

1992

Leontine C. Pond and Merle G. Hyer Company v.
Equitable Life and Casualty Insurance Company,
Insurance INvestment Company, R. Earl Ross, E.
Roderick Ross, Galen J. Ross, David E. Ross II,
Diane Ross Worthen, Betsy Ross Rapps, Connie
Ross : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 920759 IN THE UTAH COURT OF APPEALS

LEONTINE C. POND and MERLE G. HYER
COMPANY, a Utah Corporation, holders of
Preferred Stock in Insurance Investment
Company, a Utah Corporation, on behalf of
themselves and other similarly situated
holders of such stock,

Plaintiffs and Appellants,

vs.

EQUITABLE LIFE AND CASUALTY INSURANCE
COMPANY, a Utah Corporation, INSURANCE
INVESTMENT COMPANY, a Utah Corporation,
R. EARL ROSS, E. RODERICK ROSS, GALEN J.
ROSS, DAVID E. ROSS II, DIANE ROSS
WORTHEN, BETSY ROSS RAPPS, CONNIE ROSS,
and Does 1 through 20,

Defendants and Appellees.

Case No. 920759-CA

ARGUMENT PRIORITY CLASSIFICATION 16

BRIEF OF APPELLANT

APPEAL

FROM THE THIRD JUDICIAL DISTRICT COURT

COUNTY OF SALT LAKE, STATE OF UTAH

HONORABLE JAMES S. SAWAYA, JUDGE

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May 1, 1992

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JURISDICTION

This appeal is from proceedings in a district court concerning an action by shareholders against related corporations and their principals. The Supreme Court had appellate jurisdiction under Subsection 78-2-2(3)(j) of the Utah Code. This Court now has jurisdiction pursuant to Subsection 78-2a-3(2)(k) since the Supreme Court transferred this case on November 2, 1992 in accordance with Subsection 78-2-2(4).

The Notice of Appeal filed June 23, 1992 (ROA at 696) conferred jurisdiction to review all Orders and Judgment adverse to plaintiffs and made final by the Order Certifying Order and Summary Judgment as Final Judgment dated June 1, 1992.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The appellants assert that the pertinent issues and the corresponding standard of review are as follows:

1. Should the plaintiff class have been certified under Rule 23(b)(1) or (2) of the Utah Rules of Civil Procedure, or in the alternative under Rule 23(b)(3), where the proposed class consists of 105 holders of preferred stock having claims based on facts such as the company failing to pay dividends, and certain insiders selling all of their preferred stock to a controlled company at a price per share over 16 times as great as the members of the proposed class could obtain? This is a question of whether the trial court misapplied the law, for which no deference is owed, or abused its discretion. Call v. West Jordan, 727 P.2d 180 (Utah 1986).

2. Where over one-third (based on liquidation rights) of the stock in a holding company is purchased by the company it controls, has there been "any liquidation" under its 1944 Amended Articles of Incorporation entitling its shareholders to be paid in the manner prescribed therein? This is a question of law, with no need for deference to the trial court's decision. Transamerica Cash Reserve v. Dixie Power & Water, 789 P.2d 24 (Utah 1990).

3. Are a controlled company and its officers and shareholders insulated from any fiduciary duty to the shareholders of its holding company? This is a question of law, with no need for deference to the trial court's decision. Id.

4. In order to resolve disputes over a corporation's control, does the business judgment rule justify that corporation's secretly purchasing of all of certain insiders' preferred stock of its holding company at a price per share over 16 times as great as the price the other holders of that stock could obtain from the corporation or anyone else? This is a question of law, with no need for deference to the trial court's decision. Id.

5. Must every action for breach of fiduciary duty of the officers and directors of a corporation be brought as a derivative action? This is a question of law, with no need for deference to the trial court's decision. Id.

6. May punitive damages be awarded against the officers and directors for breach of fiduciary duty when only equitable relief involving the company, and no general or compensatory damages from the officers and directors, is specifically sought?

This is a question of law, with no need for deference to the trial court's decision. Id.

7. Were plaintiffs entitled to amend their Complaints to allege additional acts of oppression against the minority shareholders and to specifically claim a right to a partial rescission of a sale of stock when the case was still in the discovery and motion stage? This involves a question as to whether the trial court abused its discretion. Stratford v. Morgan, 689 P.2d 360 (Utah 1984).

DETERMINATIVE LAW

The interpretation of the following Utah Rules of Civil Procedure is determinative of certain issues in this appeal:

Rule 15 provides in pertinent part:

Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Rule 23 is set forth in the addendum at the end of this Brief.

STATEMENT OF THE CASE

Plaintiffs are holders of preferred stock in defendant Insurance Investment Company ("II"). II holds most of the voting stock of the defendant Equitable Life and Casualty Insurance Company ("Equitable"). These companies and their principal officers, R. Earl Ross ("Earl") and E. Roderick Ross ("Rod"), are all jointly referred to as the "Equitable defendants", and sometimes herein as "defendants".

Plaintiff Leontine C. Pond ("Pond"), and later plaintiff

Merle G. Hyer Company ("Hyer"), have sought to represent a class composed of all holders of II preferred stock, except for Earl, Rod, and their relatives ("the Ross family"). The trial court declined to certify this plaintiff class.

Although since the early 1940's Equitable has grown and been quite profitable, the plaintiff class has never shared any benefits arising therefrom, nor are any foreseeable. A share of II preferred stock sold during World War II at a par value of \$1 and now represents a liquidation value of over \$80. Nevertheless dividends have never been greater than \$.06 per share, and have only been declared 3 times in the last 35 years. There is no market for the stock, but members of the Ross family have been willing to pay around \$3 per share for it.

In 1986 a dispute among members of the Ross family developed over control of Equitable. The following year, in order to end this dispute, the members in the minority were essentially allowed to liquidate their direct and indirect ownership interest in Equitable. Equitable bought all of their stock interest, including II preferred stock, for an amount approximating its liquidation value. This was paid in the form of cash and a new issue of Equitable preferred stock, with the latter likely to be redeemed over a period of about 10 years.

Although this transaction was to be kept secret, it became apparent that some transaction had been consummated. After this action was initiated, and a motion to compel was granted, discovery revealed most of the pertinent facts.

Plaintiffs sued on several bases, including the premise that since a de facto partial liquidation had taken place, they should be entitled to participate therein. The trial court ruled that they failed to state a cause of action on that basis.

Plaintiffs also based their suit on the premise that fiduciary duties were violated when defendants used the assets of Equitable to benefit only certain shareholders, namely, the Ross family shareholders that were bought out. The trial court eventually granted defendants summary judgment on this issue as well, apparently on the basis of the presumption that defendants' actions were taken in good faith reliance on their business judgment. The Equitable defendants had also argued that there could be no liability for punitive damages in the absence of a prayer for actual damages; that II was not involved in any transaction and plaintiffs were not shareholders of Equitable, and so Equitable owed them no fiduciary duty; and that Pond and Hyer had no cause of action as individual shareholders.

Plaintiffs moved to amend their complaint to include a cause of action based on oppressive treatment of the minority shareholders. That motion was denied.

Only the Equitable defendants have vigorously defended this action, and the orders and judgment have only been applicable to them. Nevertheless, these orders are appealable since the trial court certified the Order and Summary Judgment as final.

The facts in more detail are as follows:

1. Pond is a resident of Lewiston, Cache County, State

of Utah, and Hyer is a Utah corporation doing business in that same city and county. ROA at 2, 158.

2. Defendants Equitable and II are Utah corporations doing business in Salt Lake County, State of Utah, and defendants Earl and Rod are residents of that same county. ROA at 158-9, 205.

3. Pond was issued her 500 shares of II preferred stock after the death of her husband, Stillman H. Pond, upon the cancellation of the certificates that had been issued to him when he purchased them during their marriage in the early 1940's. ROA at 3.

4. Hyer is and has been at least since November of 1970 the owner of 1,175 shares of preferred stock of II. ROA at 159, 206.

5. There are a total of about 105 persons, including the named plaintiffs, who are similarly situated, and who together hold about 30% of the II preferred stock which is outstanding. ROA at 63, 475-76.

6. Pursuant to Rule 23 of the Utah Rules of Civil Procedure, plaintiffs Pond and Hyer sought to bring this action as a class action on their own behalf and on behalf of all other similarly situated owners of preferred stock in II. ROA at 5, 160-61.

7. All other holders of preferred shares in II are similarly situated to plaintiffs except the named individual defendants and their close relatives who with them make or made up the Ross Family. ROA 475-76.

8. Many stockholders of this proposed class are probably not residents of this state, and the names of some stockholders are unknown to plaintiffs Pond and Hyer and cannot with due diligence

be ascertained by them. ROA at 160, 207. However, an effort to bring them all before the court has met with some limited success as indicated by the attempted intervention of eleven other plaintiffs. ROA at 493, 532.

