IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM B. WEINBERGER, Plaintiff Below, Appellant, v. UOP, INC., THE SIGNAL COMPANIES, INC., SIGCO INCORPORATED, LEHMAN BROTHERS KUHN LOEB, INC., Defendants Below, Appellees.	§ § § § § § § § § § § § § §	No. 58, 1981

Submitted: September 14, 1981
Decided: February 9, 1982

Before DUFFY, McNEILLY and QUILLEN, Justices, constituting the Court _en Banc_.*

Upon appeal from the Court of Chancery. Affirmed.

William Prickett (Argued), of Prickett, Jones, Elliott, Kristol & Schnee, Wilmington, for plaintiff-appellant.

A. Gilchrist Sparks, III, of Morris, Nichols, Arsht & Tunnell, Wilmington, for defendant-appellee UOP, Inc.

Robert K. Payson and Peter M. Sieglaff, of Potter Anderson & Corroon, Wilmington, and Alan N. Halkett (Argued), of Latham & Watkins, Los Angeles, California, for defendant-appellee The Signal Companies, Inc.

R. Franklin Balotti (Argued) and Jesse A. Finkelstein, of Richards, Layton & Finger, Wilmington, and Simpson, Thacher & Bartlett, New York, New York, for defendant-appellee Lehman Brothers Kuhn Loeb Incorporated.

McNEILLY and QUILLEN, Justices (for the majority):

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*The Justices named are the only members of the Court qualified to sit in the appeal. Supreme Court Rule 4(a).

Following a merger between UOP, Inc., a corporation in which The Signal Companies, Inc. had held a majority interest, and Sigco Incorporated, a wholly owned subsidiary of Signal, the plaintiff, a former minority shareholder of UOP, who was cashed out, brought suit derivatively and in a class claim against Signal, Sigco, UOP and Lehman Brothers Kuhn Loeb Incorporated. After lengthy pretrial and trial proceedings, the Vice Chancellor, in an exhaustive decision, entered judgment for the defendants. Weinberger v. UOP, Inc., Del.Ch., 426 A.2d 1333, 1363 (1981). The plaintiff appeals. We affirm.

The facts are set forth in detail in the Vice Chancellor's opinion and need not be repeated here. Basically, as to the contentions raised on appeal, we find no reason to justify reversing the trial conclusions of the Vice Chancellor. We will make multiple references to his opinion and a familiarity with the opinion below is necessary to understand the summary conclusions herein. We do find it desirable to focus our attention briefly on two of the multiple issues raised, the status of the investment banking firm of Lehman Brothers Kuhn Loeb Incorporated and the fairness of the $21.00 price per share paid the cashed out UOP minority.

As to Lehman Brothers, we find no basis to upset the findings and conclusions of the Vice Chancellor. Nor do we

find it fruitful in the present context to characterize the relationship between Lehman Brothers and UOP, and the UOP minority, as anything but contractual. The contract obviously created a duty, including a duty to the minority, but there is no basis for liability in the present record, given the conclusions of the trier of fact. 426 A.2d at 1347-8. Because of its general expertise and financial insight as UOP's investment banker for many years, Lehman Brothers was employed to render a fairness opinion for the immediate benefit of the members of UOP's Board of Directors who were scheduled to meet five days from the date of employment. The working team of Lehman Brothers submitted its report to the Board within the time allotted, thereupon fulfilling its duties and obligations under the agreed upon contractual terms.

As to the fairness of the $21.00 per share cash-out price, obviously the heart of the case, we find no basis for overruling the Vice Chancellor's factual finding on the hotly contested record. 426 A.2d at 1356-1362. The techniques of evaluation are varied and deference must be paid to the trier of the facts. As we see it, the only significant question for appeal is the absence in the record of a fresh appraisal of certain assets, particularly timberland and patents. Given the clear proxy disclosure of no fresh appraisal, other evidence of value from the litigants in abundance, and a

finding of no intention to liquidate, we cannot say that a fresh appraisal of the assets was required as a matter of law. It must be remembered that the price offer was: (1) almost a fifty percent premium over market; (2) substantially higher than $18.625, which was, exclusive of a prior tender offer period, the highest price traded in the four and a half years prior to the offer; and (3) even more substantially higher than the $15.875 peak price in the calendar year of the offer. Furthermore, as to the minority shares voted, the merger was approved by almost 12 to 1. In our judgment, the record justifies the Vice Chancellor's conclusion that the cash-out price was fair.

