BEFORE THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM B. WEINBERGER, Plaintiff,	
v.	No. 58, 1981
UOP, INC., THE SIGNAL COMPANIES, INC., SIGCO INCORPORATED, LEHMAN BROTHERS KUHN LOEB, INC., CHARLES S. ARLEDGE, BREWSTER L. ARMS, ANDREW J. CHITIEA, JAMES V. CRAWFORD, JAMES W. GLANVILLE, RICHARD A. LENON, JOHN O. LOGAN, FRANK J. PIZZITOLA, WILLIAM J. QUINN, FORREST N. SHUMWAY, ROBERT S. STEVENSON, MAYNARD P. VENEMA, WILLIAM E. WALKUP and HARRY H. WETZEL, Defendants.	

Supreme Court Building
Dover, Delaware
June 23, 1982
10:00 A.M.

BEFORE: HON. CHIEF JUSTICE DANIEL L. HERRMANN, and JUSTICES WILLIAM T. QUILLEN, JOHN J. McNEILLY, HENRY R. HORSEY, and ANDREW G. T. MOORE, II.

APPEARANCES:

WILLIAM PRICKETT, ESQUIRE,
Prickett, Jones, Elliott, Kristol & Schnee,
For the Appellant.

A. GILCHRIST SPARKS, III, ESQUIRE,
Morris, Nichols, Arsht & Tunnell
For the Appellee.

APPEARANCES: (continued)

ROBERT K. PAYSON, ESQUIRE,
Potter, Anderson & Corroon,
-and-
ALAN N. HALKETT, ESQUIRE,
Latham & Watkins, of the California Bar
For Appellee - The Signal Companies, Inc.

ALSO PRESENT:

BREWSTER L. ARMS
Vice President and General Counsel
The Signal Companies

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P R O C E E D I N G S

CHIEF JUSTICE HERRMANN: Good morning, gentlemen.

MR. PRICKETT: Good morning, Your Honor.

CHIEF JUSTICE HERRMANN: The Court will now take up Weinberger against UOP, et al.

MR. PAYSON: Good morning, Chief Justice.

CHIEF JUSTICE HERRMANN: Good morning.

MR. PAYSON: Members of the Court:

Before Mr. Prickett begins argument, I would like to reintroduce to the Court Mr. Alan Halkett, a member of the California Bar and a partner in the firm of Latham & Watkins. Also Mr. Brewster L. Arms, who is a senior vice president and general counsel of the Signal Companies. Mr. Halkett has already been admitted for purposes of this proceeding.

CHIEF JUSTICE HERRMANN: Gentlemen, you are welcome to our Court.

MR. HALKETT: Thank you, Your Honor.

CHIEF JUSTICE HERRMANN: Mr. Prickett, before you get into your argument, the Court has a basic general question of you, and that is this:

What issues are removed from this case that were briefed which are no longer in the case by

reason of the dismissal of the claim against Lehman Brothers?

MR. PRICKETT: Your Honor, before commencing my argument let me address that, because I was sure the Court was going to ask it:

I think that what is removed from the case is any possibility of a direct judgment against Lehman Brothers. They are no longer a party.

It was somewhat fortuitous that I was able to sue Lehman in the original action. Lehman was a Delaware Corporation, and hence amenable to service in this jurisdiction. Ordinarily I wouldn't suppose that I would have been able to sue them. I would have made the same claims against the majority for the acts of Lehman Brothers whether they were a party or not, and therefore, I think the conduct of Lehman Brothers is still in the case, and it is in the case in two senses. It is in the case because Glanville was himself a director of UOP, and therefore he is a member of the UOP team, and they are responsible for his actions, and I think in the same context there is agency responsibility for the actions of Lehman Brothers by Signal and by UOP.

So that to summarize, I don't think there

is any judgment possible against Lehman Brothers, but I think the issue is still very much in the case, though they have been dismissed as a party-defendant.

JUSTICE HORSEY: Mr. Prickett, can you be any more specific as to what issues -- which of your arguments under II of your opening brief are now out of the case? Start at A under Page 47.

MR. PRICKETT: I'm turning to the index of the brief, and at Page 47: "Lehman is liable to the minority under agency and fiduciary principles."

As I said, I don't think any judgment is possible against Lehman Brothers, and therefore, I don't think that that is applicable to Lehman Bros. I do think it is applicable in the converse situation, and that is that Signal and UOP are responsible for the acts of their agents.

I think Denison is very applicable. That is, the Denison case basically in its pertinent provisions indicated that the significance of a representation by a prestigious banking firm such as Lehman Brothers was significant in the context of representations made to the stockholders. I think that's applicable.

Lehman Brothers' failure to disclose the Lehman Brothers' '76 opinion, that remains applicable,

not because of a judgment that might be possible against Lehman Brothers, but because Glanville was a director of UOP and is responsible for the actions of Lehman Brothers. So that I think you have that in the context.

JUSTICE MOORE: Is that a different theory than your conspiracy theory, Mr. Prickett?

MR. PRICKETT: The conspiracy theory is grounded basically on the principle that running through the seven days in which this merger was accomplished was a common purpose. I do not think that the existence of the '76 memorandum can be ascribed either to Signal or to UOP. They did not know about it except -- and this is an important exception -- that Glanville, a director of UOP, was the man who directed that be done, and therefore, I think they have agency responsibility for what he knew, or what he had done.

So that to try and field the question a little more adequately, the conspiracy theory is bottomed on the fact that if you look over the seven days which it took to put this merger together, there is, we think, a common purpose that all three of the corporate entities participate in; Lehman, Signal and UOP. They are all working to achieve the common end of cashing out the stockholders at $21, and everybody cooperates to get it

done.

JUSTICE MOORE: So that's your conspiracy theory?

MR. PRICKETT: Yes, sir.

JUSTICE HORSEY: That's one of your explicit arguments on appeal?

MR. PRICKETT: Yes. It's not abandoned. It is suggested that it is abandoned. It is not abandoned.

I think this Court, though the court below indicates that there is a paucity of authority on the law of conspiracy, can in conformity with its skepticism with which it views a transaction that is orchestrated by a majority -- should be alert, and should alert the lower court to see if in fact running through a transaction there is not a common purpose to which all participants dance. Though they may observe the forms, are they really doing their jobs as fiduciaries. or are they all dancing to a common tune; that is the tune of the majority that seeks to cash-out the minority, And I would think that the Court, as Vice Chancellor Hartnett indicated, would alert the lower courts to be sensitive to the fact that where the majority controls all the players, a conspiracy, not in the worst sense of the word, but a common purpose to achieve an end that is

the purpose of the majority, the Court should be alert to define that just as Vice Chancellor has in one of the cases that was cited.

Let me turn --

CHIEF JUSTICE HERRMANN: How about Item 4 under A? Have you discussed that? Have I missed something?

MR. PRICKETT: No, I don't think I have, Your Honor. I think that remains there. I think it remains a part of the case.

CHIEF JUSTICE HERRMANN: All right.

MR. PRICKETT: Now let me turn --

CHIEF JUSTICE HERRMANN: You may proceed with your argument now.

MR. PRICKETT: Yes, sir.

CHIEF JUSTICE HERRMANN: I think we have our answers as to what your contentions are as to the effect of the dismissal of the complaint against Lehman Brothers.

MR. PRICKETT: Yes, sir.

Now, as I said in the original argument, one necessarily has to be selective in a case where there are several interlocutory decisions, a final judgment, and this is now compounded somewhat by the fact that

there is a summary affirmance with a dissent after the oral argument. Before, however, taking up these three selected points that I would discuss with the Court, let me dispose of some preliminary matters.

First, as I have already indicated, I welcome questions from the Court on all facets of the case.

Second, I call the Court's attention to the transcript of the earlier argument. It is one of the documents on file. I incorporate and rely on what was said in that earlier argument even though time won't permit me to repeat those.

Finally, I call the Court's attention to three significant decisions which the Delaware courts have handed down. All three were decided since the briefing and original argument in this appeal. Let me refer to them briefly:

First is the Masoneilan case. The significance, as I see it, in that case is that the court in a contemporaneous decision has reaffirmed the principles of Singer and its progeny; whereas in contrast, the summary affirmance in this case I think is completely opposed to the principles of Singer, and specifically undercuts Singer and its progeny in connection with

proper business purpose, intrinsic fairness and complete candor. So that I think the two decisions, though dated the same, look in opposite directions.

Second, I call the Court's attention to Gabelli versus Liggett Group. It was decided April 8, 1982, by Vice Chancellor Hartnett. I have copies of that opinion. The other two opinions I referred to are both in the record of this Court, or are reported opinions. The Gabelli, I will hand up a copy of that after the argument.