9. The attorneys for the plaintiffs are experienced and capable in litigation in the field of corporate law and have actively conducted and been responsible for the plaintiffs' case herein. ROA at 2, 5, 38.

10. II is a holding company, holding Equitable common stock. ROA at 475. As of October 31, 1986, Equitable only had one class of stock outstanding, and II owned about 63.3% of that Equitable stock. ROA at 7, 39.

11. At that time II held approximately 3.717 shares of Equitable common stock for each share of its own stock outstanding, common and preferred. ROA at 15, 38.

12. Under the Amended Articles of Incorporation of II dated July 17, 1944, in "the event of any liquidation" of II, the holders of the preferred stock would be entitled to be paid at least as much for one of their shares as would be paid for each share of II common stock. ROA at 9-10, 42.

13. On November 17, 1986, Equitable offered to purchase up to 115,500 shares of its own stock for \$22.50 per share on or before December 8, 1986. ROA at 6-7, 39.

14. Pursuant to that offer, Equitable paid a total of \$2,152,404 for its own stock. No Equitable stock was purchased from II. Deposition of Earl Roderick Ross taken June 10, 1991 -

ROA at 759, 549 (Rod Depo), Exh. 1, 4th page; Addendum hereto.

15. Very few purchases of Equitable stock had taken place during the preceeding five years. The purchase price ranged from about \$2.00 to \$4.00 per share. It was not listed on any exchange and no over-the-counter sales were made. ROA at 7, 39.

16. In fact, during those preceeding five years, only members of the Ross family would purchase Equitable or II preferred stock, and then only for less than \$5 per share. Rod Depo at 120-21. Deposition of Raymond Earl Ross taken June 11, 1991 - ROA at 760, 549 (Earl Depo) at 67-71.

17. As of October 31, 1986, the Ross Family owned or controlled all or nearly all of the voting common stock of II and about 70% of the II preferred stock. ROA at 475-78.

18. As of October 31, 1986, three members of the Ross Family, Earl, Rod, Diane Ross Worthen (now known as Diane Ross Gandre), served as directors of II and Equitable. Rod Depo at 27, 29.

19. Rod and Earl determined that with the stock owned or beneficially owned by themselves and by Earl's sisters and mother, they could control II, and hence Equitable, if they could control most of the stock owned by the Roderick Earl Ross Memorial Foundation. Earl Depo at 12, 19.

20. Since they, along with Earl's sister Diane Gandre, were three of the three or four trustees of the Foundation, they arranged for a sale of about 1,200 shares of the Foundation's II common stock to Jim Bowlden for about \$30 a share, or a total of about \$35,000. Earl Depo at 11, 14.

21. Defendant Galen Ross objected to this sale by the Foundation, and submitted an offer for the same stock for a total of less than \$100 more. Earl Depo at 17-18. Despite this objection, the sale took place in 1986, which effectively resulted in the complete control of Equitable by Earl and Rod. Earl Depo at 10-14. Rod Depo at 11-13. Various other takeover attempts and litigation began after that sale. ROA at 476-77.

22. Earl and Rod withstood the threats to their control of Equitable by means of litigation and through Equitable's said purchase of its own stock set forth above. ROA at 477.

23. The threat to Earl and Rod's control was finally eliminated by Equitable's secret purchase of all of the II common and preferred stock and Equitable stock held directly or indirectly by defendants Galen Ross, Connie Ross, David Ross and Betsy Ross Rapps, the members of the Ross family who had been pushed from a position of control. ROA at 437, 476-78.

24. This was paid in the form of cash and a new issue of Equitable preferred stock, with the latter likely to be redeemed over a period of about 10 years. ROA at 422-30.

25. The 1988 Annual Statement reported that in the purchase of its own stock pursuant to the 1986 offer, and in the purchase from "a coalition," Equitable paid a total consideration of \$6,809,596 for the equivalent of 300,609 of its own shares, or an average of \$22.65 per share. As part of this purchase, Equitable bought over one-third (based on liquidation rights) of the outstanding II stock. Rod Depo, Exh. 1, 4th page, included in the Addendum hereto.

26. That same 1988 Annual Statement reported that each share it held of II stock, both common and preferred, was equivalent to 3.717 shares of its own stock "(based on liquidation rights)." Id. Thus those same liquidation rights would result in an average value of over \$84 per share of II stock.

27. In 1988 Jim Bowlden sold the II common stock he held to Earl's mother for a little over \$100,000, or a little over \$83 per share. Earl Depo at 15.

28. When Equitable made that secret purchase of stock, including II preferred stock, from the said "coalition" of insiders, it made no comparable offer to purchase the II preferred stock held by the plaintiff class, which would have meant an additional investment of less than \$1,730,000. ROA at 11, 43.

29. All of Earl's sisters are now serving as directors of Equitable, namely Lana Ross Hall, Rita Mahmood, and Julie Foster, the latter serving without voting powers. Earl Depo at 22, Rod Depo at 117.

30. Each director of Equitable receives an annual compensation for being a director of at least \$10,000. Earl Depo at 22. The total earnings of Earl and Rod have not been disclosed, in accordance with their attorney's direction. Earl Depo at 4. Earl's sisters all work for Equitable and receive additional annual compensation of about \$75,000. Earl Depo at 23.

31. Dividends have been declared or paid by II in only very few years since the issuance of the preferred stock therein, and then only at the minimum rate, 6% of the \$1 par

value. II has indicated that dividends have been paid to the preferred shareholders of II on four occasions, namely, in 1954, 1981, 1983 and 1984, and seven times total. ROA 211-12, 500.

32. Pond initiated this action by means of a Complaint dated September 21, 1989, on behalf of herself and all other similarly situated holders of preferred stock in II. ROA at 2. She then filed a Motion for Maintenance as Class Action dated September 22, 1989. ROA at 18.

33. The Equitable defendants opposed that motion, arguing that 105 members of the class were not numerous enough; Pond was not typical since others had not expressed an interest in joining the lawsuit; she had only 2% of the II preferred stock and she and her counsel had not proven they could adequately represent the class. ROA at 60.

34. This opposition proved successful, with the trial court denying Pond's Motion by means of a Minute Entry dated November 22, 1989. ROA at 84. The court later clarified that its basis for the denial was that the case was not the type appropriately pursued as a class action. The court also stated that additional authority on the matter would be considered. ROA at 738.

35. Pursuant to that invitation, Pond filed a Renewed Motion for Maintenance as Class Action dated February 13, 1990 and supported it by extensive citation to case law. ROA at 103. That Renewed Motion was denied by means of an Order dated June 20, 1990. ROA at 218.

36. Meanwhile, the parties had stipulated on May 22,

1990 to the intervention of plaintiff Hyer, and had acknowledged the filing of its Complaint dated April 18, 1990 in which it sought to be a class representative along with Pond. ROA at 201, 158.

37. To discover the pertinent documents despite the secrecy agreed upon among the defendants, plaintiffs obtained an Order Compelling Production. ROA at 275.

38. The Equitable defendants filed a Motion for Partial Summary Judgment dated August 8, 1990, in which they sought a dismissal of all claims against them based on the existence of a de facto partial liquidation of II. ROA at 269. An Order dated October 24, 1990 granted that Motion. ROA at 317.

39. The Equitable defendants subsequently filed a Motion for Summary Judgment as to all remaining issues, dated September 24, 1991. ROA at 390. In support of that Motion they argued, among other matters, that there could be no liability for punitive damages in the absence of a prayer for actual damages; II was not involved in any transaction and plaintiffs were not shareholders of Equitable, and so Equitable owed them no fiduciary duty; that their actions were justified on the basis of business judgment; and that Pond and Hyer had no cause of action as individual shareholders. ROA at 484, 393.

40. Pond and Hyer opposed that Motion and filed a proposed Amended Complaint showing the proposed intervention of eleven (11) additional representative plaintiffs, and including and clarifying the causes of action for oppressive conduct and for

the alternative right to partial rescission so that all shareholders would have the right to sell an equal percentage of their II preferred stock to Equitable. ROA at 495, 529.

41. However, the trial court granted the Equitable defendants' Motion for Summary Judgment by means of an Order and Summary Judgment dated December 9, 1991, and in connection therewith, refused to allow the Complaint to be amended and denied the additional intervention. ROA at 596, 603, 608.

42. The said Order and Summary Judgment decided all claims pertaining to the Equitable defendants. Therefore it was certified as a final judgment by means of an Order Certifying Order and Summary Judgment as Final Judgment (Rule 54(b)) dated June 1, 1992. ROA at 693.

SUMMARY OF ARGUMENTS

Since no appealed order or judgment specified any particular basis, all arguments made by the Equitable defendants are addressed.