In addition, we find no basis on appellate review for overturning the Vice Chancellor's conclusions with regard to the purposes for the merger (426 A.2d at 1348-1350), the alleged misrepresentations to UOP's shareholders (426 A.2d 1350-1353) and the alleged failure of UOP's board to fulfill its responsibility to its minority shareholders (426 A.2d 1353-1356).

With regard to the structure of the merger vote (426 A.2d 1362-1363), the Vice Chancellor's posttrial view (such structuring was "simply another element that must be considered as part of the overall picture in evaluating the terms of the merger for entire fairness to the minority")

is correct at a minimum. We find it unnecessary to consider in this case arguments by the defendants that greater legal effect is warranted.

Finally, in light of our view that there is no basis to reverse the Vice Chancellor's findings on the merits, plaintiff's contentions with respect to the dismissal of the derivative allegations and with respect to the certification and enlargement of the class are moot.

The judgment of the Court of Chancery is affirmed.

DUFFY, Justice, dissenting:

As I see it, this case presents to the Delaware Courts important issues involving the responsibility of an investment banking firm, in the context of a corporate merger, and the fairness of the price paid by a dominant majority stockholder to the minority (public) stockholders who were squeezed out of the enterprise by the merger. The appeal also requires review of the way in which the Court of Chancery assigned the burden of proof on fairness of the price paid for the shares.

In a lengthy opinion, Weinberger v. UOP, Inc., Del.Ch., 426 A.2d 1333 (1981), the Vice Chancellor explained the reasons why he entered judgment against the public stockholders (represented by William B. Weinberger, plaintiff, in this class action) and for defendants, The Signal Companies, Inc., UOP, Inc., and Lehman Brothers Kuhn Loeb, Inc. A majority of the panel has summarily affirmed the judgment but, respectfully, I dissent.

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I agree with much that the Vice Chancellor wrote in explaining his understanding of the prior law announced by this Court, and his analysis reflects a careful review of the cases and of the evidence offered at trial. But to respect his craftsmanship is not necessarily to agree with his judgment which

exonerates all defendants. In my opinion, he was mistaken on the two issues that I have noted and he erroneously excused Signal from meeting its burden to prove that the price it paid to the public stockholders was fair. Given the result in the case, there is little purpose in doing more than outlining my views:

(1) As to Lehman Brothers: The question as to liability of this defendant is one of first impression in this Court, namely: does an investment banker who gives an opinion as to the value of stock, knowing that it will be used to help persuade minority public stockholders to transfer their shares to the majority stockholder at the price offered by the majority, owe any duty to the minority stockholders? In Denison Mines, Ltd. v. Fibreboard Corp., D.Del., 388 F.Supp. 812,821 (1974), Judge Stapleton identified the significance of such an opinion by an investment banker when he wrote:

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

In my view, Lehman Brothers had a duty to exercise reasonable care or competence in obtaining or communicating the information as to the value of the UOP shares (that is, in giving its opinion that the proposed merger was "fair and equitable to the

stockholders of UOP other than Signal"); any failure to perform in accordance with that standard would make Lehman Brothers liable to the public stockholders for negligent misrepresentation under the circumstances stated in the Restatement of the Law, Torts 2d § 552. See also Prosser, Law of Torts (4 ed) § 107, pp. 704-708; § 109, pp. 720,721.

Given (a) the haste with which Lehman Brothers assembled its opinion on the value of the UOP stock and, (b), the disregard of its own internal memorandum, which had concluded that the stock was worth as much as $21 to Signal in 1976 after UOP had a $35 million operating loss in 1975, 426 A.2d at 1347, and its failure to explain why that same price was a fair one to the minority after UOP had a significantly improved performance in 1976 and 1977, there is at least enough in the case to require a trial on the issue of reasonable care or competence.*

(2) As to price: In his opinion, the Vice Chancellor noted that, under Sterling v. Mayflower Hotel Corp., Del.Supr., 93 A.2d at 107 (1952),

> "[I]t is presumably proper to view the benefits that may flow to the majority shareholder as a result of becoming the 100 per cent owner as one of the elements to be considered in determining the fairness of the transaction. I say this again because of the decision in Sterling.

