IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALDEN SMITH and JOHN W. GOSSELIN, Plaintiffs Below Appellants, v. JAY A. PRITZKER, ROBERT A. PRITZKER, JEROME W. VAN GORKOM, BRUCE S. CHELBERG, WILLIAM B. JOHNSON, JOSEPH B. LANTERMAN, GRAHAM J. MORGAN, THOMAS P. O'BOYLE, ROBERT W. RENEKER, W. ALLEN WALLIS, SIDNEY H. BONSER, WILLIAM D. BROWDER, TRANS UNION CORPORATION, a Delaware corporation, GL CORPORATION, a Delaware corporation, and NEW T. CO., a Delaware corporation, Defendants Below, Appellees.	No. 255, 1982 On Appeal From The Court of Chancery of the State of Delaware, in and for New Castle County, Civil Action No. 6342

DEFENDANTS' ANSWERING BRIEF

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Dated: November 24, 1982

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I. NATURE AND STAGE OF THE PROCEEDINGS

This action was filed on December 19, 1980, by Alden Smith, whose complaint sought, inter alia, to enjoin the merger of Trans Union Corporation ("Trans Union" or the "Company") into New T Co., an indirect wholly-owned subsidiary of GL Corporation ("GL"). GL is a private holding company, the stock of which is owned by members of the Pritzker family of Chicago. Trans Union, New T Co. and GL are all Delaware corporations. The other Delaware corporate defendant is The Marmon Group, Inc. ("Marmon"), an operating subsidiary of GL. The individual defendants named in the complaint were Jay A. Pritzker, Robert A. Pritzker and the ten members of Trans Union's Board of Directors.

After extensive discovery, plaintiff's motion for a preliminary injunction was presented to the Court of Chancery on briefs and affidavits. In a Letter Opinion dated February 3, 1981, the injunctive relief sought by plaintiff was denied. Smith v. Pritzker, Del.Ch., C.A. No. 6342, Letter Opinion dated February 3, 1981 (A 215-222). The proposed merger was approved overwhelmingly by Trans Union's stockholders at a special meeting held on February 10, 1981, and became effective on that date.

After plaintiff Smith's motion for a preliminary injunction was denied, John W. Gosselin moved to intervene as an additional plaintiff. Gosselin was permitted to intervene by Stipulation and Order dated March 5, 1981. On that same date, defendants consented to the entry of an Order certifying that Smith and Gosselin were representatives of all persons, other than defendants, who held shares of Trans Union common stock on September 22, 1980, or at any time thereafter up to and including immediately prior to the effectuation of the merger of Trans Union and New T Co. on February 10, 1981.

Trial was conducted from September 22 through October 2, 1981. Plaintiffs Gosselin and Smith testified briefly, followed by their expert, Milton Meigs. Defendants' witnesses were Jerome W. Van Gorkom, former Chairman of the Board and Chief Executive Officer of Trans Union; William B. Johnson, a former outside director of Trans Union who is Chairman of the Board and Chief Executive Officer of IC Industries, Inc., a Chicago based conglomerate; Jay A. Pritzker, whose family controls the entities that acquired and helped finance the acquisition of Trans Union; and Arthur H. Rosenbloom, an expert called by Marmon who opined that the merger price was fair to the stockholders of Trans Union.

Robert W. Reneker, a former director of Trans Union named as a defendant, died on April 27, 1981. Plaintiffs failed to join Mr. Reneker's estate as a party after a Suggestion of Death was filed, as a result of which Mr. Reneker was dismissed as a defendant pursuant to Chancery Court Rule 25(a). See Order entered October 23, 1981 (Docket Entry #142). Plaintiffs have not appealed from that Order. See Notice of Appeal filed on August 11, 1982. In addition, all claims against Jay A. and Robert A. Pritzker were dismissed, with prejudice, after plaintiffs' attorney conceded at the conclusion of trial that he had not proved any of the allegations made against them (A 1757). See Stipulation of Dismissal entered by the Court of Chancery on October 23, 1981 (Docket Entry #143).

After extensive post-trial briefing and argument, on July 6, 1982, Chancellor Marvel issued a letter opinion in which he found that the members of Trans Union's Board of Directors had properly exercised their business judgment with respect to the merger, that the merger consideration was fair, and that the shareholders of Trans Union had been fairly informed with respect to the merger. Smith and Gosselin v. Pritzker, Del.Ch., C.A. No. 6342, Letter Opinion dated

July 6, 1982 (A 9-23). A Final Judgment Order in favor of the defendants was entered on July 14, 1982 (A 24-25), and this appeal followed. This is the answering brief of those defendants who remain in the litigation.

II. SUMMARY OF ARGUMENT

A. Defendants' Response To Plaintiff's Summary Of Argument

1. Plaintiffs' summary:

> 1. The lower Court should be reversed since its brief letter opinion contains six major factual errors on uncontradicted factual matters.

Plaintiffs' Opening Brief ("PB"), p. 2.

Response: Denied. The Chancellor's decision contains no substantive factual errors. In fact, the Chancellor's resolution of material factual issues is supported by substantial evidence, and any seeming confusion was caused by plaintiffs' arguments below.

2. Plaintiffs' summary:

> 2. It is an absolute predicate to the application of the business judgment rule that the record show that the directors took the requisite time and assembled the requisite information on which to make an informed judgment. The lower Court avoided measuring the defendants' conduct by the record to determine whether the defendants met the threshold requirements of due care and prudence. Rather the lower Court justifies the application of the business judgment rule on extraneous considerations and events that occurred after September 20, 1980.

PB 2.

Response: Denied. The Chancellor found, based on the evidence, that the directors of Trans Union exercised informed business judgment with respect to the merger "... which they believed to be in the best interest of the stockholders of Trans Union." (A 22).

3. Plaintiffs' summary:

> 3. The lower Court again erred in measuring disclosure in terms of "adequacy" rather than "completeness" and also utilized an erroneous standard of materiality. The record shows that neither the original Proxy Statement of January 19, 1981, nor the belated Supplemental Proxy Statement of January 26, 1981, (which admittedly included material facts omitted from the original Proxy Statement) satisfies the requirements of complete candor. Finally, the lower Court erred in holding that the Supplemental Proxy Statement, mailed less than twenty days before a stockholders meeting, satisfies 8 Del. C. §251.

PB 2.

Response: Denied. The Chancellor found, based on the evidence and applicable Delaware law, that the stockholders of Trans Union had been "fairly informed" (A 22) with respect to the proposed merger. Moreover, plaintiffs' argument with respect to 8 Del. C. §251 is wrong as a matter of law.

4. Plaintiffs' summary:

> 4. The lower Court's opinion shows that, while ignoring the actual evidence of the value of the TU shares, the lower Court made its own determination of value utilizing a patently incorrect standard. This Court should review the record and establish the plaintiffs' damages.

PB 2.

Response: Denied. The Chancellor found, based on the evidence, that the test of the marketplace established the fairness of the consideration of the subject merger. In any event, the "fairness" of the merger price is not a proper subject for judicial inquiry in this action challenging an arm's-length merger.

B. Defendants' Summary Of Argument

1. This is a case in which plaintiffs challenged the exercise of business judgment by an independent Board of Directors. There were no allegations and no proof of fraud, bad faith, or self-dealing by the directors.

2. The offer by the Pritzkers to acquire by merger all of the stock of Trans Union Corporation at a price of $55 per share was first presented to the Company's Board of Directors on September 20, 1981. After the initial consideration of the merger proposal on September 20, 1980, the Board considered certain aspects of the proposal again on October 8th. On January 26, 1981, the Board again reviewed the entire history of the proposal. During three of the four months that the proposal was under consideration by the Board, a better offer was sought by Salomon Brothers and by a management group that wanted to obtain operating control of the Company. Salomon Brothers contacted more than 150 potential purchasers, but no other offer was ever received. Having tested the adequacy of the Pritzkers' offer in the marketplace and having reviewed once again all relevant factors, on January 26, 1981, the directors voted unanimously to recommend approval of the proposed merger to Trans Union's stockholders.

3. On February 10, 1981, Trans Union's stockholders, no one of whom owned as much as 5% of the Company's stock, met to decide whether it was in their best interest to approve the proposed merger and accept the cash offer for their stock that represented a per share premium of $17.75, or almost 48%, over the last closing price before the announcement of the merger proposal; a per share premium of $21.12, or more than 62%, over the average of the high and low prices at which the stock traded during the nine-month period prior to the announcement of the merger; and an aggregate premium over market of more than $222,000,000 to the holders of Trans Union's 12,512,956 shares. The stockholders voted overwhelmingly in favor of accepting the merger proposal. That approval renders the merger transaction immune from minority stockholder attack. Also significant is the fact that no stockholder filed a petition for appraisal pursuant to 8 Del. C. §262.

4. The business judgment rule, which was properly applied by the Chancellor, allows directors wide discretion in the matter of valuation and affords room for honest differences of opinion. In order to prevail, plaintiffs had the heavy burden of proving that the merger price was so grossly inadequate as to display itself as a badge of fraud. That is a burden which plaintiffs have not met.

5. Tacitly conceding that he could not succeed in an attack upon the business judgment of the directors or the judgment of the overwhelming majority of the stockholders, Smith amended his complaint on the eve of the preliminary injunction hearing by adding an attack on the adequacy of the Proxy Statement. However, at trial plaintiffs utterly failed to show that the Proxy Statement, either standing alone or as supplemented after the January 26, 1981 Board meeting, contained any misstatements or omissions of facts that would have been viewed by a reasonable investor as having significantly altered the total mix of information made available to the stockholders.*

III. COUNTERSTATEMENT OF FACTS

A. Trans Union Corporation

Trans Union is a diversified holding company, the operations of which are conducted by its subsidiaries (A 2246). As of December 19, 1980, the record date for the February 10, 1981 special meeting at which Trans Union's stockholders overwhelmingly approved the merger, there were 12,512,956 shares of the Company's common stock issued and outstanding (A 2223), in the hands of

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* The Proxy Statement with respect to the subject merger is set forth at A 2216-2323. The Supplemental Proxy Statement is set forth at A 2324-2329.

approximately 12,900 stockholders (B 1441), no one of whom owned as much as 5% of the Company's stock (A 2224).

Trans Union's principal business activity is the leasing of railway cars (A 2246). The economics of rail car leasing are closely tied to the tax laws, and in particular to the investment tax credit and accelerated depreciation applicable to equipment such as rail cars (A 1027). The investment tax credit permits a reduction of federal income taxes equal to 10% of the amount invested in rail cars and other equipment owned and leased by Trans Union (A 1029). In order to take full advantage of the tax credit, however, a taxpayer must have sufficient taxable income to create a tax liability that is equal to twice the entire amount of credit that can be used to offset that liability because the investment tax credit can be used to offset not more than one-half of taxes payable (A 1029-30).

Depreciation is an expense of doing business which, for tax purposes, reduces taxable income. Accelerated depreciation is depreciation at a rate that is faster than the equipment actually wears out or becomes obsolete and increases the tax deduction available to lessors of qualifying equipment (A 1032, 1034). The effect of accelerated depreciation is pronounced when applied to long-lived assets, such as rail cars, which have a useful life of approximately forty years (A 1027). With the advent of accelerated depreciation in the early 1960's, Trans Union was able to take depreciation for tax purposes at a rate of up to 15% per year (A 1033). However, in Trans Union's case, each increase in the amount of depreciation which could be deducted for tax purposes reduced the Company's ability to fully use otherwise available investment tax credits (A 1036). This result obtained because depreciation has the net effect of reducing taxable income, and investment tax credits could only be used to offset taxes.

Thus, despite the seeming benefits of increases in investment tax credits and accelerated depreciation, such increases actually had an adverse impact on Trans Union. The lessees of railroad cars are fully aware of the tax advantages generated by the investment tax credit and accelerated depreciation. The competition in the leasing business is such that lessees are able to demand successfully that those tax advantages be passed on to them in the form of reduced rental payments, even if the particular lessor's tax situation dictates that it cannot fully utilize the credit (A 1031). Thus, a lessor that is unable to make full use of the investment tax credit generated by purchases or manufacture of new equipment is at a competitive disadvantage vis-a-vis other lessors (A 1036-37, 1044).

In the late 1960's, Trans Union began a program of acquiring small companies in an effort to increase consolidated taxable income and thereby remain competitive by making full use of the potential tax benefits available to it (A 1037, 1041-42; B 1098). Investment tax credits may be accumulated for up to five years, but are lost forever if not used within the five-year accumulation period. In the mid-1970's, Trans Union was accumulating unused investment tax credits at a rate which would preclude their use within five years. (A 1039-40). In order to avoid loss of the credits, Trans Union reduced the amount of depreciation taken which in turn increased taxable income and permitted use of more investment tax credits (ibid.). Notwithstanding these efforts, the Company estimated that by the end of 1980 its accumulated unused investment tax credits would equal approximately $32 million (B 180).

In the late 1970's Trans Union joined with other capital intensive companies in an effort to persuade Congress to make the investment tax credit refundable in the form of a cash payment to those taxpayers that did not have sufficient taxable income to use all of the credit (A 1043). Jerome Van Gorkom, Trans Union's Chairman and Chief Executive Officer, testified and lobbied in Washington during the summer of 1980 for refundability and against further accelerated depreciation, but by the end of August he was convinced that Congress would not accept the concept of refundability and was going to enact legislation that would further accelerate allowable depreciation (A 1043-47, 1052-53, 1069). Were this to occur, it would have only exacerbated Trans Union's competitive problems arising from its inability to generate enough taxable income to take full advantage of accelerated depreciation and utilize available investment tax credits (A 1045).

Upon returning from his unsuccessful lobbying efforts, Van Gorkom met on August 27, 1980 with senior Trans Union management, including Bruce Chelberg, who was the President, Chief Operating Officer and a Director of the Company, Sidney Bonser, an Executive Vice President who was also a Director of the Company, and Donald Romans, the Chief Financial Officer (A 1053). Van Gorkom described Congressional reaction to his lobbying efforts and his belief that an increase in the allowable rate of accelerated depreciation would be enacted (A 1054-55, 1070). It was commonly accepted by most businessmen that depreciation allowances would be "dramatically" increased (B 1099-1100). He explained that Trans Union's historical solution to the problem of unused investment tax credits, which had been to acquire relatively small income producing companies, would no longer be adequate (A 1054). Small acquisitions not only would not produce enough taxable income to solve the problem, but would also be difficult to manage (A 1055). The scope of the problem was heightened by the fact that Trans Union's position as a leader in the industry was being challenged by new competitors who were entering the rail car leasing business because they had large amounts of taxable income to shelter (A 1062, 1271).

