IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALDEN SMITH and JOHN W. GOSSELIN, Plaintiffs below, Appellants, v. 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, MARMON GROUP, INC., a Delaware corporation, GL CORPORATION, a Delaware corporation, and NEW T CO., a Delaware corporation, Defendants below, Appellees.	)	No. 225, 1982 On Appeal From The Court of Chancery of the State of Delaware, in and for New Castle County, Civil Action No. 6342

DEFENDANTS' OPENING SUPPLEMENTAL BRIEF

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Dated: May 1, 1984

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS - Contd.

NATURE AND STAGE OF THE PROCEEDINGS.

This appeal was first argued before Chief Justice Herrmann and Justices McNeilly and Moore on February 24, 1983. Pursuant to this Court's Order of April 19, 1983, the case was reargued, without further briefing, before the Court en Banc on May 16, 1983. On March 30, 1984, this Court issued an Order directing the parties to file and exchange supplemental and reply briefs on the following questions:

> a) In connection with pertinent events occurring between August 27, 1980 and January 26, 1981, is there sufficient evidence of record to support a conclusion that there was an absence of good faith on the part of one or more directors of Trans Union Corporation (TU), which thereby deprives such director of the protection of the business judgment rule?
>
> b) In connection with the TU directors' meetings of September 20, 1980 and October 8, 1980, is there sufficient evidence of record to support a conclusion that one or more directors, other than defendants Van Gorkom and Chelberg, may be entitled to claim the protection of the business judgment rule because of reasonable reliance in good faith under 8 Del.C. §141(e), upon reports, including legal advice, rendered to the Board by Van Gorkom, Chelberg and others?
>
> c) If there is insufficient evidence of record to support a conclusion that one or more directors, other than Van Gorkom and Chelberg, are entitled to the protection of the business judgment rule by reasonable reliance upon 8 Del.C. §141(e), what effect, if any, does the stockholder vote of February 10, 1981, have in relieving such director of a duty to timely exercise business judgment in connection with the sale of TU?

d) Can shareholder ratification of the merger, by less than unanimous vote, cure director approval of the merger if one or more directors are found not entitled to the protection of the business judgment rule for absence of good faith?

This is the Supplemental Brief of the defendants in response to the foregoing questions.

ARGUMENT

> Question (a): In connection with the pertinent events occurring between August 27, 1980 and January 26, 1981, is there sufficient evidence of record to support a conclusion that there was an absence of good faith on the part of one or more directors of Trans Union Corporation (TU), which thereby deprives such director of the protection of the business judgment rule?

Response

Simply stated, the answer to the question is no. There is no evidence whatsoever to support a conclusion that any Trans Union director acted in bad faith. To the contrary, there is a concession by plaintiffs, a factual finding by the Chancellor supported by substantial evidence, including live testimony,* and a legal presumption under Delaware law that all of Trans Union's directors acted in good faith.

Defendants stated in point one of the Summary of Argument in their Answering Brief filed in this Court that

> 1. This is a case in which plaintiffs challenged the exercise of business judgment by an independent Board of Directors. There

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* We respectfully submit that this Court's first question misstates plaintiffs' burden in this appeal. As stated by this Court in Warren v. Goldinger Bros., Inc., Del.Supr., 414 A.2d 507, 509 (1980), the Chancellor's findings may be reversed on appeal

> ...only if there be no substantial evidence to support such ultimate findings so as to demonstrate them to be "clearly wrong."

See also Levitt v. Bouvier, Del.Supr., 287 A.2d 671, 673 (1972).

were no allegations and no proof of fraud, bad faith, or self-dealing by the directors. (emphasis added).

Defs.'Ans.Br., p. 4. In their Reply Brief, plaintiffs' entire response to that statement was "Agreed". Pltfs.'Rep.Br., p. 2. Thus, plaintiffs, in this Court, have unequivocally conceded that there was "no proof of...bad faith...by the directors [of Trans Union]."

