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. 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' REPLY SUPPLEMENTAL BRIEF

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SUMMARY OF REPLY ARGUMENT

In this reply supplemental brief, defendants make two arguments: (1) there is no basis for this Court to overturn the Chancellor's finding that the defendants acted in good faith; and (2) stockholder ratification is a complete defense in any event.

Defendants view the "absence of good faith" question of the Court as one involving the duty of loyalty, the directors' honest belief that they are acting in the best interest of the corporation and its stockholders. Since the plaintiffs conceded there had been no proof of fraud, bad faith or self-dealing, it is not surprising that they view the Court's question as encompassing the duty of care, the directors' duty to be reasonably informed. The Chancellor specifically found that the directors did not act either "recklessly or improvidently" (A-22).[1] Since the record clearly justifies the conclusion that the directors performed the duty of care as well, the Chancellor's decision must be affirmed even if the plaintiffs' view of the Court's inquiry is correct.

The first argument is factual. The directors were duly informed and there was no absence of good faith. Moreover, unless this Court intends to undertake a post-trial, de novo factual review of the evidence, the Chancellor simply must be sustained under established scope of review standards. Defendants submit the factual record offers compelling support for the Chancellor's conclusions. The trial included lengthy live testimony including the testimony of Mr. Van Gorkom and Mr. Johnson, to which the Court's attention is respectfully invited.

The second argument, ratification, is legal and constitutes an independent ground for affirmance.

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1 All pages of the record cited by defendants in this brief are included in the Supplemental Appendix filed herewith.

ARGUMENT

I. PLAINTIFFS DID NOT ESTABLISH AT TRIAL THAT THE DIRECTORS OF TRANS UNION WERE UNINFORMED OR THAT THEY ACTED IN BAD FAITH.

In their Opening Supplemental Brief ("PSB") plaintiffs have again attempted to retry the facts on appeal. In so doing they take license with the record that would probably not even be permitted in a closing argument to a jury. Plaintiffs present their "facts" in colorful, single-spaced text having the appearance of being quotations from the record. See PSB at pp. 3-6 and 8-10. However, plaintiffs' "facts" are not quotations; rather, they are distortions of the record or simply are not found in the record. Repetition does not make inaccurate statements accurate. Plaintiffs' claim that defendants acted in bad faith is not supported by the record and must fail. In this argument we will review plaintiffs' most egregious distortions to demonstrate their inaccuracy.

A. Plaintiffs' Claim That Van Gorkom Acted Alone And Without Authority.

To bolster their misplaced reliance on Bennett v. Propp, Del.Supr., 187 A.2d 405 (1962), plaintiffs repeatedly state or suggest that the sale of Trans Union ("TU") was made single-handedly by Mr. Van Gorkom without Board authorization or approval and without subsequent stockholder approval. Plaintiffs point to Van Gorkom's September 13 meeting and subsequent discussions with Jay Pritzker. But the facts of record establish beyond question that Van Gorkom did nothing improper and made no commitment to Pritzker on behalf of TU.

Plaintiffs have mischaracterized Van Gorkom's conduct and motives as follows:

> Mr. Van Gorkom...usurped the function of the TU Board by seeking out and preliminarily negotiating a cash-out Merger,...without Board authorization and without consulting his fellow directors [No record citations]....
>
> * * *

...Mr. Van Gorkom, without Board approval, took it upon himself to single-handedly negotiate and commit to a merger proposal [No record citations].[1]

* * *

TU's Board of Directors never even discussed much less authorized or directed Mr. Van Gorkom to initiate the Merger discussions (TR. 769, Johnson).[2]

* * *

Nevertheless, Mr. Van Gorkom deliberately and secretly set out to accomplish a merger without first consulting TU's Board, other officers, or financial or legal advisers [No record citations].

Mr. Van Gorkom unilaterally decided without Board authorization to seek a merger partner for TU (TR. 769, Johnson).

* * *

He [Van Gorkom] did not contact any other person or entity that might be interested in acquiring TU (A 1273).[3]

By his unilateral action, Mr. Van Gorkom intentionally put TU and its Board in a time squeeze as a result of Mr. Pritzker's take it or leave it offer (A 1111, 1113, 1347).[4]

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1 Compare this statement at PSB 3 with plaintiffs' wholly inconsistent statement at PSB 11: "The TU directors were not confronted with a fait accompli or a corporate obligation that they could not avoid."

2 Plaintiff's incomplete citation to Mr. Johnson's testimony is misleading. Johnson also testified that Van Gorkom, as Chief Executive Officer, was authorized to look at any proposal he wanted, but could not act upon a proposal which the directors were required to consider and decide upon (B 1170).

