UNITED STATES TAX COURT

(Caption omitted in printing)

SUPPLEMENTAL STIPULATION OF FACTS

(Filed June 16, 1987)

The below signed parties hereby agree to this Supplemental Stipulation of Facts pursuant to the same terms and conditions as set forth in the Preamble of the original Stipulation of Facts dated June 4, 1987:

1. Petitioner's Form 1120 return for the 1978 fiscal year was filed on September 14, 1979, and reported a tax liability of $5,802,017.

2. Petitioner made estimated tax payments with respect to the 1978 fiscal year on the following dates in the amounts shown:

| Date | Amount |
|---|---|
| April 17, 1978 | $850,000 |
| April 17, 1978 | 2,000,000 |
| June 15, 1978 | 2,500,000 |
| September 15, 1978 | 840,000 |
| September 15, 1978 | 360,000 |
| | $6,550,000 |

3. On October 11, 1979, Petitioner received a refund of $747,983 from Respondent.

4. The statute of limitations for assessment of tax with respect to the 1978 fiscal year was extended, pursuant to Section 6501(c)(4) of the Internal Revenue

Code, by agreements in writing executed by Petitioner and Respondent as follows:

| Date Signed by Petitioner | Date Signed by Respondent | Statute Extended Until |
|---|---|---|
| June 18, 1982 | June 23, 1982 | June 30, 1983 |
| February 2, 1983 | February 10, 1983 | December 31, 1983 |
| June 24, 1983 | June 15, 1983 | June 30, 1983 |

5. Pursuant to a partial agreement executed by Petitioner and Respondent involving unrelated issues, Petitioner paid $257,444 on September 20, 1983, as an additional tax assessment with respect to the 1978 fiscal year.

6. The DPL&G fee of $490,000 (plus out-of-pocket expenses of $15,069) charged Petitioner was determined by allocating the total cost of the services rendered by DPL&G between Petitioner and the Greenwalls in the proportion two-thirds to Petitioner and one-third to the Greenwalls for the period October 11, 1977 through December 31, 1977. For the period January 1, 1978 through August 15, 1978, the services of DPL&G were separately accounted for as between Petitioner and the Greenwalls. The total DPL&G fee was reasonable in amount and was determined at arm's length in accordance with DPL&G's normal billing practices. Respondent does not stipulate that the allocation of the DPL&G fee between Petitioner and the Greenwalls reflects the services rendered to each.

7. Copies of the following documents prepared by (or in the case of exhibits R and V, from the files of) DPL&G are attached as exhibits as indicated.

| Description | Exhibit |
|---|---|
| –10/20/77 Memo re: Acquisition Structuring | P |
| –10/24/77 Memo re: Alternative Structure | Q |
| –10/26/77 Letter from CS&M to DPL&G (with enclosure) | R |
| –10/21/77 Draft "Agreements in Principle" | S |
| –Undated Draft "Agreements in Principle" | T |
| –11/1/77 Memo re: latest Draft (10/31/77) "Memorandum of Terms" | U |
| –11/17/77 letter from CS&M to DPL&G (with enclosure) | V |
| –11/18/77 Memo re: Summary of Delaware and New Jersey Takeover Statutes | W |
| –12/2/77 Letter from DPL&G to Morgan Stanley (with enclosure) | X |
| –12/4/77 Draft "Memorandum of Terms" | Y |
| –12/6/77 Memo re: Comments on Proposed Memorandum of Terms | Z |
| –12/9/77 Draft "Letter of Intent" | AA |

| | |
|---|---|
| –2/28/78 Memo re: Summary of DPL&G Due Diligence Activities | AB |
| –March 1978 Memo re: DPL&G Due Diligence–Thomas J. Lipton, Inc. and Lever Brothers | AC |
| –2/1/78 DPL&G letter re: draft agreement concerning payment of tax liabilities of Holding | AD |
| –3/10/78 Memo re: Restrictions on the Transfer of Securities to Designated Persons Under Delaware law | AE |
| –2/27/78 Memo re: Voting Agreements | AF |
| –11/9/77 Memo re: Directors & Officers Liability Insurance | AG |

Petitioner stipulates only that these documents are authentic copies of items prepared by or from the files of DPL&G, as the case may be, but does not stipulate

as to the truth of the contents thereof and reserves all other evidentiary objections.

WILLIAM F. NELSON
Chief Counsel
Internal Revenue
Service

/s/ Leonard E. Kust
Leonard E. Kust

By: /s/ Richard J. Spinski
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June 15, 1987

**Transcript of Trial before Judge Charles E. Clapp, II, United States Tax Court**

(p. 21) Whereupon,

*NED W. BANDLER*

was called as a witness and, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated and state your name and address for the record.

THE WITNESS: Ned W. Bandler, 322 Central Park West, New York 10025.

DIRECT EXAMINATION

BY MR. WALKER:

Q. Good morning, Mr. Bandler.

Would you please state your present occupation for the Court?

A. I'm senior vice president and a director of Unilever United States and director and officer of a number of smaller subsidiaries of Unilever U.S.

Q. What are your current responsibilities as senior vice president of Unilever United States?

A. My principal duties are acquisitions and divestitures or the corporate development portfolios, as it's normally described.

I'm responsible for the administration of the holding company and for external affairs for Unilever United States.

(p. 22) Q. Could you summarize your prior employment?

A. Following graduation from college, I worked for six years for a foods and dairy products manufacturing company which later became a subsidiary of Foremost Dairies.

I joined Lever Brothers in 1956 in their sales and marketing division, and moved into corporate development work as a corporate developer and analyst in '57 and corporate development manager some years thereafter, and became director of corporate development for Lever Brothers Company in 1964.

In 1976 I was seconded to the staff of the Unilever corporate development director where I worked exclusively on the North American acquisition project that led to the acquisition of National Starch in 1978.