"Good faith", in the context of the business judgment rule, means the directors' honest belief that they are acting in the best interest of the corporation and its stockholders. Block and Prussin, The Business Judgment Rule and Shareholder Derivative Actions: Viva Zapata?, 37 Bus. Law 27, 33-34 (1981). Warshaw v. Calhoun, Del.Supr., 221 A.2d 487, 492-493 (1966) (Good faith equated to "bona fides of purpose"); Gimbel v. The Signal Cos., Inc., Del.Ch., 316 A.2d 599, 610 (1974), aff'd, Del.Supr., 316 A.2d 619 (1974) (Good faith present in absence of any indication of self-dealing).

In this case, plaintiffs presented no objective facts to demonstrate that any director of Trans Union did not act honestly in deciding to recommend approval of the merger to Trans Union's stockholders. There was no proof of any improper motive by any director, such as insider trading, conferring benefits on a fellow director, conflicts of interest, or usurping a corporate opportunity. Indeed, the fact that Mr. Van Gorkom owned 60,701 shares of Trans Union stock and the directors collectively owned 113,749 shares demonstrates their good faith. Because the directors' economic interests coincided with

that of the stockholders they served, "[i]t was obviously to their interest to get the best price obtainable." Cottrell v. Pawcatuck Co., Del.Supr., 128 A.2d 225, 231 (1956), cert. denied and app. dismissed, 355 U.S. 12 (1957). As the Court of Chancery noted in Gropper v. North Central Texas Oil Co., Del.Ch., 114 A.2d 231 (1955), a case involving a sale of assets and liquidation of a Delaware corporation pursuant to which each stockholder would receive $29 per share, an amount which the plaintiff alleged to be grossly unfair:

> If these directors [who were substantial stockholders] and the Equity Corporation [also a substantial stockholder] through its directors on defendant's board participated in a bad bargain, they have injured themselves, Finch v. Warrior Cement Corporation, 16 Del.Ch. 44, 141 A.54. There has been no showing of any plausible motive which would cause such officers and principal stockholder to commit acts of self-injury. (emphasis added).

114 A.2d 234-35. Plaintiffs did not prove any motive, much less a plausible one, for the directors to have recommended an affirmative vote by the stockholders if they had not concluded, in good faith, that $55 per share was fair and in the best interests of all Trans Union's stockholders.

The Chancellor found, after noting that the proposed merger had been "considered by the board of directors of Trans Union on three separate occasions,"

> ...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. (Emphasis added).

(A21-22).

The Chancellor's finding that the directors believed that their decision was in the best interest of the stockholders is a specific finding that the directors acted in good faith. That finding is supported by substantial evidence.

The best evidence that each director was motivated by a desire to act in the best interest of all of Trans Union's stockholders is their belief--uncontroverted by any evidence--that the price offered was fair.* Mr. Browder, a long-time officer and director of Trans Union, testified at page 176 of his deposition (PX 146):

> Q. Would you tell us in your own words why you thought it was a fair price.
>
> A. I felt that based upon what the stock buying public had been paying for Trans Union stock for many, many years, including right up to date, even though it was a little higher than it had been at many times during those recent years, that the spread between the market evaluation, evaluation that the market gives, had been giving our stock, and the price offered by the Pritzkers, was substantial. 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.
>
> It was high enough to satisfy my feelings that this price was one that was--that should be presented to the shareholders for their determination.

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* A finding based on inference, as well as a finding based on direct evidence, will not be disturbed on appeal if there is competent evidence from which the inference may be fairly and reasonably deduced. Turner v. Vineyard, Del.Supr., 80 A.2d 177, 179 (1951).

Mr. Wallis, an outside director of Trans Union and the former dean of the University of Chicago School of Business, testified at pages 51-53 of his deposition (PX 151):

> Q. Do you know to this day how the number one million shares was arrived at?
>
> A. No.
>
> You see, the board's interest was not how the proposition was formulated, but "Is it a good proposition from the point of view of our stockholders."
>
> * * *
>
> Q. So that on one part of the deal the stockholders were going to get $55 for their shares, is that right?
>
> A. Yes.
>
> Q. And did you think that was a reasonable price?
>
> A. Yes.

Mr. Van Gorkom testified at trial that:

> 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?