3 Plaintiffs fail to note that after the Pritzkers made their offer, Van Gorkom met with representatives of two prospective purchasers, KKR and General Electric, and TU retained Salomon Brothers which approached 150 prospective purchasers (A 1155, 1165-66, 1171-73; Higgins, 76).

4 There is no support in any of the pages cited by plaintiffs, or anywhere else in the record, for the claim that Van Gorkom "intentionally put TU and its Board in a time squeeze." In fact, Van Gorkom testified that when he visted Mr. Pritzker he "didn't try to get a bid for the company [and] didn't expect this to develop this way" (A 1111). As Van Gorkom also testified, he was "astounded" that Pritzker made an offer in such a short period of time (A 1101, 1316).

> Without the advice or consent of the rest of management or the Executive Committee of the Board or the Board itself...Mr. Van Gorkom decided to propose a $55 per share merger price to Mr. Pritzker (A 1282-1283;...).

PSB 3, 4.

Contrary to the impression plaintiffs seek to create, the record clearly shows that Van Gorkom decided to meet with Pritzker after a meeting of TU's senior management at which the adverse impact of proposed tax legislation and the possible sale of TU was discussed (A 1076-77). Van Gorkom's purpose was not sinister, as plaintiffs suggest. He was motivated by the best of intentions. Van Gorkom, who had participated in 30 to 40 acquisitions (A 1077, 1233; B 1337), believed that a private purchaser would pay more for TU than a public company (A 1083-84).[1] Van Gorkom decided to meet with Pritzker because (1) Pritzker's business acumen was well known, (2) Pritzker was representative of a type of private purchaser who could be expected to pay more for TU than a publicly owned company, and (3) Van Gorkom expected to learn what a private purchaser would be willing to pay for TU (A 1083-85, 1091-92, 1095; PX 154, Lanterman, 33; PX 155, Johnson, 17; PX 147, Van Gorkom, 69, 70, 84). As Van Gorkom testified:

> I went to see Mr. Pritzker not with the idea of selling the company in seven days -- that was the farthest thing from my mind -- but to explore in some depth the potential for such a sale to a class of buyers like the Pritzker family.

A 1108. No authority for the meeting with Pritzker was required (A 1101, 1293), and no commitment to sell TU was made at the meeting. There was no reason to inform TU's directors that Pritzker was reviewing information about TU during the week of September 15 until he made an offer on September 19 to purchase TU (A 1279-80).

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1 A private company would place a higher value on TU's cash flow, while a public company would be constrained by considerations of net income and debt/equity ratio (A 1083-84, 1273; B 1308-09).

When Pritzker made an offer on September 19, Van Gorkom immediately called a meeting for the very next day (A 1101, 1107, A 1317-18). As Van Gorkom testified:

> ...having found myself with what was a concrete offer, I certainly was not in a position to say no, we don't want to do that. I felt I didn't have that authority and so I felt definitely that the board had to pass on this.

A 1109.

Plaintiffs' claim that one or two directors of TU decided "when, for what price and if a merger should occur" (PSB 2) is nonsense. The record clearly shows that the Pritzkers' $55 per share offer was presented to and decided upon by TU's Board of Directors, subject to further approval by the stockholders. In fact, as the Chancellor found, the proposed merger was considered by the directors on three separate occasions (A 21). Plaintiffs' claim that Van Gorkom acted alone and without authority is false.

B. Plaintiffs' Claim That Van Gorkom And Chelberg Did Not Act In Good Faith.

Notwithstanding their concession in this Court that no defendant acted in bad faith, plaintiffs now make unsupported statements or distort the record in an effort to show that Van Gorkom and Chelberg did not act in good faith. First, in discussing a leveraged buy-out, plaintiffs say:

> Mr. Van Gorkom knew that if a leveraged buy out did occur, Mr. Romans and Mr. Bonser would replace him in the new company (A 1422-1423; Van Gorkom 196, 309). [Mr. Van Gorkom]...was intent on thwarting an attempt to displace him. [No record citation].
>
> * * *
>
> Mr. Van Gorkom squelched the KKR $60 per share leveraged buy-out which was presented to him by Mr. Henry Kravis on December 2, 1980 by rejecting it and refusing to issue a press release concerning it. [No record citation].
>
> * * *

> Mr. Van Gorkom wanted to pull off a single-handed 'coup' to preclude a leveraged buy out. [No record citation].

PSB 4 fn., 6, 7 fn.