In 1978 I became a vice president for administration and planning and corporate development for the newly created Unilever United States and in 1983 I became senior vice president and director of Unilever United States.

Q. Would you describe briefly the organization of Unilever and its subsidiaries?

A. Unilever is an international business, somewhat unusual in structure because there are two Unilever companies — Unilever PLC based in London and Unilever NV based in the Netherlands. They
(p. 23) have identical boards of directors although they are two discrete, independently organized corporations.

Unilever United States is a wholly owned subsidiary of Unilever NV, and Unilever United States in turn is the holding company which owns all the shares of Lever Brothers Company, Thomas J. Lipton, Na-

tional Starch and Chemical and Chesebrough-Ponds, plus a number of minor subsidiaries.

Q. You stated earlier in your testimony that you had been involved in a North American acquisition project I believe beginning in 1976.

Could you describe what that project was?

A. For many years Unilever had been unsuccessful in expanding its relatively modest base in the United States and they had tried a number of ways to acquire businesses and expand to a reasonable percentage of their total business. These had not been successful.

In 1976, the Unilever corporate development director, whom I may refer to afterwards, a Mr. Henk Meij M-e-i-j — was a main board member of Unilever NV and Unilever PLC, was asked to try to find a new way to succeed.

He decided that he could not do that unless he spent considerable time in the U.S. and had a U.S. staff of his own.

(p. 24) I was, although an employee of Lever Brothers, seconded to his staff in June of 1976. We had an 18-month mandate from the board and executives of Unilever to make a thorough analysis of acquisition opportunities in the U.S., review Unilever's overall strategy, and to make recommendations of suitable acquisition candidates.

Q. Mr. Bandler, I would appreciate it if you would describe briefly the activities which took place over this 18-month period.

A. Beginning with Mr. Meij's organization of the project, which was approved by the board of Unilever, my small staff in New York and his small staff in Europe arranged to work together to do an overall comprehensive analysis of Unilever's current position in various industrial areas and an assessment of our strengths and weaknesses and to identify those areas that it was plausible to look.

In order to accomplish this, Mr. Meij and I agreed that I would spend a full week in Europe every other month and he would spend a full week in the United States and that our staffs would work together in a very intensive way to do this job in a relatively compressed period of time.

Because Unilever is a complicated organization with approximately 20 main board directors, each of whom have responsibilities in different areas, such as
(p. 25) edible fats and dairy products, foods, detergents, personal products, we also spent a great deal of time meeting with each of the Unilever directors to make sure that we had the fullest support for any acquisition that was identified.

We then began what could only be described as a grueling and intensive examination of 700 businesses that had been identified in the U.S. as meeting certain of the criteria that we had initially set, which would include growth potential, a strong management, meeting financial criteria we had set and falling within the range of scale of investment that we believed would be appropriate.

Within a relatively short period of time, that list of 700 was condensed to a list of 100, and thereupon, after a series of meetings with all of the relevant

Unilever directors who had industrial interests in one area or another, the list was further winnowed down then to 30 and then to a more manageable list which was reviewed over a period of months in greater detail with the special committee.

I should just add that the special committee of Unilever is a three-man executive consisting of the chairman of NV, the chairman of PLC, and a third member who functioned in the conventional way that a U.S president or CEO would function.

Q. Did there come a time when Unilever reached
(p. 26) a decision concerning an acquisition candidate?

A. Yes. We had cast a very wide net for several reasons, not the least of which was that one could not be sure as to whether or not a management was receptive to acquisition talks.

If a business presented what appeared to be serious antitrust problems, you had to give further consideration as to whether it should be included.

We did not narrow on a precise candidate, but had picked a number of businesses which varied widely in terms of their relationship to our existing businesses but which had several common characteristics, and this list was narrowed in meetings with the special committee based on the recommendations that we made.

Q. Was one of the candidates who was selected National Starch and Chemical Corporation?

A. National Starch and Chemical was one of a number of semifinalists which then led us to do more intensive studies in which we brcught in outside experts to study each business we had picked.

For example, McKinsey and Company studied one of the businesses in the semifinals who is Alan Hamilton, Monton Rumsey and Charles Klein, so we supplemented our work at that point with very intensive
(p. 27) analyses of the businesses and the categories in which these businesses were placed.

Q. What were the factors which led Unilever to select National Starch and Chemical?

A. As we narrowed the list down, we were very much impressed with the fact that National Starch met many of the principal criteria which was an excellent growth record, potential for development in the future, a management that had demonstrated enormous strength and versatility, people of the highest reputation and thus people we would be proud to be associated with.

The size of the business was well within the financial range that our people had said was permissible. Our opportunity to carry the acquisition through seemed to a good prospect, and of all the companies we were then considering this seemed to be one that we should approach first.

Q. Was consideration given as to whether or not the combination of National Starch and Unilever would result in any synergy for National Starch?

A. That was, if you reflect on it, a political problem within Unilever because naturally after so many years of not being successful in the U.S., our people would have been delighted to have a company with enormous synergy.

(p. 28) To buy a business that fit into one of our consumer products lines would have been ideal but that also was a problem of limited availability and also the potential of antitrust problems and so many of those desirable candidates fell away.

National Starch did not present an opportunity for synergy in the classic sense but it was not a business that was alien to Unilever's activities. It was a good supplement and a third leg of substance for Unilever in the United States.

We did not have, however, synergy in the sense that what we could put to the business would necessarily enhance the business or vice versa.

Q. After selection of National Starch as a potential candidate, what steps took place? What happened next?

A. As part of our 18-month mission in this project, not only to make the industrial cases for businesses and to identify candidates, but to recommend to Unilever a strategy of approach.

As an example of how we went at that, Mr. Meij and I made the rounds of prominent investment bankers in New York to see where investment bankers could be useful.

We also had direct contact with some of the companies on the list so we approached each one on an
(p. 29) individual basis in an attempt to determine what was the most promising and sensitive way to make that contact.