1. The plaintiff class should have been certified under Rule 23(b)(1) or (2) of the Utah Rules of Civil Procedure, or in the alternative under Rule 23(b)(3). The proposed class consists of 105 holders of preferred stock, which is numerous enough.

They all have claims based on facts such as the company failing to pay dividends, and certain insiders selling all of their preferred stock to a controlled company at a price per share over 16 times as great as the members of the proposed class could obtain. Thus the similar issues overwhelmingly predominate over any variation among the members of the class.

The class is adequately represented by the representative plaintiffs and their attorneys, and the representative plaintiffs are typical of the class.

The likely remedies are such that all members of the class should be included, with no right to opt out. Although the plaintiffs have the burden to show a class action is appropriate, that burden has been met and the class action is favored.

2. Where over one-third (based on liquidation rights) of the stock in a holding company is purchased by the company it controls, there has been "any liquidation" under its 1944 Amended Articles of Incorporation, entitling its shareholders to be paid in the manner prescribed therein.

Whether there has been "any liquidation" is a question of fact. "Any liquidation" includes partial liquidation, and is not limited to any statutory definition.

3. A controlled company and its officers and shareholders are not insulated by artificialities from any fiduciary duty to the shareholders of its holding company.

It is well settled that courts will look to the substance and actualities, rather than convenient corporate formations, in order to determine the realities.

4. A corporation is not justified in secretly purchasing all of certain insiders' preferred stock of its holding company, at a price per share over 16 times as great as the price the other holders of that stock could obtain from the corporation or anyone else, especially in order to resolve disputes over a corporation's

control, despite the business judgment rule.

Equitable had an obligation to offer all holders of II preferred stock the same price for its stock that it paid to the insiders for such stock. Equitable's directors were not excused by the business judgment rule when they preferentially used the corporate assets, since the purchase was made to retain control.

5. Every action for breach of fiduciary duty of the officers and directors of a corporation need not be brought as a derivative action.

The shareholders have a claim for direct relief where, as here, the corporation violated their rights as shareholders.

6. Punitive damages may be awarded against the officers and directors for breach of fiduciary duty when only equitable relief involving the company, and no general or compensatory damages from the officers and directors, is specified in the prayer.

Equitable relief is sufficient to justify punitive damages. Additionally, general or compensatory damages may yet be awarded, since plaintiffs' remedies are not restricted by the prayers of their complaints.

The statutory exception as to when punitive damages may be awarded should be narrowly construed, and not bar punitive damages where the judgment results in a substantial financial loss to the defendants.

7. Plaintiffs were entitled to amend their complaints to allege additional acts of oppression against the minority shareholders and to specifically claim a right to a partial rescission

of a sale of stock when the case was still in the discovery and motion stage.

An amended complaint can include claims already dismissed so that they are not deemed waived, although the law of the case is applicable. An added cause of action should be allowed during the discovery phase when it is based in large part on facts already pleaded.

ARGUMENT

1. THE PLAINTIFF CLASS SHOULD HAVE BEEN CERTIFIED UNDER RULE 23(B)(1) OR (2) OF THE UTAH RULES OF CIVIL PROCEDURE, OR IN THE ALTERNATIVE UNDER RULE 23(B)(3), WHERE THE PROPOSED CLASS CONSISTS OF 105 HOLDERS OF PREFERRED STOCK HAVING CLAIMS BASED ON FACTS SUCH AS THE COMPANY FAILING TO PAY DIVIDENDS, AND CERTAIN INSIDERS SELLING ALL OF THEIR PREFERRED STOCK TO A CONTROLLED COMPANY AT A PRICE PER SHARE OVER 16 TIMES AS GREAT AS THE MEMBERS OF THE PROPOSED CLASS COULD OBTAIN.

The class is numerous enough.

Defendants have argued that the class size of 105 preferred shareholders is insufficient to satisfy the first requirement of Rule 23(a) of the Utah Rules of Civil Procedure that the class be so numerous that joinder of all members is impractical. ROA at 63.

The court in the case of Dameron v. Sinai Hospital of Baltimore, Inc., 595 F. Supp. 1404, 1408 (D. Md. 1984) stated, "A class consisting of as few as 25 to 30 members raises the presumption that joinder would be impractical."

The case of Ikonen v. Hartz Mountain Corp., 122 F.R.D. 258,

262 (S.D. Cal. 1988) may have put the presumptive figure somewhat higher. It stated that generally "classes of 20 are too small, classes of 20-40 may or may not be big enough depending on the circumstances of each case, and 40 or more are big enough."

Examples of cases where numerosity was reviewed and the class certified include Smith v. MCI Telecommunications Corp., 124 F.R.D. 665 (D. Kan. 1989) with a class of 96, and Cherry Hills Farms v. City of Cherry Hills, 670 P.2d 779 (Colo. 1983) with a class of 92.

Clearly the class of 105 preferred shareholders in the instant matter is numerous enough.

Apparently the trial court agreed on this point. The court's stated that the basis for the denial of the Motion for Maintenance as Class Action was that it did not seem like the type of a case for a class action. ROA at 738. That would not appear to indicate that at 105 members the class was not numerous enough. The class is adequately represented.

Defendants have argued that plaintiff Pond (sometimes referred to herein as plaintiff) is an inadequate representative of the class because she owns only 2% of the preferred stock outstanding. ROA at 65. Even if this percentage is accurate, it in no way disqualifies her as a representative.

In the case of Epstein v. Weiss, 50 F.R.D. 387, 391 (E.D. La. 1970) (ROA at 132-36), the court stated, "a single plaintiff may represent the entire class, no matter how small his claim may be", citing Green v. Wolf Corporation, 406 F.2d

291 (2nd Cir. 1968) and Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2nd Cir. 1968).

The Epstein opinion noted that the Green case allowed a single plaintiff to represent a class exceeding 2,000 shareholders who purchased stock pursuant to three separate prospectuses, despite no interventions being filed. The Eisen ruling allowed a single odd-lot investor with damages of \$70 to represent a class of some 3,750,000 individuals, that court stating, "If we have to rely on one litigant to assert the rights of a large class then rely we must." 391 F.2d at 563.

Defendants contend plaintiff's counsel have not demonstrated they are capable of representing the intended class of preferred shareholders. ROA at 65. However, the Affidavit of Plaintiff's Counsel (ROA at 79-81) shows that plaintiff's counsel satisfy the requirement of adequate representation that "the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation." Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247, (3rd Cir. 1975), cert. denied 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975), as cited in 3B Moore's Federal Practice, (2nd Ed.) ¶23.07[1] at 23-193.

Defendants complained that the plaintiff "made no demonstration of her financial capability to fund what is inevitably going to be an expensive lawsuit." ROA at 65. Along those same lines, defendants call into question the ability of plaintiff's counsel to bear the expenditures of time and money necessary to vigorously pursue this litigation as a class action. ROA at 65.

In the Affidavit of Plaintiff's Counsel, plaintiff's attorney attested that plaintiff's counsel is willing and able to spend the time and advance the necessary costs, and the lack of prompt reimbursement will in no way compromise the vigorous prosecution of this litigation. ROA at 79-81. Since the class is not extremely large, costs will not be burdensome.

Since there are no factors present which cast doubt on plaintiff's ability to reimburse counsel, such as a pending bankruptcy or financial distress, any contention that plaintiff lacks adequate financial resources to conduct this litigation is irrelevant. Genden v. Merrill Lynch, Pierce, Fenner & Smith, 114 F.R.D. 48 (S.D.N.Y. 1987) (ROA at 137-139).

Any doubts about adequacy of representation should be resolved in favor of certification since the "courts presumably are aware of the irony that a dismissal for inadequacy of representation may as a practical matter in some situations result in no representation at all of the class interest." 3B Moore's Federal Practice, (2nd Ed.) ¶23.07[1] at 23-199.

Apparently the trial court agreed that the class was adequately represented since the stated basis for the denial of certification was that it did not seem like the type of a case for a class action. ROA at 738.

The member's desire to join is not an element of typicality.

Defendants have argued that plaintiff has not proven that she is typical of the class because she has not shown that other members of the class care whether or not they have a cause

of action. ROA at 63-64. The cases cited do not stand for that proposition.

The cases of White v. Gates Rubber Co., 53 F.R.D. 412 (1971) and Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975) demonstrate the need for each member of the class to have a legally cognizable claim, not the need for each member to subjectively desire to pursue that claim.

Even if a subjective desire to receive the benefits of the action were necessary, that would be deemed present in the instant matter. It is only logical that a shareholder would want the opportunity to sell his stock for over \$80 per share, when he can presently only sell it for less than \$5 per share. Typicality is satisfied by the similarity of claims.

In the case of Epstein v. Weiss, 50 F.R.D. 387 (E.D. La. 1970) (ROA at 132-36), a plaintiff class composed of selling shareholders was certified in a case alleging violations of the Securities Exchange Act by reason of misleading information in the tender offer.