Gabelli was an unreported decision in which Vice Chancellor Hartnett dismissed a complaint, but with leave to replead. Essentially Vice Chancellor Hartnett held that a decision to pass a regular dividend following a tender and mop-out, cash-out merger would state a cause of action if there was included in the allegations of the complaint a count on the unfairness of the cash-out price. That decision is in stark contrast to the decision in this case.

In this case there was a cash-out merger price agreed to on March 7, and it was anticipated that the details would be taken care of relatively promptly. SEC compliance took far longer than had been anticipated, and during the interim the second quarter merger came up.

It had never been considered in the price. The majority simply voted that dividend to itself. The court below said there was no explanation for this. And therefore, within seven days of the date of the expiration of the second quarter the dividend was gobbled up by the majority, and no explanation is given. That decision we think is in contrast to the Gabelli decision.

And finally, I refer to Steinhart versus Southwest Realty, an unreported decision again from Vice Chancellor Hartnett coming down December 28th. The significance of this opinion lies in the fact that though this is an appraisal, it points out the significance of an up-to-date fresh appraisal where in fact the assets of the company in question are non-income producing assets. In the Southwest case, similar to our case it was real estate.

I think that those three decisions are incompatible with the decision of the court below, and should be reconciled.

CHIEF JUSTICE HERRMANN: You say the two Hartnett decisions are not reported so far as you know?

MR. PRICKETT: So far as I know, Gabelli may be.

CHIEF JUSTICE HERRMANN: Are they in form

for reporting?

MR. PRICKETT: The Steinhart decision says that it is unreported. The Gabelli decision does not indicate whether it is going to be reported or not. I can't tell.

CHIEF JUSTICE HERRMANN: Do you say you have copies of those two?

MR. PRICKETT: I have a copy here. The Steinhart decision was appended to the motion for reargument.

CHIEF JUSTICE HERRMANN: Yes.

MR. PRICKETT: Therefore, that is in the records of the Court.

CHIEF JUSTICE HERRMANN: Yes.

MR. PRICKETT: Gabelli, so far as I know, is not. I have copies of that. And of course Masoneilan is a reported decision of the court.

JUSTICE HORSEY: I was under the impression somebody had given us a copy.

JUSTICE QUILLEN: You did, I think, Mr. Prickett.

JUSTICE HORSEY: I think you have already done it.

CHIEF JUSTICE HERRMANN: All right.

JUSTICE QUILLEN: Maybe if you have copies, maybe --

MR. PRICKETT: I have a cluster of copies.

CHIEF JUSTICE HERRMANN: Let's let the clerk have five copies, or whatever you have there.

MR. PRICKETT: Yes.

CHIEF JUSTICE HERRMANN: And if the appellee here wasn't aware that these cases were going to be discussed this morning, why, we will talk about that when your turn comes.

MR. PRICKETT: Your Honor, I did inform both counsel yesterday. I really did not want to burden the Court with a further communication on these cases, one of which was a reported case, one of which was attached to the motion for reargument, and the other one of which involves --

CHIEF JUSTICE HERRMANN: Yes. Well, it's only a question of whether they had word that it was coming up today. If they had some word, we'll find out what objection they may have.

MR. PRICKETT: Sure.

CHIEF JUSTICE HERRMANN: You may proceed.

MR. PRICKETT: With these preliminaries out of the way, let me turn to the points that I have

selected to present to the Court in argument. They are three.

First, fundamentally this is a case in which material misrepresentations were made by the majority to the minority.

The second point is the decision of the lower court unless modified constitutes judicial approval of a significant retreat from the principles of Singer and the subsequent cases.

The third and final point: The court below, contrary to the decisions stemming back to Guth and Sterling, actually imposed the burden of proof on the plaintiff, not only as to damages, as Justice Duffy correctly pointed out in his dissent, but on liability as well. Let me turn to the first point:

This is a case of misrepresentation. The outcome of this case we think turns on whether the Court finds that the defendants made full and fair disclosure as measured by the standard of Lynch.

Now, limitations of time prevent a detailed discussion of all the specific points by which plaintiff has shown there was a lack of adequate disclosure. In addition, in the prior argument which I have referred to plaintiff set out the reasons why he believed the standards

of fiduciary responsibility are mot met simply by adroit conformance to technical requirements both as to the fiduciary standards themselves and as to the duty to disclose.

JUSTICE MOORE: Mr. Prickett, you are dealing with, I guess, the issue of fairness here. Is that correct?

MR. PRICKETT: I was dealing more with misrepresentations than fairness, which was the final point, but they overlap.

JUSTICE MOORE: Doesn't fairness include fair dealing --

MR. PRICKETT: Yes.

JUSTICE MOORE: -- in addition to price, and is candor, or lack of candor, fair dealing?

MR. PRICKETT: Yes. That's exactly what I mean. They are intertwined, and we are dealing with fairness in the sense of fair dealing in terms of disclosure.

JUSTICE MOORE: And what other aspects of lack of fairness are you relying on in addition to the lack of candor?

MR. PRICKETT: Well, I think the price, candor, and carrying out of fiduciary obligations.

Let me pause on that because I won't come back to it:

As I indicated in my original argument, I think the Court has got to breath life into the standard of what it means by carrying out fiduciary responsibilities, because in this case I can't point to any technical lack of observance of form, but I can tell you that there is not one single instance where anybody from Signal, from UOP, from Lehman Brothers stood up and said I represent the minority, and I'm going to use my best efforts to get the best deal.

Now, if fiduciary responsibility means simply not doing something opposed, that's one thing. But if in corporate law, as in trust law, it really means doing something for them, then it is not found in this case, and the Court, we think, has got to breath life into that, and say it means something more than technical observance.

So that I do think that in the fairness aspect we are relying on the fact that there is a total absence of that affirmative effort that should characterize the discharge of fiduciary responsibilities.

JUSTICE MOORE: Well now, in asking us to breath life into your point, specifically what are the

indicia of entire or intrinsic fairness that you think this Court needs to breath life into?

MR. PRICKETT: Well, I can see the Court saying something like the technical compliance with fiduciary responsibilities is not met by that alone. There must be an indication of affirmative action that advances by deeds rather than words the interests. And here we find that no one, though they were warned by counsel that they had a fiduciary responsibility, did anything affirmatively. There is nothing that they can point to that affirmatively advanced the interests of the minority. And certainly in trust law you would expect that a fiduciary would advance the interests of his cestui by affirmative acts rather than simply mouthing that it is a fiduciary, and that's what we would expect the Court would say if it is really serious that a majority is a fiduciary for the minority in these sort of situations, because if it doesn't have any affirmative responsibilities, and simply has to be tacitly aware of the name that's hung on it, it is of little effect, and there was nothing done here by anybody, either Signal or UOP.

JUSTICE MOORE: Well, I understand now you have said candor, and you have said positive action which

would show efforts to advance the interests of the minority by the fiduciary. Are there any other inidica of fairness that you believe this Court should turn to in breathing life into your position?

MR. PRICKETT: Yes. I think -- and I'm jumping a little ahead in my argument --

In Harriman versus DuPont there was a conflict of interest that went back --

JUSTICE MOORE: You are speaking of the indpendent negotiating team?

MR. PRICKETT: Committee, yes.

JUSTICE MOORE: Right.

MR. PRICKETT: If you are going to breath life into it, you've got to say in a situation where there is a majority stockholder there is bound to be, or often going to be conflict of interests, and therefore, you've got to do something. Not just say I've got a pure heart, and I'm going to steer in between, because the essence of discharge of fiduciary responsibility is affirmative action. And DuPont tells us just exactly how honest, straightforward businessmen facing the fact resolve it. They say we've got a conflict of interest, and we're going to divide, and we're going to arm each side with the requisite professionals, lawyers

and investment bankers, and then we are going to really negotiate where nobody has a reservation about what their responsibility is.

Now, that was alluded to at the trial. It is not even mentioned in the opinion of the court below, and it seems to me that this Court could well say, as it did in Maldonado, we are going to give you some standard so that when you face these conflicts of interest, you have some guidance as to what you can do, and we are not simply going to be satisfied that you tell us afterwards that you had a pure heart, and you steered in between. That won't work in a conflict of interest.

JUSTICE HORSEY: Doesn't Mr. Payson argue quite strongly that the board of UOP had outside directors on it who were not dominated by Signal, and that they were experienced businessmen, and that they reviewed the proposed transaction, the merger, and concluded that it was in the best interests of the minority as well as the majority?

MR. PRICKETT: Oh, he argues that, but let's see what really happened:

In the first place, these people were all voted in by Signal as the majority stockholder. So we

start with that. They served at the sufferance of Signal.

CHIEF JUSTICE HERRMANN: When you say "these people", you mean the outside directors?

MR. PRICKETT: Yes. And I don't mean that in a derogatory term.

Secondly, let's see what really happened:

They were summoned on three days notice by Signal to come and consider a cash-out merger by Signal of the minority. They got no advance information whatsoever. Contrast that with Gimbel versus Signal. So that they came not knowing anything about it other than what they had been told very informally on the phone. And on that it's very significant.