Q. What approach was decided upon for National Starch?

A. We concluded after an analysis of all the relationships that may have existed within the company with people in National Starch that we should in the first instance approach them through an investment bank.

The logic of this approach is if an intermediary is rebuffed, you still can have one of your top people do it. If one of your top people is rebuffed, you often have nowhere to go.

Q. Who was selected to make the approach?

A. Lazard Freres had been our bankers on a number of matters over years and we had concluded that they would be the best emissary in this and so we asked Mr. Felix Rohaytn to make the initial contact with National Starch.

Q. Did Lazard Freres play any role in identifying National Starch as a potential acquisition candidate?

A. No. We did not feel that we needed to bring investment bankers into the process of analyzing what Unilever's objectives ought to be or what would best meet those needs.

This initial impression was supported by our management for several reasons. First of all, the
(p. 30) maintenance of confidentiality is extremely difficult even when you have a small group within your own business. The minute you add outsiders and the commotion that attends such activity, you cut your chances further so all of this work was done by internal people.

We did consult periodically with investment bankers primarily for a sense of the industrial correctness of some of our assumptions and to build what you

would call the basic commercial intelligence to support an acquisition.

Q. What instructions were given to Lazard Freres in terms of making an approach to National Starch?

A. The key to our strategy of approach was first to determine receptivity, since it was Unilever's preference and we felt Unilever's interests would be best served by a negotiated transaction rather than one that had any element of management reluctance.

Q. Did Lazard make an approach to National Starch?

A. They did and National Starch's response was appropriate I think for any publicly owned business, that they obviously would consider an offer, a responsible offer, and I think the — my recollection is that there was some request on their part that we come up with a specific figure before they could consider it seriously.

Q. Did there come a time when in fact an agree-
(p. 31) ment in principle was reached between National Starch and Unilever with respect to the acquisition of National Starch by Unilever?

A. Yes. Following that initial approach, our two chairmen came over, there were discussions and on December 11 of 1977 we entered into a letter of intent with National Starch which was subject to securing a tax ruling with respect to the nature of the transaction for which we filed immediately.

Q. Mr. Bandler, did you have substantial involvement in the acquisition following the signing of the letter of intent?

A. At that point this became a principal endeavor for tax specialists, for the various attorneys representing all of us to carry out the terms of that letter of intent, so my own role at that point had been reasonably concluded.

MR. WALKER: Thank you, Mr. Bandler. I don't have any further questions at this time.

THE COURT: Mr. Sapinski, do you wish to examine?

MR. SAPINSKI: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. SAPINSKI:

Q. Mr. Bandler, you testified that Lazard Freres did not play a role in identifying National Starch as a
(p. 32) candidate.

We stipulated Lazard did receive approximately $2,400,000. Will you tell us what that fee was paid for?

MR. WALKER: Objection. If this witness is qualified to answer what Lazard was paid — I doubt that.

MR. SAPINSKI: Your Honor, he testified he was the director of corporate development, and he was one of the supervisors of this project and he was dealing with those people. I think he's competent to answer the question.

THE COURT: I think if Mr. Bandler knows anything about what Lazard Freres was paid for, he can say so. If he doesn't, I'm sure he can say he doesn't know.

THE WITNESS: The ways of investment bankers is something that I have to leave to those who are perhaps investment bankers themselves.

The fees that are charged by investment bankers are negotiated and in this case the financial director of Unilever, who had multiple involvements with Lazard and with Mr. Rohatyn, obviously had to arrive at a fee that they regarded as satisfactory.

This was not a role in which the American corporate development group had any say, but I think you can conclude that somebody of Mr. Rohatyn's stature who did perform those tasks which Unilever set for
(p. 33) him in this had arrived at a way of satisfying Unilever that those services were indeed worth what they paid for them.

BY MR. SAPINSKI:

Q. What tasks were those?

A. Well, the approach to National Starch was made by Mr. Rohaytn and he then — he did participate in a number of meetings with Unilever's management.

I could make the case based on my own experience that this is a very critical period in the development of an acquisition and if in the end the mix of Lazard's advice to Unilever and Unilever's response to that advice was wrong, we might not have had a transaction.

Those meetings which were attended by David Orr, the chairman of the PLC, Franz VandenHoven, the chairman of NV and various other directors took place both in New York and there was another meeting at Heathrow Airport in which I know there were ex-

tensive discussions of how much one did and how one did it.

I think in summary Unilever must have been satisfied in arriving at that fee.

I, as the director of corporate development, while I played I hope a very constructive role in that, I was not an officer of the company and certainly not privy to an analysis of even how much the lawyers got paid.

(p. 34) Q. Do you know whether part of what Lazard was paid for included advice as to how much they should pay for National Starch?

A. Well, it would be inconceivable that you sat down with an investment banker and did not try to get a view as to what they thought the market price was for a business of that sort, what they thought of the potential, how they saw the industry.

It is not a snapshot sort of process. You talk with people, you form opinions, you draw on the talents of diverse people, and it would be very difficult for me to say that there is any one single person whose omissions made possible shortcutting this very sustained and at time very enervating process of arriving at a consensus.

Q. Not to put words in your mouth, but I understand your answer to mean that it's inconceivable to you that they didn't at least participate.

A. Participate in advising?

Q. Right.

A. The question whether their advice was the final figure that came out, I would say that when you

go into an acquisition what you find out is everybody's perception is apt not to stand the view of history.

I think some of us took views of what the price
(p. 35) should be that were not realistic in the end.

Q. Do you know if Lazard rendered any sort of a fairness opinion to Unilever shareholders?

A. My impression—I never saw such an opinion but since we are a public company and we had to vouch for the appropriateness of the transaction, my assumption is that that is so.

Q. But you don't know.

A. I never saw the opinion but I assume we had one of that type.

Q. You mentioned before that the letter of intent was subject to a tax ruling. Could you explain why there had to be a tax ruling?