(A1116-17). His own answer to that question was:

> ...And of course they [the directors] kept coming back to the fact that, one, $55 is a good price. After all, compared to what the range in which the stock had sold during all of 1980 and for prior years as well--for that matter, it was about a 60 percent premium. There was no reason to think that there was going to suddenly be a greater appreciation of our company if we turn down the Pritzker offer because we had increased our earnings steadily for 10 years, and had seen practically no movement in our stock price.

You also had to recognize that if they decided to turn the Pritzker offer down, it was gone.

(A1117). And, Mr. Johnson testified:

In my judgment the $55 [price] and the sale of the one million shares at 38, if that were all there was involved, take it or leave it, I would have taken it and recommended it for shareholder vote. I think it would have been absolutely unconscionable of the board not to submit that to the shareholders for a vote and to give their opinion.

(B1227-1228). Johnson further testified:

Q. At the September 20, 1980 board meeting did you form a judgment as to whether the offer of $55 per share should be submitted to the stockholders?

A. Yes.

Q. And what was the basis of that judgment?

A. Well, my judgment was that it should be definitely submitted to the shareholders, and not only that; we should recommend it to the shareholders.

* * *

But $55 was a multiple of 11 times, and we were then at 7 times. It was a premium over market of approximately 50 percent, depending upon what you use as market. I think it would be fair to use the average price during the preceding thirty days or quarter, but no matter what you use, it was a very good premium and a very good multiple. And it was far beyond any prospective or any proven performance that the stock would have.

> And so I concluded it was fair and that the shareholders were entitled to have a chance to accept it.

(B1112-1113).*

The Chancellor's finding of good faith is further supported by the presumption of good faith that is afforded to directors of Delaware corporations. As recently stated by this Court in Aronson v. Lewis, Del.Supr., No. 203, 1983, Moore, J. (Mar. 1, 1984), slip op., p. 12:

> ...The business judgment rule is an acknowledgement of the managerial prerogatives of Delaware directors under Section 141(a). See Zapata Corp. v. Maldonado, 430 A.2d at 782. It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Kaplan v. Centex Corp., Del.Ch., 284 A.2d 119, 124 (1971); Robinson v. Pittsburgh Oil Refinery Corp., Del.Ch., 126 A. 46 (1924). Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption. See Puma v. Marriott, Del.Ch., 283 A.2d 693, 695 (1971). (emphasis added).

Plaintiffs' concession and the fact that there was no proof of bad faith, the Chancellor's finding that the directors acted in good faith, the narrow scope of appellate review applicable to that finding, and the presumption that disinterested directors of Delaware corporations exercise their

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* The Chancellor had the benefit of hearing and observing the trial witnesses, which is another reason why his findings should not be disturbed unless "clearly wrong". Phillips v. State ex rel. Dep't. of Natural Resources and Envtl. Control, Del.Supr., 449 A.2d 250, 256 (1982).

business judgment in good faith all compel the conclusion that Trans Union's directors acted in good faith.

Question (b): In connection with the TU directors' meetings of September 20, 1980 and October 8, 1980, is there sufficient evidence of record to support a conclusion that one or more directors, other than defendants Van Gorkom and Chelberg, may be entitled to claim the protection of the business judgment rule because of reasonable reliance in good faith under 8 Del.C. §141(e), upon reports, including legal advice, rendered to the Board by Van Gorkom, Chelberg and others?

Response

The short answer to the question is yes. Section 141(e) of the Delaware General Corporation Law provides in pertinent part:

> A member of the board of directors...shall, in the performance of his duties, be fully protected in relying in good faith upon the books of accounts or reports made to the corporation by any of its officers, or by an independent certified public accountant, or by an appraiser selected with reasonable care by the board of directors..., or in relying in good faith upon other records of the corporation.

Thus, under 8 Del.C. §141(e), "directors are fully protected in relying in good faith on reports made by officers." Michelson v. Duncan, Del.Ch., 386 A.2d 1144, 1156 (1978), aff'd in part and rev'd in part on other grounds, Del.Supr., 407 A.2d 211 (1979). See also Graham v. Allis-Chalmers Mfg. Co., Del.Supr., 188 A.2d 125, 130 (1963); Prince v. Bensinger, Del.Ch., 244 A.2d 89, 94 (1968). As we have already shown, each of the directors acted in good faith.