Plaintiffs' only citations to the record in support of these statements are inaccurate, incomplete and misleading. Van Gorkom had been TU's Chief Executive Officer for more than 17 years and had to retire within 2 years. His successor, Chelberg, had already been chosen (A 1086, 1093, 1225; PX 153, Chelberg, 110-112). His paramount concern was not his remaining year as Chief Executive Officer of TU, but to get the best price for the stockholders in view of pending adverse legislation (B 1208, 1315, 1387-88). Van Gorkom, who was described at the trial as "a man of a very high standard of integrity" (B 1312), did not learn until sometime after December 2, 1980, more than two months <u>after</u> the Pritzker offer was made, that he and Chelberg would be replaced by Romans and Bonser if a leveraged buy-out by KKR were accomplished (PX 147, Van Gorkom, 200; A 1422-23).

At trial, Van Gorkom testified that he would have welcomed a KKR offer at $60 (A 1421-22). <u>See also</u>, A 1155; B 1337, 1341; PX 147, Van Gorkom, 75-78. The only reason Van Gorkom refused to issue a press release immediately when asked to do so by KKR on December 2 was that the KKR "offer" was so indefinite that it was not an offer (A 1211-13, 1432, 1435), and Van Gorkom did not want to chill other bidders (A 1430). Van Gorkom met with counsel and was preparing to present the question of issuing a press release to the Board when, for reasons having nothing whatsoever to do with any action or inaction by Van Gorkom, the issue became moot because the KKR "offer" was withdrawn 3 hours after it was made (A 1433; B 1456).

Second, plaintiffs claim that:

> Neither Mr. Van Gorkom nor Mr. Chelberg disclosed to TU's Board these meetings [held during the period September 13 through September 16, 1980]. [No record citation].

*　　　　*　　　　*

> ...Mr. Van Gorkom still did not consult or inform the other TU Board members or officers when, on September 18, 1980, he learned that Mr. Pritzker was going to formalize the very offer that Mr. Van Gorkom himself had proposed (A 1317-1318, 1333-1334).

PSB 5.

The fact is there was nothing for Chelberg or Van Gorkom to report to the directors until Pritzker made a firm offer on September 19. As Van Gorkom explained at trial, his reason for not informing anyone other than Chelberg and Peterson that there was a possibility of a Pritzker offer was to avoid leaks, which would have been harmful to TU's stockholders (A 1259-61, 1364; B 1367). Van Gorkom testified:

> ...if it were known in the public that we were in any way considering selling the company, and particularly if we were talking to somebody about it, it would trigger a wave of speculation in our stock...[which] could very easily damage our stockholders.
>
> * * *
>
> ...if a half a dozen people knew that we were discussing a merger, they would almost certainly bid the price of the stock up. And our shareholders who sold would be selling without the knowledge that these buyers had.

A 1084, 1364.

Third, plaintiffs charge that:

> Mr. Van Gorkom simply told the Board orally what <u>he thought</u> was the substance of the proposed Merger Agreement (TR. 708, Johnson)[1] though he had never even read the Merger documents at that time (or indeed before he signed the merger documents later that evening) (A 1378-1379).
>
> * * *
>
> ...Mr. Brennan, TU's outside legal counsel, was never given any written summary of the Agreement; instead he was made to rely on Mr. Van Gorkom's summary of what

1 In citing page 708 of the trial transcript, plaintiffs continue to ignore defendants' appendix. In fact, as Johnson testified, Van Gorkom's explanation of the substance of the proposed merger agreement was accurate in all respects (B 1109-18).

> Mr. Van Gorkom thought the substance of the Agreement was (A 1329-1330). Mr. Van Gorkom himself never read the entire Merger Agreement, though he knew it had been drafted by counsel for the buyer (A 1379)."

PSB 6, 12 fn.

What the record actually shows is that TU's outside counsel, James Brennan, worked with the Pritzkers' lawyer drafting the merger documents for several hours on the day before the September 20 Board meeting (A 1106, 1333, 1378-79; B 1362-63) and "spoke from" the documents at the Board meeting (A 1347). Van Gorkom reviewed the merger documents as they were being drafted (A 1382), "went through the documents" late Friday evening (A 1344) and reviewed them again just prior to the September 20 meeting (A 1132-33). Van Gorkom explained that he did not read the documents in final form because they were ninety-five percent "boilerplate" and he "had no reason to think they had been changed from the night before" (A 1344-45). Before signing the documents, he talked to Brennan and relied upon Brennan to advise him if any changes had been made from the draft he had reviewed (A 1378-79).

C. Plaintiffs' Claim That Trans Union's Directors, Other Than Van Gorkom and Chelberg, Were Not Informed And Did Not Act In Good Faith.