A. Yes The Unilever NV, while a publicly listed company with shares, had some complications with using them. Our shares were selling at an extraordinarily low multiple. Because it was a foreign owned business, people did not understand the shares so we did not have the flexibility that other companies had in using our own shares, so we were seeking a cash transaction.

The problem with a cash transaction for some shareholders is that they could not defer their capital gain and National Starch had two groups of shareholders—some with a very low base and some
(p. 36) who were people who had bought it recently on the open market.

Throughout the discussions we had with National Starch, we were impressed by the sense of fairness of the management who felt that they could not accept any sort of deal that did not treat all shareholders equally, but they did not feel it fair to those with a low base to have to take cash and pay the capital gains if there was another option.

We felt that there was a way that we could create an acquisition transaction whereby those who wished to accept a special class of preferred stock—I think it was 4-1/2 percent preferred—could opt for that and those who wanted cash could receive cash.

We went to the Internal Revenue Service to seek a ruling and such was our confidence in this approach that we were able to reach a letter of intent based on the expectation that the Internal Revenue Service would provide such a ruling, which they did.

Q. I understand that.

Mr. Bandler, the original approach, I believe you testified, was to Mr. Greenwall. From Unilever's point of view, as I understood you to say, you wanted if possible a cash transaction, and if I understood you also, the preferred was something to make the trans-
(p. 37) action palatable to certain shareholders of National Starch.

Would it be fair to say that Unilever wanted to pay as close to cash as possible in the transaction?

A. I should mention one thing. It is my recollection that the first approach by Mr. Rohaytn was to Dr. Carlisle Caldwell, who was the president of National Starch, not to Mr. Greenwall, but that I do not know of my own knowledge.

Q. We stipulated it was to Mr. Greenwall.

A. When I refreshed my recollection, I did find that there had been a discussion with Dr. Caldwell and Mr. Rohaytn.

In any case, given Mr. Greenwall's role in the company, he would have been fully involved at the beginning.

Q. Let me ask you this. At any point did Unilever give consideration to making a hostile takeover bid for National Starch?

A. Certainly within those who had the professional responsibility for this project—Mr. Meij and myself and others—we regarded such an event as utterly inconceivable because it's a matter of industrial common sense.

You make a hostile tender offer for a company which is very different from your own, which does not fit into your own corporate structure, which you would have no way of managing after you bought it because
(p. 38) you have no people who understand the starch or adhesives or other specialty chemicals that they manufacture. It would make no sense to do that.

Whether it was considered, I would say in the course of an acquisition project it is possible that somebody may have thought of the idea but they must have put it out of their minds very quickly.

Q. So it was to be a friendly deal or no deal.

A. Our interest was in a negotiated deal where the hearts and minds of the executives and the employees went with the transaction. We could not afford to have any other kind of deal.

MR. SAPINSKI: Thank you, Mr. Bandler. I have no more questions.

MR. WALKER: I have no further questions.

THE COURT: Thank you very much, Mr. Bandler. I appreciate your coming down to help us out.

(Witness excused.)

MR. WALKER: Your Honor, our second witness is Mr. Perell, who is a partner in the firm of Debevoise and Plimpton. I'll get him from the witness room.

(Recess.)

(p. 39) Whereupon,

*EDWARD A. PERELL*

was called as a witness and, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated and state your name and address for the record.

THE WITNESS: My name is Edward Andrew Perell and my residence address is Cricket Lane, Dobbs Ferry, New York.

MR. WALKER: Your Honor, before proceeding with my examination of Mr. Perell, may I introduce the Court to Mr. Daniel Murphy who is also a partner at Debevoise and Plimpton, who has been representing Mr. Perell in terms of our discussions with Mr. Perell and the government's discussions before trial.

There is one issue that is a bit sensitive and I would request the Court's permission to permit Mr. Murphy to sit within the well of the court for

purposes of guarding an attorney-client privilege for Mr. Greenwall, who was the principal shareholder of National Starch.

Debevoise performed services for Mr. Greenwall as well as for National Starch. Mr. Greenwall is now deceased and it's our understanding that the attorney-client privilege cannot be waived at this point and we
(p. 40) would request permission to have Mr. Murphy present during the questioning of Mr. Perell simply to make sure that no one gets off bounds and asks questions which would be objectionable in that sense.

THE COURT: What's he going to do—wave a red flag or something like—or maybe it's a checkered flag. All right.

DIRECT EXAMINATION

BY MR. WALKER:

Q. Mr. Perell, what is your occupation?

A. I'm an attorney.

Q Are you affiliated with a firm?

A. Yes, I'm a partner at Debevoise and Plimpton.

Q. How long have you been a partner?

A. Since January 1, 1973.

Q. And in 1977 and 1978, was Debevoise and Plimpton known as Debevoise, Plimpton, Lyons and Gates?

A. Yes.

Q. In that period of time—1977 and 1978—did Debevoise, Plimpton, Lyons and Gates render services

to National Starch and Chemical Corporation in connection with its acquisition by Unilever?

A. Yes.

Q. And were you one of the attorneys who worked on the acquisition?

(p. 41) A. Yes.

Q. Can you describe what your role was in connection with the acquisition?

A. Yes. I was the partner in charge of the National Starch work.

Q. Who were the other attorneys at your firm who were involved in the acquisition?

A. There must have been at least 20 or so, but the principal ones were Oscar Ruebhausen, Phillip Winterer, Andrew Hartsell, Ken Wallach, Greg Friedrich and Paul Harbison and myself.

Q. And did there come a time when a structure for the transaction was proposed?

A. Yes.

Q. Do you recall when that was?

A. The structure for the transaction was proposed a very short time after representatives of Unilever approached Mr. Pascal and Mr. Greenwall to see whether there would be any interest in a combination.

MR. WALKER: Your Honor, if we could take just a minute—Mr. Sapinski has left the courtroom with one of his witnesses. I think it would be appropriate to halt the questioning until he returns.