Mr. Crawford, the president, was able to tell Signal before that board had met that it was his feeling that he could deliver then at $21 a share.

JUSTICE MOORE: Was there ever any evidence that at that point Mr. Crawford was aware of the study of Mr. Arledge and -- was Chitiea?

MR. PRICKETT: Yes. I think that -- Let me say that I think so, because what happened was that Arledge and Chitiea, two UOP directors made a study for Signal based on UOP information. That was disclosed to

the Signal executive committee.

JUSTICE MOORE: That was never, however, disclosed to the minority shareholders; was it?

MR. PRICKETT: It was never disclosed to the minority shareholders, and it was never disclosed to the independent members of the UOP board.

JUSTICE MOORE: In fact when did it first come to the attention of the independent members of the UOP board?

MR. PRICKETT: I think when they read my complaint, or the discovery.

JUSTICE MOORE: In other words, the first time that saw the light of day outside of Signal's precincts was when you filed your lawsuit?

MR. PRICKETT: Not when I filed it.

JUSTICE MOORE: Or when you got into discovery?

MR. PRICKETT: Finally I found it on discovery, that they had all this inside information that had never been disclosed either to the stockholders of UOP or to the so-called outside directors.

I am still left a little bit hanging by Justice Horsey's question as to what UOP's directors did.

But the directors, having been alerted at

thatvery meeting as to what was going to happen, did not say wait a minute; why do we have to vote on this immediately? Why don't we get our own independent evaluation? Why don't we have an appraisal done so that in a space of time that is very short with -- And I with a considerable amount of diligence could never determine whether that meeting was one hour long or two hours long. There were no times kept. They immediately went with the majority.

JUSTICE MOORE: Incidentally, viewing that short -- I guess it was a four business day time period from what I counted.

MR. PRICKETT: Yes.

JUSTICE MOORE: Viewing that most favorably to Signal, what evidence was there to show that that was a necessary act in the four business days? In other words, what was the compelling need, viewing it as favorably as you can from Signal's standpoint and the evidence that was adduced that required this speedy joint action by the boards in the four business days?

MR. PRICKETT: Well, you are asking the condemned man to build his own scaffold, but let me do it as fairly as I can:

I think that once they had determined that

they were going to buy out the majority, they wanted to do it as quickly as they could.

JUSTICE MOORE: I mean, were there any business reasons that they gave?

MR. PRICKETT: None whatsoever. They had been thinking for two-and-a-half years what are we going to do with $400,000,000 worth of cash. They decided to do it. They summoned the president of UOP, told him they were going to do it, and in seven days they had done it.

CHIEF JUSTICE HERRMANN: Wasn't the question ever put on this record and answered on this record of what was your hurry?

MR. PRICKETT: It was asked, but it was never determined.

CHIEF JUSTICE HERRMANN: What answer was given on this record?

MR. PRICKETT: There was -- I've got to be fair. There was an answer. It was said, well, if the thing didn't go through in a hurry, there might be speculation in the stock of UOP.

CHIEF JUSTICE HERRMANN: Well, who made the press release?

MR. PRICKETT: Signal and UOP.

CHIEF JUSTICE HERRMANN: And what was the necessity of a press release if they didn't want a leakage on it?

MR. PRICKETT: Oh. No. Let me be fair on that.

Having once made a determination that they were going to do it at the 28th meeting, I think SEC requirements required them to disclose that, so they had to disclose it.

CHIEF JUSTICE HERRMANN: Even before the UOP meeting?

MR. PRICKETT: Yes, I think so. I think, Your Honor, that federal law -- and I'm sure Mr. Payson or Mr. Halkett will touch on that -- they had to release it.

CHIEF JUSTICE HERRMANN: All right.

MR. PRICKETT: But what they did not have to say was something that was blatantly untrue, and what they said -- and I don't want to flog a dead dog, and I've done it a lot in the briefs -- was they represented they were negotiated, and that was just plain not true. Nobody negotiated. They had a deal. It was 20 to 21, and nobody stood up and said hey, I want a little more money on this.

JUSTICE MOORE: In fact what happened between March 6th when the joint board approval occurred and the UOP meeting on the 26th in terms of "negotiations" or "discussions"?

MR. PRICKETT: Well, nothing. Let me be clear on that:

On the 28th the executive committee authorized management to negotiate with UOP. The record is clear as to what happened. There was one phone call between Crawford, who had already said that he thought the price was generous, and Walkup, and unrecorded phone call. But on March 6th the deal was presented to the board of UOP that at that very meeting accepted it. After that the deal was in concrete. Nobody did anything after that. Well, they picked up the second quarter dividend, and -- but Lehman Brothers never even evaluated whether the offer which they said was fair on the 6th of March was still fair on the 28th of May. Though the market had gone up 13 percent, Signal's own stock had gone up way beyond the market, and of course UOP had stayed flat. But there were no negotiations after that, and the action of the management of UOP, Crawford, was to fend off with bland letters all the stockholders who said why are you doing this? And

at the meeting of stockholders there were people there urging that this was a rotten deal, and Crawford is saying, oh, no. He's just fending it off. He's defending the deal, and of course he knows he's got the ticket by that time, so it's really not a very serious exercise. But there are real questions raised at that time, and nothing is done after that time either by way of evaluating the deal, much less any negotiation, much less anything that reflects the rise that has occurred in Signal's stock, the stock market generally, or in connection with the dividend.

JUSTICE MOORE: Is there any dispute that Crawford was in fact a Signal director?

MR. PRICKETT: Oh, no. No, no. When he was made president of UOP, he got two things. He was, one, made president of UOP and chairman, and also for the first time in his career he's put on the Signal board.

JUSTICE MOORE: No. What I meant by that was he was Signal's designee, one of their designees on the UOP board?

MR. PRICKETT: Oh, no. I think there is no dispute on that.

When Crawford was selected by Signal to be

the new president of UOP, and move from Garrett to UOP, he was made the president of UOP, and he was made a Signal director, and that was some two years before this time. And I don't suggest that there is anything improper about that. I think the impropriety occurs when Crawford is summoned to Signal's headquarters, and then plays dead dog so far as his minority stockholders are concerned. He does nothing for them, and yet it is represented, and it is even believed by his own board that he is the man, he's the front man for the minority. He's negotiating.

CHIEF JUSTICE HERRMANN: You say the record shows that Crawford knew of the $24 "profitable" evaluation?

MR. PRICKETT: Your Honor, let me delineate what the record is:

Arledge and Chitiea, two UOP directors, and Signal financial officers, made a report to the executive committee of Signal on February 28th, and Crawford was present.

CHIEF JUSTICE HERRMANN: My only question is did Crawford know?

MR. PRICKETT: Yes. He was present at that time, and he knew.

CHIEF JUSTICE HERRMANN: All right.

Mr. Prickett, we ought to talk about timing. I know the Court has been questioning you closely. You are still on Point 1, right?

MR. PRICKETT: Let me --

CHIEF JUSTICE HERRMANN: We took some time on preliminaries, but the best we can do this morning is to give you another 15 minutes.

MR. PRICKETT: Goodness! That is, I hope, more than adequate.

Let me turn to the second gross misrepresentation among a number that I would like to discuss, because it seemed to come up in the dissent by Justice Duffy, and that is there was no disclosure to the minority that the $21 price included any elements for the undervalued asset of UOP.

JUSTICE MOORE: What was the reason that they gave for not doing that? They had almost three months between the time of the board approval and the stockholders' meeting. What does the record show as to the reasons that neither Signal nor UOP thought that was necessary?

MR. PRICKETT: Well, because the deal had been done. It had been done in seven days. That is,

they disclosed that they were going to pay $20 to $21, and seven days later the UOP board approved it, and the price was then $21. The interim had been consumed by getting a fairness opinion by Lehman Brothers. Lehman Brothers had packed together a little one-line opinion that the price was fair including a disclaimer that said they had no appraisal made of the assets. Well, of course there wasn't time. And then --

JUSTICE MOORE: Would there have been time between March 6th and May 28th?

MR. PRICKETT: Oh, sure. I mean, you might have said well, we'll tentatively approve this, but subject to an appraisal. The UOP directors didn't say that. They approved it. The deal was closed, and nobody -- Lehman Brothers didn't say well, we would like to have an appraisal made. We would like to refine our numbers. We would like to take another look. We would like to give you another opinion at the end of the time. Nothing like that. The deal was closed.

JUSTICE MOORE: Was there any reason given by the Signal directors on UOP's board -- and by that I mean the Signal people on UOP's board -- why they were not discharging their fiduciary duties to UOP by insisting that there be adequate appraisal?