The defendants in that action argued that a class should not be certified because of individual issues. They argued that each member had to establish his own reliance on the tender offer, show it was material in his decision, and prove the damages he suffered. The court rejected this contention on a number of grounds.

Mainly the court found that the common issues of law and fact predominated over any such individual issues. Also, it cited cases showing that materiality had to be measured by an objective

"reasonable man" standard. Additionally, it reasoned that since the shares were sold at the same price pursuant to the same tender offer, each member of the class suffered the same loss per share. Finally, it cited cases showing that where there is nondisclosure, reliance plays a role that is small or nonexistent.

In another case, Genden v. Merrill Lynch, Pierce, Fenner & Smith, 114 F.R.D. 48, 52-53 (S.D.N.Y. 1987) (ROA at 139), the court emphasized the need to examine the question of liability in determinining the issues of commonality and typicality. It quoted from the case of Dura-Bilt Corp. v. Chase Manhattan Corp., 89 F.R.D. 87, 93 (S.D.N.Y. 1981) when it stated: "The typicality prerequisite requires plaintiff to show that plaintiff's claim 'arises from the same event or course of conduct that gives rise to claims of other class members and the claims are based on the same legal theory.'"

In the instant matter, the common factual elements applicable to all members of the class are that they (1) owned preferred stock in II on or about November 4, 1987, (2) were not part of the "Ross Family" which controlled well over 90 percent of the voting stock and about two-thirds of the preferred stock of II and took the action complained of, and (3) did not and could not participate in the transaction involving the sale of about one-third of the said shares of II preferred stock to Equitable, and in fact were not supposed to learn about the said transaction, and thus were left with the ability to sell their stock at only a small fraction of the amount for which the insiders had sold their stock to the

company.

All of the members of the class would therefore have the same cause of action in that they were owed a fiduciary duty as holders of preferred stock in II by all of the defendants. Likewise, the actions taken by the defendants breached that duty to all of the members of the class.

The damages are also easily determinable and distributable among the members of the class. Whatever is determined to be the proper remedy for this breach of fiduciary duty should apply to all of the members of the class in proportion to their ownership of preferred stock in II.

Paragraphs (b)(1) and (2) of Rule 23 apply.

PARAGRAPH (B)(1)

Paragraph (b)(1) of Rule 23 applies to this case. That paragraph concerns the risk of inconsistent or varying adjudications.

The case of Zachary v. Chase Manhattan Bank, 52 F.R.D. 532 (S.D.N.Y. 1972) (ROA at 140-41) is instructive on this point.

In that case, a credit card holder brought a class action to challenge the imposition of a finance charge. First of all the court pointed out that "when there is a choice between a (b)(1) and (b)(3) class action, the court should order that the suit be maintained as a class action under (b)(1), rather than under (b)(3)." Id. at 534.

The Zachary court then found the existence of the risk referred to in Rule 23(b)(1)(A) of "inconsistent or varying adjudications with respect to individual members of the class

which would establish incompatible standards of conduct for the party opposing the class," since "the finance charge exacted by defendant is either legal or it is illegal as to all members." Id.

Finally, the court found the risk set forth in Rule 23(b)(1)(B) of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests". Id.

Just as the credit card holders in the Zachary case were all treated the same way with respect to the contested finance charge, so also in the instant matter were all of the preferred shareholders other than the defendants subjected to the same treatment by the insiders. It is only natural that as a practical matter, great weight would be given to the decision of the first court to address these identical issues.

In addition, as indicated in the prayer of the Complaint, punitive damages are sought. In practicality and fairness, this should be applied to all members of the class according to their respective ownership of preferred shares of II, rather than to just be awarded to the first shareholder who sues, especially if in the event that absent class certification, the others would be barred by a statute of limitation.

In the note of the Rules Advisory Committee pertaining to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, it sets forth the reasons why actions by shareholders often fit into

this category:

This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. ... For much the same reason actions by shareholders to compel the declaration of a dividend, the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions although the matter has been much obscured by the insistence that each shareholder has an individual claim. [Citations.] The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. [Emphasis added.]

PARAGRAPH (B)(2)

Turning now to Paragraph (b)(2) of Rule 23, that is applicable where:

The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Clearly the first requirement of the grounds being generally applicable to the class is met here. As was just mentioned, all of the grounds which the representative plaintiff has are equally applicable to all members of the class.

As to the second requirement, the major relief set forth in the Complaint is equitable, requiring particular action on

the part of the defendants with respect to the class as a whole. Specifically, paragraph 1.b. of the prayer would allow Equitable the option of exchanging its common stock for the II preferred stock, and tendering a stated amount per share to buy back that common stock.

The case of Fradkin v. Ernst, 98 F.R.D. 478, 490-91 (N.D. Ohio 1983) set forth the two part test referred to above, and found that the proposed class of shareholders should be certified since the defendants' conduct had a similar effect upon all members of the class and the prayer sought declaratory and injunctive relief.

There should be no right to opt out and notice is unnecessary.

Not only can and should this lawsuit be pursued on behalf of the class specified, but it should only be pursued in that manner, with all members of the class being included.

In paragraph (c)(3) of Rule 23 of the Utah Rules of Civil Procedure, it draws a distinction between the treatment of classes meeting the conditions of paragraphs (b)(1) or (b)(2) of that Rule and the treatment of classes meeting the conditions of paragraph (b)(3). In the case of the former type of classes, all members are included and none excluded, thus obviating the need for notice to determine which members wish to be excluded. As shown above, the instant matter should fall into that former category, including all members of the class regardless of any desires to be excluded.

In the case of Bowen v. General Motors Corp. A C Spark

Plug Div., 542 F. Supp. 94, 98 (N.D. Ohio 1981), the court stated that "notice is discretionary in 23(b)(2) actions and there is no opt-out privilege given to absent class members."

The case of Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1554 (11th Cir. 1986) (ROA at 131) reversed the trial court's ruling allowing members of the class to opt out.

When there is no right to opt out, notice is unnecessary. In Fradkin v. Ernst, supra, where there was certification of a class of 2600 shareholders, the court declined to require notice be given. The court in Lindquist v. Bowen, 633 F. Supp. 846, 862 (W.D. Mo. 1986) likewise declined to order notice be given. The burden of proof for a class action has been met.

Defendants have indicated that plaintiffs bear the burden to prove that this matter should be maintained as a class action. ROA at 61-62. This burden has been met.

Submitting this factual information in affidavit form is sufficient. As was indicated in the case of Genden v. Merrill Lynch, Pierce, Fenner & Smith, 114 F.R.D. 48, 51 (S.D.N.Y. 1987) (ROA at 137-39), a motion for class certification can be granted without "an evidentiary hearing or a 'mini-trial' on the merits of the complaint." The Genden court went on to grant such a motion based on the record and on the affidavits that were submitted.

On the other hand, an evidentiary hearing should be held before a court dismisses the class aspect of a case. Rossin v. Southern Union Gas Co., 472 F.2d 707 (10th Cir. 1973).

Since the plaintiffs' have discharged their obligation

as to proof, they are entitled to have the class certified. As stated in Lindquist v. Bowen, 633 F. Supp. 846, 860 (W.D. Mo. 1986), if the requirements for class certification have been met, the plaintiff is entitled to certification. That is, there is a right to have the class certified when the requirements are met.

Class actions are favored.

The Tenth Circuit has indicated that doubts are to be resolved in favor of certification:

[T]he interests of justice require that in a doubtful case, such as was presented here when considered by the trial court, any error, if there is to be one, should be committed in favor of allowing the class action. Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968).

This is particularly applicable in actions involving stockholders. As stated in the case of Gruber v. Price Waterhouse, 117 F.R.D. 75, 78 (E.D. Pa. 1987):

Securities actions are particularly suitable for class action treatment and any doubts should be resolved in favor of allowing a class action. Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985).

Not only should any doubt be resolved in favor of certification, but the certification should be under Rule 23(b)(1) and/or (2) rather than the more restrictive (b)(3). This principle was set forth in Berman v. Narragansett Racing Ass'n, 48 F.R.D. 333, 337 (D. I. 1969) (ROA at 122-26).

2. WHERE OVER ONE-THIRD (BASED ON LIQUIDATION RIGHTS) OF THE STOCK IN A HOLDING COMPANY IS PURCHASED BY THE COMPANY IT CONTROLS, THERE HAS BEEN "ANY LIQUIDATION" UNDER ITS 1944 AMENDED ARTICLES OF INCORPORATION, ENTITLING ITS SHAREHOLDERS TO BE PAID IN

THE MANNER PRESCRIBED THEREIN.

Liquidation cannot be ruled absent as a matter of law.