THE COURT: Yes, we can go off the record.

(p. 42) (Off the record.)

BY MR. WALKER:

Q. Mr. Perell, when was it you learned of the proposal for structuring the transaction?

A. It was in early October of 1977.

Q. Do you recall what the proposal was at that time?

A. As I was told by Mr. Ruebhausen, my partner, that Mr. Pascal and Mr. Greenwall had been approached by a representative of Unilever and asked whether there was any interest on the part of the company and on the part of Mr. Greenwall for there to be a combination of National Starch with the Unilever group.

Q. Was any specific suggestion made as to the kind of structure which would result in that kind of combination?

A. Yes. The suggestion was that it would be an all cash transaction.

Q. Was there any consideration at that time as to the form in which the transaction would take place?

A. I think as reported to me, the initial contact was just a request as to whether they would be interested in an all cash deal.

Q. Was there subsequently a refinement of that proposal which led to the structuring of a transaction?

A. Yes.

(p. 43) Q. When did that occur?

A. It occurred a few days later when Mr. Greenwall reported back to the representatives of Unilever that he was not interested in an all cash deal.

MR. SAPINSKI: Your Honor, while most of this is stipulated, I do object to Mr. Perell testifying to what Mr. Greenwall told another person unless he was personally present. I think it's hearsay.

THE COURT: Is that covered in the stipulation?

MR. WALKER: Yes, it is, Your Honor. Really I'm interested in eliciting from the witness what the structure of the proposal was that was devised. That's my only interest really.

THE WITNESS: I was present at that particular conversation.

THE COURT: Generally speaking, people in their 80s aren't interested in cash deals, although I did once have a client in his 80s who was looking for deferred compensation agreements. He was an optimistic fellow.

BY MR. WALKER:

Q. As a result of the discussions among the parties, was a structure or a tentative structure agreed upon?

A. Yes.

Q. What was that structure?

(p. 44) A. Well, it was eventually—I guess the question is when are you referring to.

Q. In the period after October of 1977, following discussions with Mr. Greenwall. Was there a proposal that was made concerning the structuring of the trans-

action which would meet the requirements of all the parties?

A. Yes. One was developed shortly after Mr. Greenwall reported back that he was not interested in a cash transaction. It was suggested by Cravath that a novel structure might be worked out and we did in fact begin working on that.

Q. What was the suggestion by Cravath for the structuring of the transaction?

A. The suggestion by Cravath was to use a section of the code for the transaction which would permit less than a majority of the shareholders to enter into a tax-free reorganization. The section I believe was Section 351 and it was at that time a very novel approach, or at least it was to our firm.

Q. Do you recall approximately what point in time that proposal was made?

A. I would say it was mid October, maybe a week or so after the initial approach.

Q. And was that proposed structure the structure which was eventually adopted for the transaction?

(p. 45) A. Yes, it was.

Q. Was consideration given from time to time after that proposal as to other possible structures for the transaction?

A. Yes.

Q. And why was that?

A. Because we were never sure until a ruling was issued by the IRS that that structure would work so that we did consider alternatives.

Q. Were steps in fact taken to secure approval for the Cravath proposal?

A. Approval—I 'm not sure—

Q. Approval from the Internal Revenue Service.

A. We did eventually request a private letter ruling, yes.

Q. Prior to that time, do you recall whether there were any meetings or communications with the Internal Revenue Service to discuss the Cravath proposal?

A. Yes.

Q. Can you describe what took place before a letter ruling was requested?

A. I didn't participate personally in the meetings or the phone calls but they were reported to me by my partner Mr. Winterer.

(p. 46) MR. SAPINSKI: I object to anything that was reported as hearsay.

MR. WALKER: I'm not asking for the substance of it but certainly I think this witness is competent to testify as the corporate partner who was supervising the transaction if he to his knowledge was aware that meetings took place, without going into the substance of it.

THE COURT: He may answer.

BY MR. WALKER:

Q. To your knowledge did meetings take place in which the structure was discussed between representatives of the parties and the Internal Revenue Service?

A. I believe one meeting took place, yes.

Q. Do you recall when that meeting took place?

A. It was very early—I believe very early in November.

Q. And after that meeting with representatives of the IRS, did you meet with National Starch's directors?

A. Yes.

Q. Do you recall when you met with National Starch's directors?

A. Yes. It was after a board meeting of the directors I believe on the 7th of November of that year.

Q. Can you state generally what substance you
(p. 47) discussed with the directors following the board meeting on November 7th?

A. Yes. In general I told them of the approach and advised them of the steps that had been taken since the approach and discussed with them the duties of the board and where it was going.

Q. Did you also discuss with them the proceedings that were taking place in discussions with the Internal Revenue Service concerning the proposed structure?

A. Yes.

Q. What did you tell the directors on November 7, 1977, about their fiduciary duties and responsibilities?

A. To my recollection—I probably can't give you the exact words.

I reviewed with them the duties of directors in connection with unsolicited requests of this nature, duties of directors in connection with offers that may be made and duties of directors with respect to their obligations to stockholders in the event they were to negotiate a transaction.

Q. And what did you tell them their duties were in that regard?

A. I advised them that they had duties to ensure that a transaction—to the best of their abilities, that
(p. 48) a transaction would be fair to the shareholders and that that would involve valuations of the company, including looking forward and at present as to the value of the company.

That if a transaction went forward, and at that point we did not know whether it would go forward, but if it went forward that they would be wise to form a committee of independent directors to review the status of the transactions and to assist the board in making independent judgments, and that they use outside experts to assist them in that regard.

Q. Did you discuss with the directors at the meeting on November 7th the advisability of retaining an investment banking firm?

A. Yes.

Q. What did you tell the directors in that regard?

A. I told them as a practical matter that it would be extremely useful for the board to have a firm of outside independent investment bankers, one, to assist in the valuations of the company to ensure fairness of any transaction.