One possible solution was for Trans Union to make a major acquisition that would generate $150 million additional taxable income, which Van Gorkom estimated would be sufficient to enable the Company to take full advantage of accelerated depreciation and investment tax credits (A 1055). However, the cost of acquiring a company that generated taxable income of $150,000,000 would be approximately $750,000,000, which was more than Trans Union itself was worth (A 1075). As William B. Johnson, a director of Trans Union and the Chairman and Chief Executive Officer of IC Industries, Inc., testified, there "was no conceivable way" that Trans Union could make an acquisition that would produce enough income to solve the investment tax credit problem because the acquired company would have to be larger than Trans Union itself (B 1104).

The improbability of Trans Union being able to make an acquisition of that magnitude was heightened by the historic low price/earnings ratio of Trans Union's stock and the Company's highly leveraged position, which precluded substantial additional borrowing to finance a major acquisition (A 1073-74; B 1104-05). Even if such an acquisition were possible, it might change the investing public's image of Trans Union into something other than a leasing company, an image which could lower the market price of Trans Union stock (A 1054-55). Also, increased accelerated depreciation would not enhance the investing public's perception of the value of Trans Union stock (B 1101). For these reasons, additional acquisitions by Trans Union of a magnitude sufficient to remove the probability of a worsening competitive disadvantage were not feasible.

The most realistic solution to the problems created by an increase in the rate of allowable depreciation, by unused and soon to be lost investment tax credits and by new competition that had large amounts of taxable income, was the sale of Trans Union to a company which could fully utilize Trans Union's existing and potential tax benefits (A 1055-56, 1061; B 1446). During a discussion at the August 27 management meeting of the possibility of selling Trans Union, the Chief Financial Officer, Donald Romans, stated that he had made some preliminary calculations aimed at determining an appropriate selling price (A 1067-68). Romans assumed that a purchaser of Trans Union would use the Company's substantial cash flow to service a loan, the proceeds of which would be used to finance a substantial part of the purchase price (A 1067-68). Romans concluded that the size of the loan required to finance the purchase of the Company at an assumed price of $50 per share could be easily serviced from cash flow, that $60 per share would be "doable, but harder" and that $55 per share would be "somewhere in the middle" (ibid.; B 1533).

At the August 27 meeting, Romans also "raised the concept" of a leveraged buyout (A 1063) which, in the context used by Romans, meant an acquisition which would be financed with a relatively small equity contribution by existing management and a large borrowing secured by the assets of the acquired company (A 1064). Existing management would obtain a substantial share of the newly purchased company in relation to the share of the Company they owned prior to the acquisition (A 1065). Mr. Romans told those present that he had learned about the concept in a financial article about the leveraged buyout of a company named Houdaille which had been arranged by Kohlberg, Kravis, Roberts & Co. ("KKR"), a firm specializing in such transactions (A 1063; PB 8). At the meeting, Van Gorkom expressed his concern with the concept of a leveraged buyout because of the conflicts of interest which he perceived in that type of transaction. Van Gorkom believed that if Trans Union were to be sold in a leveraged buyout, the members of management involved would be interested in obtaining a lower price rather than the best possible price for the Company, and in discouraging other offers (A 1066; B 1527).

For the next several days after the August 27 meeting with senior management, Van Gorkom considered the possibility of Trans Union being acquired by another company (A 1076-77). He had participated in over forty acquisitions in his career at Trans Union and as a director of other companies and was very familiar with acquisition procedures, valuation methods and negotiations (A 1077). Van Gorkom first weighed the merits and likelihood of being acquired by a public company as opposed to a private purchaser (ibid.). The obvious advantage of an acquisition by a public company was the possibility of an exchange of stock that would defer the stockholders' liability for capital gains taxes (ibid.). Van Gorkom, who owned 60,000 shares of Trans Union with a low tax basis and options to purchase an additional 15,300 shares (A 1068, 1235-36), would have preferred a stock-for-stock acquisition by a public company (A 1077-78).

On the other hand, there were several factors that reduced the likelihood of such a transaction with a public company. First, Trans Union's debt/equity ratio of more than 60% was very high when compared with companies in other industries, which meant that an acquisition of Trans Union would increase the debt/equity ratio of most potential acquirors (A 1081-82). Another obstacle to a merger with a public company was Trans Union's low earnings as compared to the price which an acquiror would have to pay for Trans Union, which would be likely to dilute the earnings per share of the acquiring company (A 1079, 1273). For these reasons, Van Gorkom believed that a public company would not pay as much for Trans Union as would a private company (A 1273).

Moreover, there were certain advantages to exploring, on a preliminary basis, the possibility of the sale of Trans Union to a private company before exploring sale to a public company. One of Trans Union's strong points was its cash flow, generated primarily by its leasing operations (A 1082). Cash flow is most valuable to a private company which, unlike a public company, need not be concerned with debt/equity ratios, price/earnings ratios or dilution of earnings resulting from an acquisition (A 1083). In addition, access to the owner of a private company who would understand Trans Union's cash flow and potential tax benefits was readily available through Jay A. Pritzker,* a business and social acquaintance of Van Gorkom (A 1083-85). Van Gorkom was confident that discussing a possible sale of Trans Union with Pritzker would be, at the very least, informative preparation for discussions with the owners or management of other potential purchasers (A 1083, 1085).

In preparation for a possible meeting with Pritzker, Van Gorkom directed Trans Union's Controller, Carl Peterson, to calculate whether it would be reasonable for a purchaser to buy Trans Union for as much as $55 per share, or a total price of $690,000,000 (A 1087-88). The calculations by Peterson assumed that a purchaser would contribute $200 million in equity and would borrow the $490 million balance at an interest rate of 14% (A 1088, 1284). It was also assumed that the purchaser's loan would be repaid from Trans Union's cash flow and from the proceeds of sales of certain subsidiaries (A 1088). In making these calculations, Peterson used Trans Union's five-year forecast and a study of Trans Union that had been completed in the summer of 1980 by an independent business consultant, The Boston Consulting Group (A 1051-52, 1087).

Van Gorkom was disappointed to learn that Peterson's calculations revealed that a $490 million loan could not be paid off in five years and that there would be an unpaid balance of $50 to $80 million at the end of the five-year period (A 1089, 1284). This meant that it would be difficult to sell Trans

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* Jay A. Pritzker will be referred to hereafter as "Pritzker." His brother will be referred to as Robert Pritzker.

Union at a price as high as $55 per share (A 1089-90). Notwithstanding Peterson's discouraging calculations, Van Gorkom scheduled a meeting with Pritzker for September 13, 1980.

B. The Events of September 13-19*

On September 13, 1980, Van Gorkom and Pritzker met at Pritzker's home for approximately two hours (A 1090, 1095; B 1310). Van Gorkom told Pritzker that he wanted to explore a transaction whereby the Pritzkers, or someone like them, would agree to buy Trans Union but, in order to be sure that the very best price was obtained, Trans Union would be free to accept any better offer (A 1310, 1336). Van Gorkom then reviewed Peterson's calculations with Pritzker and indicated that he thought $55 per share would be a fair price for Trans Union's stock (A 1093; B 1331, 1336). Pritzker indicated that the price looked high to him and inquired as to whether Van Gorkom would consider $50 per share. Van Gorkom indicated that he would not (A 1094-95; B 1311).**

Pritzker also questioned the concept that, were an offer made, Trans Union would nonetheless be free to accept a better offer. He said he would not want to be a "stalking horse" just to permit a potential bidding contest (B 1310). Pritzker advised Van Gorkom that the only way he could see the Pritzkers

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* Plaintiffs incorrectly state that "by September 14, 1980, Mr. Van Gorkom had decided (1) against approaching General Electric" (PB 9). In fact, GE was not in the picture until November, 1980, its interest having been sparked by Pritzker's offer and Salomon Brothers' search. See pp. 35-39, infra.

** Plaintiffs claim that Pritzker "conceded" that Van Gorkom's method was "rather unusual" (PB 11). In fact, Pritzker testified that the structuring of the transaction was "very intelligent" and that "one of the things that was quite unusual was I haven't run into many CEO's who view their constituency completely to be their shareholders. His [Van Gorkom's] only interest seemed to be to get the absolute best price he could for his shareholders...." (B 1315).

making an offer under the conditions Van Gorkom insisted upon would be if Trans Union would permit the Pritzkers to buy 1,750,000 shares at the market price, which at that time was about $37 per share so that, if someone made a higher bid, the Pritzkers would at least have some compensation for having issued what amounted to a "put" to Trans Union (B 1312). In Pritzker's mind, the proposal amounted to a "put" because during the 90 to 120 days estimated to be required to gain necessary approvals for the merger, the Pritzkers would be contractually obligated to consummate the merger while Trans Union would be free to accept a better offer (A 1103-04). The September 13 meeting concluded with Pritzker indicating to Van Gorkom that he would think about their discussion and call him back (A 1095; B 1312).

On Monday, September 15, Pritzker called Van Gorkom and advised that the Pritzkers were interested in pursuing the matter further (A 1095; B 1312-13). A meeting was then held on Tuesday, September 16, in New York City attended by Van Gorkom, Chelberg and Pritzker. At that meeting, which lasted for approximately four hours, Van Gorkom and Chelberg responded to numerous questions from Pritzker relating to the operations of Trans Union (A 1096-97). At the conclusion of the meeting, Pritzker inquired as to how he would be able to learn more about the Company. Chelberg then suggested that Trans Union make Michael Carpenter, the representative of The Boston Consulting Group who had been advising Trans Union, available to the Pritzkers (A 1097-98). On Wednesday morning, September 17, Chelberg, Van Gorkom and Pritzker met for two hours with Carpenter (A 1099). Pritzker and Carpenter then flew back to Chicago, and on Thursday and Friday Carpenter met with members of the Pritzkers' staff to consider the situation in further detail (A 1099; B 1353). On the afternoon of Thursday, September 18, Van Gorkom met again with Pritzker to talk about Trans Union (A 1100). It was only after that meeting that Van Gorkom became convinced that Pritzker was going to make an offer to acquire the Company (ibid.).

On Friday, September 19, attorneys for the Pritzkers and Trans Union began drafting merger documents (A 1101-02). That afternoon, Van Gorkom and the Pritzkers met with representatives of Continental Bank who indicated that they thought the bank could put together a group to provide the $450 million in financing at 14% interest which the Pritzkers had requested (B 1314). Throughout the week discussions had gone on between Van Gorkom and Pritzker relating to Pritzker's insistence that, were he to make an offer, it would have to include a requirement that Trans Union sell to GL or its designee 1,750,000 shares of Trans Union stock at the market price. In those negotiations, Van Gorkom sought to increase the price for the stock and to reduce the number of shares to be issued (A 1103-05; B 1359-60). By the close of business on Friday, September 19, Pritzker finally agreed to limit his demand to the issuance of 1,000,000 shares at $38 per share, which was slightly above the then market price of $37.25 (A 1105-06, 2228; B 1313).* Finally, Pritzker insisted that the Trans Union Board act on his merger proposal before the end of that weekend (B 1319).

C. Trans Union's Board of Directors

Trans Union's Board of Directors that considered the proposed merger consisted of ten men, five of whom were "inside" directors and five of whom were "outside" directors. The five "inside" directors were: Jerome W.

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* Pritzker testified that he did not believe he had been adequately protected even by the 1,000,000 share issuance, given not only the substantial expense and risk incurred by the Pritzkers in giving Trans Union a "put," but also the fact that the proposed transaction would, while it was pending, foreclose the Pritzkers from pursuing other opportunities that might arise (B 1313, 1317-18). Moreover, plaintiffs' statement that "[t]here was no negotiation on the price [with respect to the 1,000,000 shares]" (PB 12) is completely belied by the record. In fact, Van Gorkom persuaded Pritzker to pay $750,000 more for such shares than Pritzker had proposed.

Van Gorkom, Chairman and Chief Executive Officer; Bruce S. Chelberg, President and Chief Operating Officer; Sidney H. Bonser, Executive Vice President; William B. Browder, Senior Vice President - Law; and Thomas P. O'Boyle, Senior Vice President - Administration (A 2250-51).

Van Gorkom was a CPA and a lawyer when he joined Trans Union as its Controller in 1956 and, after holding various executive positions, became President and a Director in 1963 (A 1022-23, 1026, 1030). In 1978, Van Gorkom became Chairman of the Board of Directors (B 1445). At the time of the proposed merger, Van Gorkom had been the Chief Executive Officer of Trans Union for more than 17 years, and probably knew more about the Company than anybody else in the world (A 1086). Chelberg joined Trans Union upon graduation from law school in 1958 and held various positions until he became President, Chief Operating Officer and a Director in 1978 (B 1442-45). Bonser became President of Procor, Limited, Trans Union's Canadian rail car subsidiary, in 1964, became a Senior Vice President of Trans Union in 1972, and became Executive Vice President in 1978 (B 1417-20). He was first elected to the Board of Directors in 1969 (A 2250). William Browder, also an attorney, joined Trans Union in 1948, became the Company's General Counsel in 1952 and became Senior Vice President - Law in 1978 (B 1427-29). Browder was first elected to the Board of Directors in 1955 and served continuously thereafter (B 1430). Thomas P. O'Boyle, also a law school graduate, joined Trans Union in 1958, served as its Treasurer, Group Vice President, Senior Vice President - Administration, and became a Director in 1968 (B 1515-19). Thus, when the merger was proposed, Trans Union's five "inside" directors had collectively been employed by the Company for 116 years and had 68 years of combined experience on the Board of Directors.