The case of Jones v. Griffin, 216 F.2d 885 (10th Cir. 1954) concerned the appropriate rate of taxation and involved the question as to whether the purchase by a corporation of its preferred stock was a partial liquidation. The opinion ruled that this question was a question of fact.

Likewise in the instant matter, the established facts cannot sustain a ruling as a matter of law that there was not any liquidation within the meaning of the contractual provisions.

"Any liquidation" includes a partial liquidation.

The case law gives numerous examples of where liquidation has been determined to have occurred under factual situations comparable to that of the instant matter.

The Equitable defendants claim that "liquidation is an all or nothing affair," requiring the permanent cessation of business, the winding up of affairs, and the complete distribution of all assets, and that no act can be said to be a "partial liquidation" unless there is a manifest intention and continuing purpose to terminate and dissolve the corporation. ROA at 261-62. Such is not the law.

In the Jones case just cited, the Tenth Circuit upheld the jury verdict finding that there was a partial liquidation where the corporation purchased its preferred stock from the holders thereof. Nevertheless, in that case the corporation continued its business undiminished and at a profit. Id. at

889.

This principle and the rationale supporting it are also found in the case of Commissioner of Internal Revenue v. Quackenbos, 78 F.2d 156 (2nd Cir. 1935).

In that case the company reduced its capital account by about \$400,000, using cash in the same amount to buy stock at the market value. The taxpayer treated this as a partial liquidation.

The Commissioner of Internal Revenue contested that there was not a partial liquidation, arguing as do the Equitable defendants herein that for such to exist there must be a winding up of the corporation, a process leading to final liquidation. The court rejected those arguments, affirming that a partial liquidation did not require the corporation to be "planning a cessation of business or in the process of final liquidation." Id. at 157.

Another example is found in the case of Yankey v. Commissioner of Internal Revenue, 151 F.2d 650 (10th Cir. 1945).

In that case, the issuing corporation formulated a plan to purchase preferred stock issued in partial payment of debts of a predecessor corporation. The Court affirmed that such payments were received in partial liquidation although there was no intention to curtail the normal operations of the corporation. Id. at 652.

Citing the advantage of uniformity between state tax laws and federal tax laws, the Alabama Supreme Court in Bashinsky v. Sparks, 146 So.2d 303 (Ala. 1962) found that Alabama's statutory

definition of partial liquidation also did not require the corporation's discontinuance of operations.

The cases of Henderson v. United States, 105 F.2d 461 (3rd Cir. 1939); Citizens & Southern National Bank v. Commissioner of Internal Revenue, 136 F.2d 406 (5th Cir. 1943); and Dodd v. Commissioner of Internal Revenue, 131 F.2d 382 (5th Cir. 1942) reached similar conclusions.
Liquidation is not defined by statute.

These cases cited above generally deal with tax questions and statutory definitions of liquidation. Although these statutory definitions show that the winding up of a corporation is not required for there to be a partial liquidation, the applicable definition of liquidation in the instant matter would not be restricted to such statutory definitions. Since the instant matter does not solely concern tax matters, the finder of fact will not be confined to the corresponding definitions in deciding whether there has been "any liquidation" entitling the preferred shareholders to the same payment per share as the common shareholders. Rather, the more general common definitions will apply.

The opinion in Thornton v. Commissioner of Internal Revenue, 159 F.2d 578 (7th Cir. 1947) points out a difference between a statutory definition of liquidation, and its general definition.

The definition of liquidation in the tax code at that time included the element that shares be surrendered or endorsed. Therefore, the general understanding of the word liquidation was not relevant:

If our general understanding of the meaning of the word liquidation be different, it must give way to the statutory definition for tax purposes. ...

Here there was no complete cancellation or redemption of all or a portion of the stock. Without it there was no liquidation, partial or complete. This ends the matter. It may be that the Mortgage Company at one time intended to wind up its affairs, and later changed its mind. It distributed some of the money received on sale of its assets among its stockholders including petitioner. In a broad or general sense or use of the word, it could have been described as liquidated. But it was not such a partial liquidation as Congress defined that term. Id. at 580-581. (Emphasis added.)

In the instant matter, there need not be any such unnatural definition applied to "any liquidation." There is no unilateral special definition that must be employed and might thereby end the matter.

Rather, the trier of fact can and should be allowed to look at all of the pertinent facts and decide whether "any liquidation" took place when Equitable bought out the holders of about one-third of the stock of II, a company which held about 80% of Equitable's stock, without there being a rigid requirement such as the shares being cancelled. The trier of fact can make this determination by looking at the substance of the transaction, not just the form.

3. A CONTROLLED COMPANY AND ITS OFFICERS AND SHAREHOLDERS ARE NOT INSULATED BY ARTIFICIALITIES FROM ANY FIDUCIARY DUTY TO THE SHAREHOLDERS OF ITS HOLDING COMPANY.

Defendants argue that plaintiffs are owed no duty by Equitable or its officers and directors as such, because plaintiffs hold stock in the holding company II, not in Equitable itself.

ROA at 408.

The principles which should govern this issue are set forth in the case of Brown v. Tenney, 532 N.E.2d 230 (Ill. 1988). In that case, the subsidiary defended a derivative action on the basis that the plaintiff was a shareholder in the holding company, not the subsidiary.

The court pointed out that to accept the subsidiary's defense would leave a shareholder of the holding company without a remedy even where the holding company was the wrongdoer which caused the subsidiary to take the wrongful action. Just by having an additional layer, the wrongdoer would be insulated. The law does not permit such devices. Id. at 233.

The court went on to emphasize the fact that the people were real, not the corporate forms, "For beneath the corporate cloak beats the heart of its shareholders." Id. at 234.

The court then addressed the fact that where the holding company and subsidiary share common directors, there is even more reason for concern.

Such interlocking directorates present special problems, and the dealings between the two corporations must be watched with a jaundiced eye. ...

... In other words, according to the plaintiff, the subsidiary is accountable to no one since its shareholder, the holding company, is controlled by the wrongdoers. There is no justice in denying relief under these circumstances, and this court may look through the corporate form. Id. at 235.

Additional principles applicable in the instant matter on this issue are set forth in the case of Kwick Set Components,

Inc. v. Davidson Industries, Inc., 411 So.2d 134 (Ala. 1982). In that case the dominant corporation was found liable for a debt of the subservient corporation.

The court in that case stated that the legal fiction should not allow evasion of responsibility, or to permit any inequitable result.

[T]he legal fiction of separate corporate entity should not be so extended "as to enable the corporation to become a vehicle to evade just responsibility." [Citation]. The theory of separate corporate existence can properly be discarded, even in the absence of fraud, to prevent injustice or inequitable consequences. [Citation]. Id. at 136.

It then stated that the instrumentality doctrine would be applicable when the dominant corporation controlled the subservient corporation, and the dominant corporation proximately cause the action complained of.

In the instant matter, the entire transaction complained about pertained to control. All factions of the Ross family decided not to continue to fight over that control, but rather to use their instrumentalities to resolve the matter. Control was represented by ownership of Equitable stock, directly and through ownership of stock in other entities, particularly in II. It was directly because of that control through II that their decision could be implemented by Equitable giving consideration to the sellers in excess of 4 1/2 million dollars in a transaction committing Equitable for a period of about 10 years.

To assert, as the defendants do (ROA at 409) that II was not involved in the decision to enter into this transaction and

Equitable acted independently is ludicrous. Reality dictates it happened otherwise.

Likewise it is disingenuous to assert that the case of Richardson v. Arizona Fuels, 614 P.2d 636 (Utah 1980) stands for the proposition that directors can, with impunity, use the corporate assets at any time to preferentially benefit only the majority shareholders, provided there is no loss to the corporation. ROA at 408-409.

4. A CORPORATION IS NOT JUSTIFIED IN SECRETLY PURCHASING ALL OF CERTAIN INSIDERS' PREFERRED STOCK OF ITS HOLDING COMPANY, AT A PRICE PER SHARE OVER 16 TIMES AS GREAT AS THE PRICE THE OTHER HOLDERS OF THAT STOCK COULD OBTAIN FROM THE CORPORATION OR ANYONE ELSE, ESPECIALLY IN ORDER TO RESOLVE DISPUTES OVER A CORPORATION'S CONTROL, DESPITE THE BUSINESS JUDGMENT RULE.
Equitable should have offered to buy plaintiffs' II preferred shares.

Equitable should have offered to buy plaintiffs' II preferred shares at the same price and on the same terms as those applicable to its purchase of II preferred shares from the defendants Galen J. Ross, David E. Ross II, Betsy Ross Rapps, and Connie Ross.

Its failure to make such an offer was, on its face, a breach of the duty owed by defendants, both as directors and as controlling stockholders, to the plaintiffs.

Many of the principles on which this statement is based are found in the seminal case of Donahue v. Rodd Electrottype Co. of New England, Inc., 328 N.E.2d 505 (Mass. 1975).

