants with a fiduciary duty, specifically with an affirmative duty, to oppose and to take steps to prevent a merger designed to eliminate minority shareholders, and/or to prevent a merger which proposed to cash-out minority shareholders at an unfair price. The complaint seeks recovery because it alleges that the defendants failed to carry out this affirmative fiduciary duty ascribed to them.

Thus analyzed, it seems to me that the violation

of fiduciary duty charged against the defendants here, in light of the factual context of the case, is that they failed to use Signal's majority stockholding position to stop a proposed merger that was overwhelmingly approved by the majority of UOP's 49.5 per cent minority shareholders. Thus, in sum, Weinberger seeks recovery against the defendants on behalf of himself and others who opposed the merger, or who have not turned in their stock, based upon the premise that the defendants, who technically could have stopped the merger and in his view had a fiduciary duty to do so, allowed the merger to go through to the detriment of those minority shareholders who opposed it and who wanted to continue as shareholders of UOP.

If it seems a non sequitur to say that one has a fiduciary duty to oppose and prevent that which it proposed in the first place, I can only say that this is how it seems to work out from the language of Weinberger's complaint. But even if it really means that there was a fiduciary duty not to propose such a plan of merger in the first place, it works out the same for the purpose of defining the class of shareholders who were harmed by it. Either way, the class consists only of those members of the minority shareholders who were not satisfied with the terms of the merger as they applied to them, but who were powerless without the aid of the majority shareholder to do anything to stop it.

For the foregoing reasons, I conclude that the class sought to be certified should consist only of those former shareholders of UOP who are not disputed by the defendants as constituting a proper class, namely, those former shareholders of UOP who voted against the merger and/or have not turned in their stock certificates in exchange for the $21 per share payment.

As to the second issue presented by the defendants' opposition to Weinberger's motion, I conclude that Weinberger should be designated as representative of the class despite the considerable protestations of the defendants.

I have read Weinberger's deposition in light of the arguments made by the defendants based thereon. I acknowledge that he is eighty-one years of age; that at the time of his deposition he had virtually no accurate knowledge of the status of the suit that he had filed; that he was unaware of the findings and opinion of any financial analyst who had been retained by his counsel to evaluate his contentions as to the value of the stock (if, indeed, a financial analyst had in fact been retained); that he had not met his lead Delaware counsel until two days before his deposition and some five months after his suit was filed; that at the time of his deposition he had no written understanding with his counsel concerning his responsibility for the payment of costs in the event that his suit was unsuccessful; and that, at his deposition, he had virtually no recall whatsoever

as to the outcome of several other class and derivative actions in which he participated as a party plaintiff including one in this Court in which I granted his motion to intervene as a party plaintiff, and as to which I approved a final settlement and an allowance of counsel fees as recently as January 19, 1978.

Nonetheless, Weinberger does have experience as a class or derivative plaintiff. He has been permitted to maintain such suits in this and other jurisdictions. There is no proof or history of inadequate or improper performance as a party litigant in those suits. He is an experienced private investor with considerable holdings. He would appear to be capable of assisting his counsel in the interests of others on whose behalf he seeks to maintain the suit. Finally, it does appear that his lack of familiarity with the status of this case at the time of his deposition is largely attributable to the illness and incapacitation suffered by his New York counsel subsequent to the filing of the suit. It is represented that this has been remedied and that lines of communication between Weinberger and Delaware counsel are now open and will remain so.

Based upon a consideration of the foregoing factors, I conclude that at this point Weinberger is a proper person to be designated as representative of the class previously identified.

I ask counsel to agree upon and submit a form of order embodying the rulings contained herein.