Plaintiffs now argue that TU's directors did not act in good faith, notwithstanding their unequivocal concession in this Court that there "were no allegations and no proof of...bad faith." Pltfs.'Rep.Br., p. 2. In support of their newly advanced claim of bad faith, plaintiffs make sweeping statements, without citation to the record, such as:

> TU's Board then abdicated their statutory and fiduciary obligations by quickly and supinely acquiescing in the unauthorized and reckless conduct of Mr. Van Gorkom and Mr. Chelberg. [No record citation].

*　　　*　　　*

> TU's Board failed to take any steps to inform themselves, prior to approving the Merger, of...the actual terms of the Merger and their effect. [No record citation].
>
> * * *
>
> ...TU's directors passively accepted Mr. Van Gorkom's patently inaccurate representations about the Agreement's contents. [No record citation].
>
> * * *
>
> TU's Board did not take even the most rudimentary steps to assess the $55 Merger proposal. [No record citation].
>
> * * *
>
> By recommending the proposal to the stockholders, [the TU directors] falsely represented to the stockholders that they had brought their full attention and expertise to bear on the Merger and had decided that the Merger was in the stockholders' best interest. In fact, they had not. [No record citation].

PSB 3, 12, 13, 27.

In an effort to support this rhetoric and meet their burden of establishing gross negligence,[1] plaintiffs again distort the record and take facts out of context. Plaintiffs charge that the Board did not inquire at the September 20 meeting as to the origin of the terms of the proposed merger or how the $55 price was set (PSB 8). However, as Mr. Wallis testified, the history of the offer was not the issue before the Board--the question was whether the merger was "a good proposition from the point of view of our stockholders" (PX 151, Wallis, 51-53).

Plaintiffs' claim that the directors did not understand or bring their full attention to bear on the terms of the proposed merger is belied by the fact that the

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1 Plaintiffs have conceded that "Gross negligence is the standard for determining whether directors have acted with requisite care" (PSB 2, fn). Lutz v. Boas, Del. Ch., 171 A.2d 381 (1961), upon which plaintiffs rely (PSB 10), clearly involved "grossly negligent" directors. This case does not.

directors insisted upon two important amendments to the proposed merger agreements (A 1133, 1372, 1387; B 1114, 1240-41, 1431-35, 1449, 1529-30).

Plaintiffs also state that TU's directors:

> ...posed no questions as to why an opinion or evaluation by TU's investment bankers had not been obtained (A 1352-1352).
>
> * * *
>
> The Board made the affirmative decision not to obtain the advice or opinion of TU's investment bankers (A 1353). Indeed, the TU Board <u>never</u> obtained for themselves or their stockholders an independent investment banker fairness opinion (TR 799, Johnson).

PSB 8.

Plaintiffs' argument ignores the circumstances under which the Pritzker offer was made. The offer was made on September 19, a Board meeting was called immediately, the Board met on September 20, and the Pritzker imposed deadline was September 21 (A 1101, 1107, 1117, 1317-18). The directors did ask TU's counsel, Brennan, whether a fairness opinion was required as a matter of law and were advised that it was not (A 1118, 1129; B 1436, 1501-06; PX 153, Chelberg, 148-49).[1] Moreover, the directors concluded that a fairness opinion was unnecessary under the circumstances because the market would have at least three months to test the fairness of the $55 per share price (A 1113, 1117-18, 1130, 1359-60; B 1122-23, 1172, 1208). The retention of Salomon Brothers and the market test also refute plaintiffs' claim that the directors "did not seek a price higher than $55" (PSB 14).

Plaintiffs state that:

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1 Plaintiffs claim there was no admissible evidence as to the advice rendered by Brennan (PSB 21). In fact, the evidence of Brennan's advice was admitted under a well recognized exception to the hearsay rule (D.R.E. 803(3)) "subject to a motion to strike" (A 1125). No motion to strike was ever made by plaintiffs.

> There was no discussion [by the directors] of whether Mr. Pritzker would actually withdraw his offer if it was not acted upon by Sunday night (A 1360).

PSB 9. The actual testimony on the page of the record cited by plaintiffs in support of that statement was "I don't remember if there was any discussion on the subject" (A 1360). The fact is, regardless of whether there was any discussion on the subject, the directors were informed that the Pritzkers had imposed a deadline and made the judgment that there was a genuine risk that the offer would be withdrawn if the deadline were not met (A 1117; B 1109-11; 1119-20, 1218, 1423, 1470-71; PX 155, Johnson, 24; PX 146, Browder, 187; PX 153, Chelberg, 123.). As Mr. Lanterman testified:

> Everyone, including myself, was of the opinion that there was a possibility of the offer being withdrawn unless action was taken on it [at the September 20 meeting].