In that case, Rodd Electrottype was a corporation in

which the Rodd family held the majority of the stock, and the plaintiff the minor portion. When Harry Rodd reached the age of 77, he had conveyed most of his stock to his children. He was now ready to convert some of his remaining stockholdings to cash and retire. At about this same time, Joseph Donahue passed away. He had worked in the company as well and held the minority interest.

The company reached an agreement with Harry Rodd to buy 45 of his 81 shares of stock for a price reflecting the book value and liquidating value of that stock, namely \$800 a share. The corporation declined to buy the 50 shares held by the Donahues on the same terms. Joseph Donahue's widow held 45 of those 50 shares, and she sued because the offer to sell her shares was rejected.

The court first found that the company was a close corporation, based on the fact that it had few stockholders, little market for corporate stock, and substantial majority stockholder participation in the management, direction and operation of the corporation. Id. at 511.

It found that due to the similarity with a partnership, the stockholders of a close corporation must have a relationship of trust, confidence and absolute loyalty. Id. at 512, 515-518.

The court stated that the corporate form makes the minority stockholders vulnerable to oppressive devices, or "freeze-outs." These devices include refusal to declare dividends and draining off earnings in the form of exorbitant salaries and bonuses to the majority shareholders-officers. Id. at 513.

The result of such oppressive devices is that the minority

stockholders must either wait and passively suffer the losses, or seek a buyer at whatever price they can get. Id. at 514. Since an outsider would not knowingly buy into such a position, the minority must sell to the majority for less than fair value, and that is when the majority has won by these tactics. Id. at 515.

Thus, when a close corporation buys its own stock, those causing this purchase must act with the utmost good faith and loyalty to the other shareholders. This means they must make them the same offer, so that there is no disproportionate benefit to the majority. Id. at 518.

By this means, the minority can also receive the benefits of the purchase by the corporation. Those benefits include providing a market for their shares and having access to corporate assets for personal use, transforming an illiquid investment into a liquid one. Id.

If only the members of the majority group were to receive such benefits, there would be a preferential distribution of assets, which would be inconsistent with the strict fiduciary duty. Id. at 519.

The case of Comolli v. Comolli, 246 S.E.2d 278 (Ga. 1978), discusses some of these same principles in a similar factual setting.

The facts in the instant matter show that here also the defendants had a duty to authorize Equitable to purchase the plaintiffs' stock at the same price and on the same terms given to the insider sellers.

In this case as in the cases cited, the holders of less

than half of the controlling interest were willing to sell their stock to the corporation at what was perceived to be its true value. The corporation agreed to buy their stock at that value, while making no such offer to the minority stockholders. This benefited those who had been part of the majority stockholders by giving them a market for their stock and making it liquid, while allowing the remainder of the majority stockholders to maintain control.

This case also involves a close corporation. The Ross family has controlled the companies and still does. The remaining shareholders are few in number, especially when compared to public corporations. There is no market for plaintiffs' stock. The majority shareholders are directors and officers and participate substantially in the management, direction and operation of the corporation.

Not only has the purchase reduced the amount available for dividends, but dividends have historically not been declared, which was one of the hallmarks of oppression by the majority. Other hallmarks showing that oppression include the high salaries enjoyed by the majority shareholders/directors/officers and the fact that those not wishing to wait longer than 40 years for a return on their investment have had to sell it to the major stockholders for far below the value it represents.

Defendants are not excused by the business judgment rule.

Defendants argue that the purchase of II preferred stock was justified on the basis of the business judgment rule, that is,

because of the presumption that the directors acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. ROA at 413-14, citing Aronson v. Lewis, 473 A.2d 805, 812 (Del. Supr. 1984).

Defendants state that the presumption cannot be rebutted because "the actions of the Equitable board were motivated by the business judgment of its board that the buying out of the dissident stockholders was necessary to maintain the very existence of the corporation." ROA at 413.

However, the said Aronson case cited by defendants names certain conditions under which the business judgment rule will apply, including the condition that the directors be disinterested. Aronson, supra, 473 A.2d at 812. In addition, there must be director independence. This is inherent in the presumption that actions are taken for business, rather than extraneous, reasons. Id. at 816.

One of the more common reasons a director may not be disinterested, and one of the more common extraneous considerations, is the natural desire of a director and his fellow directors to maintain control.

Another case cited by defendants, Cheff v. Mathes, 199 A.2d 548, 554 (Del. 1964), states that there is no such presumption of good faith when a threat to control is involved and the directors authorize corporate funds to be used for a purchase of the shares of the corporation. In such an instance the burden is on the director to show the action was taken in good faith.

In the case of proxy fights, the courts "have not sanctioned the use of corporate funds to advance the selfish desires of directors to perpetuate themselves in office." And if the board causes the corporation to buy out a dissident stockholder "solely or primarily because of a desire to perpetuate themselves in office, the use of corporate funds for such purposes is improper." Id.

The said shift in burden was applied in the case of Schilling v. Belcher, 582 F.2d 995 (3rd Cir. 1978). The defendants in that case made the conclusory statement that the stock purchase was necessary "to meet the real and immediate threat to the corporation." The only evidence supporting that statement was testimony that a change in management would be disastrous at a time when the whole industry was in a very bad way. Therefore, the appellate court cited the Cheff case in finding that they had "failed to carry their burden of proving that the purchase was made primarily in the corporate interest." Id. at 1004.

On the other hand, there was sufficient evidence to support the finding of the trial court that the defendants' primary purpose for directing the company to purchase its own shares was to perpetuate their control of the company, and that was unlawful. Id. at 1004-5.

In the instant matter, there are likewise numerous facts which show that defendants' primary purpose for expending corporate funds to purchase shares of II was to maintain the status quo as far as the control of Equitable.

The first gambit was made by Earl's family and Rod when they approved the sale of a large portion of the Foundation's holding of II stock to an individual favorable to them. Then there was the Bennett Leasing agreement and Equitable's offer to buy its own stock. This latter move by Equitable seems to have been motivated by the possibility of a dissolution of II, since otherwise control of II meant control of Equitable.

Then there were the lawsuits putting in issue the legality of what had been done, including the legality of the sale of stock by the Foundation. Finally the issue of control was resolved by Equitable's purchase of all of the Equitable and related holdings of the members of the Ross family, other than Earl's family and Rod.

Counsel for the Equitable defendants admitted that Equitable purchased equitable stock from members of the Ross family "to thwart a takeover attempt by Bennett Leasing" and to "make sure that the selling group ... would not try this again, and sell Equitable down the river, and initiate another hostile takeover attempt." ROA at 742-43.

Even if in the face of all of this evidence that the primary purpose of the stock purchase was to maintain control, the defendants believe they can carry their burden of showing otherwise, they have to do so before a finder of fact. They certainly cannot prevail on this issue as a matter of law without a trial.

5. EVERY ACTION FOR BREACH OF FIDUCIARY DUTY OF THE OFFICERS AND DIRECTORS OF A CORPORATION NEED NOT BE BROUGHT AS A

DERIVATIVE ACTION.

Defendants argue that any claim against them belongs to II or Equitable, and can therefore only be brought as a derivative action. ROA at 414-17.

It is true that if the rights belong to a corporation, shareholders can generally only enforce those corporate rights by means of a derivative action. The case cited by the defendants, Richardson v. Arizona Fuels Corp., 614 P.2d 636 (Utah 1980), provides an excellent analysis in this respect. In that case, the Court analyzed all of the claims asserted and found that each one of them was based on rights possessed solely by the corporation.

It is not true that the claims asserted by the plaintiffs in the instant matter belong solely to the corporations, and it is not alleged that they belong to any corporation at all.

Equitable apparently paid a fair price for the stock of II and so it was not damaged. Likewise, II does not appear to have been damaged since the value of the Equitable stock it holds apparently remained unchanged.

Thus, under the principles enunciated in the Richardson case, plaintiff could not have brought a derivative action by reason of Equitable's purchase of II stock.

However, that case stated that shareholders could have direct claims as individuals which might be appropriately pursued in the context of a class action. Id. at 638.

The case then quoted Fletcher as stating that it is an individual action when the injury is not one to the corporation as

a whole, but to the shareholder individually. Id. at 639.

Plaintiffs' Complaints set forth facts and claims which show that the rights of the plaintiffs and the other members of the class they represent, held in their individual capacities, were violated by all of the defendants working together. These rights do not belong to either corporation nor to all of the shareholders of either corporation, but only to the stockholders in the described class.

As was stated in the case of Horizon House - Microwave, Inc. v. Bazzy, 486 N.E.2d 70, 74 (Mass. App. 1985):

To the degree that the gravamen of Emil's action was abuse of fiduciary duty by a majority stockholder, he was not required to bring a minority stockholder's derivative suit against Microwave but could move against that corporation and William directly.

