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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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ALDEN SMITH and JOHN W. GOSSELIN, Plaintiffs, v. JAY A. PRITZKER, et al., Defendants.	)	Civil Action No. 6342

DEFENDANTS' PRE-TRIAL BRIEF

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Dated: September 21, 1981

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I. NATURE AND STAGE OF THE PROCEEDINGS

This action was filed on December 19, 1980, by Alden Smith ("Smith"), who then owned 54,061 shares of the common stock of Trans Union Corporation ("Trans Union"). Smith sought, inter alia, to enjoin the merger of Trans Union into New T Co., an indirect wholly-owned subsidiary of GL Corporation ("GL"), a private company, the stock of which is beneficially owned by various members of the Pritzker family of Chicago. Trans Union, New T Co., and GL are Delaware corporations. Also named as defendants are The Marmon Group, Inc. ("Marmon"), which is a subsidiary of GL, Jay A. Pritzker and Robert A. Pritzker, both of whom are directors and officers of Marmon, and the ten individuals who were then members of the Board of Directors of Trans Union and who voted on two occasions to recommend the proposed merger for approval by Trans Union's stockholders.

After extensive discovery, plaintiff's motion for a preliminary injunction was presented to this Court on briefs and affidavits. In a Letter Opinion dated February 3, 1981, the injunctive relief sought by plaintiff was denied. This Court reasoned:

> "The provisions of 8 Del.C. §141 place the management of a Delaware corporation under the direction of a board of directors and where there is no indication of fraud or ultra vires conduct, this Court will not interfere with questions of policy and business management, there being a

presumption that directors form their judgments in good faith, Allaun v. Consolidated Oil Co., Del.Ch., 147 A. 257 (1929). And when the transaction complained of is the result of independent business judgment the test applicable to the transaction in the absence of fraud is business judgment, Puma v. Marriott, Del.Ch., 283 A.2d 693 (1971)."

*   *   *

"I conclude that plaintiff has not demonstrated that probability of ultimate success on final hearing which would entitle him to the granting of a preliminary injunction. If the proposed merger is not in the best interests of the stockholders of Trans Union Corporation, it is their prerogative so to decide at the vote to be taken on February 10, 1981 at the special meeting to be held in Chicago...."

Smith v. Pritzker, C.A. No. 6342, Letter Opinion dated February 3, 1981 at pp. 7, 8 (copy attached hereto as Annex A). The proposed merger received the overwhelming approval of Trans Union's stockholders at the February 10, 1981 special meeting.

After plaintiff Smith's motion for a preliminary injunction was denied, John W. Gosselin ("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

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* Gosselin's motion to intervene was filed on February 5, 1981, two days after this Court noted, in its opinion denying Smith's motion for a preliminary injunction, that Smith's opposition to the merger may have been based on his unusual (if not unique) tax situation regarding the Trans Union stock which he had acquired in 1959. Smith v. Pritzker, supra, at p. 5.

persons, other than defendants, who held shares of common stock of Trans Union on September 22, 1980, or at any time thereafter up to and including immediately prior to the effectuation on February 10, 1981, of the merger of Trans Union and New T Co.

The merger having been accomplished more than six months ago, plaintiffs have presumably abandoned their claim for injunctive relief and now seek only damages. Trial is scheduled to begin on September 22, 1981. This Pre-Trial Brief is filed on behalf of all defendants in opposition to plaintiffs' claims.

II. STATEMENT OF FACTS

The common stock of Trans Union Corporation or its predecessor and principal subsidiary, Union Tank Car Company, has been traded on the New York Stock Exchange for more than 60 years. Trans Union is a diversified holding company, but its principal activity is the manufacture, leasing and service of railroad cars.

A recurring concern of Trans Union's management was that the stock market did not fully recognize the underlying value of the Company. Notwithstanding management's persistent efforts to educate the market, the fact that Trans Union's income per share from continuing operations had steadily increased from $3.20 in 1975 to $5.01 in 1979, and the fact that its dividends had increased from $1.58 per share to $2.24 during the same period, the average price per share of the Company's stock had increased from $31.04 in 1975 to only $32.31 in 1979.

Another recurring concern of Trans Union's management was the Company's inability to fully utilize the tax benefits available to it. In 1979, approximately 80% of Trans Union's income before taxes was derived from its leasing operations. The rail car leasing business provides substantial potential tax benefits, but Trans Union's inability to fully utilize those benefits placed the Company at a competitive disadvantage. In mid-1980, senior management of Trans Union became convinced that proposed federal legislation would be enacted that would

increase the potential tax benefits available to the rail car leasing business. Such legislation would further exacerbate Trans Union's inability to fully utilize the potential tax benefits generated by its primary business activity.

