Doc.

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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May 25, 1983

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Re: Weinberger v. UOP, Inc.
Civil Action No. 5642
Submitted: March 17, 1983

Gentlemen:

Plaintiff has moved the Court to approve the form and content of his proposed order with regard to the class action notice to be sent to the former minority sharholders of the defendant, UOP, Inc. Defendants oppose the application and have countered with their own proposals. In addition, the parties are at odds as to who should give the notice and who should bear the initial cost of giving it. Defendants also suggest that to give notice now would be premature. Finally, there is a dispute as to whether notice should be sent to those shareholders who previously opted out of the class in response to the initial class

action notice sent in this case.

These controversies have been born of the fact that the Delaware Supreme Court reversed the decision of this Court after trial and remanded the case for further proceedings. The case was tried as a class action. However, the class was limited initially to those former UOP shareholders who voted against the merger of UOP into The Signal Companies, Inc. and/or who had not surrendered their UOP shares for the merger price. In this Court judgment was entered in favor of the defendants. On appeal, however, the Supreme Court found evidence of a breach of the fiduciary duty owed to UOP minority shareholders by the defendants and remanded the matter to this Court for the purpose of ascertaining what damages, if any, had been sustained by the minority shareholders as a result. The Supreme Court further directed that on remand the post-trial motion of the plaintiff to enlarge the class should be granted.

As a result the parties agree that for the purpose of further proceedings in this Court on the remand the class represented by the plaintiff must be enlarged to include all shareholders of UOP, other than Signal, as of May 26, 1978, the date of the merger. Against this background I address the various issues set forth previously.

(1) The Necessity of Giving Notice Now. The direction has been given to enlarge the class. It must be done. I see no need to delay the notice until a decision has

been made as to how and when matters will finally proceed on the remanded issue. Therefore, the order will be signed now and the notice will be given.

(2) The Form Of The Notice. On this I find the form of notice proposed by the defendants to be preferable. It would seem to be a fair summary of the present status of things. I do not feel that the detail as to certain matters as proposed in the plaintiff's form of notice is necessary. Moreover, I feel that defendants' proposed notice adequately informs former shareholders with regard to the necessity of taking action if they desire to be excluded from the class and the fact that they will be included in the class, and bound by the decision on remand, unless they take such action. I do not find the repeated, bold-type warnings suggested by plaintiff to be necessary. However, for reasons set forth hereafter, an adjustment will be required for Paragraph 10 of the defendants' proposed form of notice.

(3) The Publication Notice. On this I also find the defendants' offering to be preferable. The second sentence in the defendants' proposal appears to be a neutral statement of fact. The second sentence proposed by plaintiff could be construed by one not familiar with the case to mean that the Supreme Court has found the defendants to be liable and has remanded the case for the purpose of fixing the amount which the minority shareholders have

coming to them. Since the Supreme Court opinion leaves it to my discretion to determine what award, "if any," should be made to the minority shareholders, the insinuation that could be derived from plaintiff's second sentence is not necessarily warranted.

(4) The Form For Requesting Exclusion From The Class. On this I prefer the form proposed by the defendants. However, in keeping with plaintiff's fears, I do feel that the document itself, in addition to the notice previously mentioned, should contain a warning. I suggest that immediately below the signature lines, in bold-type, the following language be inserted: "Former UOP Shareholders Desiring To Be A Member Of The Class Being Represented By The Plaintiff In The Above Captioned Action Should Not Execute This Document. It Should Only Be Executed And Mailed If You Wish To Be Excluded From The Class." I also feel that the form should contain a place for indicating the date on which the request for exclusion is signed.

(5) Giving The Notice And The Cost Thereof. On this point I side with the position of the plaintiff although, admittedly, with some mild reservation. Since the merger took place some five years ago, the difficulty and expense of giving individual, mailed notice to all of those former minority shareholders of UOP who voted to approve the merger, and who turned in their shares in return for the

merger price, will undoubtedly be substantial. Defendants argue that the giving of notice is normally the burden of the plaintiff who is certified as class representative, and that the accepted practice should be followed here. See Newberg, Class Actions, at page 57. Plaintiff counters by pointing out that he bore the burden and expense of giving notice to the class as originally certified and that as a consequence he should not be required to be responsible for giving the second notice, especially when the defendant corporations are better equipped to do it, both financially and logistically.