MR. PRICKETT: Nobody even raised it. And it may be -- I suggest this:

Frankly, when I brought this suit I had no conception that there was a vast sum of undervalued assets. I mean, I looked at the thing, looked at the proxy statement. I didn't know that, and neither did my client. It was only when I had a financial analyst who said, "My goodness, look at this! They've got 220,000 acres, and they are carrying that at cost. What is the true value?" I said, "I don't know," and he said, "Well, the only way to determine that was to have had an appraisal." They carry that at cost, and that's perfectly correct accounting-wise. Nothing wrong with that.

But he said, "When you are kicking these people out, that has nothing to do with the income stream, and even if $21 is fair for the income stream, you've got to give them something for the undervalued assets." And I said, "Oh." But he said, "It's more than true about the woodlands, but it's also true about the patents. They are carrying all these valuable patents at less than what they produce each year." And he said, "That's perfectly correct accounting-wise," but he said, "When you are kicking minority stockholders out, they

ought to be paid back." And he said, "If it was a stock-for-stock deal, then you have no problem because they continue their interest in the undeveloped assets. But where you are throwing them out, then that's all going to be Signal."

So that I think UOP and Signal both knew of those vast holdings of UOP. There wasn't time for an appraisal. Lehman Brothers said there was no appraisal made. They never even refer to why they don't include something. And two-and-a-half years later when Mr. Purcell, the guy who was hired to defend the thing at trial, is asked about it, he says well, the reason was that they weren't going to liquidate.

So if Signal had said well, we think we will liquidate UOP, and reassign it, we would have gotten something for the undervalued assets, but because Signal says no, we don't get anything.

CHIEF JUSTICE HERRMANN: Was that word "liquidate" used on the record in the sense that we have no plans to sell off any assets of UOP?

MR. PRICKETT: Yes, it is.

CHIEF JUSTICE HERRMANN: Not liquidate UOP, but sell off any assets. Was that the sense?

MR. PRICKETT: Oh, Your Honor, my memory

of the record is not quite that good. As I remember, it was there were no plans to liquidate. Now, whether --

CHIEF JUSTICE HERRMANN: Liquidate the corporation? Is that what he was talking about, to your understanding? Liquidate what, Mr. Prickett? I don't understand that word.

MR. PRICKETT: I don't think there is any difference. I mean --

CHIEF JUSTICE HERRMANN: Well, a corporation may exist and still have some of its assets sold off.

MR. PRICKETT: Yes.

CHIEF JUSTICE HERRMANN: Liquidate the timberland, or liquidate the corporation? What is your understanding of what he was saying?

MR. PRICKETT: As I understand Purcell, he was saying that there was no plan to liquidate UOP as a corporation.

CHIEF JUSTICE HERRMANN: All right.

JUSTICE MOORE: But what benefit is unused timberland to the company until it is actually sold? So what was their explanation for not giving some weight to it?

This is like owning coal in a mine or ore

in a mine. I mean, yes, it's there, and you are not going to earn anything from it until it's sold. Clearly it must have some value where it's a liquidating asset.

MR. PRICKETT: Oh, yes, it has great value. And what happened was that --

Let's take the last justification, and that's Mr. Purcell. He does an evaluation on a going-concern basis. He ascribes nothing to the undervalued assets. He gives them little or no weight. Why? Because it's not going to be liquidated.

Now, if you are doing a going-concern valuation, if you are giving stock-for-stock that's fine, because then you fix the value of what the going-concern is. And the person who still owns stock still has a share so that eventually they get their share of the undervalued assets either when it's sold, or the coal is mined, or the timber is taken off. But here they are thrown out, and they get nothing for those assets.

CHIEF JUSTICE HERRMANN: Mr. Prickett, if you wish to save any time for rebuttal, you should prepare to close at this point.

JUSTICE HORSEY: Just let me ask this:

Mr. Prickett, I'm correct am I not, that

the arguments you have made were all taken up and disposed of, maybe unsatisfactorily to you, by Vice Chancellor Brown?

MR. PRICKETT: No. Your Honor, I've tried to suggest those points that I don't think were handled by Vice Chancellor Brown.

JUSTICE HORSEY: On the point of the undervalued assets he starts on Page 1355. He says:

"Turning to the alleged failure of UOP's board to give consideration to undervalued assets of UOP --" and he goes on for a full page, and refers back to the Sterling case, and concludes that those assets had no material bearing on the fairness of the terms of the merger.

MR. PRICKETT: The only thing I can say on that is that I suggest that Justice Duffy's comments are appropriate. He refers to it, and then he gives us no reason why those assets have no place in it. So I don't think he really -- The problem with the Chancellor's opinion is that it will at times lay out in great detail a point, and then it will not rule on it.

For example, Arledge and Chitiea, it's clearly delineated what they did, who they were, and why they did it, and then the opinion is silent as to

why that is not a material misrepresentation.

In the same way on the assets: He deals with them. He refers to it, but then he does not tell us why those assets should not have been considered in the valuation points.

JUSTICE QUILLEN: Mr. Prickett, I'm sorry to prolong the questioning, but the appraisal point is the one that struck me as the most significant the first time around.

I take it it's your position that the defendants can't meet their burden of proof without an appraisal. Is that right?

MR. PRICKETT: Yes, I would think so.

JUSTICE QUILLEN: Because otherwise -- Was it prohibitive for you to have evidence of an appraisal?

MR. PRICKETT: Well, we --

JUSTICE QUILLEN: The opportunity was there. You could have come in and said this timberland is worth a billion dollars, or whatever, and you didn't do it. So it seems to me it follows from that -- Your ultimate argument comes down to this is a necessary element of the defendants' burden of proof.

MR. PRICKETT: Your Honor, I think you have

stated it succinctly. Let me say beyond that I don't think it's up to the minority stockholders to do it. I don't think he even realized it. It was only when we were getting ready for the trial that we recognized that, and then to have asked us to get UOP to let us do an appraisal is a monumental burden to put on us when the majority has the responsibility.

JUSTICE QUILLEN: Okay. But is my point not correct that in order to prevail on that point it has to be an essential element of their burden of proof? That is, they cannot meet their burden of proof without it.

MR. PRICKETT: I think that's right, Your Honor.

JUSTICE QUILLEN: Let me ask you one other question:

As I understand it -- and we have interrupted you so much that I'm afraid you haven't gotten too far along in your argument -- but you started off on Point 1, which was material misrepresentation, and I think you have talked about two items under that. One was there was no affirmative action, and that's related to the negotiations point, and the second was no appraisal.

If I may ask you this one question about the first:

How does that relate, the lack of affirmative action, to the ultimate price? Let me try to pinpoint what I'm saying:

Suppose they had offered $25, which is a dollar more than the 24, and I think a dollar more than what you argue for --

MR. PRICKETT: A dollar less.

JUSTICE QUILLEN: A dollar less. Let's say they offered $27.

MR. PRICKETT: Yes.

JUSTICE QUILLEN: $27, and the UOP people said great. Both boards met the next day and approved it.

Do they have a duty of affirmative action? Do they have a duty to get an independent committee to negotiate that, or does the duty of affirmative action relate ultimately to what the fairness of the price is?

MR. PRICKETT: Well, let me say that it seems to me that they have got to show -- they have got to affirmatively defend their actions as cestuis.

Suppose that the Signal people had said, you know, our study showed 24. Twenty-five might be fair, but we are going to do 27 just to be on the safe

side and to be generous to the minority, and they disclosed that. It would seem to me that those who have a fiduciary responsibility to represent the minority have got to act reasonably there. They've got to look at that. They've got to get professional advice, and if it's such a good deal that they better grab it immediately, and they can justify it saying, you know, if Signal ever really looks at this again, we're crazy, they're going to take it away from us, they better grab it, but they ought to be able to justify that.

JUSTICE QUILLEN: Well now, do you define when that is? Is that something more than intrinsic fairness?

MR. PRICKETT: What, that --

JUSTICE QUILLEN: Where you take the deal and run.

MR. PRICKETT: Yes, I think it is.

JUSTICE QUILLEN: I mean, you could make an argument that 50 percent above market, or 45 percent above market is a good deal.

MR. PRICKETT: No, I don't think so, Your Honor.

JUSTICE QUILLEN: I didn't say you. I said you could make that argument.

MR. PRICKETT: Well, Your Honor, I've got to say that I don't think you can, because the question is the worth of the stock, and 50 percent may be a rotten deal. Fifty percent is not a magic number. If that stock is worth $200 --

JUSTICE QUILLEN: I'm not resting on the 50 percent, but my point is at some point it might look like a good deal, and I'm asking you to define when you have the duty to affirmatively act; when you have the duty to set up the independent committees like in Harriman, and when do you have that duty? Do you have that duty in every instance regardless of the price offered?