B 1500. And, as Johnson testified when asked whether he believed the Pritzker offer would be withdrawn if not acted upon by September 21:

> Well, he [Pritzker] said it would, and I believed him. As I say, I have had experience with the Pritzkers before.

B 1120. Moreover, the directors were advised by Brennan that they could be subject to lawsuits if they failed to act on the Pritzker offer before the deadline (B 1506).

Plaintiffs charge that:

> The Board made the affirmative decision not to obtain the studies of the value of TU shares made by TU's financial department headed by Mr. Romans (A 1353).
>
> *   *   *
>
> [Mr. Van Gorkom] ignored or did not know that TU's own financial section had done studies indicating that the value of TU stock ranged between $55 and $65 per share. Moreover, even when he learned about the existence of the studies at the management meeting, Mr. Van Gorkom never directed that the study be produced for the upcoming Board meeting (A 1338).
>
> *   *   *
>
> ...no director asked for Mr. Romans' studies even though Mr. Romans told the Board that his studies showed that

> the stock was worth between $55 and $65 per share (A 1353).

PSB 8, 13, 23 fn.

In fact, the "study" prepared by TU's financial department was not a formal document. As Romans testified:

> We just ran the numbers at 50 and then we ran them at 60...[i]t was just an assumption of price and then run the numbers against the assumption... 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 as saying I have a valuation of the company at X dollars.

PX 156, pp. 46, 48. Thus, the so-called Romans' "study" was simply a mathematical calculation and the directors were informed of the results of that calculation. It is not surprising that--nor is there anything improper about the fact that--the directors did not ask to see the work sheets containing Romans' mathematical calculations.

Plaintiffs state that at the September 20 Board meeting:

> There was no discussion of whether potential competing offers would surface <u>if Mr. Pritzker did withdraw</u> (A 1360-1361). (emphasis added).

PSB 9. The statement is deceptive. The directors believed it would be a breach of their duty to the stockholders not to act on the Pritzker offer before the deadline and thereby give the Pritzkers the opportunity to withdraw their offer (B 1228). The directors did, of course, discuss the probability of competing offers. <u>See</u> Defts.'Ans.Br. at pp. 24-26. There was simply no reason for the directors to limit their discussions to the context of a hypothetical withdrawal of the Pritzker offer.

Plaintiffs also state:

> The directors had not read the Merger Agreement (A 1379; TR. 777-778, Johnson) nor were they furnished any documents concerning the Merger (A 1338-1339; TR. 775-776, Johnson).
>
> * * *
>
> None of the Board members ever asked to read or did read the Merger documents or even a written summary of their critical terms (A 1379).
>
> * * *

> ...all [the directors] got was Mr. Van Gorkom's oral presentation of what he thought the Merger documents prepared essentially by Mr. Pritzker's attorneys would contain. As the record shows, Mr. Van Gorkom was flat wrong in his understanding as to the actual terms of the Merger documents.[1] As a result of the Board's haste, there was no way to learn the actual terms before voting to approve the Merger. [No record citation].
>
> * * *
>
> ...not only did the directors not read the agreement, but the Merger documents were not even made available to them at the September 20, 1980 Board meeting. [No record citation].

PSB 9, 12, 20 fn., 30.

It is true that the directors did not read the merger documents at the September 20 meeting. However, contrary to plaintiffs' contentions, the merger documents were at the meeting and their contents were explained to the directors by TU's outside counsel (PX 154, Lanterman, 64). Brennan "spoke from [the merger] documents" at the September 20 Board meeting (A 1347). He had participated in drafting them (A 1106, 1333, 1378-79). The record clearly shows that Brennan explained the substantive terms of the merger documents to the Board (A 1132-33).

Plaintiffs also complain that the directors did not read the October 10 amendments to the merger agreement that were approved at the October 8 Board meeting (PSB 14). Obviously, amendments written on October 10 (A 2125) could not be read on October 8. However, the amendments approved in concept by the directors on October 8 were contained in the October 10 documents. See Defts.'Ans.Br., at pp. 33-35.

Plaintiffs also state that:

> The board neglected to pursue the KKR $60 per share leveraged buy-out which was complete as of December 2, 1980 except for 20% of the necessary financing (A 1423-1427).

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1 Van Gorkom was not wrong at all. See B 1109-18.

PSB 10. The KKR statement of intent dated December 2, 1980 was withdrawn within 3 hours after it was delivered (A 1160) and therefore there was nothing for the directors to "pursue".

Plaintiffs further charge that:

> At the January 26, 1981 meeting the Board simply attempted to make a 'paper' record to show that they were now belatedly bringing their judgment to bear on the issues that had been before them on September 20, 1980 (DX 8: A 1877).