One possible solution to the problem of trying to increase the market value of Trans Union's stock was to acquire other companies that generated sufficient taxable income to permit full utilization of the tax benefits generated by the rail car leasing business. Another solution was to sell Trans Union to a company that could fully use those tax benefits. With these problems and potential solutions in mind, Jerome W. Van Gorkom, the Chairman of Trans Union, arranged a meeting with Jay A. Pritzker in mid-September, 1980. Van Gorkom's purpose was twofold. First, he regarded Pritzker as having one of the best financial minds in the United States, and any opinion Pritzker expressed would be worthy of consideration. Second, Van Gorkom believed that the Pritzkers, whose companies are privately owned, could afford to pay more for Trans Union than a publicly-owned company because cash flow, a major strength of Trans Union, was more valuable to the Pritzkers than earnings, and because the Pritzkers would not be concerned, as a public company would, with Trans Union's high debt/equity ratio.

As a result of the meeting between Van Gorkom and Pritzker late in the week of September 14, the Pritzkers made an offer to purchase Trans Union. The offer provided that each stockholder of Trans Union would receive $55 per share in cash

if a majority of the stockholders voted to accept the offer, and it was conditioned on the Pritzkers obtaining financing commitments by October 10, 1980. The Pritzker offer was also conditioned on the grant of an option to a Pritzker designee to purchase one million shares of Trans Union at $38 per share, a price slightly above the market price at the time the offer was made. The option was exercisable, however, only if the financing condition was satisfied or waived.

On September 20, 1980 the Pritzker offer was presented by Van Gorkom to Trans Union's board of directors at a special meeting. The ten-man board of directors had five outside directors, all of whom were experienced businessmen, including the chairmen of major companies such as IC Industries Inc., United States Gypsum, and Esmark, Inc. (formerly Swift and Company). The Board was particularly well informed about Trans Union and its prospects, having in the preceding two months received a comprehensive study of the Company from Boston Consulting Group as well as internally prepared 5-year projections. Eight of the nine directors present at the meeting voted to recommend that the stockholders approve the $55 per share offer.* The closing price for Trans Union's stock on the New York Stock Exchange on September 19, 1980, the last trading day before the announcement of the proposed merger, was $37.25.

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* One director was hospitalized and another director later claimed to have remained silent, although he subsequently approved minutes stating he had voted affirmatively.

The average of the high and low prices at which the stock had traded in 1980 prior to announcement of the proposed merger was $33.88. Thus, the price offered by the Pritzkers represented a per share premium of $17.75, or more than 47%, over the last closing price before 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 proposal; and an aggregate premium of more than $222,000,000 to the holders of Trans Union's 12,512,956 shares. The issue that was presented to the board, as framed by Van Gorkom and as perceived by the directors, was whether the stockholders should have the opportunity to decide whether to accept the substantial premium that was being offered for their stock. The directors recommended the offer in full confidence that anyone willing to pay more than $55 per share for the stock would make a higher offer. On October 10, 1980, the merger agreement was amended so as to permit Trans Union actively to solicit higher offers from third parties. Prior to that amendment Trans Union could provide all relevant information to interested parties, but could not actively solicit.

From mid-October, 1980 until the latter part of January, 1981, Trans Union's long-time investment banker, Salomon Brothers, sought to obtain for the stockholders an offer of more than $55.00 per share by contacting more than 125 potential purchasers. Salomon Brothers had tremendous incentive

to find a purchaser willing to pay more than $55.00 per share. Under the terms of its contract with Trans Union, Salomon Brothers would receive a fee of 3/8 of 1% of any amount bid that was more than $55.00 per share. Under this arrangement Salomon Brothers would receive a fee of $2,650,000 if it could find a purchaser willing to pay only $1.00 per share more than $55.00.* However, notwithstanding Salomon Brothers' efforts, no prospective purchaser ever made an offer to pay more than $55.00 per share.

On January 26, 1981, Trans Union's Board of Directors reviewed their September, 1980 decision to recommend to the stockholders that they approve the $55.00 per share offer. They also carefully reviewed events which had occurred since September 20, 1980, and the plaintiff's allegations in this litigation. At the conclusion of that review, the Board unanimously reaffirmed its decision to recommend approval of the proposed merger. No Board member sat on both sides of the transaction, and there are no allegations or evidence of fraud or ultra vires conduct by any individual defendant.

