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STATE OF DELAWARE

GROVER C. BROWN
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June 23, 1980

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Re: Weinberger v. UOP, Inc., et al
Civil Action No. 5642
Submitted: June 3, 1980

Gentlemen:

With my apologies for the intervening delay, I offer this as my ruling on the status of the Rule 41(b) motion articulated in the main by Mr. Halkett and made on behalf of all defendants at the close of the plaintiff's case.

The basis for the motion was that upon the facts and the law the plaintiff had shown no right to relief. The argument of Mr. Halkett in support of the motion was ably and meticulously presented, comparing Signal's interpretation of plaintiff's evidence against the liability allegations of the complaint in light of the applicable Delaware case law, again as interpreted by Signal. Mr. Sparks, with some additional remarks, joined in this motion on behalf of UOP as did Mr. Balotti on behalf of Lehman Brothers. Mr. Balotti also made

a separate argument as to the conspiracy allegations against Lehman Brothers. At the conclusion of all this, I reserved making any decision on the motion, preferring under the circumstances to defer until the conclusion of the defendants' case. In so doing, I did not require the plaintiff to respond to the motion. With regard to the matter of post-trial briefing, the question then became whether plaintiff should first be required to respond to the Rule 41(b) motion and obtain a decision thereon before going further, or whether post-trial briefing on all the evidence should be directed as though the Rule 41(b) motion had been denied.

Rule 41(b) of this Court is patterned after Rule 41(b) of the Federal Rules of Civil Procedure. In applicable part, it reads as follows:

> "After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The Court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."

For some reason, this last quoted sentence, as added to the Federal Rules by amendment some time ago, had been omitted from our Rule until November 21, 1978. It was added to our Rule 41(b) at that time by order of the Chancellor. As best I can tell, this amendment has not yet been picked up in the

supplements to the Delaware Code Rules volume, but it is now formally a part of the procedures in this Court nonetheless.

The aforesaid sentence was added to the Federal Rules so as to resolve conflicting interpretations of Rule 41(b) as they then existed within the Federal Circuits. Its purpose was to make it clear thereafter that the standard applicable to a Rule 41(b) motion (which is made only in a non-jury case) is not the same as that applied to a motion for a directed verdict in a jury trial pursuant to Federal Civil Rule 50(a). (This Court, of course, has no corresponding Rule 50.) In the latter situation the judge is not sitting as trier of the facts, and therefore his function is only to determine whether there is sufficient evidence from which the jury could reasonably find for the plaintiff. In a jury trial the judge is not permitted to weigh the evidence and pass upon its credibility. This is also the status of the law in this State. Millman v. Millman, Del.Supr., 359 A.2d 158 (1976); Ebersole v. Lowengrub, Del.Supr., 208 A.2d 495 (1965).

In a non-jury case, however, the judge does sit as trier of the facts and accordingly, before granting a Rule 41(b) motion, the trial judge must weigh and evaluate the evidence in the same manner as if he were making findings of fact at the conclusion of the entire case. Palmentere v. Campbell, 8th Cir., 344 F.2d 234 (1965); Benton v. Blair,

5th Cir., 228 F.2d 55 (1956). Thus, in their motion, the defendants urged that I weigh and evaluate the evidence offered by the plaintiff, and the detail with which Mr. Halkett made the motion was quite properly designed to both assist and tempt the Court into doing so.

At the same time, the aforesaid last-quoted sentence of Rule 41(b) as added to our Rule in 1978 makes it clear that the Court is not required in all cases to make factual determinations upon such a motion. Moreover, it is not required to rule on the motion at that time. Smith Petroleum Service, Inc. v. Monsanto Chem. Co., 5th Cir., 420 F.2d 1103 (1970). Rather, the purpose of Rule 41(b) is to permit the Court, sitting as trier of the facts without a jury, to avoid further needless proceedings and enter judgment on the merits in favor of the defendant in the event that it appears clear to the trial judge, after weighing the plaintiff's evidence, that the plaintiff is not entitled to relief. It is intended as a tool to expedite the course of litigation in an appropriate case; it is not intended to require a trial judge sitting without a jury to rule on the status of the plaintiff's evidence at the conclusion of the presentation of his case. See, 9 Wright & Miller, Federal Procedure § 2371.

Moreover, even a denial of a defendant's Rule 41(b) motion amounts to nothing more than a refusal to enter judgment at that time. At most such a denial constitutes a tentative

and inconclusive ruling on the quantum of plaintiff's proof. It does not preclude the trial judge from later making considered findings and determinations not altogether consistent with his prior tentative ruling. Armour Research Found. of Ill. I. of T. v. Chicago, R.I. & P.R. Co., 7th Cir., 311 F.2d 493 (1963), cert.den., 83 S.Ct. 1091, 372 U.S. 966, 10 L.Ed.2d 129.

Viewed in light of these authorities, I treated the defendants' motion here as being one which offered the Court the opportunity to evaluate the plaintiff's evidence standing alone and to enter judgment on the merits in favor of the defendants if I was so inclined. As I stated at the time, due to the complexity of the matters involved, coupled with the fact that a good deal of plaintiff's case was presented through the introduction of some dozen depositions which I had only a hurried opportunity to read, I felt it best to decline the offer. For that reason, in the language of the Rule, I "decline[d] to render any judgment until the close of all the evidence."

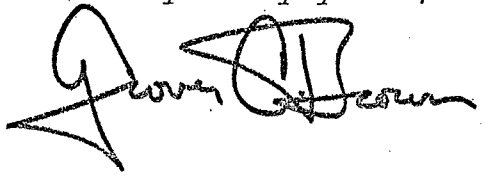
Having declined to render judgment on the merits (as Rule 41(b) requires) until the close of all the evidence, it would not be consistent now, after all the evidence is in, to revert to the motion made at the conclusion of plaintiff's case and to require the plaintiff to first defend the adequacy of his evidence (just as though the defendants' evidence had

never been offered) before possibly moving to a second and separate consideration of all the evidence. Such a procedure would violate the purpose of Rule 41(b) by utilizing it so as to add an additional step to the trial procedure rather than to use it as a means to expedite the end of litigation in an appropriate case.

Accordingly, it is my decision that this case should now be considered as being in the post-trial briefing stage, on all the evidence. No factual or legal inference should be drawn one way or the other from my decision to decline to render judgment on the Rule 41(b) motion as of the time it was made.

I ask counsel to endeavor to agree upon and submit a brief schedule, giving deference to their respective schedules and commitments to other courts in so doing.

Very truly yours,



GCB:mlw

cc: Register in Chancery