The five "outside" directors included four chief executives of major corporations and a distinguished educator in the field of economics. The educator, W. Allen Wallis, is Chancellor of the University of Rochester and the former Dean of the School of Business at the University of Chicago. At the time of the merger, Wallis was also a director of Bausch & Lomb, Eastman Kodak Company, Metropolitan Life Insurance Company and Standard Oil Company (B 1541-42). William B. Johnson is the Chairman and Chief Executive Officer of IC Industries, Inc., a Chicago based conglomerate with annual sales of more than $4 billion, whose subsidiaries include Illinois Central Gulf Railroad, Midas Muffler Company and Pet, Incorporated (B 1084-87). Johnson, the Chief Executive Officer of IC Industries since 1966 and a director of Trans Union since 1969, is a law school graduate who worked in the law department of the Pennsylvania Railroad and was President of Railway Express Agency before joining IC Industries (ibid.). Joseph B. Lanterman was the Chairman and Chief Executive Officer of Amsted Industries, Incorporated, a Chicago based steel manufacturer and supplier to the railroad industry, from 1958 until he retired in 1980 (A 2251; B 1496-99). He became a director of Trans Union in 1976 (B 1498). Lanterman, at the time of the merger, was also a director of International Harvester Company, Illinois Bell Telephone Co., Kemper Insurance, the Midwest Stock Exchange and Harris Bank and Trust Company (B 1498-99). Graham J. Morgan, who was elected to Trans Union's Board in 1979, became the Chief Executive Officer in 1961, and the Chairman in 1971, of United States Gypsum Company, a major supplier of building materials and industrial products (A 2251; B 1514). Robert W. Reneker, at the time of his death in April of 1981, was the retired Chairman of Esmark, Inc., formerly Swift & Company (B 1087). Reneker had been the Chief Executive Officer of Esmark since 1968 and a director of Trans Union since 1971 (A 2251; B 1520). Thus, at the time the merger was proposed, Trans Union's outside directors had 78 years of combined experience as chief executive officers, and 53 years of cumulative service as Trans Union directors.*

Trans Union's directors were regularly provided with detailed reports of the Company's operations (A 1071; B 1142-43). Those reports included a monthly operations report, quarterly report, dividend report, annual review and a five-year forecast that was revised every year (A 1071; B 1088-90). As Johnson testified:

> Mr. Van Gorkom, as the chief executive, was a CPA, former controller of the company. And I must say that the reports, the business reports at Trans Union were far more detailed than any director normally has, in my opinion. They are more detailed than we give our directors, I am afraid. (B 1090-91).

The problems created by accumulated investment tax credits and accelerated depreciation were discussed "repeatedly" at Board meetings, and all of the directors of Trans Union "understood the problem thoroughly" (A 1047-48; B 1421-22). The directors were informed of the problem "ad nauseum" and were confronted with it in connection with every annual review and every five-year forecast (A 1071, 1115; B 1099). Moreover, with each acquisition that was made by Trans Union during the 1960's and 1970's, there was extensive discussion at Board meetings of the problem of generating more taxable income to permit use of the investment tax credit (A 1038). Van Gorkom's unsuccessful efforts to

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* In light of these credentials, plaintiffs' suggestion that Trans Union's directors were not independent is absurd (PB 5). Plaintiffs' observation that the Board never voted down a proposal made by Van Gorkom, except for a merger that was proposed in 1968 (PB 5) is disingenuous. As explained by Johnson, if Van Gorkom sensed that the directors were not in favor of a proposal, he would either abandon, modify or defer decision on the proposal, after obtaining the benefit of the informed judgment of the directors, because that was the productive and efficient way to run a large company (B 1142).

interest Congress in the concept of refundability of unused investment tax credits and the probability of an increase in the rate of allowable depreciation were well known by Trans Union's directors in 1980 (A 1048, 1052, 1071). As Johnson testified, there was no need to study the problems created by the investment tax credit and accelerated depreciation because they were matters which had been the subject of continuous discussion and consideration (B 1168-69).

As of September, 1980, the Board was particularly well informed about Trans Union and its prospects. At the July, 1980 Board meeting, the directors, in addition to the other information regularly supplied to them by Trans Union, had reviewed Trans Union's newly prepared five-year forecast (A 1116, 1883-1909; B 1091). At the August, 1980 Board meeting, Van Gorkom presented the results of a comprehensive study of Trans Union made by The Boston Consulting Group, a highly regarded firm of independent business consultants (A 1108; B 1092-93). The study was prepared over a period of about 18 months and consisted of a detailed analysis of all Trans Union subsidiaries, including competitiveness, profitability, cash throw-off, cash consumption, technical competence and future prospects for contribution to Trans Union's combined net income (A 1050-52; B 1092-94, B 1-145,* 351-851, 853-1075). Armed

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* Plaintiffs cite one volume of the study made by The Boston Consulting Group as standing for the proposition that "TU's problem, if it actually had one in August 1980, was how best to utilize the huge amount of cash it produced (PX-17)" (PB 4-5). The cited exhibit, PX-17, is actually a reproduction of 139 slides (B 1-145), none of which supports plaintiffs' proposition. Moreover, the slides are prefaced by the following admonition:

> The following are reproductions of slides prepared by The Boston Consulting Group for discussion with members of Trans Union Corporation during June and July 1980. The slides are incomplete without the accompanying oral comments, thus they will be fully meaningful only

(Footnote cont'd. on next page.)

with this wealth of business experience, complete and contemporary information about Trans Union, and lengthy service as directors of the Company, the Board met on September 20, 1980 to consider the Pritzkers' merger proposal.

D. The September 20, 1980 Senior Management Meeting And Board Of Directors Meeting

On the morning of September 20, 1980, Van Gorkom met with the senior executives of Trans Union, including the "inside" directors (except O'Boyle, who was hospitalized) (A 1107-1112). At that meeting, the Pritzker offer was discussed "at great length" (A 1115). Immediately after the meeting, the inside directors, accompanied by Romans, Peterson and William B. Moore (Trans Union's General Counsel) joined the five "outside" directors for a special meeting of the Board (A 1115). Also attending the Board meeting was James Brennan, a partner in the law firm of Sidley & Austin, Trans Union's outside counsel, who was asked to be present in order to explain the merger documents which he had helped draft (A 1129, 1132-33, 1328, 1347).*

At the Board meeting Van Gorkom reviewed all aspects of the proposed transaction and repeated the explanation of the Pritzker offer that he

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(Footnote cont'd. from previous page.)

> to those who were in attendance, and then only to highlight the key points.

(B 3). Plaintiffs also state that The Boston Consulting Group "report did not deal at all with alternate possible solutions to TU's problems in the 1980's" (PB 5). That statement is simply wrong. The very purpose of the work done by The Boston Consulting Group was to outline alternative strategies for the future (Defendants' Appendix, Tabs 1, 10-12).

* Plaintiffs suggest that the Chancellor should have drawn adverse inferences because defendants did not call Mr. Brennan as a witness (PB 16). However, plaintiffs fail to suggest what adverse inferences should have been drawn. In fact, Brennan specialized in corporate law and Van Gorkom knew he was experienced in drafting merger documents (A 1332). Plaintiffs never sought to depose Mr. Brennan.

had earlier given to senior management (A 1115-16, 1350; B 1522-23, 1424, 1447-48). The terms of the Pritzker offer, as explained by Van Gorkom, were: an offer to pay $55 per share in cash for all outstanding shares of Trans Union stock; the offer was subject to the Pritzkers obtaining the necessary financing by October 10, 1980; if the financing contingency were either met or waived by the Pritzkers, then Trans Union was required to sell, and GL (or a Pritzker designee) was required to purchase, one million newly issued shares of Trans Union stock at $38 per share; Trans Union could receive, but could not actively solicit, competing offers; only published information would be furnished by Trans Union to potential competing bidders; and the Pritzker offer had to be acted upon by Sunday evening, September 21 (A 1136; B 1109-11, 1183).

The financing contingency was not considered to be of any significance because the Pritzkers' financial standing was well known to the directors and they never doubted that the Pritzkers would be able to obtain the necessary financing (B 1109, 1216). Similarly, the contract to purchase one million shares was viewed as being an alternative to the usual practice of an acquiror making preliminary purchases of shares in the open market to protect his exposure and commitment and as consideration for the Pritzkers making an offer against which others could bid (A 1102-04, 1325; B 1115-16, 1248, 1448). Moreover, because the agreement with respect to the million shares was a contract and <u>not</u> an option, Trans Union had the right to require the Pritzkers to purchase the million shares at $38 per share even if, for instance, no merger were consummated and the market price for Trans Union stock fell below $38 (A 2291-92).

It was understood that the one million share purchase would not reduce the amount received by Trans Union's stockholders if the Pritzkers were the successful bidder (B 1117, 1249). Moreover, the Board concluded that the one million share purchase by the Pritzkers would not be a deterrent to other potential bidders, a conclusion that was later confirmed by the fact that none of the potential purchasers contacted expressed any concern about the one million shares (B 1118-19, 1466-67, 1511). It was recognized that a competing bidder would have to purchase an additional one million shares, but a successful bidder would receive the $38 million paid to Trans Union for the shares by the Pritzkers. Thus, a competing bidder would be required to pay $17 million more than the Pritzkers to equal their offer ($55 less $38 times one million shares equals $17 million). However, in the context of a $690 million transaction, that additional $17 million payment was believed to be so de minimis as not to be a deterrent. (B 1118-19).

The deadline imposed by the Pritzkers for action on their offer did not inhibit the exercise of informed business judgment by the directors, all of whom were very familiar with the financial condition of and future prospects for the Company (B 1119-20, 1217). The deadline was an express condition of the Pritzkers' offer, and the directors believed that the offer would be withdrawn if not acted upon (A 1117; B 1119-20, 1218, 1423, 1470-71, 1500).

The condition prohibiting active solicitation of competing offers was not deemed to be significant, because the directors understood that the entire financial community would know that Trans Union was for sale upon the announcement of the Pritzker offer, and anyone desiring to make a better offer was free to do so (A 1134-35; B 1259, 1450, 1544-45).* In any event, that condition became academic when it was removed three weeks later on

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* Jay Pritzker, whose financial acumen has been acknowledged even by plaintiffs, testified that he "assumed that all investment banking firms would have their pencils out Monday morning, and start to approach their customers to see whether they could interest them in making a better offer" (B 1319).

October 8, 1980 and Trans Union issued a press release stating that it was soliciting other bids (A 1146-47; B 299).

Having heard Van Gorkom's explanation of the Pritzkers' offer, and Brennan's explanation of the merger documents, and having fully discussed the matter, the directors did insist upon two interrelated modifications to the Pritzker proposal (A 1132-33, 1365-66; B 1114).* First, they required that any potential competing bidder be given access to the same information concerning Trans Union that had been provided to the Pritzkers, including unpublished information (A 1133; B 1114, 1431, 1434, 1449, 1529-30). Second, the merger documents were to be modified to reflect the fact that the directors could accept a better offer and would not be required to recommend the Pritzker offer if a better offer were made (A 1133, 1372, 1387, 84; B 1114, 1240-41, 1432-35, 1529-30). The following underlined language was inserted in the supplemental merger agreement to accomplish the second modification:

> The Board of Directors of TU shall recommend to the stockholders of TU that they approve and adopt the merger agreement (the "Stockholder Approval") and shall use its best effort to obtain the requisite vote therefor; <u>provided, however, that GL and NTC acknowledge that the Board of Directors of TU may have a competing fiduciary obligation to the Stockholders under certain circumstances</u>. (Underlining added)

(A 1940, 1387; B 1240-41).

Van Gorkom testified that he understood that the directors' fiduciary obligation to the stockholders gave them the right to accept a better offer even if that right were not specifically reserved in a merger agreement (A 1386). However, the above quoted, underlined language was added to the merger documents to "make specific the right that the directors assumed they already

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* Plaintiffs charge that there is "nothing in the record" to show that modifications were insisted upon (PB 28), ignoring the uncontradicted sworn testimony of five different witnesses cited herein. Moreover, the charge that the directors did not read the merger documents (PB 15-17) is meaningless in light of the fact that Brennan explained the terms of the merger, speaking from the documents (A 1132-33, 1346-47).

have; namely, always to accept an offer that they thought was better, and not to recommend the Pritzker offer" in the face of a better one (A 1388; B 1377). Even if, as suggested by plaintiff, the above quoted language was ambiguous, Johnson testified that there was no doubt "what the Board intended to do and what we voted on" (B 1243). "We approved and recommended the Pritzker proposal subject to the right to receive and substitute a recommendation of a better offer" (B 1247). Pritzker also understood that Trans Union would have the right to accept the best offer, if there were competing offers, and that the Trans Union Board would be required to accept and recommend the highest offer (B 1319-20, 1375). Moreover, a tender offer by another bidder could have been made at any time either with or without the Board's approval, recommendation or cooperation (A 1391).

Thus, the primary issue considered by the directors at the September 20, 1980 special meeting was the fairness of the offered price. The basic question was not whether $55 per share was the highest price that could be obtained (A 1113, 1358), but rather whether it was a fair price that the stockholders should be given the opportunity to accept or reject (A 1113-14, 1117, 1130, 1358; B 1171-72). The directors' repeated answer to that question was that $55 was not only a fair price, but was also a "good" price that should be recommended to the stockholders (A 1117, 1358; B 1112, 1172, 1208). As Browder, who owned more than 19,000 shares of Trans Union stock (A 2250), testified:

> And I felt that in my own thinking and knowledge of the Company operations and its financial results, that while I couldn't say that there is no single dollar price which is the only fair price, this would certainly be a fair price to me.

(Browder Dep., p. 156). As Johnson testified, the price offered by the Pritzkers was "far beyond" any proven or prospective performance of the stock, and represented a good multiple and a good premium (B 1112). Johnson also believed that "...it would have been absolutely unconscionable of the Board not to submit [the proposed merger] to the shareholders for a vote..." (B 1228). The directors recognized that the offered price would be tested in the market for at least three months (A 1117-18, 1359-60; B 1172, 1208). Johnson described the terms of the offer as "the best of both worlds" because the Pritzkers had offered "a very good price" while Trans Union retained the right to sell to a higher bidder if one were forthcoming (B 1113-14). However, regardless of whether any other offers were received, the judgment of the directors was that the Pritzker offer was "fair" (B 1136). Plaintiffs' contrary claim that such a judgment was not made (PB 27) is squarely and repeatedly contradicted by the record.