Secondly, to have the firm available in the event that matters became unfriendly—*i.e.*, either Unilever or a third party made a hostile tender offer or what we refer to as a bearhug—an unsolicited offer— so having
(p. 49) investment bankers at hand would assist us immediately if we needed help.

As a practical matter, I felt that it would be wise for them to do so, and, secondly, I told them that it was wise from a legal point of view in carrying out their fiduciary responsibilities.

I remember I was asked whether it was a requirement of law that they do so and at that time I knew of no requirement but I advised them that not getting investment bankers might be evidence that they did not carry out their responsibilities and in my judgment they ought to.

Q. Did the directors reach any decision following your discussion with them on November 7th?

A. Yes. They agreed that if the transaction was to go forward, and they were still unsure of that, but if it was decided to go forward that there be engaged an investment banking firm to work on behalf of the board.

Q. To the best of your recollection did the directors place any conditions on going forward at that time?

A. Yes. The only condition, and this was a condition which was recommended by management as well, was that we be satisfied that the structure which we were testing out at the IRS, that there be a reasonable chance of it working.

Q. And was there subsequently some com-
(p. 50) munication from the IRS that provided the satisfaction that management was looking for?

MR. SAPINSKI: Again, Your Honor, I object unless he participated in that. Otherwise, it's hearsay.

MR. WALKER: Well, I'm not asking him the substance of what was said with the IRS to the extent that he wasn't present, but the question is whether or not some form of satisfaction—he indicated that the directors had conditioned going forward on receipt of some preliminary indication of approval from the Internal Revenue Service.

I'm not asking for the truth of what the Internal Revenue Service said, but certainly the state of mind of the people who might have heard something from the Internal Revenue Service would not be hearsay.

If that led them to proceed in connection with the transaction—I'm not offering the truth of what the Internal Revenue Service said from this witness.

THE COURT: Isn't the answer to this question that the Service issued a favorable ruling?

MR. WALKER: Well, it did in fact issue a favorable ruling.

THE COURT: And isn't that all in the stipulation and we know that they did?

MR. WALKER: That is Your Honor, but I believe
(p. 51) there was a prior communication before the ruling which in fact conditioned or led the directors to believe in advance of actually receiving a ruling that a ruling would be likely and that that in fact caused them to proceed forward in terms of considering the transaction so there was a point in time before the actual receipt of the ruling which was the triggering event.

MR. SAPINSKI: Your Honor, that I believe is hearsay. It's just going through the back door of calling it state of mind.

Both Mr. Walker and I did interview the person who testified to—who participated in that conversation with the Internal Revenue Service and that person is available to testify. He's another partner at DPL&G.

I don't think it's proper that the substance of that conversation, or whatever Mr. Walker might choose to call it, be introduced through a witness who heard it from another party and who did not participate.

MR. WALKER: Again I'm not asking for the substance to be accepted for the truth of what the substance was.

THE COURT: Do we have any serious disagreement that there was some sort of indication, informal indication, before the ruling was issued that said it would be coming?

MR. SAPINSKI: Well, we have a disagreement as
(p. 52) to what was being told to them, yes, we do.

THE COURT: What is your position on this?

MR. SAPINSKI: Your Honor, I assume from what Mr. Walker is trying to elicit that he's trying to elicit in some way that the Internal Revenue Service gave some sort of a positive indication that a ruling would be issued if it were submitted and I don't believe the notes or anything else or the interviews that we've conducted indicated that, with the people who participated in the transaction.

I object to that inference being created when it is not in fact true.

MR. WALKER: Again, I'm not trying to prove what they said or what they didn't say. My object is to prove that the state of mind of those who talked with the Internal Revenue Service was such that they concluded it was reasonable to proceed forward with the transaction regardless of what was said to them.

There was some comfort that was perceived so that in their minds the—

THE COURT: In the informal discussions, your position is that the Internal Revenue Service said we will probably rule favorably on this.

MR. WALKER: That's correct.

THE COURT: And Mr. Sapinski is saying that
(p. 53) the Internal Revenue Service never said anything like that?

MR. SAPINSKI: That's correct, Your Honor.

THE COURT: Well, I guess we'll have to—it if really makes any difference, we'll have to hear from whoever heard the magic words of maybe we'll rule.

MR. WALKER: Again, Your Honor, we do not believe that magic words have any significance other

than the fact that they in turn caused the directors to proceed forward with the transaction. They provided some measure of encouragement that in fact a favorable ruling might be obtained in the future. That is the only basis for—

THE COURT: That there was a still a contingency here that they would in fact get a ruling and have a written ruling in hand before it went ahead.

MR. WALKER: Absolutely, before the transaction was completed.

THE COURT: I guess if Mr. Perell knows about that of his own knowledge he can testify. If not, we'll try and get it from somebody else.

MR. WALKER: That's all I want to find out.

THE COURT: Then we can see later whether it makes any difference anyway.

BY MR. WALKER:

Q. Did there come a time, Mr. Perell, that the directors decided to proceed in terms of considering the
(p. 54) transaction?

A. Yes.

Q. Can you tell me what led to that decision to proceed, what events?

A. I'm not sure—I don't understand this well enough to—

MR. SAPINSKI: I think I'm going to object at this point. I think I know where it's going.

MR. WALKER: Well, I think the purpose of my—

THE COURT: It seems to me that if one of his partners told him that things looked pretty good from the point of view of the Internal Revenue Service and he went ahead on the strength of that, he heard that conversation and whether the partner was making it up or not if that was the--if the words were in fact said and that's what moved it along, I don't think that's hearsay and I don't see any problem with it.

MR. SAPINSKI: I respectfully disagree, Your Honor.

THE COURT: Well, you're out of luck. I make the ruling.