6. PUNITIVE DAMAGES MAY BE AWARDED AGAINST THE OFFICERS AND DIRECTORS FOR BREACH OF FIDUCIARY DUTY WHEN ONLY EQUITABLE RELIEF INVOLVING THE COMPANY, AND NO GENERAL OR COMPENSATORY DAMAGES FROM THE OFFICERS AND DIRECTORS, IS SPECIFIED IN THE PRAYER. Equitable relief suffices.

Defendants argued that punitive damages are not available in a suit in equity, citing the Colorado Appellate case of Seal v. Hart, 755 P.2d 462 (Colo. App. 1988) dealing with rescission of a sale of a cabin. ROA at 53. However, it is not the law in Utah that punitive damages are never permitted in a suit in equity.

In the case of Nash v. Craigco, Inc., 585 P.2d 775 (Utah 1978), the trial court had ruled as a matter of law that punitive damages were unavailable in a suit in equity for specific performance

and rescission. This was reversed.

Defendants also have contended that punitive damages are not recoverable absent general or compensatory damages. ROA at 53, 406. The case cited for this proposition, Atkin Wright & Miles v. Mountain States Tel., 709 P.2d 330 (Utah 1985), did not deal with an action in equity, but rather an action at law based on an error in the yellow pages and remedial measures taken, in which a jury tried the plaintiff's claim for monetary damages.

Furthermore, the Atkin opinion did not even address the case of Nash v. Craigco, Inc., 585 P.2d 775 (Utah 1978) referred to above, let alone overrule that case.

There is no statutory bar.

Also, the statute quoted by the defendants (ROA at 406), Section 78-18-1(1)(a) of the Utah Code, would not preclude an award of punitive damages.

That statute generally requires an award of compensatory or general damages as a condition for an award of punitive damages.

In the instant matter, a legally protected interest of the plaintiff has been violated by these individual defendants. It may well be that just and equitable relief will include compensation from these defendants for actual damages. As indicated below, plaintiffs are entitled to the appropriate relief whether or not it is specified in the prayer. This appropriate relief could certainly include an award of compensatory or general damages sufficient to satisfy any statutory prerequisite for awarding punitive damages.

It would not be surprising at all for the finder of fact to find it appropriate to charge all of the defendants, jointly and severally, with the obligation to compensate the plaintiffs for the results of the breach of their fiduciary duty, including compensation for interest, the frustration and other mental anguish, and other consequences of the delay by defendants in discharging their obligations.

There appears to be no Utah case law interpreting this statute. The statutory exception to the general common law rules allowing punitive damages, as in the case of any other such exception, should be narrowly construed.

It would be anomalous indeed for a court to find under this statute that there had been no general or compensatory damages awarded in a case where the plaintiff class prevailed and thus gained and in large part exercised an option to have Equitable pay hundreds of thousands of dollars more for their stock than the class could have received otherwise. Likewise it would be anomalous to find there had been no general or compensatory damages awarded against the named individual defendants even though the value of their financial holdings decreased proportionally to that same extent. The prayer need not be specific.

The prayer of plaintiffs' Complaints demands "such other relief as the Court may deem just and equitable." Thus there is included in the prayer a demand for compensatory and general damages to the extent the Court deems them to be just.

Rule 54(c)(1) of the Utah Rules of Civil Procedure

states in part:

Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

This rule was cited and quoted in part in Behrens v. Raleigh Hills Hospital, Inc., 675 P.2d 1179 (Utah 1983), as justification for the conclusion in that case that "if the plaintiff were able to adduce the necessary foundational evidence at trial, she could claim punitive damages under Rule 54(c) without a formal amendment of the pleadings." Id. at 1182.

The Behrens case also quoted on this point 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice. ¶54.60 at 1212 - 14 (2d ed. 1983), in part as follows:

[A] pleading should not be dismissed for legal insufficiency unless it appears to a certainty that the claimant is entitled to no relief, legal, equitable or maritime, under any state of facts which could be proved in support of the claim, irrespective of the prayer for relief; and, except as to a judgment by default, the prayer does not limit the relief, legal, equitable or maritime, which the court may grant. [Emphasis added, footnotes omitted.]

7. PLAINTIFFS WERE ENTITLED TO AMEND THEIR COMPLAINTS TO ALLEGE ADDITIONAL ACTS OF OPPRESSION AGAINST THE MINORITY SHAREHOLDERS AND TO SPECIFICALLY CLAIM A RIGHT TO A PARTIAL RESCISSION OF A SALE OF STOCK WHEN THE CASE WAS STILL IN THE DISCOVERY AND MOTION STAGE.

Defendants acknowledged that Rule 15 of the Utah Rules of Civil Procedure provides that when a party seeks to amend his

pleading, "leave shall be freely given when justice so requires."
ROA at 568.

Claims previously denied can be reiterated.

The defendants argued that the proposed Amended Complaint should not have been allowed because it included claims that had already been adjudicated, including the claim for class certification and the claim that there had been a liquidation. ROA at 569.

Any amended complaint relates back to the start of the lawsuit. Plaintiffs should not have to run the risk of being deemed to have waived their rights with respect to the class and liquidation claims by omitting them in an amended complaint.

Therefore the proposed Amended Complaint contained allegations pertaining to the certification of a class and the partial liquidation of II, although the court had made rulings adverse to these claims. However, the court would not have changed the law of the case by allowing the filing of the Amended Complaint, especially if the order of allowance specifically so indicated.

In any event, the law of the case would not preclude certification of the class. Kas v. Financial General Bankshares, Inc., 105 F.R.D. 453 (D.C. 1984); 3B Moore's Federal Practice, (2d ed.) ¶23.07[1] at 23-190.

As to the prayer of the Amended Complaint, the Order of the trial court concerning liquidation dated October 24, 1990 did not preclude the remedy of liquidation. It merely stated that plaintiffs could not rely upon the claimed partial liquidation of II to justify the relief sought. ROA at 317.

Disallowance of amendment could cause deprivation of claims.

Defendants have also argued that new claims should not be allowed added at this point. ROA at 569.

In view of the fact that all of the claims arise in whole or in part from the same transactions or occurrences, there may be res judicata effect on all of these claims even if not all are pursued. That is, if the applicants do not pursue some of the claims contained in the Amended Complaint, and then file a later action on those remaining claims, the court hearing that later action may find those claims could and should have been litigated in this action, in which case they would be barred on the basis of the claim preclusion branch of res judicata. Penrod v. Nu Creation Creme, Inc., 669 P.2d 873, 875 (Utah 1983).

Claims exist on the basis of oppressive conduct.

With respect to plaintiffs' claims on the basis of oppressive conduct, defendants essentially have moved to dismiss for failure to state a claim upon which relief can be granted. ROA at 569.

They state that as a matter of law, there could not have been oppressive conduct. They state that the defendants followed the law and were legally endowed with the discretion they exercised and in no way could there have been oppressive conduct under these facts.

In other words, they contend that it does not matter that the plaintiffs could not sell their stock for even as much as 1/16th of its liquidation value while defendants used assets of

Equitable to pay members of the controlling group 100% of that liquidation value for exactly the same stock.

They would have this Court believe and rule that it does not matter that over 25 years passed without a dividend, and that it has been over 8 years since the last dividend, with the dividend paid three of the years between those periods equalling \$.06 per share each year it was paid, an annual return for those years of less than 1/10th of a percent of the stock's liquidation value.

It cannot be so easily determined, and certainly not as a matter of law, that such conduct is not oppressive. In large measure, that is because, and appropriately so, oppressive conduct is not a rigidly and narrowly defined concept.

In the case of McCauley v. Tom McCauley & Sons, Inc., 724 P.2d 232, 236 (N.M. App. 1986), the court stated that "oppressive" conduct "is an expansive term that is used to cover a multitude of situations dealing with improper conduct." The advantage of not having sharply defined rules allows courts to equitably and carefully examine whether shareholders are not receiving the treatment they reasonably should be able to expect from those owing them a fiduciary duty. Id.

Oppressive conduct is distinguished from, and does not necessarily include, illegal or fraudulent behavior. It may include situations where the minority shareholder cannot participate in the operation and management of the corporation. It may be where the majority has an "imperious attitude" and/or follows an "arbitrary, overbearing and heavy-handed course of conduct" sufficient

to show oppression. Id. at 237.

Right to amend the prayer to include various remedies

As mentioned above, defendants urged on several occasions that since no relief except for punitive damages was demanded from several defendants, no relief could be granted.

However, plaintiffs are entitled to appropriate relief, whether included in the prayer or not. It follows a fortiori that they should be allowed to amend the prayer to include that appropriate relief. Such an amendment would serve to make more specific the part of the prayer of plaintiffs' Complaints which demands "such other relief as the Court may deem just and equitable."