Finally, plaintiffs' contention that the Board did not consider whether to obtain an opinion from an investment banker (PB 21) is directly contradicted by the record. One of the specific questions raised at the September 20 Board meeting was whether it was desirable or necessary to obtain an opinion as to the fairness of the proposed merger from an investment banker (A 1129). Brennan, Trans Union's outside counsel, who explained the merger documents to the directors at the meeting, opined that a fairness opinion was not required as a matter of law (A 1118, 1129; B 1436, 1501-06). Van Gorkom and Johnson concluded that a fairness opinion was unnecessary because the market would have at least three months to confirm the directors' judgment that $55 per share was a fair price (A 1130; B 1122-23). Also, the directors, who knew Trans Union intimately, were in a better position than an investment banker to determine the fairness of the offered price (B 1122, 1502).*

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* Plaintiffs' charge that the directors were not qualified by training or experience to determine the value of Trans Union (PB 17) is nonsense in light of the directors' qualifications and experience described herein. In contrast with plaintiffs' expert, Meigs, who had less than one month to acquaint himself with Trans Union before reaching his conclusion, Trans Union's directors had 194 cumulative years of experience as executives and 121 cumulative years experience as Trans Union directors.

At the conclusion of the meeting, the proposed merger was approved by a voice vote of the directors with no indication of opposition (A 1132; B 1451, 1472-1508).* Although the directors believed at the conclusion of the September 20 meeting that a final decision had been made, subsequent events were such that the proposed merger remained under consideration until January 26, 1981, when the entire matter was reviewed and the decision to recommend the merger was unanimously reaffirmed.

E. The Reaction Of Senior Management And The October 10 Amendment To The Merger Agreement

Approximately ten days after the merger was announced, Van Gorkom was advised by Browder that there was dissent among some of the officers of Trans Union with respect to the Pritzkers' merger proposal and that if the Board's approval of the merger were not rescinded, those officers were threatening to leave the Company (A 1137). Thereafter, Van Gorkom met with a number of the executives to ascertain the reasons for the discontent.

The apparent motives for the position taken by the dissatisfied members of senior management varied. Some, particularly those who were interested in a leveraged buyout, expressed the opinion that the merger price of $55 was too low (A 85). Some were opposed to the idea of "going private"; they wanted Trans Union to remain a public company (A 1143). Others thought that the $55 offer by the Pritzkers was "fine" as far as the shareholders were

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* Sidney Bonser, who approved the minutes of the September 20 Board meeting which reflected a unanimous approval by the directors of the merger, stated sometime after the meeting that he had remained silent when the vote was taken (B 1452). However, at the January 26, 1981 Board meeting, when each director was polled individually, Bonser voted in favor of the proposed merger (A 1205).

concerned, but felt insecure about losing their jobs, and did not like the idea of having a new boss (A 1143; B 1453). Some had bruised egos because they had not been consulted during the negotiations (B 1425-26). Still others had heard that it would be difficult to work for the Pritzkers and were upset about that (A 1143-44). One man, William Devers, who ran Trans Union's credit reporting division, wanted to buy that business from Trans Union and apparently felt it would be more difficult to purchase it from the Pritzkers (A 1144).* There were other reasons for senior management's apparent dissatisfaction, including the fact that the Pritzkers did not grant stock options (B 1262).

Among those upset with the proposal was Jack Kruizenga, who headed Trans Union's rail car leasing operations (A 1137). Van Gorkom and Chelberg met with Kruizenga, who explained that he wanted to work for the Company just as it was and did not want anyone else to own it (A 1138). Kruizenga also indicated that if the transaction went through he was going to leave and try to take some of his people with him (A 1139).**

After meeting with Kruizenga, Van Gorkom called Pritzker and explained that 15 to 20 people in the Company's top executive group were upset about the proposed merger and were threatening to quit, including Kruizenga, who would be particularly difficult to replace (A 1137). As a possible solution to the problem, Pritzker stated that he would be willing to agree to

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* Devers believed the Company's obligation was primarily to its employees, secondly to its customers, and lastly to its shareholders. Van Gorkom told Devers, "Well, we don't agree with that" (A 1144). Price formed no part of Devers' objection (B 1535).

** No part of Kruizenga's objection was based upon dissatisfaction with the merger price (B 1475-76).

amendments to the merger documents which would give Trans Union the right to affirmatively solicit other bids and would extend until February 10, 1981, the date upon which Trans Union was required to present the merger proposal to its stockholders (A 1139-40; B 1328-29).*

On October 4, 1981, Van Gorkom met with the key executives of Trans Union. He apologized if in fact the merger proposal had upset those present and advised of Pritzker's willingness to give Trans Union additional time to seek affirmatively a better offer for the Company (A 1142; B 1477). After meeting among themselves, the executives advised Van Gorkom that they thought the proposed amendments were fair and that they would agree that if the transaction did eventually result in a purchase by the Pritzkers, they would stay on for at least six months to see what it was like working under the new owners (A 1141-43).

On October 8, 1980, the Trans Union Board met to consider the proposed modifications to the merger agreement and to decide how Trans Union was going to proceed with regard to obtaining additional bids (A 1146; B 1124-25, 1454, 1473-74). At that meeting Van Gorkom explained and the Board discussed the circumstances which gave rise to the proposed amendments. There was also discussion as to whether an investment banker should be retained to solicit bids (A 1146-47; B 1123-27). The Board authorized Van Gorkom to negotiate and

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* Pritzker was not particularly concerned about the proposed amendment to permit Trans Union to solicit bids, since he had assumed that there would be vigorous activity in the investment banking marketplace in any event. However, he was very much concerned by the extension of time from early January until February 10, because it meant that the Pritzkers' "put" would be extended for an additional month, during which time they would be subject to the vicissitudes of the marketplace (B 1329). Moreover, the extension of time until February 10 was closer to the March 31 deadline when the Pritzkers' $450 million line of credit at a fixed interest rate would expire (B 1329).

execute on behalf of the Company amendments to the merger documents providing that Trans Union would be permitted until January 31, 1981 to actively solicit other offers for the acquisition of the common stock or assets of Trans Union and giving the Board the right, under certain circumstances, to terminate the agreements with the Pritzkers. The Board also authorized Van Gorkom to retain the services of an investment banking firm to assist Trans Union in obtaining a more favorable offer (B 1127). Van Gorkom sought and received the Board's views as to what particular investment banker should be retained, and a decision was made to approach Salomon Brothers to determine if they would accept the assignment (A 1146-47; B 1127-28).*

On October 9, 1980, Trans Union issued a press release placing the investment community clearly on notice that Trans Union was up for bid:

> Trans Union also reported that certain amendments have been made to the existing merger agreements. Under these amendments, Trans Union is permitted to actively seek other offers for the Company and it has retained Salomon Brothers to assist in this effort. If a more favorable offer is not received by Trans Union before February 1, 1981, then it is planned that the shareholders will meet in early February to vote on the existing proposal.

(B 299).

F. Trans Union's Unfettered Right To Solicit And Act Upon Better Offers

Plaintiffs, in what at this late date can only be viewed as a deliberate attempt to misstate the record, repeatedly mischaracterize the terms of the

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* Plaintiffs assert that "no explanation has ever been given" as to why Salomon Brothers was not asked by the Board to render a fairness opinion (PB 35, Note-1). Not only was no such explanation sought in the pages of the record cited by plaintiffs, but plaintiffs ignore the extensive testimony of Van Gorkom, Johnson, Browder and Lanterman that a fairness opinion was superfluous given the superior test of the marketplace to which the offer was to be subjected (A 1130; B 1122-23, 1437-40, 1502-06).

merger documents in asserting that they did not give to Trans Union the unfettered right to solicit, accept and recommend to shareholders better offers and in suggesting that the merger documents did not reflect the Board's understanding of the transaction it had authorized. (See PB 25-30, 32-34).

As of September 20, 1980, both Trans Union's Board and the Pritzkers understood that Trans Union was free to receive other offers. As Van Gorkom testified, he stated to Trans Union's Board at the September 20 meeting:

> [I]f the board agrees to send this to the stockholders for their decision, an announcement will be made to the public, will have to be made of this fact. And at that point then the $55 price will be announced to the world, and it will be known to the entire investment world that the Pritzker family is willing to pay $55 in cash for all the stock of Trans Union. It would be at least 90 days before the stockholders vote, and probably not until the first part of next year, in early January, and I said that during that entire period that price will be out as a target where anybody who thinks it's too low can shoot at it, come in with a better offer. I said, "So that by the time we actually send out the proxy statement this $55 price is going to have stood the test of the market, and in the last analysis it is the market that really determines price, not what the people may think it is. No matter how elaborate the calculations they [investment bankers] adduce to support their estimate of what the market value should be, in the last analysis something is only worth what somebody is willing to pay for it."

(A 1114-15).

After the merger documents were explained by Brennan at the September 20 Board meeting, Trans Union's directors, as previously noted, insisted on the addition of language to reflect Trans Union's right to accept and recommend any better offer that might subsequently be made. See pages 24-25, supra. That there was a meeting of the minds between the parties as to the meaning of the additional language is clear from Pritzker's testimony about the change:

Q. [By Mr. Prickett] In your opinion, did it not add or detract from the deal one way or the other?

A. I couldn't see that it made any difference. I always understood that if a higher bidder was found, that they were free to recommend that higher bid.

Q. Now, was it your understanding that the contractual document, with or without the addition of this language, permitted the TU board to accept a higher bid?

A. Yes.

Q. And just so that I am clear on this, did you feel that it was permitted under the terms of the contract or, as Mr. Van Gorkom said, that the board always had the right to accept a higher bid, no matter what the contractual documents said?

A. Yes. They don't accept. They recommend. And they would, of course, recommend a higher bid. How could they recommend $55 if somebody was willing to pay $56?

Q. So that it was your view of the original deal that if the board authorized the officers to get into this contract, that the board was still free to withdraw its adherence to that contract and enter into a contract that had a higher price, for instance, $60?

A. They could withdraw their recommendation and recommend a higher price, yes.

Q. And get into another merger agreement that had a higher price; is that right?

A. I imagine they could.

Q. Well, is that what you thought the contract was?

A. Yes, I would think they could.

(B 1375-76). Thus, there is simply no basis for plaintiffs' claims that the merger documents executed on September 20 as understood by both parties to the transaction did not permit Trans Union's Board to withdraw its recommendation of the Pritzker proposal and both accept and recommend a higher proposal. The undisputed facts are to the contrary.

The October 10 amendments to the merger documents not only gave to Trans Union the right to solicit as well as receive higher bids, but also set forth in detail the parties' original understanding of Section 2.03(a), which Section was amended to read as follows:

> (a) Prior to February 1, 1981, the Board of Directors of TU intends to solicit and shall have the right to obtain other offers that it might accept in lieu of the Merger Agreement. In order to obtain such offers, the Board of Directors of TU expects to engage in discussions and negotiations with third parties, and expects to engage the assistance of investment banking advisors to assist it in soliciting third parties interested in making such offers and conducting discussions and negotiations with such third parties. If as a result of such discussions and negotiations, the Board of Directors of TU receive an offer from any third party providing for a merger with or into or a consolidation with any third party, or a sale of the assets of TU substantially as an entirety to a third party, or there is a proposal made that a third party should acquire by purchase or exchange more than 45% of the then outstanding stock of TU (with a commitment by the offeror to acquire promptly the balance of such Common Stock by merger or otherwise), the Board of Directors of TU shall as promptly as practicable meet to consider such offer or proposal. If in the opinion of the Board of Directors such offer or proposal is more favorable to the Stockholders of TU than the Merger Agreement it shall promptly advise NTC and GL in writing of the nature of the proposal and of its opinion that such offer or proposal is more favorable to the Stockholders of TU than the Merger Agreement. Such obligation to advise NTC and GL in writing shall be independent of, and without prejudice to, whether or not the Board of Directors of TU has or may thereafter acquire or desires to exercise the right to terminate the Merger Agreement pursuant to Article V (e) thereof.
>
> The solicitation of such offers or proposals by TU and determinations with respect thereto by the Board of Directors shall not be deemed to constitute a breach of this Supplemental Agreement or the Merger Agreement provided that unless and until the Board of Directors of TU is entitled to and does exercise its right to terminate the Merger Agreement pursuant to Article V (e) thereof, it shall not (1) delay promptly seeking all consents and approvals required hereunder or under the Merger Agreement except that it shall be deemed to have complied with Section 2.03(b) hereof if it files its Preliminary Proxy Statement by December 5, 1980, uses its best

> efforts to mail its Proxy Statement by January 5, 1981 and hold a special meeting of its Stockholders on or prior to February 10, 1981, or (2) pay or become obligated for more than $500,000 in respect to the solicitation or disposition of other offers or proposals (including investment banker's fees and expenses) except for amounts that would not be payable if the Merger Agreement were consummated.
>
> The Board of Directors may (1) accept such offer or proposal provided that such acceptance does not preclude submitting the Merger Agreement to the Stockholders of TU for their approval unless it has been previously terminated and (2) may submit such offer or proposal to the Stockholders of TU for their approval with or without a recommendation of approval provided that not later than such submission it also submits the Merger Agreement to the Stockholders of TU for their approval. It is the present intention of the Board of Directors of TU to recommend the approval of the Merger Agreement to the Stockholders, unless another offer or proposal is made which in their opinion is more favorable to the Stockholders than the Merger Agreement. (Underscoring added)

(A 2130-32).

Pursuant to these provisions and consistent with the earlier understanding, Trans Union's Board was free to accept and recommend to its stockholders _any_ more favorable offer from a third party for a merger, consolidation or sale of assets. There were no restrictions whatsoever imposed by the Pritzkers relating to the conditions which might or might not appear in such a third party offer. The only requirement which the Pritzkers did insist upon was that their merger proposal be presented to stockholders simultaneously with that of any third party. Such a requirement, of course, was of no moment if another offer were perceived by Trans Union's stockholders as being better than the Pritzker offer (A 1409; B 1401-02).