In interpreting §141(e), this Court has applied a broad standard as to what constitutes a "report" within the meaning of

the section. Thus, in Cheff v. Mathes, Del.Supr., 199 A.2d 548, 556 (1964), this Court stated that directors were entitled to the protection of §141(e) in relying upon the report of informal, personal investigations by two officers:

> Staal and Cheff had made informal personal investigations from contacts in the business and financial community and had reported to the board of the alleged poor reputation of Maremont. The board was within its rights in relying upon that investigation, since 8 Del.C. §141(f) [now (e)] allows the directors to reasonably rely upon a report provided by corporate officers.

However, the specific categories of reports enumerated in §141(e) are not the only information upon which directors may rely in exercising their business judgment. See Kors v. Carey, Del.Ch., 158 A.2d 136, 141 (1960) (reliance upon discussions with member of faculty of Harvard Business School). In exercising their business judgment, directors are entitled to bring to bear all information to which they have access as well as their own experience in forming a business judgment:

> While directors may confer, debate, and resolve their differences through compromise, or by reasonable reliance upon the expertise of their colleagues or other qualified persons, the end result, nonetheless, must be that each director has brought his or her own informed business judgment to bear with specificity upon the corporate merits of the issues without regard for or succumbing to influences which convert an otherwise valid business decision into a faithless act.

Aronson v. Lewis, supra, slip op. at 22-23 (Mar. 1, 1984). See also Graham v. Allis-Chalmers Mfg. Co., supra, 188 A.2d at 130 ("These [officers' reports] they were entitled to rely

on, not only, we think, under general principles of the common law, but by reason of 8 Del.C. §141(f) [now (e)]....").

In this case the directors brought with them to the directors' table on September 20 and October 8 their own extensive business experience as well as their particular knowledge of Trans Union, including its business, its problems, its prospects and the history of its performance in the stock market. Because the Court's second question is limited to reports and legal advice rendered at the September 20 and October 8, 1980 meetings, defendants will not repeat in this brief the substantial evidence concerning these factors relevant to the directors' exercise of business judgment. However, we respectfully refer the Court to the detailed recital of that substantial evidence, with citations to the record, in the Counterstatement of Facts at pages 6 through 47 of Defendant's Answering Brief.* In addition, at the January 26, 1981 directors' meeting there was an extensive review of the proposed merger and related events, including the market test of the fairness of the offered price that resulted initially from

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* Those factors include: the directors' qualifications and their extensive business experience; the extensive and detailed regular reports provided to Trans Union's directors; the special reports, including a five-year forecast and an independent consultant's report presented to the directors in July and August of 1980; the management meetings which were attended by Trans Union's five "inside" directors on August 27, 1980, and just prior to the September 20, 1980 directors' meeting; and the discussions among the directors at the September 20 and October 8 Board meetings.

the very announcement of the merger and thereafter from Salomon Brothers' efforts after October 8 to obtain a better offer, the allegations made in this lawsuit, and General Electric's decision not to make an offer, all of which occurred after the October 8, 1980 meeting.*

The principal report presented to the directors at the September 20, 1980 Board meeting was Mr. Van Gorkom's presentation of the terms of the Pritzker offer and all aspects of the proposed merger. See Defs.'Ans.Br., pp. 21-24, 31. James Brennan, a partner in the law firm of Sidley & Austin, Trans Union's outside counsel, attended the September 20 Board meeting. Mr. Brennan explained to the directors the terms of the formal merger agreements, which he had helped draft. He also opined, in response to a question by the directors, that an opinion by an investment banker as to the fairness of the proposed merger was not required (A 1118, 1129, 1132-33, 1328, 1347; Reneker Dep. (PX 152), pp. 70-71; Lanterman Dep. (PX 154), p. 69; Browder Dep. (PX 146), pp. 83, 184).