PSB 15, 16. The document cited by plaintiffs, DX-8, is the minutes of the meeting. However, plaintiffs conveniently ignore the Supplemental Proxy Statement (PX 100; A 2324-29) and the affidavit of William B. Moore (PX 101) which recite in detail the matters reviewed by the directors at the January 26, 1981 meeting. The Moore affidavit clearly shows that the meeting, which lasted for 4 hours, was not, as plaintiffs' claim, a mere "paper record", but rather was a thorough review of all significant events relating to the proposed merger which had occurred since August 27, 1980 (A 1192-93, 1199-1202; B 1509; PX-101). The directors had a fiduciary duty to review the events that had occurred since they first approved the merger and were free to withdraw their recommendation of the merger on January 26 if they believed that changed circumstances warranted it. See Great Western Producers Co-Op. v. Great Western United Corp., Colo. Supr., 613 P.2d 873 (1980); Jewel Companies, Inc. v. Pay Less Drug Stores Northwest, Inc., N.D.Cal., 550 F.Supp. 770 (1982). The directors were advised by counsel at the January 26, 1981 meeting that they could:

> (a) continue to recommend to the stockholders that the latter vote in favor of the proposed merger, (b) recommend that the stockholders vote against the merger, or (c) take no position with respect to recommending the proposed merger and simply leave the decision to shareholders.

PX 101, at p. 7. Having received that advice, the Board unanimously reaffirmed their recommendation that the stockholders approve the proposed merger (PX 101).

D. <u>Plaintiffs' Claim That There Was No Corporate Emergency.</u>

Plaintiffs claim that:

> ...there was no corporate emergency of any kind that threatened TU's financial viability if the Merger was not approved prior to Mr. Pritzker's artificial Monday deadline. [No record citation].
>
> * * *
>
> ...the Board was not presented with an emergency situation and easily could have sought additional information and taken more time to consider the matter before it. [No record citation].

PSB 11, 12, 23.

While there may not have been a "corporate emergency", in light of the deadline imposed by the Pritzkers, the stockholders stood to lose more than $200 million (the difference between the Pritzker offer and the premerger market price) if the directors had not acted on the offer. As Van Gorkom testified:

> I didn't try to get a bid for the company. I didn't expect this to develop this way....But we had this offer before us. It had to be acted on on that day or it was going to expire before the market opened on Monday....

A 1111. The directors believed that the Pritzker offer would be withdrawn if not acted upon (A 1117; B 1119-20, 1218, 1423, 1470-71, 1500), and they also believed that it would have been "unconscionable" to deprive the stockholders of the opportunity presented by the Pritzker offer (B 1228).

E. <u>Plaintiffs' Claim That The $55 Price Was Inadequate.</u>

Plaintiffs make the following attacks on the fairness of the $55 price:

> The $55 number was an entirely subjective determination by Mr. Van Gorkom based on his personal views and needs. [No record citation].
>
> * * *
>
> The $55 price was such a bargain Mr. Pritzker snapped it up. [No record citation].
>
> * * *

> The Board's failure to demand a justification of the fairness of the $55 price is all the more shocking because that $55 price was at the very bottom of the $55-65 range that TU's own Chief Financial Officer, Mr. Romans, believed the fair range to be. [No record citation].[1]
>
> *   *   *
>
> The $55 merger price was not the result of arms-length negotiation. It was suggested by Mr. Van Gorkom and snatched up by Mr. Pritzker (A 1299-1300).

PSB 4, 5, 13, 14, 31.

Plaintiffs have not explained and cannot explain why, if the price were such a bargain, no one made a tender offer[2] or a competing merger offer to acquire TU, despite the intensive efforts by Salomon Brothers to find a better offer. See Defts.' Ans. Br., at pp. 35-39. The assumptions upon which the $55 price was determined were not subjective, but were based on reasoned analysis of what a purchaser would pay for TU (A 1087-90, 1284, 1482).

Plaintiffs' claim that there was no negotiation over the price is also refuted by the record. Pritzker said that a price of $55 was too high (A 1094, 1297-98). As Pritzker testified, he asked Mr. Van Gorkom if a price of $50 per share would be considered, to which Van Gorkom replied, "No" (B 1311).

Plaintiffs' criticism of the merger price and the way it was established also ignores an important and unusual feature of the proposed merger, namely, the test of the marketplace to determine whether $55 per share was the highest price that anyone would offer to pay (A 1113, 1130, 1358-59; B-1310, 1315-16, 1319, 1336, 1348-49, 1387-88; PX 149, Morgan, 128; PX 152, Reneker, 61, 129-30; PX 146, Browder, 280-82; PX 153, Chelberg, 277-78).