MR. PRICKETT: No. I can think of extreme cases, Your Honor, where I would be glad to defend a board that had acted quickly in order to prevent the deal from going away, but I would not want to defend a board that immediately in the face of a majority, and without any real in-depth consideration, accepted a price and justified it because it was 50 percent better than market without regard to its value, or justified it because a tender offer and a direct purchase four years before had been at that price. And I would say that is not looking into the matter, and in

this case you have a fiduciary responsibility to take a look.

Now, there are times when a fiduciary must act quickly, but he ought to be able to justify the reason for it. I don't see that in this case.

Thank you, Your Honor.

CHIEF JUSTICE HERRMANN: Thank you, Mr. Prickett.

Mr. Halkett.

MR. HALKETT: Chief Justice Herrmann, members of the Court:

Most of the recent cases which have come before this Court in the area of mergers or tender offers by majority shareholders involve situations in which there has not been a full judicial scrutiny of the transaction.

For example, the Singer case was a motion to dismiss. Rowland was a motion to dismiss. Harriman was whether a complaint stated a cause of action. Two cases recently cited by the plaintiff -- the Gabelli case was a motion to dismiss for failure to state a claim. Tanzer was itself a preliminary injunction hearing. Roizen, another recent one which the plaintiff has mentioned, was an application for a

preliminary injunction.

Now, I point this out because in many, if not most of those cases, the court was required, and in fact the opinions of this Court point out that the court was required to accept as true for purposes of such motions and for purposes of such preliminary proceedings -- that they had to accept as true the allegations of the complaint. That is not our situation here. There is no need for this Court, nor should this Court accept as true the statements or representations or allegations of the plaintiff.

Our present case is after a full evidentiary hearing. We are not here on the basis of avoiding a fairness hearing. We submit that we have had a full fairness hearing as contemplated by the Singer case and its progeny.

JUSTICE MOORE: Well, the Singer case and the Lynch case require total fairness, complete candor, and can it be said that that is present here when you have two directors of UOP put on the board by Signal, Messrs. Arledge and Chitiea, who make a feasibility study showing that the price would be profitable of up to $24 a share, and failing to even disclose that to their fellow independent directors?

MR. HALKETT: Yes, I think so.

JUSTICE MOORE: Why?

MR. HALKETT: First of all, I think we've got to look at what has been referred to as the Arledge and Chitiea report. It is not a report. It does not contain information which was unavailable to others. What that is is an arithmetic computation of what the assumed return would be on a given investment.

If I, for example, were to go out today with $10,000, and go to the various savings and loans and banks to see what return I could obtain on that money under various conditions, a six month money market account, a regular checking account with interest, a this account or a that account, I can arithmetically compute what my return in dollars would be under various interest computations.

JUSTICE MOORE: Yes. But didn't these men when they were reporting back to the parent company have some duty to say look, we've made a study, and we think you should know this? Didn't they have a fiduciary duty to their fellow directors and to their stockholders to say look, this is something we did? They may have just done arithmetic.

MR. HALKETT: I don't believe so.

JUSTICE MOORE: Why not? What case would say they don't have that duty of candor?

MR. HALKETT: Well, I think that common sense says that it is impossible to, nor is it required to simply set out that which is available to all others and that can be done, and is purely arithmetic.

For example, let me speak a minute to that:

I think as this Court pointed out -- I believe it's in the Denison Mines case -- there was a situation in which internally what had been done was to commission and to obtain an appraisal that gave to the inside people within the company a fact which was not available to those outside the company.

CHIEF JUSTICE HERRMANN: Let's talk about this case.

MR. HALKETT: Well, I am. I'm bringing it to that, but I'm trying to distinguish, Your Honor, between the two --

CHIEF JUSTICE HERRMANN: All right.

MR. HALKETT: -- that in that case that was not arithmetic. That was not information that was available to anyone outside the company.

What we are talking about here is something

that was indeed available to everyone outside the company.

CHIEF JUSTICE HERRMANN: Does the record show how long it took for those two gentlemen to prepare that report, or statement, or whatever you would call it?

MR. HALKETT: Yes, Your Honor. I think it was a matter of a few days.

CHIEF JUSTICE HERRMANN: And it was requested by the Signal executive committee?

MR. HALKETT: Yes. They asked the people --

CHIEF JUSTICE HERRMANN: And it was submitted in writing?

MR. HALKETT: -- to make a spread sheet. Yes, it was.

CHIEF JUSTICE HERRMANN: And were these two gentlemen who made that report inside or outside directors?

MR. HALKETT: They were officers and directors of Signal. They were on the Signal board, and they were also members of the UOP board.

CHIEF JUSTICE HERRMANN: So as members of the UOP board, inside or outside?

MR. HALKETT: Inside.

CHIEF JUSTICE HERRMANN: They are inside directors?

MR. HALKETT: Yes, sir.

JUSTICE MOORE: Well, it's a 26-page document, Chief Justice, shown at Pages A1472 through 1479.

MR. HALKETT: Now, there --

CHIEF JUSTICE HERRMANN: What justification can there be? I've got to say on this, because I consider it important, what justification can you give this Court for whatever you may call that document; report, evaluation -- for not revealing it anywhere along the line until the discovery stage of this litigation?

MR. HALKETT: Because it was not relevant, Your Honor, to the considerations of those persons who were involved in making the decision.

CHIEF JUSTICE HERRMANN: Do you mean by that, that the people to whom that report was submitted considered it inaccurate, of no value whatsoever, when you say irrelevant?

MR. HALKETT: I mean it was irrelevant to a question of the fairness of the transaction.

CHIEF JUSTICE HERRMANN: We're talking

about the fair value of stock.

MR. HALKETT: Yes, we are. That's what I'm referring to also.

CHIEF JUSTICE HERRMANN: Well, in their judgment $24 would have been a profitable --

MR. HALKETT: Yes; but that's where it's misleading, if I may for a moment --

CHIEF JUSTICE HERRMANN: All right.

MR. HALKETT: As that study shows, at a variety of different prices beginning at $17 a share going up to $24 a share it shows what return would be received by Signal on its investment.

JUSTICE MOORE: And what does it show as the difference in the profitability to Signal between the $21 and $24 in percentage?

MR. HALKETT: Between approximately two-and-a-half and three percent. Now, that's --

JUSTICE MOORE: So we go from 5.4, whatever it was to what?

MR. HALKETT: It's about eight, I believe.

JUSTICE MOORE: Where do I see that on the report?

MR. HALKETT: I'm not sure what page it is, but on one of those pages it shows at the bottom

line what the percentage return is on the investment.

Now, the difficulty --

CHIEF JUSTICE HERRMANN: Well, it was concealed, was it not?

MR. HALKETT: No, sir.

CHIEF JUSTICE HERRMANN: Was it not concealed?

MR. HALKETT: No, it was not concealed. I'm sure that --

CHIEF JUSTICE HERRMANN: Did the whole board of Signal know about it?

MR. HALKETT: Yes. It was presented --

CHIEF JUSTICE HERRMANN: Why didn't the whole board of UOP know about it? If it was relevant to Signal, why was it not relevant to UOP? I don't understand.

MR. HALKETT: Well, the board of Signal is charged with its responsibility as to where it is going to invest its money and what is a fair and reasonable return in investments for Signal to make. Let's look at that for a moment:

Now, at that point in time they want to know, and I'm sure they are looking at the other options and other choices as to where that company is going to

invest.

CHIEF JUSTICE HERRMANN: That was their primary purpose, was it not?

MR. HALKETT: Yes.

CHIEF JUSTICE HERRMANN: An investment.

MR. HALKETT: That's right. Well, it was an investment as well as in dealing with UOP there were other considerations in which the acquisition of UOP's outstanding minority interests would be beneficial.

CHIEF JUSTICE HERRMANN: Well, to go off on a tangent, would you call those purposes, or benefits? The Chancellor called them benefits, those other things, rather than purposes.

MR. HALKETT: Well, semantically, if one is to obtain a benefit, I suppose then there may be a purpose in obtaining the benefit, but I don't want to get into that.

CHIEF JUSTICE HERRMANN: All right.

JUSTICE MOORE: The chief executive officer testified it was "the only game in town". Is that correct?

MR. HALKETT: It was the only available -- or the opportunity for them to accomplish their purposes with the moneys that they had to invest. They had tried

for at least a year or a year and a half before to find a reasonable investment.

JUSTICE MOORE: Now, wouldn't you recognize that Mr. Chitiea and Mr. Arledge had definite fiduciary duties to UOP?

MR. HALKETT: Yes.

JUSTICE MOORE: Equally, or more so than they did in Signal?

MR. HALKETT: Yes.

JUSTICE MOORE: What legal authority do you stand on that says that they had no fiduciary duty to disclose that they had made a feasibility study when the price is being talked about, and $21 is mentioned as the upper offer by Signal, that they had no duty to tell their other fellow directors, look, we've made a study, and as far as Signal is concerned, this is worth up to $24 to them?