THE WITNESS: That is in fact what took place. My partner did inform me that he had received sufficient comfort that he thought it was a reasonable risk for us to proceed, the only risk being, I might add, that
(p. 55) we did not want it to become public knowledge that the offer was—that the discussions were underway, but we had sufficient comfort that we decided to proceed.

BY MR. WALKER:

Q. And what happened after receipt of this encouragement? What was done next?

A. Following that, the firm of Morgan Stanley was engaged by the company for the company and the directors.

Q. By the time Morgan Stanley were retained, had the significant elements of the Cravath structure been defined?

A. Yes.

Q. Who was principally responsible for devising the terms of the preferred stock which was used in connection with the transaction?

A. Our firm and Cravath.

Q. Did Morgan Stanley play any significant role in terms of devising the terms of the preferred stock?

A. Could you clarify the word "significant?"

Q. Well, perhaps you can tell me what involvement to the best of your knowledge Morgan Stanley had in terms of working on the preferred stock which was used in connection with the transaction.

A. To my recollection they did give us some pieces of advice as to ratios, for example, on assets to stock
(p. 56) and a couple of other similar terms like that.

Q. To your knowledge what was the principal function of Morgan Stanley in connection with the transaction?

A. To value the company and to render a fairness opinion to the stockholders and to stand ready to assist in case there was a hostile offer.

Q. Mr. Perell, I would like to hand you what has been received in evidence as Joint Exhibit 26 which are a series of billing statements from your firm.

THE COURT: This is 26-Z.

BY MR. WALKER:

Q. If you could take a look at 26-Z, Mr. Perell, I'd like to ask you when Debevoise rendered its first statement for services in connection with the acquisition of National Starch's stock.

A. In March of 1978.

Q. And what period of time did that statement cover?

A. October 1 '77 through December 31 '77.

Q. How much is the bill?

A $100,000.

Q. Was that bill subsequently paid?

A. I believe it was. I didn't receive payment myself but I believe it was.

Q. Can you describe generally the services that
(p. 57) were performed by your firm during this period?

A. Yes. I think generally they ran the gamut of the broad services one would expect in connection with a proposed combination of this type and magnitude which ran from what I would call sort of plain vanilla corporate work of advising the management and the directors of corporate structural matters under relevant law—in this case Delaware—fiduciary responsibilities to stockholders, analyzing ancillary documents, in this case spending time on the proposed structure, antitrust review, preliminary tender offer, defense work, looking at foreign laws that relate to acquisitions of international and transnational companies, looking at the securities laws aspects, both the '33 and the '34 Act.

In this case, it also involved, because of the preferred stock terms, some investment company act work. Generally just the very broad things that one does.

Q. Was any tax work or analysis performed during this period?

A. Yes.

Q. What was the tax work and analysis which was performed, generally speaking?

A. Generally speaking it related to the structure of the transaction to again afford stockholders the right to a tax-free reorganization.

(p. 58) Q. Was work done in connection with drafting of any documents during this period?

A. Yes. During this period the letter of intent was drafted and finalized. The merger agreement work began and together with that I would assume the proxy materials would also begin, and an S-I we also began.

We also worked on a request for a private letter ruling from the Internal Revenue Service and there were a few ancillary agreements relating to ordinary course of business during that period.

Q. During this period, did you have discussions with anyone other than the directors? I believe you mentioned shareholders of National Starch. Any other official at National Starch?

A. At National Starch, yes.

Q. Did you also have discussions with other law firms that were involved in connection with the transaction?

A. Yes, we had quite continual discussions with Cravath.

Q. And discussions with any representatives of Unilever?

A. Yes. They attended some meetings.

Q. Can you describe how the time records with respect to the acquisition matter were kept by your firm during the fourth quarter of 1977?

(p. 59) A. Yes. When we first learned of the transaction, I opened a new account at the firm for keeping time and disbursements which was a blind account which we refer to as acquisition suspense and give it a special number.

This was done customarily in the firm to preserve confidentiality.

Time was billed to that account until the public announcement of the negotiations at which point we opened another account under the National Starch name and billed time into that.

Q. And was any other time kept in the original account, the acquisition account which was opened?

A. I'm not sure I understand.

Q. It was all work done in connection with the acquisition, is that correct?

A. In the broad sense, yes.

Q. And how was the bill for the fourth quarter of 1977 prepared on the basis of the account that you had opened?

A. I personally reviewed the time tickets and allocated time to the National Starch bill and allocated time to an account for Mr. Greenwall and his family.

Q. Your firm represented Mr. Greenwall at the time as well as National Starch?

(p. 60) A. Yes.

Q. Can you describe how the time was in fact allocated between National Starch and Mr. Greenwall?

A. Yes, it wasn't done with precision but rather with judgment.

As I mentioned, I reviewed all of the time tickets and as I recall I believe that I charged time for one of our associates—I charged all of her time to the Greenwall account. She was a trust and estate lawyer and worked with the Greenwalls on their family matters and I believe probably all of her time was related directly to their work.

I allocated a substantial portion of the tax work done during that period to the Greenwall account and I allocated a portion of my time which I thought was reasonable in connection with the conversations that I had with the Greenwalls as well, and some of Mr. Ruebhausen's time.

Q. Do you recall what the final allocation was for the bill for the fourth quarter of 1977?

A. Yes. I believe that 100,000 was allocated to the company and 50,000 was allocated to the Greenwalls.

Q. And were the Greenwalls separately billed for the $50,000?

A. Yes, they were.

Q. And that was taken out of the National Starch
(p. 61) account and billed to the Greenwalls?

A. Yes.

Q. When was the next bill submitted to National Starch for services rendered in connection with the acquisition?

A. Looking at the exhibit and relying on that, I think it was May 10th, transmitting a bill dated May 9th.

Q. Do you recall what period of time that bill covered?

A. Yes, January 1 '78 to March 31 '78.

Q. How much was attributable to work done by your firm in connection with the acquisition during that period of time?

A. From this bill, it says 185,000.

Q. And do you recall what services were rendered during the billing period that you've just described—the first quarter of 1978?