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1 In fact, Romans 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" (PX 156, Romans, 50).

2 A tender offer was always a possibility (A 1211; B 1387, 1397).

F. Plaintiffs' Claim That The Price For The One Million Shares That The Pritzkers Were Obligated To Purchase Was "Waste".

Plaintiffs inaccurately state:

> No reasonable person, fully informed and acting in good faith, could conclude under the circumstances of this case that the $38 price for the Pritzker block of stock was proper when the merger price was $55. The sale at $38 was purely an act of waste intended to 'lock up' the sale of TU to Mr. Pritzker prior to a stockholder vote. [No record citation].

PSB 32, 33.

It is a distortion to compare the $38 per share price that the Pritzkers were required to pay for the one million shares with the merger price of $55 per share, because the Pritzkers were required to purchase one million shares and TU was assured of receiving $38 million as a result of that purchase whether or not a merger was consummated and whether or not the price for TU stock later fell below $38 (A 2291-92; B 1325).[1]

The contract to purchase one million shares was at a price above market (A 1106). After their issuance, the one million shares constituted only 8 percent of the total outstanding shares. As Pritzker testified, he would not have made an offer without the right to purchase one million shares (B 1318). Pritzker explained his willingness to assume the risk of the market test insisted upon by Van Gorkom (B 1310) as follows:

> ...if all we did was make an offer at $55, and were left naked with that offer out, what we would have done is kicked off an auction contest at great expense to ourselves, the expense being substantial commitment fees for financing, substantial legal fees, substantial lost opportunity costs at no recompense, and then someone else could have come out and said well, we'll pay $55.10.

1 Plaintiffs erroneously refer to the contract to purchase one million shares as an "option" (PSB 32).

B 1317-18. See also A 1102-04, 1325; B 1115-16, 1248, 1310. No better offer was made and the one million share purchase became a wash in the hands of the 100 percent owner.

The TU Board recognized the contract to be an alternative to the usual practice of an acquiror purchasing shares in the open market prior to making an offer to purchase. As Johnson, who had been involved in 30 mergers (PX 155, Johnson, 64), testified:

> Q. [By Mr. Prickett] Now, another element of the proposal was that the Pritzkers would have the option to purchase a million newly-issued shares at $38 a share. Was there, in your view, any justification for that provision?
>
> A. Yes, it was justified. There is no question. Normally, if you are an acquiror, what you do to protect against your exposure and your commitment is to go into the marketplace and make an acquisition of a reasonable number of shares, usually less than 5 percent. And we have done this on occasion in our company. But in the case of the Pritzkers, that was not plausible.
>
> And what they were doing by insisting on the right to buy a million shares was virtually the same thing. It was not all that unusual. And it has been done in other situations.

B 1115-16. See also A 1102-04, 1325; B 1248.

G. Plaintiffs' Claim That The Pritzker Offer Was a "Lock Up".

Throughout their brief plaintiffs claim that the Pritzker offer was a "lock up" as a result of (1) the one million share purchase, (2) the time available to a competing bidder, and (3) the terms of the merger agreements (PSB 3,6,9,15,32). All of the evidence is to the contrary.

The shares purchased by the Pritzkers could not be voted on the merger proposal (A 2224; B 1330). TU's directors concluded that the shares purchased by the Pritzkers would not be a deterrent to other potential bidders, and their judgment was confirmed by the fact that none of the potential purchasers contacted by Salomon Brothers, including General Electric ("GE"), expressed any concern about the one million shares purchased by the Pritzkers (Higgins, 121-23; Moore, 108; Van Gorkom, 344; B 1118-19, 1466-67, 1511). It was also the judgment of the directors that, in the context of a $690 million transaction, the fact that a competing bidder would be required to pay $17 million more than the Pritzkers to equal their offer ($55 less $38 x 1,000,000 shares = $17 million) was de minimis (B 1118-19).

The Pritzkers' offer was tested in the marketplace for almost four months (A 1117-18, 1211, 1359-60; B 1172). During that period, no one contacted by Salomon Brothers indicated that there was insufficient time to evaluate TU in order to decide whether to make a competing offer (Higgins, 131-132). See also A 1211. GE, which first approached TU in November 1980, had plenty of time to make an offer (A 1466). And, any serious potential bidder was given access to the same information that had been provided to the Pritzkers. For example, Michael Carpenter of the Boston Consulting Group, who met with the Pritzkers, also met with representatives of GE and its investment banker, Morgan Stanley (Higgins, 100, 101).[1]