MR. HALKETT: That's where the mistake comes in, Your Honor. If I may --

JUSTICE MOORE: What case do you --

MR. HALKETT: Well, but the premise is it was not worth $24 a share to Signal.

CHIEF JUSTICE HERRMANN: But in their judgment it was, they said.

MR. HALKETT: No, it was not.

CHIEF JUSTICE HERRMANN: Isn't that what their judgment was?

JUSTICE MOORE: They said it would be a good investment at the time.

MR. HALKETT: No, sir. No place, in no document, in no testimony in this case is there any indication that anyone at Signal ever said that it would be a good investment, or that they would consider it, or that they would pay one dime over $21 a share.

JUSTICE MOORE: Didn't the lower court at Page 1347 of its opinion so find, that that is one of the purposes that Signal had prepared this document for, that up to $24 a share --

MR. HALKETT: No, sir.

JUSTICE MOORE: At Page 1347 of the opinion --

MR. HALKETT: No, sir, that's not what the court said. It said the report of Arledge and Chitiea indicated that it would be a good investment for Signal to acquire the remaining 49.5 percent of UOP at any price up to $24 per share.

Now, that is the then Vice Chancellor, now Chancellor Brown's statement, and if you will note the

footnote in our brief with which we disagree --

JUSTICE MOORE: Yes. To get back to your view as to why they had no fiduciary duty, would you elucidate that for us, please?

MR. HALKETT: Yes. Because they had not concluded -- there was no decision within the Signal organization that in fact any price greater than $21 a share was, A, acceptable to Signal, and B, was considered by Signal to be a good investment for Signal.

JUSTICE MOORE: I'm not speaking of from Signal. I'm saying their duty to UOP. Why didn't they turn to UOP and say, look, I don't know what Signal's ultimate view of this is, but we have made a study -- a feasibility study is what it is termed in the lower court -- we have made a study, and we conclude that up to $24 this would be a good investment for Signal?

MR. HALKETT: But that's the point. They had not so concluded, Your Honor. What that is -- I keep coming back to this -- They could have hypothetically started at $16 a share, and run it up to $30 a share. They started with 17, and ran it up to 24 to give the directors of Signal an opportunity to see at what price they would receive what return.

Now, it was on the basis of these figures that the Signal directors had decided that they would not offer, they would not be willing, they would not pay, they would not try to get those shares for anything more than $21 a share. And the return -- there is a difference between showing something will return a profit, and that something is a good transaction.

For example -- and I think I used this the last time I was here. I think it's a great example, and I'll use it again:

If I had money now, and I were a fiduciary, and I were to put that money in a savings account that paid 5 1/4 percent when I can go down the street and invest it and get 12 percent, I think I would get surcharged by making it at the 5 1/4 percent return. Somebody can say but at that you are making a profit. It is profitable to you to get 5 1/4 percent. That may be the case, but that is not the point.

What this arithmetic spread sheet showed was that at $24 a share, were Signal to have paid that, its anticipated return on its investment would be a certain percentage, and I believe it's high five percent, or close to six percent. No one within the Signal organization ever said that we are willing to pay that,

or that that is a good investment, or that we should put our money in at $24 a share.

JUSTICE MOORE: But shouldn't Arledge and Chitiea nonetheless have said, look, this is something we did? This is information that Signal has. Since we are standing on both sides of the transaction, at least you should be as familiar with the situation as we are.

MR. HALKETT: I don't --

JUSTICE MOORE: You don't think they had that duty?

MR. HALKETT: Not because of the nature of it. The figures from which this was done were available to everyone. It comes out of the published reports that were then extant.

JUSTICE MOORE: Yes. But that would mean that every member of the board would then have to do the same work again when two members who owe a fiduciary duty to them have already done it, and it bears directly on a transaction before the board.

MR. HALKETT: Well --

JUSTICE MOORE: Why does each board member now have to sort of redo the arithmetic that two members have, and who have a fiduciary duty to the board to

disclose this?

MR. HALKETT: I don't know -- I can't agree that they have a fiduciary duty to disclose that. For example --

JUSTICE HORSEY: Let's put it another way: Were those pro forma figures?

MR. HALKETT: Yes. They are a spread sheet based upon their projections and an assumption of what the return would be based upon the then projected income for UOP and the income for Signal for the year put together to then say how much would we be expected --

JUSTICE HORSEY: So they were all hypothetical assumed figures?

MR. HALKETT: They were hypothetical assumed figures, but based upon the then best estimates which had been published and were available.

Justice Moore, the question, it seems to me, has got to be put into its context here. If you have a large board -- And by the way, to touch on this point here that's been made, the members of the board of UOP had approximately one week from the time of their first notification until the time of the hearing. I have no idea, and neither does anyone else as to what sort of computations were made, and by whom, on that

board which they then brought to the overall meeting on March 6th.

JUSTICE MOORE: That never came out in the trial.

MR. HALKETT: And I don't see how it can. Mr. Logan was a member of the board. Mr. Venema was a member of the board. Those gentlemen owned large blocks of stock. They had as much of a fiduciary duty to their remaining directors as did Arledge and Chitiea. As far as anybody would know, in the normal course of events Mr. Venema and Mr. Logan may well have sat down during that week period and done all sorts of computations on their own of how would these prices affect them.

For example, Mr. Venema may well have sat down and worked out because of his tax program whether or not cashing out his shares at this point in time would be valuable or invaluable, or what his profit would be, or his losses might be, and whether he should take a capital tax loss, and that's why he's going to vote for this transaction. I have no idea, and neither does anyone else, of all the various criteria that people sat down and worked out that were brought to that board meeting and upon which they made their business decision.

I think it is absolutely impossible and

and impractical to suggest that simply by applying a general label of fiduciary duty, or fiduciary relationship, that one can suggest that each of these persons on the board would have to disclose at a meeting to all of their members all of these processes through which they went.

JUSTICE MOORE: I could agree with you to that extent, but your theoretical analysis doesn't come to grips with the fact that two directors, inside directors, placed there by Signal made a study, reported the results to the majority shareholder who owes a fiduciary duty itself to the minority, and did not disclose that same study to the minority, whatever it may be worth.

MR. HALKETT: Well, I don't want to fence on this, but the stockholder is Signal, and I don't know why its duty was any different than what I have just talked about as to Mr. Venema's duty, who owed a responsibility to everybody, or anyone else's duty.

Now, I mentioned Denison Mines, and I'm going to come back to that because I think that it is easy to get lost in that. In that case there was the situation -- Well, not in Denison. Pardon me. It's in Lynch versus Vickers.

The difference you have here is that it was

clear that within the company there they had made a decision, and were willing to pay up to $15 a share, which was in excess of the tender offer price that was being made. They had decided that. There was no decision in Signal that they were willing to pay any amount of money above $21. Had there been, then clearly I think that would have been a duty to disclose that we are offering this, but we will pay something more. That was not the point. That never happened.

JUSTICE HORSEY: Mr. Prickett in his reply brief at Page 13 says:

"Signal's management and directors used the feasibility study in determining terms and price of the cash-out merger."

MR. HALKETT: Yes.

JUSTICE HORSEY: Is there any support in the record for that statement?

MR. HALKETT: Only to the extent that we have been discussing that it was considered to give them a range to see what the approximate return might be anticipated at various prices, and in order to keep things in the perspective you put this range in there.

JUSTICE HORSEY: Well, then it was used by Signal?

MR. HALKETT: Used to that extent. Used to look at the numbers.

JUSTICE QUILLEN: Let me ask you a question on this, Mr. Halkett:

I think I understand your point. Your point is that this document doesn't help you establish what is a fair price?

MR. HALKETT: That's correct.

JUSTICE QUILLEN: But if you were in an arm's-length negotiating situation, and someone offered you a document which says what the object of the sale is worth to the potential buyer, wouldn't you want to see it?

MR. HALKETT: What it is worth --

JUSTICE QUILLEN: At various prices.

MR. HALKETT: I don't think one could generalize on that. You may or may not. I can't say in every negotiating situation what one would want to disclose. One of the difficulties that --

CHIEF JUSTICE HERRMANN: Mr. Halkett, you just used the word "negotiation". Who was negotiating in these seven days for the minority group?

MR. HALKETT: The board of directors through Mr. Crawford.

CHIEF JUSTICE HERRMANN: You say Crawford was negotiating for the minority?

MR. HALKETT: Yes. I think that he --

CHIEF JUSTICE HERRMANN: What in the record indicates that he was doing more than worrying about the welfare of the executive group within UOP? That was one of the things that was bothering him about the takeover.

MR. HALKETT: Well, I think that the thing that he did, and that the record discloses, is that he promptly contacted each member of the board of directors of UOP including all of the outside directors, and he advised them of what Signal was thinking, and asked them what their thinking was, what they felt --

CHIEF JUSTICE HERRMANN: Did he mention 21 during those discussions?