In addition, the October 10 amendments amended Article V of the Merger Agreement to provide that Trans Union could unilaterally terminate the merger with the Pritzkers and avoid even submitting it to the stockholders if, on or prior to February 10, 1981, there existed a definitive agreement with a third party for a merger, consolidation, sale of assets or purchase or exchange of Trans Union stock which was more favorable than the Pritzker offer and which was conditioned only upon receipt of stockholder approvals and the absence of an injunction against its consummation (A 2127-28). It is this provision, which dealt only with the additional right conferred by the October 10 amendments to unilaterally terminate the Pritzker offer and in no way restricted Trans Union's right to accept or recommend better offers or withdraw its recommendation of the Pritzker offer, which plaintiffs mischaracterize as an "illusory" right to accept a better offer and recommend it to stockholders (PB 34). As the foregoing makes clear, that right was completely unfettered and, as discussed hereafter, Trans Union took full advantage of its rights under the amended merger documents to seek a better offer.

G. The Search By Salomon Brothers For Other Offers

Following the October 8 Board meeting, the investment banking firm of Salomon Brothers was retained by Trans Union to search for offers better than that of the Pritzkers. The mandate to Salomon Brothers, as stated by Jay F. Higgins, the partner in charge of the mergers and acquisitions department of Salomon Brothers, was to do "whatever possible to see if there is a superior bid in the marketplace over a bid that is on the table for Trans Union." (B 1458). Salomon Brothers was considered by the Trans Union Board to be the ideal choice to conduct such a search since, not only was it one of the most respected investment banking firms in the country, but it was also very familiar with Trans Union (B 1127-28).

The retention agreement between Trans Union and Salomon Brothers provided to Salomon Brothers an enormous financial incentive to obtain a better offer. Specifically, if the Pritzker merger proposal were ultimately consummated, the agreement provided that "Salomon shall be paid the amount of $500,000 and shall not be entitled to any reimbursement of expenses..." (A 2121). On the other hand, the agreement provided:

> If any Sale Transaction not involving an entity controlled by the Pritzker Family is consummated, Salomon shall be paid a fee equal to 3/8 of 1% of the aggregate fair market value of the consideration received by the company, in the case of the sale of assets, or by the stockholders of the company, in the case of a merger or consolidation or an exchange for or purchase of the Common Stock, and Salomon shall in addition be entitled to reimbursement of expenses.*

Ibid. Consequently, as the Chancellor noted in his opinion of February 3, 1981, if Salomon Brothers were able to obtain a merger proposal at a price of even $56 per share -- $1 above the Pritzker offer -- rather than receiving a flat fee of $500,000 it would receive a fee of roughly $2,650,000 plus disbursements. (A 217). Moreover, by reason of having purchased over 200,000 shares of Trans Union stock through its arbitrage operations, Salomon Brothers had yet another significant financial incentive to locate a better offer (A 1147-48).

Salomon Brothers conducted a thorough and extensive search for better offers. It assembled a team consisting of "several important Salomon Brothers' partners or employees" (B 1459) and involving about 50 Salomon Brothers' employees altogether (B 1457), to work on the assignment. As a first step, members of Salomon Brothers spent slightly over a week at Trans Union's corporate headquarters working with senior management of the Company to assemble a detailed offering brochure (A 1149-50; B 146-293). That brochure set forth Trans Union's financial history, described the Company's business in great

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* The agreement also provided that if a merger with a Pritzker entity at a higher price ultimately were consummated, Salomon Brothers would receive a fee based on 3/16 of 1% of the total consideration.

detail, and contained Trans Union's five-year operating and financial projections. The brochure stressed that Trans Union's Board "has not placed any limitation on the form of the offer or the type of consideration involved ... and a tax free transaction would be viewed very favorably." (B 152).

Based on reviews of various factors, Salomon Brothers compiled a list of over 150 companies which it concluded might be suitable merger partners for Trans Union (B 294-298, 1459, 1464-65). Thereafter it contacted each of those companies, either in person or by telephone, to determine if any interest in an acquisition of Trans Union existed, and many of those companies were given both the offering brochure and substantial additional information (B 1460-63). The extensive search by Salomon Brothers led to discussions between Trans Union and four companies, General Electric ("GE"), Borg-Warner, Bendix, and Genstar, Ltd. (A 88).* None of those companies, however, ever made a firm merger proposal to Trans Union and only GE showed sustained interest.**

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* Plaintiffs incorrectly suggest that discussions with companies other than GE occurred only after GE decided not to make an offer (PB 39, Note). In fact, such discussions began at least two months before GE decided not to make an offer (A 1158).

** As plaintiffs point out, Salomon Brothers was not involved in discussions with KKR (PB 36-37). That, however, was the wish of KKR:

> By Mr. Prickett:
>
> Q. And did you ask the Salomon Brothers to participate in the attempt on Mr. Romans' part to effect a transaction with KKR?
>
> A. (Van Gorkom) Did I ask them to participate in the KKR proposal in any way?
>
> Q. Yes.
>
> A. I wanted them to do so, and twice I recommended it to Mr. Romans that they deal with the Salomon people. But Mr. Romans did not want them to deal.

(Footnote cont'd. on next page.)

Discussions with GE began in November 1980 and continued through the middle of January 1981. Toward the end of that period, GE expressed an interest in acquiring Trans Union in a cash option merger whereby the shares of Trans Union common stock would be converted to GE common stock on a tax deferred basis at $57 per share, with shareholders having the option of receiving $57 in cash, or in a total cash merger at $60 per share (A 1462).* However, GE ultimately decided not to make an offer. Its stated reasons for not making an offer were that its analysts had advised that acquisition of Trans Union was inconsistent with GE's high technology image in the marketplace, and the fact that it did not want to get into a bidding war for Trans Union (A 1469, 2327).

In the course of the Salomon Brothers search, no one contacted by Salomon Brothers expressed concern about the feature of the proposed merger which required GL to purchase one million shares of Trans Union (B 1466).

(Footnote cont'd. from previous page.)

> His statement was, "We started this thing before Salomon Brothers was even soliciting and there is nothing they can tell the KKR people."

(A 1419-20).

Henry Kravis, a principal of KKR, similarly testified:

> I was dealing directly with the company already and there was no need to talk with Salomon Brothers.

(B 1492).

* While Van Gorkom was very interested in the possibility of such an offer, he was concerned that it was not viable. GE would have to have obtained clearance under the Hart-Scott-Rodino Act, which undoubtedly would have caused some delay during a period of record high interest rates, and which might have resulted in the apparently higher GE offer not being higher at all in light of the delay Trans Union stockholders would experience in obtaining the consideration for their stock. (A 1456-57).

Additionally, no one indicated that there was insufficient time in which to make an offer for Trans Union (B 1468-69).* Indeed, as Johnson testified:

> Q. In your view, was that period of time sufficient or insufficient, if you had a view?
>
> A. Quite sufficient.
>
> Q. And upon what do you base that judgment?
>
> A. Well, that would be three months, allowing time for the preparation of materials to the extent that was relevant. And for some solicitation there would not even need to be materials.
>
> But anyhow, it was two and a half to three months, depending on the parties being solicited.
>
> In a modern investment banking firm like Salomon Brothers the characteristics and the financial resources of all probable buyers would all be computerized, and the companies that can pay three-quarters of a billion dollars to buy a company like Trans Union always have -- I won't say always, but almost always, in my experience, have the resources and the personnel capable of coming to focus on something like this very quickly. If you don't have that resource, you don't do these deals.
>
> And most of us have those resources. We have the personnel. We have the know-how. And three months is just plenty of time.
>
> I think the Conoco-DuPont deal was done in about a month. It is really not all that difficult if you are serious and you have the money.

(B 1130-31).

H. <u>The Interest Of Kohlberg, Kravis, Roberts & Co.</u>

Shortly after the September 20 meeting at which the Board accepted the Pritzker offer, Van Gorkom learned for the first time that Romans and

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* Since the Pritzkers, without the assistance of an investment banker, were able to make a firm offer for Trans Union less than one week after first considering the matter, and since plaintiffs' own expert purported to have done a thorough analysis of Trans Union in two and a half weeks, it seems obvious that time would not have been a problem to a company with a serious interest in Trans Union.

Bonser were pursuing the possibility of a leveraged buyout, and that they had contacted KKR. At the October 8 Board meeting, the possibility of such a leveraged buyout first came to the attention of the Trans Union Board and the Board directed Van Gorkom to participate in discussions and meetings with KKR representatives (B 1536).

Van Gorkom thereafter twice traveled to the East Coast concerning a possible KKR proposal. On the first trip he met with KKR representatives to discuss the Company and its operations; on the second trip he met with representatives of the Continental Bank and Prudential Insurance Company, both of which were prospective lenders to the KKR group (B 1537-38, 1540). While plaintiffs suggest that Van Gorkom was adamantly opposed to the KKR proposal (PB 42), the only record testimony reflects otherwise. Kruizenga, for instance, said of Van Gorkom:

> He participated. I would have to say that he was very objective in that I didn't recognize at any time that he was ever being the obstructionist.

(B 1478). Indeed, Van Gorkom's disinclination personally to participate in a leveraged buyout was appreciated by those persons trying to put a KKR proposal together:

> This was viewed to be a very ... constructive position for Mr. Van Gorkom to take in connection with such an arrangement, because he could ensure the lack of material conflicts in any of these transactions relative to the position of management and the position of the board representing the shareholders.

(B 1531).

On Tuesday, December 2, 1980, Kravis and Romans met with Van Gorkom and delivered to him a two-page letter stating that KKR was offering to purchase all of Trans Union's stock for $60 per share, subject to obtaining financing commitments. (A 1423, 1426-27, 2161-62). Kravis requested that a press release announcing the offer be issued in order to "cool off" other prospective bidders (A 1157, 1430; B 1491). At his deposition Kravis candidly admitted that he sought such an announcement to "preclude General Electric from coming in with an offer" (B 1493); Romans likewise admitted that the object of such a press release was to "place other offerors in a competitively disadvantageous position." (B 1532).

Van Gorkom advised Kravis and Romans that, in light of the financing contingency, he did not consider the letter to be a firm offer. His reasoning was:

> Again, I go back to something I said on direct, which I am sure that you heard, and that is, KKR is a group of three principals with very small amount of assets. When they want to make a transaction, referred to as leverage buyout, they put together an ad hoc group. This is a group of people who have not been together to work on a particular acquisition. This is a group that has to be gotten together and persuaded. There is no entity in existence which really has any particular amount of wealth to contribute to it until the entity has been created. In the case of the Pritzker family, they are known to be very wealthy. Much of their assets are clearly visible in the form of corporations which used to be public but which aren't today. They are known to have the assets necessary to support it. In addition, Pritzker was going to borrow approximately $490 million at interest rates of about 14%. KKR was facing the task of raising by their own statement $650 million or $160 million more, and at interest rates at that time in the 20% area. Naturally, I had considerably greater doubt that they would meet their timetable than the Pritzkers could.

(A 1427-28). In addition, of course, the Pritzkers' financing had long been in place when KKR's letter was received on December 2nd.

Van Gorkom also advised Kravis and Romans that he felt it would be inappropriate to issue a press release, precisely for the reason Kravis wanted such a release:

> So I said, "I really do not want to cool off other buyers because you may never get your financing. What you're really trying to do here is to buy time so that you can

> continue to look for financing while you keep other people from continuing their bidding ambitions."

(A 1158).* At that time Trans Union was actively engaged in meetings with GE, and had also had discussions with representatives of Bendix and Borg-Warner (A 1163-68). Van Gorkom, however, did advise Romans and Kravis that he would present the KKR proposal to the Trans Union Board, which was to meet that afternoon (A 1159).

In light of the scheduled Board meeting and KKR's request for a press release, Van Gorkom and Chelberg met with Brennan to discuss the KKR proposal (B 1456). In the middle of that meeting (about three hours after Van Gorkom's meeting with Kravis and Romans), Kravis telephoned Van Gorkom to advise him that the offer was being withdrawn (A 1160). As it turned out, Kruizenga had withdrawn from the KKR group even before the submission of the KKR proposal to Van Gorkom on December 2 and when Kravis learned of Kruizenga's decision, which Romans had apparently withheld from him, Kravis withdrew KKR's proposal (B 1487-89).

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* While plaintiffs seek to contrast the refusal to put out the press release requested by KKR with the issuance of the release in connection with the Pritzker offer (PB 36), the circumstances, as Van Gorkom explained, were different:

> At the time that the Pritzker press release was put out, there were no offers. There was nobody in the United States that Mr. Romans and I had been able to encourage to take a serious interest in our company, even though we had worked at it a long time to build up our desireability in the eyes of the investing public. Therefore, the first announcement of the Pritzker proposal would tell the entire United States that they could buy Trans Union if they were willing to pay more than $55. The KKR offer was not needed for that anymore, and the KKR offer was talking about a higher price, not knowing whether they could get the financing, and would therefore have a chilling effect on anybody who might be going to bid more than $55 or less than $60 or not more than $60. So you have quite a different situation.

(A 1429-31).

Following the withdrawal of the KKR proposal, there were no further contacts by Van Gorkom with the KKR principals until early January, when Van Gorkom called Kravis. Van Gorkom was surprised to learn that KKR had done nothing after December 2 to pursue the financing needed to make an offer (A 1186-87).* Van Gorkom nevertheless met with Kravis in January, 1981, but was advised by Kravis that KKR would not be able to put together a proposal (A 1471).

Van Gorkom described his overall view of the efforts of KKR as follows:

> You have to be very careful when you describe my feeling about the KKR transaction. As far as I was concerned, if KKR could come up with $60 cash for all of the stock, nobody would be happier than I would, because that would have meant almost 400,000 bucks to me. But I was concerned that only Don Romans and perhaps Sid Bonser, having so much more to gain out of the KKR transaction than they would out of General Electric, or Pritzker, that in his dealing with the various buyers he would not be even-handed.

(A 1421). Van Gorkom's actions were entirely consistent with that view, and entirely proper.

I. <u>The January 26, 1981 Board Meeting</u>**

A regular meeting of the Trans Union Board was held on January 26, 1981, more than four months after the merger was first proposed (A 1877-80).

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* While plaintiffs criticize Van Gorkom for not pursuing KKR, any pursuit was unnecessary in light of Romans' involvement:

> Now I know that Romans was working constantly with Mr. Kravis. He did not need any help from me as far as his company was concerned because he was getting all the inside help he possibly could get from Don Romans, who had a very definite personal interest in seeing it fly.