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* Lehman Brothers had been paid by UOP the sum of "$150,000 for the services rendered in connection with the preparation and delivery of" its opinion as to whether the merger was fair to the public stockholders. Moreover, UOP promised to hold Lehman Brothers harmless from any loss it sustained "in connection with the arrangements" for the opinion.

> . . . By ultimately affirming the Chancellor and thus finding the terms of the merger to be fair to the minority, it can be argued that the Supreme Court tacitly recognized that as a part of 'entire fairness' it was proper to allow the minority some element of value over and above the otherwise provable value of the minority shares for the benefit that would come to the majority shareholder as a result of becoming the 100 per cent of the subsidiary through the merger process."

426 A.2d at 1360,1361.

The Trial Court thus clearly recognized that the benefit flowing to Signal "as a result of becoming the 100 percent owner" of UOP was a proper factor to consider in determining the fairness of the $21 price. But it is equally clear that the Court did not apply that factor. And the majority in affirming the judgment also fails to do so. Compare Lynch v. Vickers Energy Corporation, Del.Supr., 429 A.2d 497,503 n. 5 (1981), in which this Court noted the

> "well settled law that entitles a beneficiary to claim all advantages actually gained by a fiduciary as a result of a breach of trust, 4 Pomeroy's Equity Jurisprudence (5 ed.) § 1075; 3 Scott The Law of Trusts (3 ed.) § 205; Bogert Trusts and Trustees (2 ed. rev.) § 543(V). That standard has been applied to corporate affairs and directors in this State. Singer v. Magnavox Co., supra; Guth v. Loft, Inc., supra."

The benefit accruing to Signal as a result of the merger was real because, under Delaware law, the "stockholders of a corporation are the equitable owners of its assets." State v. Loft, Inc., Del.Super., 156 A. 170,172 (1931). And upon liquidation, the stockholders are entitled to a pro rata share of net assets. 8 Del.C.

§ 281; Gaskill v. Gladys Belle Oil Co., Del.Ch., 146 A. 337,338 (1929); Fletcher, Cyclopedia of the Law of Corporations (perm. ed. 1971) § 5100.

As a result of the merger which Signal had caused, the public stockholders were forced out of UOP and Signal acquired the equitable ownership of UOP assets which had been owned by the stockholders it cashed out. It would be exalting form over substance to say that Signal received only the "stock" or "shares" of the minority. The certificates merely represent what Signal in fact got, that is, the equitable ownership of assets which had belonged to others, and fairness requires that Signal pay for what it received. In short, as far as the public stockholders were concerned, the mechanics were merger in form but liquidation in fact.*

I recognize that to accomplish what, in my judgment, should be required in this case, an appraisal of UOP assets might be necessary. But, if that be so, Signal is not in a position to complain about it. It was Signal's decision to go the cash-out route in eliminating the public stockholders from UOP, rather than distribute stock to them, and it should not be permitted to complain

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* Net cash value was given little weight by Signal's expert because "there was no plan of its [UOP's] liquidation," 426 A.2d at 1362, and the Trial Court accepted that conclusion. As I read that ruling, the Court held that fairness to the minority was determined, not by an objective standard but by what Signal had not planned at the time of trial. And that is a rather strange approach. Signal can, of course, come up with a plan of liquidation when it wants to.

about a consequence flowing from the way in which it structured the transaction.

(3) As to burden of proof: Our cases from the ancestors of Sterling, 93 A.2d at 110, through Singer, 380 A.2d at 976, and its progeny, see Tanzer v. International General Industries, Del. Supr., 379 A.2d 1121,1124 (1977), without exception, hold that a majority stockholder standing on both sides of a merger transaction has "the burden of establishing its entire fairness" to the minority stockholders, sufficiently "to pass the test of careful scrutiny by the courts." Singer, 93 A.2d at 109,110.

As I read the Vice Chancellor's opinion, he placed the burden on plaintiff to show that the merger price ($21) was not fair. See 426 A.2d at 1356-1362. Almost all of his discussion is about why the testimony of the plaintiff's expert should not be accepted. Little more than a page, 426 A.2d at 1361,1362, was given to discussing defendant's evidence. Indeed, the Vice Chancellor did not refer to the Delaware law stating the standards that defendants were required to meet; and he did not submit their evidence to that test.

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I would reverse the judgment of the Court of Chancery and remand the case for a new trial.