During the discussions among the directors concerning the fairness of the offered price at the September 20 meeting,

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* The reports rendered at the January 26, 1981 meeting were relevant to the directors' exercise of business judgment, in that they had a fiduciary obligation to continue to monitor developments subsequent to September 20, 1980 and were free as a matter of law to change their recommendation with respect to the merger at any time until the merger was approved by stockholders. See Jewel Companies v. Pay Less Drug Stores Northwest Inc., N.D.Cal., 550 F.Supp. 770, 772 (1982); Great Western Prod. Co-op v. Great Western Sugar Co., Colo.App., 588 P.2d 380 (1978), aff'd, Colo.Supr., 613 P.2d 873 (1980).

Mr. Romans, Trans Union's Chief Financial Officer, reported the results of a recent preliminary study made by his department. As he testified:

> Q. And did you indicate to the Board that your initial study indicated one price range?
>
> A. It really didn't indicate a price range. We just ran the numbers at 50 and then we ran them at 60, showing that 50 could easily be done. 60 was hard. So, therefore, it wasn't really a price range. It was just an assumption of price and then run the numbers against that assumption.
>
> * * *
>
> A. I told the Board that the study ran the numbers at 50 and 60, and then the subsequent study at 55 and 65, and that was not the same thing as saying that I have a valuation of the company at X dollars.

(Romans Dep. (PX 156), p. 46, 48). Mr. Romans also testified that he advised the Board at the September 20 meeting that he "...believed that $55 was in the range of a fair price, in...[his] professional view." Id. at 50.

At the September 20 Board meeting, after hearing the reports of Messrs. Van Gorkom, Brennan and Romans, and after extensive discussions among themselves, the directors of Trans Union insisted upon two changes in the draft merger agreements, i.e., to provide any interested party with the same information which had been made available to the Pritzkers, and to make clear that the directors had a fiduciary duty to accept a better offer. The fact that the directors demanded those changes shows conclusively that the directors understood Pritzker's proposal

and brought their informed business judgment to bear with specificity on the proposed transaction.

Mr. Van Gorkom presented the only report made at the October 8, 1980 board meeting. He reported the events that had occurred since the September 20 meeting that resulted in two proposed amendments to the merger agreement. He explained that one amendment would give Trans Union the right to affirmatively solicit other bids, utilizing an investment banker, and that the second amendment would extend until February 10, 1981, the date by which Trans Union was required to present the merger proposal to its stockholders. After discussion, the directors authorized those amendments and also authorized Mr. Van Gorkom to retain Salomon Brothers to search for a better offer. See pages 27 through 30 of Defendant's Answering Brief for details of the matters reported by Mr. Van Gorkom at the October 8, 1980 meeting.

The above described oral reports were properly relied on by the directors. Those reports, particularly when coupled with the wealth of experience, prior discussions, and written financial reports which the directors had and had received before, make it clear that the directors were fully informed and had every right to rely on Van Gorkom, Brennan and Romans in exercising their business judgment. As Mr. Johnson testified at trial:

> ...If we couldn't have made an informed and rational judgment, then of course it was our obligation to say that we couldn't. But I saw no reason why we couldn't do it. We all were--It's not a gigantic board like some companies have. The inside directors certainly were all very familiar with the

> company. The outside directors were very familiar. There are only four or five of us. And all the outside directors except Mr. Wallis, I guess, were thoroughly experienced businessmen who had been CEO's of large companies, most of us in multi-billion dollar companies. And we had been attending all the board meetings. We had detailed reports on operations. We had the five-year plan just a couple months before. We had the Boston Consulting Group's study. We all knew about the tax situation and the new tax law that would probably be enacted, and we had to face it. If we could make a decision, we should. I thought under the circumstances it was easy at $55 a share for Trans Union.

(B 1119-1120).