(A 1435).

** Incredibly, plaintiffs omit the January 26, 1981 meeting from their Statement of Facts.

That meeting was attended by all ten directors, by the three officers who were not Board members but regularly attended the meetings (Romans, Peterson and Moore) and by three outside attorneys (James Brennan, Thomas H. Morsch, also of Sidley & Austin, and Robert K. Payson) (A 82-89, 1188, 1877-80). The Board first discussed the Report on Operations for the month of December, 1980 and passed a resolution declaring a regular dividend, payable March 1, 1981 (A 1877-80). The decision to pay a regular dividend, which was opposed by the Pritzkers, resulted in an additional payment to Trans Union stockholders of $7,000,000 that would otherwise have become the property of the Pritzkers if the shareholders approved the merger on February 10 (A 1191-92). The Board then turned its attention to a discussion and review of all aspects of the proposed merger and all events connected with the proposed merger, including the allegations and the discovery taken in this lawsuit* (A 82-89, 1192-93, 1877-80).

The January 26 Board meeting lasted almost four hours (A 1193; B 1509). Facts that were considered by the Board and discussed at length included: that no Board member or member of senior management, except Chelberg and Peterson, knew prior to September 19, 1980, that Van Gorkom had discussed a possible merger with Pritzker; that the price of $55 per share had been suggested initially by Van Gorkom; that the Pritzkers' offer included a contract to purchase one million Trans Union shares at $38 per share; that the Board had been required by Pritzker to act upon the offer by September 21, 1980; that the merger price of $55 per share was substantially above the historical market price; that the Board had not sought an independent fairness opinion; that the Board expected the Pritzker offer to interest other parties in

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* The lawsuit was filed on December 19, 1980 and most of the discovery had been completed by the January 26, 1981 Board meeting.

acquiring Trans Union; that the Board conditioned its acceptance of the Pritzker offer on the rights to receive bids from other parties, to provide all relevant information to other bidders, and to withdraw its recommendation of the Pritzker offer if a more favorable offer were received; that Bonser claimed not to have voted at the September 20, 1980 meeting; that several members of senior management had threatened to resign and had expressed the opinion that the merger price was too low; that the merger documents had been amended on October 10, 1980, to permit active solicitation of competing offers; that, after preparation of an offering brochure,* 50 partners or employees of Salomon Brothers contacted more than 150 companies in an effort to interest them in making a competing offer for Trans Union; that some members of senior management had extensive discussions with KKR about the possibility of a leveraged buyout, a form of transaction that Van Gorkom believed involved inherent conflicts of interest; that on December 2, 1980, KKR made an offer of $60 per share, subject to obtaining financing, which was withdrawn within three hours; that GE indicated an interest in making an offer of up to $60 per share, but on January 21, 1981 advised Van Gorkom that no offer would be made; that GE officers said that no offer would be made because GE's financial analysts advised that acquisition of Trans Union might adversely affect the value of GE's shares in the market in light of GE's high technology image, and because GE did not want to enter into a bidding war; that after GE withdrew, negotiations with KKR were reopened, but KKR advised on January 26, 1981 that it could not make a firm offer within the time available; that the Chief Financial Officer, Donald Romans, had opined that the range of value for the stock was $55 to $65

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* The "brochure" was in fact a book about one inch thick described as an "excellent document" that contained a "full portrayal" of Trans Union (B 146-293, 1128-29).

per share,* but could not say that $55 per share was not fair; that no director of Trans Union had any understanding with, or commitment from, the Pritzkers concerning future employment or otherwise; that a designee of GL had exercised its right to purchase one million shares of Trans Union stock at $38 per share pursuant to the terms of the merger documents; and that some Trans Union stockholders had acquired their stock in tax-free exchanges, which stock probably had a low cost basis for tax purposes (A 82-89). As Johnson testified, the Board engaged in "a total review from beginning to end of every aspect of the whole transaction and all relevant developments" (B 1131).

That meeting also allowed the Board to review other events which had occurred since the merger was first considered by the Board on September 20, 1980, including the fact that the Pritzker offer was even more attractive than it was on September 20 since high interest rates in the last quarter of 1980 had reduced Trans Union's actual income below estimated income (A 1201-02). The Board knew that high interest rates would have a dramatic adverse impact on Trans Union's earnings and would render inaccurate the five-year forecast upon which the Pritzkers had based their offer of $55 per share (A 1202-04).

At the conclusion of the January 26, 1981 meeting at which everything relevant to the merger (and this litigation) was examined and reviewed, the Board was advised by counsel that it could recommend for or against approval of the proposed merger by the stockholders, or could make no recommendation (B 1131-32). Each director voted in favor of recommending the merger, including Bonser, who had earlier apparently remained silent, and

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* Plaintiffs complain that the "study" upon which Roman's opinion was based was never produced (PB 15). The "study" was described as "rough calculations" in which he "ran the numbers" (B 1526, 1533). Numerous documents meeting that description were produced by defendants, but plaintiffs' counsel never sought to identify them when he deposed Romans, or otherwise.

O'Boyle, who had not been present at the September 20, 1980 meeting (A82-89, 1205; B 1132).

At the January 26, 1981 meeting the Board also reviewed and approved the Supplemental Proxy Statement (A 2324-29) which, among other things, advised stockholders of the substance of what had occurred at the meeting and of the fact that GE had decided not to make an offer (A 88; B 1131).*

J. The February 10, 1981 Stockholders Meeting

On February 10, 1981, the stockholders of Trans Union overwhelmingly approved the Pritzker merger proposal. A total of 8,708,131 shares representing 69.6% of the outstanding shares entitled to vote on the proposed merger voted in favor of the proposal, 970,428 shares equal to 7.25% of the outstanding shares voted against the proposal, and 99,107 shares abstained (A 1881-82). Thus, 89% of the votes cast with respect to the proposal were voted in favor of the Pritzkers' offer.

IV. ARGUMENT

THE MERGER RESULTED FROM THE GOOD FAITH EXERCISE OF INFORMED BUSINESS JUDGMENT BY TRANS UNION'S DIRECTORS AND APPROVAL BY FULLY INFORMED SHAREHOLDERS.

A. The Standard And Scope Of Appellate Review -- This Court Should Accept The Lower Court's Findings Of Fact And Conclusions Of Law Unless They Are "Clearly Wrong"

As recently reaffirmed in Warren v. Goldinger Brothers, Inc., Del.Supr., 414 A.2d 507, 509 (1980):

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* The Proxy Statement dated January 19, 1981 informed the stockholders of the possibility that an offer might be made by GE, and Van Gorkom's January 19, 1981 letter to the stockholders stated that they would be notified if a firm offer were made (A 2223, 2227).

> this Court's standard of review as to findings of fact and conclusions of law of the Court of Chancery permits reversal only if there be no substantial evidence to support such ultimate findings so as to demonstrate them to be 'clearly wrong.' Lank v. Steiner, Del.Supr., 224 A.2d 242 (1966).

The scope of review exercised by this Court has also been described as follows:

> ...the findings of the court [below], sitting as the trier of the facts, will not be disturbed if reasonably supported by competent evidence. A finding based upon inference meets this test if there is competent evidence from which the inference may be fairly and reasonably deduced. When there is competent evidence to warrant the material findings of the trial judge, we will not substitute our judgment for his.

Turner v. Vineyard, Del.Supr., 80 A.2d 177, 179 (1951). If there is sufficient evidence to support the findings of the trial court, this Court "must affirm". Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc., Del.Supr., 336 A.2d 211, 213 (1975).

The application of these principles has led this Court to hold that:

> the only question for this court to determine is whether there was any competent evidence from which the trial judge could reasonably make such findings of fact. When determining whether findings of fact have evidentiary support, we consider only the evidence most favorable to the successful party below. (Emphasis added.)

Turner v. Vineyard, supra, 80 A.2d at 179.

With these standards of review in mind, we will show that all of the material findings of fact made by the Chancellor were entirely correct and that such findings were supported by substantial evidence. We will also show that the Chancellor properly applied the law to his findings of fact.

B. Plaintiffs' Contention That The Chancellor's Opinion Contains Six Significant Misstatements Of Fact Finds No Support In The Record*

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* Plaintiffs' argument heading claims that the Chancellor's Opinion contains six significant misstatements of fact (PB 40), but only five numbered points are identified in their brief.

1. The Trans Union Directors Considered Various Alternatives, Including The Possibility Of The Purchase Of About One-Third Of Trans Union's Outstanding Stock In The Future

The Chancellor found that Trans Union's directors considered, as a possible solution to Trans Union's long-term problems, the future purchase by Trans Union of 30% of its own outstanding stock at an average price of $50 per share (A 10). Plaintiffs say: "The lower Court is in flat error." (PB 41). We turn then to the record.

On July 17, 1980, the controller of Trans Union sent to each director an analysis of management's Five Year Forecast for the years 1981-1985 (A 1883-1909). In that analysis appeared the following:

> What to do with 1982-1985 surplus?
>
> A number of alternatives exist:
>
> 1) Stock repurchase. Assuming an average stock price of $50[*], we could repurchase about 30% of our oustanding stock. This, of course, could be reissued to support acquisitions at a later date.
>
> 2) Dividend increases.
>
> 3) A major acquisition program (if concentrated in tax-generators, this would allow for release of the TULI tax constraint).
>
> 4) Combinations of the above.

(A 1896). The minutes of the Trans Union Board meeting held on July 24, 1980 report:

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* Plaintiffs try to make much of the assumed average stock price of $50 per share (PB 6, 22, 41). However, it must be remembered that the stock purchase alternative was but one suggested use for Trans Union's projected surplus for the years 1982 through 1985. If, in June 1983, Trans Union could have purchased some of its outstanding stock at $50 per share the present value of that $50 as of February 10, 1981 (the date of the stockholders vote) would have been about $40, using a 10% discount rate. Of course, Trans Union's shareholder's received $55 per share.

> The Board reviewed and discussed ... the Five Year Plan Summary for 1981-1985, copies of which were ordered filed with the Secretary of the Company.

(A 1862).

In light of these undisputed facts of record, it is sheer nonsense for plaintiffs to assert that "[n]o exhibit or deposition or trial testimony suggest or even intimates that the board of TU took up or considered the possible repurchase of any amount of TU stock ... " (PB 41).* The record is clear -- the Chancellor's finding was supported by substantial and undisputed evidence.

2. Plaintiffs' Contentions With Respect To The Chancellor's Findings Concerning Kohlberg, Kravis, Roberts & Co. Are Without Substance

Plaintiffs criticize (PB 41) the Chancellor for finding in a footnote that:

> Such a buyout scheme [i.e., a leveraged buyout] was submitted to Trans Union by the firm of Kohlbert, Kravis and Robertson and Co., in August, 1980.

(A 11). Plaintiffs are correct that KKR did not submit a proposal in August, 1980. However, any seeming confusion in the Chancellor's opinion was caused by arguments advanced by plaintiffs.** Thus, in their opening posttrial brief plaintiffs stated:

> At the Meeting of August 17, 1980, a KKR Leveraged Buyout Was Suggested But Rejected By Mr. Van Gorkom.

(A 244). The identical statement appears in plaintiffs' opening brief in this Court (PB 8).

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* Plaintiffs' statement that "[n]either the management nor the Board had ever considered the ... Five Year Forecast" (PB 7) is incredible. The forecast was prepared by management (a fact conceded by plaintiffs -- PB 5) and reviewed and discussed by the directors.

** It is clear that the Chancellor was not confused, because he correctly observed that the only bid made by KKR was on December 2, 1980, and that such bid was withdrawn three hours after it was made (A 11, fn. 1).

The fact is that at the August meeting Van Gorkom rejected the concept of a KKR-type leveraged buyout because of the potential conflict between management and the shareholders. See page 11, supra. In any event, plaintiffs should not be heard to criticize a finding (however meaningless to the Chancellor's opinion as a whole) which they specifically argued both to the Chancellor and to this Court.

Plaintiffs also criticize (PB 42) the Chancellor's finding that Van Gorkom would have benefited from a merger involving a stock-for-stock exchange because of the deferral of capital gains taxes (A 11). While plaintiffs are correct that the KKR scheme would have involved a cash merger, the fact remains that Van Gorkom would have preferred a stock-for-stock transaction with a quality company (A 1077-79).*

3. Van Gorkom Directed Trans Union's Controller To Make Certain Calculations Based On A Merger Price of $55 Per Share

Taking one sentence from Van Gorkom's testimony out of context (PB 43), plaintiffs challenge the Chancellor's findings that

> Mr. Van Gorkom had Trans Union's controller, Carl Peterson, calculate whether or not it would be reasonable for a prospective purchaser to acquire Trans Union for as much as $55.00 per share or a total price of $690,000,000

(A 12).

Defendants submit that the foregoing finding is amply supported even by Van Gorkom's selectively quoted testimony at pages 43-45 of plaintiffs' brief. For Van Gorkom's full testimony on this point see A 1086-89. There has never been any dispute that Peterson made his calculations based on assumptions

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* Plaintiff's contention that Van Gorkom was adamantly opposed to an offer from KKR (PB 42) is incorrect. See page 40, supra. The Chancellor correctly concluded that Van Gorkom "...did not actively oppose such a proposal." (A 11).

established by Van Gorkom, and the Chancellor's opinion does not state otherwise.

Notwithstanding that the price of $55 per share was analyzed in a series of complicated mathematical computations based upon specific business and tax assumptions derived in part from Trans Union's Five Year Forecast and The Boston Consulting Group study (A 1086-89), plaintiffs continue to assert that the "$55.00 price was solely the result of ... [Van Gorkom's] subjective determination." (PB 46). In fact, no one was better qualified than Van Gorkom to suggest a fair price for Trans Union's shares. Not only was Van Gorkom a substantial stockholder, but, as he testified:

> in the last analysis I feel that I know more about this company than anybody in the world. I had been chief executive officer at that time for 17-1/2 years. I had worked seven years for it before that. I knew all of its good and bad points. I had watched its stock for 25 years, and I thought I understood it as well as anybody. And I concluded after thinking about it that I would certainly be willing to sell my stock for $55 providing it was all cash for all the stock.