A special meeting of the stockholders of Trans Union was held on February 10, 1980, the purpose of which was to permit the stockholders to decide whether to accept the offer of $55.00 per share for their stock. No stockholder entitled to

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* An additional incentive for Salomon Brothers was the fact that it owned more than 210,000 shares of Trans Union stock.

vote at that meeting owned as much as 5% of Trans Union's outstanding common stock. Approximately 77% of the shares entitled to vote were voted at the meeting. The merger was approved by almost 70% of all of the shares entitled to vote, which consisted of more than 87% of the shares that were actually voted. Only 7% of the shares entitled to vote disapproved the merger. Thus, the stockholders approved the merger by a ratio of approximately 10 to 1.

III. ARGUMENT

As this Court concluded in its February 3, 1981, Letter Opinion denying plaintiff Smith's application for a preliminary injunction, this is a case in which plaintiffs challenge the exercise of business judgment by an independent board of directors. This Court's February 3, 1981 decision that it would "...not interfere with questions of policy and business management, there being a presumption that directors form their judgments in good faith..." is solidly rooted in Delaware law. Smith v. Pritzker, supra, at pp. 7, 8.

In the leading case of Sinclair Oil Corp. v. Levien, Del.Supr., 280 A.2d 717, 720 (1971), Chief Justice Wolcott said:

> "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."

This rule is particularly apt where, as here, the primary allegation is that the price paid for Trans Union stock was inadequate. When such a question is raised, the business judgment rule requires that room be afforded for honest differences of opinion. Allied Chemical & Dye Corp. v. Steel & Tube Co. of America, Del.Ch., 120 A. 486, 494 (1923). Thus "a wide discretion in the matter of valuation, as in other matters, is confided to directors." Cole v. National Cash Credit Ass'n., Del.Ch., 156 A. 183, 188 (1931). Consequently, "a mere inadequacy of price will not suffice to condemn the transaction

as fraudulent, unless the inadequacy 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).

In Muschel v. Western Union Corp., Del.Ch., 310 A.2d 904, 908 (1973), Vice Chancellor Brown described the application of the business judgment rule to facts and allegations similar to those presented here as follows:

> "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. Wide discretion in the matter of valuation is confided to directors, and as long as they appear to act in good faith, with honest motives, and for honest ends, the exercise of their discretion will not be interfered with."

The premium over the market value of Trans Union's stock paid in the subject transaction dispels any possible notion that the merger consideration in this case carries "a badge of fraud."

It is clear that the rule of Singer v. Magnavox Co., Del.Supr., 380 A.2d 969 (1977), which is based on the fiduciary relationship between a majority and a minority stockholder, has no application here. However, the following statement from Singer does reaffirm the vitality of the business judgment rule, where, as here, there are no directors and no majority stockholders standing on both sides of the transaction:

> "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."

380 A.2d at 973.

One of the conditions of the merger offer about which plaintiffs complain most vigorously was the option to purchase one million shares of Trans Union at a price of $38 per share, which price was slightly above the market price when the option was granted. However, as recently held in Conoco, Inc. v. Mobil Oil Corp., _____ F.Supp. _____ (S.D. NY 1981), 81 Civ. 4787, decided August 4, 1981 (copy attached as Annex B), the grant of an option in connection with a merger, like the other terms of the merger, is reviewed under the business judgment rule. See also, Treadway Companies, Inc. v. Care Corp., 638 F.2d 357 (2nd Cir. 1980). It is also significant to note that the exercise of the option did not reduce the amount ultimately received by the stockholders by one cent.

The presumption that directors form their business judgments in good faith is bolstered in this case by the fact that there is no evidence whatsoever of any reason why Trans Union's directors would not want to obtain the highest available price for the Company's stock. Although the 113,749 shares of Trans Union stock owned by the directors as a group was less than 1% of the outstanding shares, several of the holdings were significant to the individual directors. No reason has been given by plaintiffs as to why the directors would want to harm themselves by recommending a merger price that was less than the

highest price attainable. Compare, Gropper v. North Central Texas Oil Co., Del.Ch., 114 A.2d 231, 235 (1955). See also, Cottrel v. Pawcatuck Co., Del.Supr., 128 A.2d 225, 231 (1956), and Smith v. Good Music Station, Del.Ch., 129 A.2d 242, 247 (1957).

The only significant event in this case that occurred after the Court's February 3, 1981 opinion was the special meeting of Trans Union's stockholders held on February 10, 1981. At that meeting, the directors' business judgment received the overwhelming ratification and approval of Trans Unions' stockholders, whose financial interests were directly affected by the proposed merger. Stockholder approval further strengthens the presumption that the directors exercised good faith business judgment and "...is properly entitled to great weight." Porges v. Vadsco Sales Corp., Del.Ch., 32 A.2d 148, 151 (1943). As this Court stated in Lewis v. Hat Corp. of America, Del.Ch., 150 A.2d 750, 754 (1970):

> "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 the stockholders absent a showing of fraud, a gift of assets, illegality or ultra vires action....