Although faced with a deadline imposed by the Pritzkers, it is apparent that the directors of Trans Union were particularly well-informed about Trans Union, its history and its prospects. In fact, they had the best of all worlds. When they accepted the Pritzkers' proposal, the directors believed, in good faith, that the $55 per share price was fair, they knew that the $55 price was substantially above the historical and recent market prices for Trans Union's shares,* and they knew

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* The averages of the high and low market prices for Trans Union stock for the years 1975 through 1979, and for the period January 1, 1980 through September 19, 1980 (the last day of trading before the public announcement of the proposed merger) were as follows:

1975	-	$31.04
1976	-	33.17
1977	-	36.34
1978	-	34.30
1979	-	32.31
1980	-	33.87

(PX-98, p. 3). Thus, despite increased earnings and dividends in each year since 1975, the market price of Trans Union's shares was essentially stagnant.

that that price would be tested in the market for at least three months. Ultimately, the market proved their decision to have been correct.

Question (c): If there is insufficient evidence of record to support a conclusion that one or more directors, other than Van Gorkom and Chelberg, are entitled to the protection of the business judgment rule by reasonable reliance upon 8 Del.C. §141(e), what effect, if any, does the stockholder vote of February 10, 1981, have in relieving such director of a duty to timely exercise business judgment in connection with the sale of TU?

Response*

The vote of the stockholders on February 10, 1981 is a full defense to (1) any claim that the directors were not entitled to rely upon the absolute defense provided by §141(e); or (2) any claim that business judgment had not been exercised because the directors failed to inform themselves of all material information reasonably available to them.

Informed decision making is part of the common law duty of care. In this case, the transaction which plaintiffs attack was a merger which was approved by Trans Union's stockholders, as well as by its directors. Under settled law in this State,

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* As discussed in our response to Question (b), the directors of Trans Union were entitled to rely not only upon the types of information specified in 8 Del.C. §141(e) in forming their business judgment, but also upon other forms of information and their own experience with respect to their decisions to adopt the merger agreement and recommend it to the stockholders. Accordingly, in this response, we address ourselves not only to the question asked by the Court, which is limited to "reasonable reliance upon 8 Del.C. §141(e)," but also to the broader question: "If there is insufficient evidence of record to support a conclusion that one or more directors, other than Van Gorkom and Chelberg, are entitled to the protection of the business judgment rule, what effect, if any, does the stockholder vote of February 10, 1981, have in relieving such director of a duty to timely exercise business judgment in connection with the sale of TU?"

that shareholder ratification relates back to cure an invalid act of a director and is a "full defense" to any claim based upon a breach of fiduciary duty.

As this Court stated in Michelson v. Duncan, Del.Supr., 407 A.2d 211, 219 (1979):

> It is the law of Delaware, and general corporate law, that a validly accomplished shareholder ratification relates back to cure otherwise unauthorized acts of officers and directors [citations omitted]. It is only where a claim of gift or waste of assets, fraud or ultra vires is asserted that a less than unanimous shareholder ratification is not a full defense. (emphasis added).

Similarly, the Court of Chancery held in Michelson that:

> A breach of common law fiduciary duties is, however, cured by stockholder ratification. Cf. Fidanque v. American Maracaibo Co., Del.Ch., 92 A.2d 311, 321 (1952).

Michelson v. Duncan, Del.Ch., 386 A.2d 1144, 1153 (1978). See also Lewis v. Hat Corp. of America, Del.Supr., 150 A.2d 750, 753 (1959) ("It is clearly established in Delaware that stockholder ratification of corporate action which is not per se void renders such action immune from minority stockholder attack...").

In addition to the foregoing, we note that question (c) posed by the Court appears to be premised upon an assumption that "one or more" directors are not entitled to the protection of the business judgment rule. In Aronson v. Lewis, supra, this Court made clear that if a majority of a board of directors was disinterested and exercised its business judgment, the protection of the business judgment rule applies to the corporate action

taken. Slip op. at 13, 19-20 and n.8. Accordingly, unless the record below shows that the Chancellor's conclusion that there was an informed business judgment was clearly wrong and not supported by substantial evidence (Warren v. Goldinger Bros., Inc., supra), and unless there is also sufficient contrary evidence to overcome the presumption that a majority of Trans Union's directors were informed of "all material information reasonably available to them" (Aronson v. Lewis, slip op. at 12-13), then the protection of the business judgment rule applies to all directors of Trans Union without the need for reference to the subsequent approval by the stockholders.