(A 1086). Of course, it was the directors of Trans Union, the marketplace, and the vast majority of Trans Union's stockholders which finally determined that $55 per share was fair.

Finally, although Van Gorkom did not remember a specific price other than $55 per share being mentioned in the initial discussions with Pritzker (PB 45-6), Pritzker had a different recollection:

> I looked at the figures, and I said [to Van Gorkom], 'Well, that [$55 per share] looks like a high price to me, but obviously I don't know enough about the company at this point to have an opinion on that,' and I said, 'Would you consider 50?' He said, 'No.'

(B 1311).* In short, contrary to plaintiffs' assertion (PB 45), there is substantial

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* Plaintiffs' statement that "[t]here was never any negotiation as to the price of $55.00" (PB 11) is clearly wrong.

record testimony to support the Chancellor's finding that Van Gorkom rejected Pritzker's suggestion of $50 per share (A 13).

4. The Chancellor's Finding Concerning When The Board Learned Of Pritzker's Deadline

We have no quarrel with plaintiffs' observation that the Board first learned of Pritzker's deadline at the meeting held on September 20, 1980 (PB 46-7). While the Chancellor's syntax might have been more precise, his finding as to when the Board first learned about the deadline (A 15) is consistent with the undisputed fact that the directors knew about Pritzker's deadline at the meeting of September 20.

5. The Directors Not Only Determined That $55 Per Share Was Fair, But Also Recommended The Merger To Trans Union's Shareholders

Plaintiffs state that "nothing in the minutes or the depositions or live testimony of those attending that meeting [of September 20, 1980] even suggests that the Board specifically considered the adequacy of the $55.00 price." (PB 47). That statement is pure sophistry, if not an intentional distortion of the record. For example, Van Gorkom testified:

> Needless to say, after I outlined the transaction and how it developed so rapidly, then the discussion centered upon well, the basic decision. Of course naturally the decision kept coming back to $55. Was that a fair price?

(A 1116-17). Johnson testified:

> Q. Okay. First of all, did you make a determination of the fairness of $55?
>
> A. I did.
>
> Q. And did the board collectively make a judgment on that?
>
> A. I think we all understood that's what we were voting on.

(B1171-72). And, Browder, a substantial shareholder, testified:

> And I felt that in my own thinking and knowledge of the Company operations and its financial results, that while I couldn't say that there is no single dollar price which is the only fair price, this [$55 per share] would certainly be a fair price to me.

(Browder Dep., p. 156).

Having determined that the Pritzkers' merger proposal, including the price, was fair, the directors adopted a resolution which provided, inter alia:

> that in the judgment of the Board of Directors of this Company it would be in the best interests of the Company's stockholders to accept the proposal of [the Pritzkers] ... .

(A 1865). Thus, despite plaintiffs' contentions to the contrary (PB 45), there is ample evidence to support the Chancellor's finding that:

> At such meeting of the board of directors, while it was decided not only to go along with Mr. Pritzker's offer but to recommend to the stockholders that it be accepted ... .*

(A 15).

In summary, there is not one substantive factual finding by the Chancellor which is not fully supported by the record. The Chancellor saw and heard the principal participants in the subject merger, and he correctly concluded that the directors of Trans Union brought their informed business judgment to bear on the proposed transaction and determined that proposal to be in the best interests of Trans Union's shareholders -- a determination that was overwhelmingly ratified by the shareholders.

C. Trans Union's Directors Exercised Informed Business Judgment

In Kelly v. Bell, Del.Supr., 266 A.2d 878 (1970), this Court concluded:

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* Plaintiffs' charge, unsupported by any record citation, that the members of the Board did not know they were recommending Pritzker's proposal to the shareholders (PB 47-48) is wrong. As Johnson testified: "We approved and recommended the Pritzker proposal ... ." (emphasis added). (B 1427).

> The record before us contains no suggestion of fraud. There is no evidence that any director or officer was motivated by expectation of personal gain, by bad faith or by any consideration other than that of doing what was best for [the corporation]. For the reasons set forth in the Chancellor's opinion, we agree with his decision that these acts are governed by the "business judgment" rule, and were in fact the result of the exercise by them of honest business judgment.

266 A.2d at 879. The same conclusion is appropriate in this case. After reviewing the relevant facts, Chancellor Marvel held:

> I therefore conclude that given the market value of Trans Union's stock, the business acumen of the members of the board of Trans Union, the substantial premium over market offered by the Pritzkers and the ultimate effect on the merger price provided by the prospect of other bids for the stock in questions, that the board of directors of Trans Union did not act recklessly or improvidently in determining on a course of action which they believed to be in the best interest of the stockholders of Trans Union.

(A 21-22).

In reaching that conclusion, the Chancellor restated the teaching of leading Delaware cases applying the business judgment rule, as follows:

> A presumption exists that corporate directors form their business judgments in good faith, Allaun v. Consolidated Oil Co., Del.Ch., 147 A. 257 (1929), and, as stated in the case of Sinclair Oil Corp. v. Levien, Del.Supr., 280 A.2d 717 (1971):
>
> > 'A board of directors enjoys a presumption of sound business judgment, and its decisions will not be disturbed if they can be attributed to any rational business purpose. A court under such circumstances will not substitute its own notions of what is or is not sound business judgment.'
>
> Furthermore, the business judgment rule provides that room be afforded for honest differences of opinion in a corporate board of directors, Allied Chemical & Dye Corp. v. Steel & Tube Co. of America, Del.Ch., 120 A. 486 (1923), a wide discretion in the matter of valuation being granted to directors, Cole v. National Cash Credit Ass'n., Del.Ch., 156 A. 183 (1931). And, as stated in the case of Singer v. Magnavox Co., Del.Supr., 380 A.2d 969 (1977):

> 'To state the obvious, under §251 two (or more) Delaware corporations 'may merge into a single corporation.' Generally speaking, whether such a transaction is good or bad, enlightened or ill advised, selfish or generous -- these considerations are beside the point.'

(A 18-19).

The Chancellor also observed that:

> In order to overcome the presumption that directors have acted in good faith and in the best interest of their corporation, one who attacks corporate action taken by the directors of a Delaware corporation must demonstrate that the judgment of the board of directors of such a corporation was not brought to bear with specificity on the challenged transaction, and that the directors acted so far without information that they can be said to have reached an unintelligent and unadvised judgment, Mitchell v. Highland-Western Glass Co., Del.Ch., 167 A. 831 (1933).

(A 19).

As detailed in the Statement of Facts, it is undisputed that Trans Union's highly qualified directors, all of whom were well-informed about the affairs and prospects of Trans Union, met on three separate occasions* to consider initially whether to recommend, and subsequently to review the wisdom of their decision to recommend to Trans Union's stockholders that they vote in favor of the merger, and even directed that certain changes be made in the merger documents. At trial, plaintiffs clearly failed to meet their burden of proving that the directors' business judgment was not "brought to bear with specificity on the challenged transaction" or that it was "unintelligent and unadvised." Moreover, the Chancellor's conclusions that Trans Union's directors did bring their judgment to bear with specificity cannot possibly be construed as clearly erroneous, and therefore, must be affirmed.

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* Plaintiffs' effort to focus attention on only the September 20, 1980 Board meeting is misleading, but does not alter the fact that the Board considered the merger at that as well as two other separate meetings. Compare, Muschel v. Western Union Corp., Del. Ch., 310 A.2d 904 (1973).

The weakness of plaintiffs' argument that the business judgment rule should not have been applied in this case is demonstrated by focusing upon Gimbel v. Signal Companies, Inc., Del.Ch., 316 A.2d 599 (1974), aff'd per curiam, Del.Supr., 316 A.2d 619 (1974), and Bennett v. Propp, Del.Supr., 187 A.2d 405 (1962), the principal decisions on which the plaintiffs relied in their posttrial briefs (A 19, 74-76) and in their opening brief filed in this Court (PB 52-59). The Chancellor properly distinguished Gimbel and Bennett from the facts in this case (A 19-21), and little further comment is necessary.

In Gimbel, at the preliminary injunction stage the court was faced with a disparity in valuation of oil and gas properties of more than $320 million, with plaintiffs' expert valuing the properties at $761 million, and defendants' expert at $438 million. 316 A.2d at 616. Plaintiffs, of course, do not even allege a disparity approaching the relative or absolute magnitude of that which confronted the court in Gimbel. In this case, after a plenary trial, the Chancellor found that the merger price of $55 per share (as compared to an historic market price of about $35 per share) was fair (A 21). Moreover, notwithstanding the enormous disparity in value in Gimbel, the court there observed:

> The factors ... do not in my judgment raise at this stage a reasonable probability that the plaintiff will be able to pierce the "business judgment" standard. When considered in light of the whole case, they do not in themselves justify the conclusion that the "directors acted so far without information that they can be said to have passed an unintelligent and unadvised judgment" [citing Mitchell v. Highland-Western Glass Co., Del.Ch., 167 A. 831 (1933).]

316 A.2d at 615.

In Bennett, the chief executive officer had committed his company to purchases of stock, which if defaulted, would have subjected the company to "financial embarrassment and possible disaster." 187 A.2d at 409. This Court held that the directors who had no prior knowledge of the purchases properly exercised their business judgment in arranging for loans to support the purchases in the face of the emergency. 187 A.2d at 411-412.

In this case, Van Gorkom did not commit Trans Union to anything. He simply presented the Board with a proposal from the Pritzkers which the Board was free to reject. In this respect, plaintiffs' contention that Van Gorkom created an emergency (PB 54) is ludicrous. It was Pritzker, not Van Gorkom, who demanded that a decision be made by the Board with respect to his proposal before the opening of the London Stock Exchange on Monday morning, September 21, 1980.

Finally, in both Gimbel and Bennett, the respective boards of directors had the authority to make the ultimate decisions. In this case, only the shareholders had the power to approve the merger and only after the transaction had been tested in the marketplace. The fact that the shareholders overwhelmingly approved the merger "is properly entitled to great weight." Porges v. Vadsco Sales Corp., Del. Ch., 32 A.2d 148, 151 (1943). As stated in Lewis v. Hat Corp. of America, Del. Ch., 150 A.2d 750, 753-54 (1959):

> It is clearly established in Delaware that stockholders' ratification of corporate action which is not per se void renders such action immune from minority stockholder attack ... . It is well established that it is not the proper function of this Court to overturn a business transaction duly ratified by stockholders absent a showing of fraud, a gift of assets, illegality or ultra vires action ... .

(Emphasis added). And, as this Court noted in Michelson v. Duncan, Del.Supr., 407 A.2d 211, 224 (1979):

> [T]he entire atmosphere is freshened and a new set of rules invoked where a formal approval has been given by a majority of independent, fully informed stockholders ... . [quoting Gottlieb v. Heyden Chemical Corp., Del.Supr., 91 A.2d 57, 59 (1952)].

In short, there can be no liability here. The facts compel the conclusion that Trans Union's Board of Directors exercised sound business judgment that was actively tested in the marketplace for more than three months; was reviewed by the directors in detail and unanimously reaffirmed more than four months after the initial judgment was made; was overwhelmingly approved by the stockholders; and resulted in the payment of a premium over the market value of the stock of more than $222 million to the stockholders. Plaintiffs' groundless attacks upon the application of the business judgment rule to the decisions made by Trans Union's directors are without merit.

D. The Plaintiffs' Charges Of Misrepresentation Are Without Merit -- The Chancellor Applied The Appropriate Legal Standard And Properly Found That Trans Union's Shareholders Were "Fairly Informed" About The Proposed Merger

Based on his review of the evidence and testimony, the Chancellor found that "the stockholders of Trans Union were fairly informed as to the pending merger" (A 22).* Plaintiffs contend that being "fairly informed" does not equate with having received complete disclosure of all germane facts (PB 60).

Plaintiffs ignore the fact that the Chancellor was not operating in a vacuum when he decided that Trans Union's shareholders had been "fairly informed" with respect to the proposed merger. In fact, in their briefs below the parties agreed that the test under Delaware law was whether all "information such as a reasonable shareholder would consider important in deciding whether to sell or retain stock" had been disclosed. Lynch v. Vickers Energy Corp., Del.Supr., 383 A.2d 278, 281 (1978) (A 339-40; B 1666-67). That the Chancellor had this standard in mind when he found that the proxy materials "fairly

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* In the opinion denying Smith's application for a preliminary injunction, the Chancellor found that "the proxy material furnished to the Trans Union stockholders ... fairly presented the questions to be voted on at the February 10, 1981 meeting" (A 220).

informed" (not adequately informed as plaintiffs suggest) the stockholders of Trans Union about the proposed merger is beyond responsible argument.

1. Plaintiffs' Contentions With Respect To The Proxy Materials Are Without Merit

(a) Trans Union's Cash Flow*

Plaintiffs complain that the proxy materials did not inform the shareholders about Trans Union's projected cash flow (PB 65). Trans Union's Proxy Statement did inform the shareholders that projections were furnished to GL and to other potential acquirors and that such projections indicated that Trans Union's net income might increase to approximately $153 million in 1985 (A 2225). That projection, which is almost three times the net income of $58,248,000 reported by Trans Union as its net income for December 31, 1979 (A 2222),** confirmed the statement in the proxy materials that the "Board of Directors believes that, assuming reasonably favorable economic and financial conditions, the Company's prospects for future earnings growth are excellent" (A 2225).

Notwithstanding this disclosure of projected earnings, plaintiffs would also have Trans Union provide to stockholders projections of future cash flow. In Securities Act Release No. 5377, CCH Fed. Sec. L. Rep. ¶72,164, the Securities and Exchange Commission made clear that the type of disclosure sought by plaintiffs decreases the credibility of conventional financial

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* In a footnote on page 65 of their brief, plaintiffs list a number of additional "disclosure deficiencies." Suffice it to say that the Chancellor considered all of plaintiffs' disclosure allegations (A 108-124) and rejected them. The Chancellor was correct.

** It was also almost three times Trans Union's 1980 net income of $60,750,000, which was announced in Trans Union's Supplemental Proxy Statement (A 2329).

statements as a measure of business activity and tends to create confusion among stockholders:

> The variation in form and purposes of such data creates confusion. The term "Cash Flow" and similar formulations such as "Earnings Before Non-Cash Charges", "Adjusted Net Income", "Net Operating Income" and "Operating Funds Generated" do not have precise definitions and may mean different things to different people. In addition to this definitional problem, there are different purposes for presenting these data....
>
> While differing definitions and purposes are basic sources of the confusion investors and registrants are experiencing with "cash flow" data, the presentation of such data on a per share basis compounds this confusion.