MR. HALKETT: I believe that he said that Signal was thinking in the range of $20 to $21 a share, and so he was seeing what the directors felt was necessary and desirable. He also retained the services of Lehman Brothers to come in and to advise the board on whether or not a transaction within that range would be fair. He also called and spoke to people at Signal about his discussions with the directors to tell

them that it would have to be at the high range.

CHIEF JUSTICE HERRMANN: But he was doing all these things as a person who was put in his position by the majority stockholder.

MR. HALKETT: Well, he was --

CHIEF JUSTICE HERRMANN: He called Lehman Brothers in, and said you've got three days to do a job. Is that negotiation?

MR. HALKETT: Yes, Your Honor. Yes, it is.

CHIEF JUSTICE HERRMANN: Well, why on the SEC inquiry was the word "negotiation" -- I think it was revoked very quickly, and the word "discussion" took its place upon Signal's choice.

MR. HALKETT: It is not in the record, but it is my understanding --

CHIEF JUSTICE HERRMANN: If it's not in the record, we'd better not get into it. I should not ask for anything that is not in the record.

MR. HALKETT: Well, there --

CHIEF JUSTICE HERRMANN: But I'm dealing with the word "negotiation" which you brought up in response to Justice Quillen's inquiry. The answer as I get it from you today is that the minority stockholders' interests were represented by Crawford and not by the

outside directors in the negotiations.

MR. HALKETT: Oh, no, sir. That's --

CHIEF JUSTICE HERRMANN: Did the outside directors get involved in any of these discussions?

MR. HALKETT: Yes, through Crawford. You can't have each of the outside directors calling the people at Signal. As I said, Crawford contacted them.

CHIEF JUSTICE HERRMANN: But you might expect a committee of the outside directors to sit down with Crawford in some kind of bargaining position, might you not?

MR. HALKETT: In some cases you may, and some you may not.

CHIEF JUSTICE HERRMANN: Why is this case so different?

MR. HALKETT: Well, the difficulty I have, with all due respect, Your Honor, is that much of what we are talking about today was the subject of a very lengthy proceeding before Chancellor Brown. He was charged with the responsibility of considering all these factors. He not only has heard the argument of counsel, but he had the benefit of at least six live witnesses, some 3,000 pages of documents, depositions, and was then charged with that responsibility of reviewing each of these.

Now, with all due respect, and with due respect to Mr. Prickett, it is very difficult to try a case if that is what you as a panel try to do here --

CHIEF JUSTICE HERRMANN: Seeking a basis for complete candor and full fairness.

MR. HALKETT: That's --

CHIEF JUSTICE HERRMANN: And that's really and inference; that's really a conclusion --

MR. HALKETT: And so, I'm sure, I'm positive, was Chancellor Brown. He did so very diligently. He asked questions during the trial. He considered all of these points.

Now --

CHIEF JUSTICE HERRMANN: I don't find anything in his opinion which says -- as a finding which tells me as a member of this Court what you have just told me, that the negotiator for the minority was a Mr. Crawford.

MR. HALKETT: Well, it's --

CHIEF JUSTICE HERRMANN: He didn't find that; did he?

MR. HALKETT: As Your Honor is very well aware, in writing any opinion, just as in writing any sort of proxy statement, or in writing anything, there

is a choice due partly to the shortness of life that one has to make a choice of what one includes and does not include. I don't know whether and to what extent he should or should not have put that in his opinion. It is clear that he considered the issue that you are talking about, and it is clear by his opinion that he decided that as a matter of fact. And for us to try today to retry all of these issues I submit is a very difficult question.

CHIEF JUSTICE HERRMANN: We understand the appellate review process, Mr. Halkett, but we still have an obligation to weigh his findings.

MR. HALKETT: I understand that, Your Honor. I'm not suggesting anything to the contrary.

One thing here that one gets into that has been suggested about this business of whether or not anything was done for the minority -- now, I would like to come back. We haven't talked about it. I don't want to overemphasize it. This Court understands it. That is the way in which the transaction was structured and the way in which the vote was given to the minority shareholders.

Now, a suggestion has been made that no one took into account the minority, no one looked out for the

interests of the minority.

I can't think, nor in any case that I have read in which the Court has been involved can I see a way that is more fair to look out for the interests of the minority than to allow the minority themselves to decide whether or not they want the transaction.

JUSTICE MOORE: And does that thereby excuse the directors who have fiduciary duties to both sides from exercising and implementing their fiduciary duties to the minority?

MR. HALKETT: No. I think the use of the term such as "fiduciary duty", and "complete candor", and words of that kind are guideposts from which we start, and then one has to look at the particular facts to see whether or not in a particular case those standards have been met, and so obviously it does not excuse anything.

JUSTICE MOORE: And if there has not been complete candor, and if the minority stockholders have been led to believe that the $21 price is the only one that ever existed, not knowing that there were two directors who had computed the profitability to the parent at a higher price, being told that there were negotiations when in fact the SEC says you have to change

that word to discussions, and semantics aside, would you concede that if you don't have a fully informed minority, that the majority of the minority vote is of no consequence?

MR. HALKETT: Well, before I answer that, I think I have to point out that first of all, the SEC did not require UOP to change the language in the statement. That was a choice which UOP did make. And what is in the record -- and the Chief Justice mentioned, and as Mr. Prickett himself mentioned -- the process of SEC review took longer than the parties had expected. The record does show that after they had been going back and forth and getting all kinds of knit picking comments, and so on, from the SEC, that the SEC said will you please expand upon negotiations? And I suggest, as again simply a shortcut, they said well, let's just change it to discussions, and move on.

JUSTICE MOORE: Doesn't the record show there was really only one telephone conversation between Mr. Crawford and Mr. -- was it Mr. Walkup and Mr. Shumway in which price was mentioned?

MR. HALKETT: Yes, in which price was mentioned.

Now, there are a couple of things there

that I would like to comment on. There are many things, unfortunately, that were said that --

CHIEF JUSTICE HERRMANN: You have another 15 minutes under our adjusted time schedule.

MR. HALKETT: Thank you, Your Honor.

Number one, someone asked of Mr. Prickett whether anything was done, whether any negotiations were conducted after March 6th, and the answer is yes, and the record clearly reflects that there were. They continued to negotiate on the basis of the definitive agreement, and that definitive agreement was not finally signed until sometime after March 6th and after the meeting.

I think the record also shows that within that -- the original decision had been made on the basis that the minority -- majority of the minority was going to have to approve this for this transaction to be concluded. And I believe that the record reflects that the 66 2/3 percent requirement became a part of the transaction only after March 6th.

So there were negotiations which continued beyond that point, and on matters of substance, and not just on matters that dealt with the executives within UOP.

But I want to now come back to your question that you asked about complete candor. My understanding of the test, which is true here, as is true elsewhere, is that the complete candor is defined as that which is germane to the transaction, and that has been said to be those facts which a reasonably informed person would want to have in arriving at his decision. I think I have --

JUSTICE MOORE: Yes. That is in your brief. You would concede that if they don't have those facts, whatever they might be, that the majority of the minority vote is of no consequence; is that correct, Mr. Halkett?

MR. HALKETT: If one says that -- and if one were to conclude that there were germane facts which meet that standard which were not communicated, then I think one has to question the effect of the minority vote. I don't think that you totally discount the minority vote or the form or the framework of the transaction, because I think it becomes a part of the totality of the way in which the transaction is being set forth.

As we draw back, I see what the Singer, Tanzer and those other cases teach, and by the way, I

totally disagree that this case -- either the Vice Chancellor's opinion or the affirmance on appeal earlier in this case change at all the Singer line of cases. I think they are absolutely compatible with it. But what they teach is this:

Where there is a situation in which you have a majority shareholder, there may be a myriad of different ways in which that majority shareholder can "take advantage of" the minority in some way.

Now, we start with the proposition that the legislature has said there may be, and there can be cash-out mergers. What this Court has said is that even though you may do so as a matter of law, we must look at that transaction to see that it is fair to the minority. And another way of looking at it; that the majority has not in some way taken advantage of the minority.

Now, that is a concept, I submit, that one can only come to and deal with in its totality. To suggest that one can unwind or undo, or believe that something is unfair because of a choice of one word, or because of the presence or absence of one particular thing, or the absence of one other thing I submit is refining it to a point of fairness that is impracticable

and unreasonable.

Now, we don't suggest -- in fact we don't suggest at all that this Court tried to establish concrete guidelines which the Court and everyone can follow in every case. I think what these cases demonstrate rather clearly is that's an impossible task. You can't do it, because as sure as you do in this case, somebody will find a way to get around it in the next case.