In short, even were this Court to conclude, contrary to the findings of the Chancellor based on the record below, that a majority of Trans Union's directors were "so far without information that they [could] be said to have reached an unintelligent and unadvised judgment," Mitchell v. Highland-Western Glass Co., Del.Ch., 167 A. 831, 833 (1933), the stockholders' overwhelming approval of the merger would be a "full defense" (1) to a claim that the directors were not entitled to rely upon the absolute defense provided by §141(e), and (2) to a claim that business judgment had not been exercised because they failed to inform themselves of all material information reasonably available to them.

Question (d): Can shareholder ratification of the merger, by less than unanimous vote, cure director approval of the merger if one or more directors are found not entitled to the protection of the business judgment rule for absence of good faith?

Response

The answer to this question is yes. As set forth in Michelson v. Duncan, supra, shareholder ratification by less than unanimous vote is a "full defense" to a claim that an act of a director was invalid unless a claim of "gift or waste of assets, fraud or ultra vires is asserted." 407 A.2d 219. In light of plaintiffs' concession in this Court that there were no allegations or proof of fraud, bad faith or self-dealing by the directors, and the fact that this action has not been prosecuted upon theories of gift, waste of assets or ultra vires action,* the stockholder ratification of the merger would relate back to cure any deficiency in the directors' approval of the merger.

Even assuming, unlike the case at bar, a situation that did involve "fraud, bad faith, or self-dealing," shareholder ratification would still have the effect of squarely placing upon plaintiffs the burden of showing that no person of ordinary sound business judgment could say that the consideration received in the merger was fair. As this Court held in

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* As confirmed in this Court's recent decision in Lewis v. Anderson, Del.Supr., No. 343, 1982, Horsey, J. (April 18, 1984), plaintiffs would not in any event have standing to prosecute a claim of gift or waste of assets. Such claims would be derivative in nature and would have been precluded by the subject merger.

Michelson v. Duncan, supra, with respect to plaintiff's claim in that case of gift and waste:

> We further hold, as the Vice-Chancellor ruled, that shareholder ratification shifted the burden of proof of want or inadequacy of consideration for the grant of the options from defendants to plaintiff. See Gottlieb v. Heyden Chemical Corporation, supra, and Kaufman v. Schoenberg, supra. In Gottlieb, this Court stated that "...[T]he entire atmosphere is freshened and a new set of rules invoked where formal approval has been given by a majority of independent, fully informed stockholders...." 91 A.2d at 59.
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> Similarly, in Kaufman, the Chancellor stated that in the absence of independent stockholder ratification, interested directors have the burden of showing that the consideration to be received for the grant of options represented a "fair exchange", but the burden shifts where there has been shareholder ratification:
>
> > "Where there has been independent stockholder ratification of interested director action, the objecting stockholder has the burden of showing that no person of ordinary sound business judgment would say that the consideration received for the options was a fair exchange for the options granted." 91 A.2d 791. (Emphasis added).

407 A.2d at 224.

In this case, it has been conceded that there was no interested director action. Even if there were such a claim, plaintiffs did not, and could not, meet their burden of showing that no person of ordinary sound business judgment could say that the merger consideration was fair, in light of Trans Union's business history and prospects and the premium paid by the Pritzkers of 62% over the average high and low prices at which Trans Union stock had traded in 1980, 48% over the last

closing price before the merger, and 64% over the average high and low prices at which the stock had traded at any time during the prior six years.

Accordingly, whether this Court accepts ratification as a "full defense", as we submit it must under the facts here, or even assuming hypothetically that such ratification resulted only in a shifting of the burden of proof to plaintiff to show that the consideration received in the merger was so inadequate that no person of ordinary sound business judgment would say it was fair, there is only one possible conclusion. The decision below of Chancellor Marvel must be affirmed.

CONCLUSION

For the reasons stated in this brief and in Defendants' Answering Brief filed herein on November 24, 1982, the Chancellor's Final Judgment Order of July 14, 1982 should be affirmed in all respects.

POTTER ANDERSON & CORROON

By Robert K Payson

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