CCH Fed. Sec. L. Rep. ¶72,164 at 62,325. After noting that "it is not clear that the simple omission of depreciation and other non-cash charges deducted in the computation of net income provides an appropriate alternative measure of performance for an industry either in theory or in practice," the Commission goes on to state:

> This problem was recognized by the Accounting Principles Board in Opinion No. 19 where it was noted that "the amount of working capital or cash provided from operations is not a substitute for or an improvement upon properly determined net income as a measure of results of operations ... ."
>
> If accounting net income computed in conformity with generally accepted accounting principles is not an accurate reflection of economic performance for a company or an industry, it is not an appropriate solution to have each company independently decide what the best measure of its performance should be and present that figure to its shareholders as Truth. This would result in many different concepts and numbers which could not be used meaningfully by investors to compare different candidates for their investment dollars.

CCH Fed. Sec. L. Rep. ¶72,164 at 62,326. Finally, after noting that the major problem in the presentation of cash flow data is that of investor understanding, the Commission concludes as follows:

> Sales, current assets, funds flow, total assets, cash and other similar figures cannot logically be related to the common shareholder without adjustment. These are

> aggregate data which are of great importance to analyst and management alike in understanding the operations of the total economic entity, but they are not items which accrue directly to the benefit of the owner of a part of the common equity. Charges and claims must be considered before the owner is benefited.

CCH Fed. Sec. L. Rep. ¶72,164 at 62,328.*

To the extent that a stockholder might be interested in the general cash flow position of Trans Union, such historical information was available in Trans Union's source and use of funds analysis in its financial statements (A 2262). As is clear from the above-quoted SEC release, for Trans Union to have gone beyond that disclosure to present to stockholders projected cash flows would have been inherently confusing and misleading to such stockholders. Far from failing to make appropriate disclosure, Trans Union has adhered to the Securities and Exchange Commission's guidelines and has made the appropriate disclosure with respect to cash flow.

(b) The Available Alternatives

Plaintiffs also complain that the proxy materials should have advised the stockholders with respect to various alternatives to the merger. For example, plaintiffs suggest that the shareholders should have been told that one alternative considered in the Five Year Forecast was the purchase by Trans Union of one-third of its outstanding shares at $50 per share in the years 1982-1985 (PB 66). Why a shareholder would have been interested in that future and less attractive alternative (see p. 49, fn., *supra*) when considering a *present* offer of $55 per share defies imagination.

We have shown in the preceding section that disclosure of projected future cash flow would have been improper. However, in light of the full disclosure with respect to historical operating results (A 2225, 2237-2250,

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* Plaintiffs cite no authority for their contention that projections of future cash flow should have been disclosed.

2254-2290) coupled with the statement that by 1985 net income might increase to as much as $153 million, a reasonable stockholder could make up his own mind whether to accept $55 per share or take his chances with the Company in the future.

Plaintiffs' reliance on Tanzer v. Haynie, S.D.N.Y., 405 F.Supp. 650 (1976), is misplaced. That case did not involve disclosure of speculative projects or tentative alternatives of the kind plaintiffs suggest.* Rather, plaintiffs alleged in Tanzer that where a majority stockholder had proposed a freeze-out merger at $29 per share, it had a duty to disclose in the proxy statement sent to minority shareholders asset valuations and operating results which, plaintiffs claimed, showed a value of up to $100 per share. The court simply held that such alleged non-disclosures were sufficient to survive a Rule 12(b) (6) motion to dismiss, while also opining that there were "only slender prospects that plaintiffs would eventually succeed on the merits." 405 F.Supp. at 653. In this case, of course, the Chancellor rejected plaintiffs' claims of non-disclosure after a plenary trial on the merits. In short, the Chancellor correctly concluded that the shareholders of Trans Union had been fairly informed about the proposed merger.

E. 8 Del. C. §251(c) Requires Only That Stockholders Of A Delaware Corporation Receive Notice Of The Time, Place And Purpose Of A Meeting To Consider A Merger At Least Twenty Days Prior To Such Meeting

Plaintiffs argue that the Supplemental Proxy Statement did not comply with the requirements of 8 Del. C. §251(c) that "due notice of the time, place and purpose of the meeting shall be mailed to each stockholder of

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* The apposite federal cases, not cited by plaintiffs, hold that management has no duty to discuss in proxy materials "the panoply of possible alternatives to the course of action it is proposing." See Bertoglio v. Texas Int'l. Co., D.Del., 488 F.Supp. 630, 641 (1980), citing Umbriac v. Kaiser, D.Nev., 467 F.Supp. 548, 553 (1979) and TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 462-63 (1976).

record ... at least 20 days prior to the date of the meeting" (PB 62-64). Since notice of the time, place and purpose of the meeting had been given in the original Proxy Statement, and since the original proxy materials were disseminated more than 20 days prior to the meeting, the Chancellor correctly concluded, in denying Smith's request for a preliminary injunction, that "the proxy material furnished to the Trans Union stockholders complied with the requirements of 8 Del. C. §251(c) ..." (A 220).* The Chancellor implicitly reached the same conclusion in his posttrial opinion, and this Court should affirm that conclusion. The cases cited by plaintiffs with respect to this issue do not even mention §251(c) and should be disregarded.

Finally, plaintiffs contend that the shareholders of Trans Union did not have sufficient time to consider the Supplemental Proxy Statement because it was mailed fifteen days prior to the meeting, citing an order granting a preliminary injunction in Jacobs v. Pabst Brewing Co., D.Del., C.A. No. 82-449 (1982) (PB 64).* In fact, that order is silent as to the time required for corrective disclosures, holding only that a tender offer would be preliminarily enjoined until defendants corrected two misleading statements in the tender offer materials. Moreover, in a related case, Chief Judge Latchum recently preliminarily enjoined the consummation of a tender offer unless additional disclosures were mailed to Pabst shareholders within four days prior to the withdrawal date of the offer. Pabst Brewing Co. v. Kalmanovitz, D.Del., C.A. No. 82-711 (1982) (copy attached).

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* The standard of review with respect to the interpretation of 8 Del. C. §251(c) is whether the Chancellor erred as a matter of law. Rohner v. Niemann, Del.Supr., 380 A.2d 549, 552 (1977). Clearly he did not. All other issues in this case are factual, the standard of review for which is set forth at pp. 47-48, supra.

Other federal authorities also establish that fifteen days is sufficient time for shareholders to consider corrective or supplemental disclosures.* For example, in Electronics Specialty Co. v. Int'l Controls Corp., 2nd Cir., 409 F.2d 937, 944 (1969), the court held that a tender offeror's September 16, 1978 correction of previous misstatements, combined with an offer of withdrawal running for eight days until September 24, 1968, was sufficient to cure past violations and eliminate any need for rescission. Similarly, in Nicholson File Co. v. H. K. Porter Co., D.R.I., 341 F.Supp. 508, 513-14 (1972), aff'd, 1st Cir., 482 F.2d 421 (1973), the court permitted the correction of a material misstatement to be mailed to stockholders within seven days of a tender offer withdrawal date.

In this case, the Supplemental Proxy Statement was not issued to correct any nondisclosures or deceptive statements in the Proxy Statement -- there were none. Rather, the purpose of the Supplemental Proxy Statement was to advise Trans Union's shareholders as to what had occurred at the January 26, 1981 Board meeting and that GE had decided not to make an offer. The shareholders had earlier been informed in the Proxy Statement dated January 19, 1981, that GE might make an offer and that they would be advised if a firm offer were forthcoming (A 2216, 2227).

To accept plaintiffs' reasoning would be to discourage the supplementation of proxy materials in order to disclose the occurrence of intervening events. In short, Trans Union provided its shareholders with timely

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* Plaintiffs also rely upon an unreported memorandum opinion and order in M. J. Whitman & Co. v. The Cyprus Corporation, W.D. Pa., C.A. No. 82-28 (February 9, 1982) (PB 63-64). Nothing in those papers states that the date fixed by the court in that case for the holding of a delayed annual meeting was premised upon any finding that any particular period of time was required for supplemental disclosure. That court's further ruling that a copy of the original proxy statement be mailed with the supplemental proxy material was obviously a result of the fact that the supplemental material was to be sent well over a month after the original proxy statement, not 6 days later as in this case.

information with which to make an informed judgment about the proposed merger on February 10, 1981.

F. The Chancellor Correctly Concluded That The Merger Price Was Fair And, In All Events, Within The Range Of Reasonable Business Judgment

Because the propriety of defendants' actions with respect to the merger is governed by the business judgment rule, the merger price is relevant only where "the inadequacy [of the price] is so gross as to display itself as a badge of fraud." Mitchell v. Highland Western Glass Co., Del.Ch., 167 A. 831, 833 (1933); accord, Cole v. National Cash Credit Ass'n., Del.Ch., 156 A. 183 (1931). Put another way:

> Mere inadequacy of price will not reveal fraud, but rather the disparity must be so gross as to lead the Court to conclude that it was not due to an honest error of judgment, but rather to bad faith, or to reckless indifference to the rights of others interested.

Muschel v. Western Union Corp., supra, 310 A.2d at 908; accord, Nathan and Shapiro, Legal Standard Of Fairness Of Merger Terms Under Delaware Law, 2 Del.J.Corp.L. 44, 45 (1977). The Chancellor, therefore, was not required to determine the fairness of the merger price. Nevertheless, in response to plaintiffs' claim that the price was unfair,* the Chancellor examined that issue, and determined that the price paid was fair:

> the merger price offered to the stockholders of Trans Union represented a premium of 62% over the average of the high and low prices at which Trans Union stock had traded in 1980, a premium of 48% over the last closing price, and a premium of 39% over the highest price at which the stock of Trans Union had traded anytime during the prior six years. Furthermore, ... in the present case

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* Plaintiffs never argued to the Chancellor that the merger price was grossly inadequate within the meaning of the foregoing principles of Delaware law and thereby implicitly conceded they could make no such showing.

> the proposed merger in issue was tested in the market-place for at least 90 days with no tangible result, and I am satisfied that such a test of value supports the fairness of the premium offered over market price in the merger here involved.

(A 21). That conclusion -- which, if anything, applies a more rigorous standard than required -- is challenged by plaintiffs on a variety of grounds (PB 67-77), all of which are without merit. The conclusion of the Chancellor was correct and supported by substantial, indeed, overwhelming, evidence.

Plaintiffs first argue that "the lower Court used an erroneous measure of damages" (PB 67), and, specifically, did not review the record "to measure rescissory damages." (Id.). That argument is frivolous. The principle of rescissory damages enunciated by this Court in Lynch v. Vickers Energy Corp., Del.Supr., 429 A.2d 497 (1981), bears on the appropriate measure of damage where a breach of fiduciary duty has been established. Here, of course, because the Chancellor found no breach, he did not measure "damages" at all, nor should he have done so.*

Plaintiffs also argue that the Chancellor simply made his own "subjective determination" (PB 68) in contradiction to "the evidence at trial"

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* Plaintiffs' claim that the Chancellor should have considered "rescissory damages" is also disingenuous since plaintiffs themselves rejected any such standard at trial. As this Court said in Lynch, "rescissory damages are to be determined as of or prior to the date on which the trial on damages ended." 429 A.2d at 505, n.8. Nevertheless, plaintiffs' expert testified solely to the value of the stock as of September, 1980, when the merger was approved by the Board, and offered no evidence as to the value of the stock at the time of trial. Indeed, plaintiffs strenuously objected to their expert being examined as to events subsequent to the merger.

> "Mr. Prickett:
>
> Your Honor, objection. We are trying this case as of the date of the acceptance of the merger, and testimony as to what has happened since that time is not admissible, and therefore we would object to questions along this line."

(A 808).

(id.), an assertion that plainly is incorrect. Both the plaintiffs and the defendants offered extensive testimony concerning the fairness of the merger price, including testimony about the premium paid to Trans Union stockholders and how that compared to premiums paid in analogous transactions. The testimony offered by defendants -- establishing that the premium paid was in the middle range of premiums (A 1537-45) -- constitutes substantial evidence supporting the Chancellor's determination.

Finally, plaintiffs complain about the Chancellor's rejection of the discounted cash flow valuation method and, specifically, his conclusion that such method:

> is not an appropriate method of determining the fair present value of the securities here in issue, the present value which would have been arrived at by such method of valuation fluctuating substantially, depending on the discount rate employed.

(A 22). In Weinberger v. UOP, Inc., Del.Ch., 426 A.2d 1333 (1981), Chancellor Brown had reached a similar conclusion, saying:

> [A]n adjustment in the discount rate to be applied can dramatically change the end result.
>
> * * *
>
> In short, this opportunity [in the discounted cash flow analysis] for the subjective selection of factors, a small variation in which can cause a wide divergence in the end result, renders Bodenstein's discounted cash flow approach unnerving when one sets out to rely upon it in an attempt to ascertain whether or not the amount paid for minority interests in a cash out merger is fair and reasonable.

426 A.2d at 1359. The record in this case plainly demonstrates that inherent flaw in the valuation method; for instance, had plaintiffs' expert simply changed his discount rate from 14% to 16% (the rate judged appropriate by defendants' expert -- A 1530), it would have changed his valuation from $67.88 per share to $35.40 per share.

In all events, even if the Chancellor should have given some weight to such a methodology, testimony of defendants' expert demonstrated that a proper application of the discounted cash flow method resulted in a valuation of about $55 per share, the merger price (A 1529-30).

V. CONCLUSION

The record is clear. The subject merger was an arm's-length transaction in which an informed Board of sophisticated businessmen, whose only interest and motivation was to obtain the best possible price for Trans Union's shareholders, concluded, in the exercise of their business judgment, that the proposed merger was fair and should be recommended to the stockholders. Having received all relevant facts concerning the proposed transaction, the shareholders overwhelmingly approved the merger. Based on the record the Chancellor found that the directors exercised informed business judgment, that the merger was fair, and that the shareholders had been fairly informed. The Chancellor should be affirmed in all respects.

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