And, as the Court stated in Michelson v. Duncan, Del.Ch., 386 A.2d 1144, 1155 (1978), aff'd in part, rev'd in part on other grounds, 407 A.2d 211 (1979):

> "If the stockholders, after receiving a disclosure of all germane facts given with complete candor, cannot ratify an act by the Board of Directors not constituting a gift or waste of corporate assets, corporate democracy is meaningless."

In short, 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 3 months; that was reviewed by the directors in detail and unanimously reaffirmed more than 4 months after the initial judgment was made; that was overwhelmingly approved by the stockholders; and which resulted in the payment of a premium over the market value of the stock of more than $222,000,000 to the stockholders. The law does not require that the directors satisfy the desires of every stockholder, particularly those stockholders with unusual income tax problems. On the contrary, the directors would have breached their duty to the stockholders if they had failed to present them with the opportunity to obtain substantially more for their stock than the market was willing to pay.

Tacitly conceding that they cannot directly attack the business judgment of the directors or the judgment of the overwhelming majority of the stockholders, plaintiffs resorted in an amendment to their complaint filed just prior to the preliminary injunction hearing to an attack on the adequacy of the disclosure of the Proxy Statement. However, in support of this attack, plaintiffs have pointed to isolated facts taken out of context or have failed to acknowledge the existence of

related facts necessary to fairly describe the events. For example, plaintiffs criticize various parts of the January 21, 1981 Proxy Statement, but have all but ignored the additional disclosures made in the January 26, 1981 Supplemental Proxy Statement. Plaintiffs are critical of the presentation and discussion at the September 20, 1980 board meeting, but fail to acknowledge that the decision to recommend the merger was reexamined in detail and unanimously endorsed by the directors four months later at the January 26, 1981 meeting. Plaintiffs condemn the initial restriction against Trans Union actively seeking competing offers, but ignore the fact that Trans Union became entitled to actively solicit competing offers on October 10, 1981. Plaintiffs are critical of the directors' decision not to obtain a fairness opinion from an investment banker. However, the extensive efforts of Salomon Brothers informed the directors of the fact, as opposed to an opinion, that no better offer was available. Plaintiffs speculate that the existence of the Pritzker offer discouraged other bidders. The recent experience of the bidding contest for Conoco by such formidable contestants as DuPont, Seagrams and Mobil demonstrates that plaintiffs' speculation has no basis in fact.

Defendants do not know which, if any, of their many criticisms of the proxy materials plaintiffs will pursue at trial. However, defendants are confident that the Proxy Statement, both standing alone and as supplemented, more than satisfies the requirements of Kaplan v. Goldsamt, Del.Ch., 380 A.2d 556, 565-66 (1977), in which this Court summarized the

nature of a Delaware corporation's disclosure obligation to its stockholders as follows:

> "[W]hile a corporation must adequately inform shareholders as to matters under consideration, the requirement of full disclosure does not mean that a proxy statement must satisfy unreasonable or absolute standards. Many people may disagree as to what should or should not be in such a statement to shareholders, and as to alleged omissions the simplest test (sometimes difficult of application) is whether the omitted fact is material. Kaufman v. Shoenberg, 33 Del.Ch., 211, 91 A.2d 786 (1952). There is obviously no requirement to include insignificant information. Compare Baron v. Pressed Metals of America, Del.Supr., 35 Del.Ch., 581, 123 A.2d 848 (1956); American Hardware Corporation v. Savage Arms Corporation, 37 Del.Ch., 10, 135 A.2d 725 (1957). Provided that the proxy statement viewed in its entirety sufficiently discloses the matter to be voted upon, the omission or inclusion of a particular item is within the area of management judgment. Schiff v. RKO Pictures Corp., 34 Del.Ch., 329, 104 A.2d 267 (1954).
>
> This long standing view of the Delaware courts comports with the recent expression of the United States Supreme Court in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976) wherein it was stated that in order for an omission to be material,
>
> '...there must be a substantial likelihood that the disclosure of the fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available. Id., 96 S.Ct. at 2133.'"

Defendants submit that the Proxy Statement and Supplement fairly disclosed the matter to be voted upon and the omission or inclusion of any particular item was within the area of management judgment.

IV. CONCLUSION

For the reasons stated herein, defendants submit that the evidence will show that judgment should be entered against plaintiffs and in favor of defendants.

Respectfully submitted,

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