A. My recollection is that during the first quarter of 1978 we continued working on the merger agreement, which was signed in mid March, and the preparation of the preliminary proxy materials, the S-1 for the exchange offer.

We discussed a number of ancillary agreements. We worked on stock option questions. We discussed some Securities Act problems with the Securities and Exchange Commission and did work on those, and we
(p. 62) had some further discussions with the Internal Revenue Service, I believe.

Q. Did you continue to advise the officers or directors or employees of the company during that period?

A. Yes.

Q. And was any work done in connection with the exchange offer during that period, to the best of your recollection?

A. Yes.

Q. What kind of work?

A. The merger agreement that was being prepared was a joint document consisting of a merger agreement and an exchange offer so we worked on the documents together basically and it was sent as one document. I can't really separate out the two.

Q. And was advice given to the special committee which had been formed?

A. Yes. I believe that we met monthly and kept them abreast of developments and received advice from them as to certain negotiating points.

Q. When was the next bill submitted to National Starch for work which was done in connection with the acquisition?

A. The exhibit contains one dated September 12, 1978.

Q. And what period of time did that bill cover?

A. April 1 '78 to June 30 '78.

(p. 63) Q. What portion of that bill was allocable to work done in connection with the acquisition?

A. According to the allocation attached, $105,000.

Q. And can you describe the services that were rendered during the second quarter of 1978 in connection with the acquisition?

A. Those services I think were similar to the ones that we did during the first quarter. We continued work on the documentation, continued discussions with the IRS and the SEC and everyone else that was continuing.

Q. When was the next statement which was rendered to National Starch for work done in connection with the acquisition?

A. October 19, 1978.

Q. That covered the third quarter of 1978?

A. Yes.

Q. July 1, 1978, through September 30?

A. Yes.

Q. How much of that bill was allocable to services rendered in connection with the acquisition?

A. According to the attached allocation, $100,000.

Q. What services were provided during that period?

A. During that period we finalized the proxy and exchange offer materials and assisted in their completion and mailing to shareholders.

(p. 64)

We worked with proxy solicitors and began all of the work necessary to close the transaction in August

and to hold the meeting in lieu of the annual meeting to approve the transaction.

Q. Apart from the initial statement of services which was rendered to the Greenwalls that you described earlier, were any subsequent bills sent to the Greenwalls for work done in connection with the acquisition?

A. Yes, I believe there was.

Q. Do you recall how much the Greenwalls were billed after the first bill in the amount of $50,000?

A. Yes, my recollection is $15,000.

Q. Do you recall how that bill was determined?

A. Yes. My recollection is that approximately 10,000 at the time had been billed to the regular Greenwall account in connection with advice being given to them with respect to their receipt of the preferred stock, the gifting program, their foundation program, their family trusts and the like and what the plans would be with the stock and some additional estate planning, and approximately 5,000 was allocated by me out of the National Starch billing account that I felt was appropriately charged to the Greenwalls.

Q. Do you recall the kinds of matters for which
(p. 65) you provided that allocation from the National Starch account?

A. Yes, it was advice relating to duties of the controlling stockholder, advice relating to a letter agreement that he had entered into in connection with the transaction, agreeing not to dispose of the shares and to vote them in the same manner as the rest of the

stockholders, and some fair amount of time which I had to take to more closely describe to him so that he could understand the terms of the preferred stock which was an extraordinarily complicated document.

MR. WALKER: Thank you, Mr. Perell. I have no further questions at this time.

THE COURT: Cross-examine.

CROSS-EXAMINATION

BY MR. SAPINSKI:

Q. Mr. Perell, I give you the supplemental stipulation of facts. We're going to be looking at a lot of the exhibits.

Mr. Perell, I believe you identified Mr. Wallach as an associate in the corporations area who worked with you on the transaction.

A. Yes.

Q. And Mr. Winterer was a tax partner at DPL&G?

A. Yes.

(p. 66) Q. And Mr. Friedrich worked in the tax department?

A. Yes.

Q. Would it be fair to say that the role of Mr. Friedrich and Mr. Winterer related to the tax advice aspects of the billings?

A. Yes.

Q. And that advice involved the submission to the Internal Revenue Service of the request for ruling?

A. In part, yes.

Q. Would you say that would have been the major part?

A. The submission of the ruling?

Q. Yes.

A. No.

Q. What other aspects?

A. Well, in arriving at submission of a ruling, one had to do a lot of work and I don't know whether you mean it gets all rolled into the submission or separate.

Q. All the work that went into that. The answer would be yes?

A. Yes, that's a major part.

Q. And in that last quarter of 1977, was most of the work that was involved in negotiation of the structure, was that also part of the allocation that you described previously?

(p. 67) A. Most of the work? Could you rephrase it?

Q. Was the work involved in negotiating the structure of the transaction part of what you described in your fee allocation on direct.

A. To Mr. Greenwall?

Q. Yes.

A. Yes.

Q. When DPL&G began consideration of the Unilever offer that you testified to, you also testified that your colleagues and yourself considered other

ways in which an acquisition could be structured, is that correct?

A. Yes.

Q. Looking at Exhibits P and Q, would those reflect the types of considerations that DPL&G made regarding possible alternative structures?

A. This is a part of it.

Q. Would it be representative of the part that—Would it be representative of the work, the consideration of alternative structures?

A. Of the type of work that we had to do?

Q. Yes.

A. Yes.

Q. I would assume that in—Did you personally negotiate with the Cravath and other Unilever repre-
(p. 68) sentatives regarding the structure?

A. Yes.

Q. Were there a series of drafts, of proposals, that were exchanged between the parties?

A. I honestly can't remember.

Q. Look at S, T, U, Y and AA.

A. S is draft of October 21?

Q. Correct. Do they look familiar to you?

A. Yes.

Q. Would it be fair to say that those were drafts that the parties were exchanging?