There are many appropriate remedies for oppressive conduct found in pertinent cases. For example, the cases of McCauley, supra, (defendants had their choice of three options: (1) liquidation of the corporation; (2) partition and reorganization; or (3) purchase by the corporation of plaintiff's outstanding shares); Chiles v. Robertson, 767 P.2d 903 (Or. App. 1989) (defendants required to buy the plaintiffs' interests in the company); and Stefano v. Coppock, 705 P.2d 443 (Alaska 1985) (buy-out ordered at a specific price, an equitable remedy less drastic than dissolution).

In an early Utah case, Union Savings & Investment Co. v. District Court of Utah, 44 Utah 397, 410, 140 Pac. 221 (Utah 1914), the Court discussed the existence of a broad range of remedies, other than dissolution, that courts could employ in actions brought by shareholders.

CONCLUSION

The trial court should have certified the plaintiff class under Rule 23(b)(1) or (2) of the Utah Rules of Civil Procedure, and not given the members of the class any right to opt out of the class.

The trial court erred in ruling as a matter of law that there was not "any liquidation" as that term was used in the Amended Articles of Incorporation, and thus that there was no requirement to evenly allocate the funds paid to the II shareholders.

The existence of a holding company should not impair the rights of the shareholders. These rights include the right to share pro rata in any distribution of assets. Directors cannot excuse a distribution benefiting only certain shareholders where their purpose was to maintain control.

Where there has been discrimination against certain shareholders, these shareholders have a cause of action which is not just derivative. They also have a cause of action for punitive damages against all involved in a breach of fiduciary duty even though their main remedy may be equitable.

The shareholders had a right to add a cause based on oppressive conduct, and to otherwise amend their complaint, especially where for the most part the relevant facts were pled in the original complaint.

DATED this 23rd day of December, 1992.

LYNN P. HEWARD & DELWIN T. POND
Attorneys for Plaintiffs and Appellants

by Lynn P. Heward
LYNN P. HEWARD

CERTIFICATE OF SERVICE

I hereby certify that four copies of the foregoing Brief were mailed with postage attached thereon to P. Bruce Badger, 215 South State Street #1200, P.O. Box 510210, Salt Lake City, Utah 84151 on this 23rd day of December, 1992.

Lynn Howard

ADDENDUM

Rule 23 provides:

(a) Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class action maintainable. An action may be maintained as a class action if the prerequisites of Subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under Subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the

judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under Subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under Subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

...

INFORMATION CONCERNING PARENT, SUBSIDIARIES AND AFFILIATES

A. The Company is controlled by Insurance Investment Company, a Utah corporation, which owns 634 of the issued and outstanding common stock of the Company. Insurance Investment has two classes of stock. There are 25,000 shares, voting stock and 77,177.5 shares of 64 noncumulative, nonvoting, \$1.00 par value of preferred stock. Ownership and control of this voting stock is described in Schedule Y, Organizational Chart.

B. The Company owns 11,802.23 voting shares and 25,050 preferred shares of Insurance Investment Corporation.

C. During 1986, the Board of Directors of Equitable Life and Casualty Insurance Company (hereafter the "Company") determined that it would be in its best interest to purchase some of the Company's outstanding common stock and the common and preferred stock of Insurance Investment Company, the Company's parent corporation. The Utah Department of Insurance was notified of this intent and gave its consent to the same where necessary. The stock purchase program would satisfy any or all of the following purposes:

- (1) To create a market for stockholders desiring to sell their stock of the Company who have been unable to do so in the past because of lack of marketability.
- (2) To reduce the cost of communication to stockholders.
- (3) To make shares of the Company and Insurance Investment Company available for employee benefit programs.
- (4) To make shares of the Company and Insurance Investment Company available for use in the acquisition of other companies.
- (5) To increase the percentage of ownership of Insurance Investment Company in the Company. Such an increase would permit Insurance Investment Company to qualify for the 100 percent dividend exclusion for federal income tax purposes and/or entitle Insurance Investment Company to file a consolidated return with the Company.
- (6) To eliminate the Company's appearance as a potential candidate for an outside takeover. The Company's publicly held stock gave the appearance to uninformed individuals that it was possible to purchase control of the Company by offering to purchase the Company's publicly held stock. Although it was believed that such attempts were futile, such attempts were nevertheless being made, and were extremely disruptive and detrimental to the operation of the Company.

On November 17, 1986, the Company initiated the above purchase plan by soliciting from its shareholders offers to sell to the Company up to 115,500 shares of its outstanding \$1.00 par value common shares for \$22.50 per share. The Company acquired 95,662.43 common shares under the solicitation and subsequent purchases for an aggregate cash consideration of \$2,152,404.

On October 31, 1987, the Company entered into an agreement with a coalition of some of its remaining shareholders wherein the Company agreed to purchase 44,544.37 shares of its common stock, 25,050.66 preferred shares of Insurance Investment Company, 11,802.23 common shares of Insurance Investment Company and 9,793.10 common shares of National Housing, related corporation, for \$1,450,000 cash and the issuance of 363,000 shares of the Company's newly authorized \$2.00 par value preferred stock. The Company was required to purchase 11 of this various stock in order to purchase any of it.

Effective April 15, 1988, National Housing was merged into the Company. As a result of the merger, the Company acquired 7,366.65 shares of its common stock, 4,315 preferred shares of Insurance Investment Company and \$662,095 in net assets, based upon their appraised fair value. In consideration for which, the Company paid \$150,000 cash and issued 10,000 shares of the Company's preferred stock.

The total consideration paid by the Company under the above acquisitions is comprised of \$3,752,404 cash and 403,000 shares of \$2.00 par value preferred stock with an assigned cost of \$9.229 per share (the minimum redemption price). Since \$662,095 of nonstock assets were received in the National Housing Merger, the total assigned cost for the treasury stock acquired is \$6,809,596 (\$3,752,404 cash + \$3,719,287 (assigned value of preferred stock) - \$662,095 (net value of nonstock assets acquired)). The aggregate consideration of \$6,809,596 has been assigned to the cost of common treasury stock attributable to the above transaction for financial reporting purposes. During 1988, the Company redeemed 36,803.35 shares of its preferred stock at an average cost of \$10.71 per share.

The owners of the preferred stock may, in the future, if the Company has sufficient earnings in the prior year, cause the Company to purchase up to 40,300 shares per year at a price of \$10.72 per share plus (or minus) a percentage of earnings (or losses) presented on line 31 of the Company's Annual Statement. Although the Company does not know whether or not this right will be exercised, the Company will record a liability as a write-in item appearing on page 3 of its Annual Statement identifying its potential liability for the subsequent year's purchase. This procedure of recording this liability has been reviewed and approved by the Utah Department of Insurance.

The Company's holding of treasury shares consists of 147,573.08 shares of its common stock which are owned directly by the Company and 153,036.28 shares which are held indirectly through the Company's 40.3 percent holding (41,167.89 shares) of its parent company's capital shares (based on liquidation rights. Both the directly and indirectly held shares are deemed to be treasury stock by the Company for financial reporting purposes. The Company is holding such shares as treasury stock to satisfy the previously mentioned purposes.

The Company has received accounting assistance from Peat Marwick Main & Co. and legal assistance from Fabian & Clendenin in recording these transactions.

D. The Company has no guaranties or undertakings for the benefit of an affiliate which might result in a material contingent exposure of the Company's or affiliated insurer's assets to liability.

E. The Company does not have any management or service contracts of insuring arrangements with any affiliated insurer.

EMPLOYEE COMPENSATION AND RETIREMENT PLANS

A. The Company has an employee profit sharing plan and a Section 401(k) plan for the employees. The Company has no retirement plan for its agents. The Company's Board of Directors has approved the profit sharing plan. Contributions to the 401(k) plan are made solely by employee

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April 1, 1993

FILED

APR 1 1993

COURT OF APPEALS

Ms. Mary T. Noonan, Clerk
Utah Court of Appeals
230 South 500 East #400
Salt Lake City, Utah 84102

Re: Pond vs. Equitable
920759-CA

Dear Ms. Noonan:

I represent the appellants in the reference appeal. On their behalf I am submitting this letter to you, with seven copies, pursuant to Rule 24(j) of the Utah Rules of Appellate Procedure (Citation of Supplemental Authorities).

This letter is the limited response to appellees' submission citing that same rule.

The recent opinion in Equitable Life & Casualty Insurance Co. vs. Ross, No. 910746-CA should not have been supplementally cited. This is because it is not a pertinent nor significant authority. It does not address the legal issues involved in the referenced appeal. It is not evidence of any factual circumstances, nor was it before the trial court.

Yours very truly,



LYNN P. HEWARD
Attorney at Law

Copy to:

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Salt Lake City, Utah 84151