I agree with the defendants that this position of the plaintiff has a certain hollow ring to it. Initially, plaintiff sought to have the class certified as all minority shareholders of UOP. Had he been successful he likely would have had the burden and expense at that time of giving notice to all those former shareholders as to which he now seeks to shift the burden. Simply because he was unsuccessful in his initial effort to circumscribe the class and only thereafter achieved his goal on appeal through perseverance, why should he not complete his obligation now?

At the same time, as indicated in Wood v. Coastal States Gas Corp., Del.Supr., 401 A.2d 932 (1979) the decision under Rule 23 as to who should pay the cost of giving

notice to the class lies within the discretion of the Court, and is subject to review only on the basis of an abuse of discretion. Since the matter is discretionary it follows that it is within the power of the Court to impose the burden upon the defendant in a case in which the circumstances warrant it. In my view this is such a case.

To begin with, defendants initially opposed the scope of the class sought by the plaintiff, and they were successful in so doing on the record as it then existed. But for their efforts, plaintiff would not be in a position to advance the argument he is now making. Secondly, the enlargement of the class by the Supreme Court came about as a result of its finding on the evidence submitted at trial that the defendants had been guilty of wrongdoing in connection with the merger and had breached a duty of fair dealing owed to UOP's minority shareholders. Stated another way, the only reason that notice is now required for the additional UOP shareholders is because the Supreme Court found that UOP and Signal had not been completely candid with them. Thirdly, the passage of five years since the date of the merger while all of the foregoing was taking place has undoubtedly complicated the matter and, in my view, makes it unfair by comparison to require an individual plaintiff and his counsel to attempt to

give notice to several thousand long-gone former shareholders when contrasted with the personnel and capability of a large corporation.

Consequently, I am persuaded that the combination of factors here warrants an order directing the defendants to see to it that the notice is given to the balance of the former UOP shareholders who will now go toward making up the completed class and, subject to any application that might be made at the conclusion of the case, to bear the cost thereof for the present. As noted in Newberg, supra, the combination of a fiduciary relationship between the parties and the establishment of a prima facie case against the defendant, especially when other considerations are present, is a recognized basis for deviating from the normally accepted practice that "plaintiff initially pays."

(6) Those Shareholders Who Previously Opted Out. As a result of the notice sent to the class as it was certified prior to the trial of this case some 146 former UOP shareholders elected to be excluded from the class. I see no basis for sending the present notice to these persons. They were afforded an opportunity to be in the original class, and they chose not to be. To send them a second notice now -- along with a form whereby they could again request exclusion -- would be tantamount to

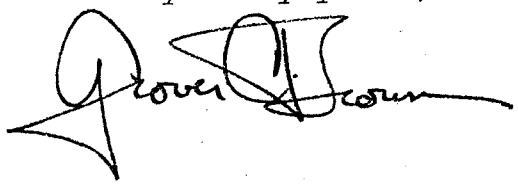
giving them an opportunity to opt back in at a time when, because of the Supreme Court decision, things look significantly brighter for the plaintiff and his class than they did at the outset. I see no basis for giving these former shareholders a second chance simply because their odds might now appear to be better.

The decision of the Supreme Court simply directed that the existing class be enlarged so as to provide others with an opportunity to get in. The decision did not indicate that there was anything wrong with the class as it initially existed other than it was not large enough. Those who previously opted out have already had their chance to make the class larger by their number. I see no equities under the facts of the matter which would justify relieving them from the choice previously made.

Since I have concluded that the defendants must be responsible for giving and sending out the notice, I think that Paragraph 10 of the defendants' proposed form of notice should be changed to reflect that additional copies of the notice can be obtained from either the defendants or their counsel as opposed to naming counsel for the plaintiffs as the source. If defendants will make this adjustment and make the addition to the form for requesting exclusion as noted herein, the long form of order submitted

by them at argument can be signed.

Very truly yours,



GCB:mlw

cc: Register in Chancery