Now, so much time has been spent on this Arledge and Chitiea study, or whatever you call it. If the bottom line of that were -- Let's suppose that the minority had been told what is in that -- that at $21 a share -- at $17 a share Signal would expect to earn a return on its investment of so much up through $24 a share, but understood that Signal, as was the case here, was unwilling to pay more than $21 a share. I suggest, Your Honor, that that would not have changed the vote of one person who put his vote on the line to get his $21 a share. He's not interested in what Signal's return is. He's interested in getting the money. And --

CHIEF JUSTICE HERRMANN: But do you think it might have brought forth some minority stockholders to protest who stayed home who might have come forth and objected?

MR. HALKETT: Your Honor, if every stockholder had voted who did not vote, all of those who stayed home had voted against the merger, it would have still passed. There were more than 50 percent of the total minority shareholders who voted in favor of this even counting those who did not vote.

So I'm sure that someone could have, and did compute, if they wanted to, at $25 what Signal would earn. That wasn't the point on what we were talking about here, nor is it that kind of report. It was not a report-- and it's absolutely not supported by the record in this case -- If there had been any indication that Signal was willing to pay more than $21 a share, then that's a totally different animal. But that's not what we have here any more than Signal was determined to pay the lower end of $17 a share. It was not. It never was, never had been.

JUSTICE MOORE: Was there ever any evidence to show that anyone on behalf of UOP's minority sought to get anything more than $21 per share?

MR. HALKETT: No.

JUSTICE MOORE: Not a bit of evidence to that effect?

MR. HALKETT: No.

JUSTICE QUILLEN: What is the dollar difference between 20 and 21? That is, what is one --

(The recording ended at this point on this tape, and resumed as follows on another tape:)

MR. HALKETT: Five point six million dollars. That's a lot of money.

JUSTICE QUILLEN: Let me, if I may, take you to the appraisal --

(The recording ended at this point on Tape 2, and began again on Tape 3 as follows:)

MR. HALKETT: Well, but again, it depends. If the company in question is in the business all or entirely in dealing with a wasting asset, if it's a mining company, if it's a timber company, if it's a some sort of company, then the answer may be yes. That's one of the factors that the trier of fact has to consider, and if so, how much to weight it. But I can't say that in every case -- if General Motors owns 2,000 acres of land with timber on it someplace, that just because it's timberland it's got to be appraised in a particular situation.

JUSTICE QUILLEN: To the extent the record reflects the nature of this land, where would we look for it?

MR. HALKETT: I think that there are within the documents some reference to it, and it may be within the testimony of Mr. Crawford, but I'm not certain at this point, Your Honor. It's been two years now since we tried the case.

CHIEF JUSTICE HERRMANN: I must ask you to close.

MR. HALKETT: All right. Thank you.

JUSTICE MOORE: Chief Justice, could I just ask a couple of other questions, because Mr. Prickett touched upon some of those, and I would like to get your view on it, Mr. Halkett:

Mr. Prickett says there was sort of a rush to judgment in seven days, four business days, between February 28th and March 6th, and then there of course was the period until May 26th of '78 when the stockholders of UOP finally vote on it. Why was there such a short period of time spent on this between the day it was first presented, and then four business days later it's acted upon by both Signal and UOP?

MR. HALKETT: Because of the activity at the market place and the way in which the stock market works.

Once a notice is made as is required to be

made under the SEC rules, then what happens is that the market deals with uncertainty one way or the other until they know whether there will or will not be a transaction. Those who were affected by this uncertainty were both the stockholders of Signal as well as the stockholders of UOP. Consequently, there is a need in dealing with the market place to have the people be certain as to whether there is or is not going to be a transaction so things can get back to even.

We have seen an example of that sort of thing in recent days with various takeovers, and who is doing what to whom, and who is merging with whom. Meanwhile, the market is reacting to the uncertainties.

So that is the reason for it. It was a period of a week. And the thing also that people tend to, I think, overlook: This is not the situation in which you are giving to a group of strangers a problem to solve. The directors of UOP live with that company. They know the company. Good grief, they are dealing with its financials, they are dealing with its problems daily. It doesn't require a long period of time. And the suggestion that somehow or other this was a rush to judgment because somehow by so rushing you could take advantage of the minority is totally belied by the fact

that then they set this for their meeting in May, some two-and-a-half months later.

JUSTICE MOORE: And in that time, though, even from the -- I mean from February 28 there is not a single person on behalf of UOP, either a Signal designee on the board or anyone else, who sought to get more, or even attempted to get more than $21 per share for the minority.

MR. HALKETT: That's right. That's right.

JUSTICE MOORE: I have nothing else, Chief Justice.

CHIEF JUSTICE HERRMANN: Please close.

MR. HALKETT: All right.

Well, there are a number of things, were there more time, that Mr. Prickett said to which I would like to respond. I don't have the time, so I will again say this, and I think it's extremely important:

We have a lengthy record here, and it is not what Mr. Prickett says, and it is not what I say on the facts, but it is the record here which should speak. It is a record which Chancellor Brown carefully considered. The briefing was very extensive in this case, as was the trial and the documentation. All of the various points which Mr. Prickett has made were covered

during the course of that trial. They were covered by the evidence, and Chancellor Brown has referred to them in some fashion or other in his opinion, so we call know that he took them into consideration. We suggest that if this Court applies its traditional standards, then there is no reason and no basis whatsoever for a reversal of that. None whatsoever. That his decision is well borne out by the facts.

And we suggest to the Court one final thing that I think, if I may just take a moment, is important, and that is the burden of proof in this case was put on the defendants, and it was a burden of proof which we carried. I would like to just take a moment to make sure that the Court is well aware of that fact both by reason of Justice Duffy's dissent and by reason of Mr. Prickett's comments. There are two parts of the opinion of Chancellor Brown which I will read, and then I'll close with that. He said, and I quote:

> "The ultimate burden is on the majority stockholder to show by a preponderance of the evidence that the transaction is fair."

That's the standard as he stated for his decision. He then said, and I quote:

> "The defendants here, rather than

standing on their interpretation of the applicable legal standard to be applied to the plaintiff's case, went on to offer evidence to refute the plaintiff's charges of wrongdoing and inadequate price. Consequently, I review the evidence hereafter in light of the overall burden imposed on the defendants to demonstrate the entire fairness of the merger terms to the minority shareholders of UOP."

And we submit that we carried that burden. Thank you.

CHIEF JUSTICE HERRMANN: Very well, Mr. Halkett.

MR. Prickett, you have five minutes.

MR. PRICKETT: Your Honors, in an attempt to respond, I think I'll try simply to take up individual points, not attempt to weave a reply argument.

First, I think there were some questions from the Court as to the reasons for the lack of an appraisal. I suggest to you that the time was so short that no appraisal could be gotten. I suggest that the fiduciaries in this case knew of the existence of

undervalued assets, and that it redounded to their benefit not to get an appraisal. And it's consistent with what they did.

The justification for the price was not what is the fair value of the stock of the minority. The justification was we paid $21 back in 1974, and that's why we are going to pay it this time. That's what Signal said, that's what the management of UOP said, and that's what the proxy statement said. It had nothing to do with the value of the stock because nobody ever thought about that.

JUSTICE MOORE: Well, they had had the intervening Come-by Chance disaster in 1975, and they had lost $35,000,000; hadn't they?

MR. PRICKETT: Yes. What they said was we paid $21 in 1974, and then there was the Come-by Chance situation, and we are now roughly in the same situation, so we'll pay $21.

Now, that seems to me to be irrelevant. The fact that the numbers were roughly the same does not determine the value of the stock. The value of the stock is what is it worth; what are its prospects; not the fact that the numbers are the same, and the appraisal of the hidden undervalued assets would have been

germane. Now --

JUSTICE MOORE: Well, were they really hidden, Mr. Prickett?

MR. PRICKETT: Well, they were hidden to a layman. That is, we're talking about stockholders, not CPA's, financial analysts, and there is no possible way that a simple stockholder can know that he is a part owner of 220,000 acres of land and some patent rights that are carried at historical costs or cost on the books, and that they are worth really a lot more. I don't pretend to be a sophisticated financial person, but I looked at that, and I certainly had no idea until somebody pointed it out to me.

JUSTICE QUILLEN: Is there any evidence in the record from your side that they are worth a lot more as distinct from that they are just carried at historical cost which might be --

MR. PRICKETT: You mean that they are worth more --

JUSTICE QUILLEN: Is there any general evidence of value? I understand there is no specific evidence of current value. Is there any general evidence of value?

MR. PRICKETT: Well, I think -- Let's take

the patents. The patents are carried at -- and I don't have the numbers at my fingertips -- something like $2,000,000, or maybe it's $10,000,000, but they generate per year $14,000,000.

Now, if you can generate $14,000,000, you can sell those patents for whatever they are capitalized, but you carry them on the books at the cost because that's what accountants make you do. But when you come to sell them, you don't sell them for that. And UOP was not about to sell those patents for the cost that --

(At this point the tape recording terminated.)

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