The only "evidence" cited by plaintiffs in support of their claim that other bidders were deterred from bidding is Mobil Corp. v. Marathon Oil Co., 6th Cir., 669 F.2d 366 (1981) (PSB 9, 32). The holding of that case (that the grant of a stock option and the right to purchase a corporation's "crown jewel" asset to a potential tender offeror violates the Williams Act) was expressly limited to its particular facts, is clearly distinguishable and has since been rejected by the courts of every circuit, including the Third Circuit, which have considered the issue. See e.g., Buffalo Forge Co. v. Ogden Corp., 2nd Cir., 717 F.2d 757 (1983), cert. den., __ U.S. __, 78 L.Ed 2d 724 (1983); Schreiber v. Burlington Northern, Inc., 3d Cir., C.A. No. 83-13, Adams, J. (Slip Op., April 2, 1984), a copy of which is attached to this brief as Annex A. In short, the Chancellor was correct when

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1 Plaintiffs suggestion that Mr. Carpenter was not made available to other potential bidders (PSB 5, fn.) is wrong.

he concluded that the one million share contract was not a deterrent to competitive bidding (A 23).

Plaintiffs continue to mischaracterize the terms of the merger agreements to support their claim that TU could not accept an offer that was better than the Pritzker offer (PSB 6). That claim is refuted by the terms of merger agreements. See Defts.' Ans. Br. at pp. 30-35. TU's right to accept a better offer was accurately summarized in the offering brochure prepared by Salomon Brothers as follows:

> The Pritzker offer permits the Company's Board of Directors to accept an offer which it considers more favorable to the Company's stockholders for a merger or consolidation of the Company or the sale of the Company's assets substantially as an entirety or the purchase or exchange of all of the Company's outstanding stock. While the offer must be for the entire equity of the Company, it may involve cash or securities or a combination of both. The Board of Directors of TUC has not placed any limitation on the form of the offer or the type of consideration involved. Since a tax-free reorganization would be advantageous to many TUC stockholders, TUC management feels that a tax-free transaction would be viewed very favorably.[1]
>
> The acceptance by the Board of Directors of another offer would not necessarily, of itself, permit the Company to terminate the Pritzker offer. The Pritzker offer can be terminated by the Company if a definitive agreement has been signed and if the other offer has a value in excess of $55 per TUC share and is subject to no conditions other than stockholder approval by both companies and absence of a court order restraining consummation of the transaction.
>
> In the case of the acceptance by the Board of Directors of an offer not meeting the requirements mentioned above, the Pritzkers will have the option of terminating their offer or requiring the Company to present it to the stockholders along with the new offer.

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1 That statement clearly refutes plaintiffs' claim that the directors never considered the tax consequences of the proposed merger (PSB 8).

PX 54; B 151-152. In short, the directors could accept a better offer, but, unless the better offer was unconditional, they were required to submit the Pritzker offer and the better offer to the stockholders.

The foregoing comparison of plaintiffs' statements of "fact" with the evidence of record demonstrates that plaintiffs have made whatever claims suit their purpose, without regard for the facts of record. However, over-zealous advocacy can be dangerous. For example, plaintiffs' counsel argued in another case in the court below, in an effort to distinguish the Chancellor's opinion denying a preliminary injunction in this case:

> [Argument by Mr. Prickett] And there is one further suggestion. There is a suggestion about Smith versus Pritzker. Let me suggest there was no lock up there and therefore, that case is different.(emphasis added).[1]

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In response to the first two questions in this Court's Order of March 30, 1984, we have shown in this and our earlier briefs that, as the Chancellor found after a plenary trial, the record shows that the directors of TU acted in good faith and were duly informed in exercising their business judgment to approve the subject merger.[2] We have also shown that the directors relied in good faith upon reports made to them

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1 See, transcript of hearing on January 22, 1982 before Vice Chancellor Brown in David J. Steinberg, Ltd. v. The Children's Place, Inc., Del.Ch., C.A. No. 6685, Hearing Transcript at p. 58, a copy of which is attached as Annex B to this brief.

2 While plaintiffs argue at some length (PSB 21-22) that the absolute protection of §141(e) does not extend to legal advice, defendants never contended that it did. What defendants do contend is that the directors of a Delaware corporation are clearly entitled to rely on such advice, as well as other information, in forming their business judgment. See Aronson v. Lewis, Del.Supr., No. 203, 1983, Moore, J. (Mar. 1, 1984), slip op., pp. 22-23, and the cases discussed at Defendants' Opening Supplemental Brief, 11-12.

by TU's officers.[1] With reference to the Court's second two questions, we will also show that plaintiffs have utterly failed to distinguish the Delaware cases which make clear that shareholder ratification is also a complete defense to this action.

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1 Plaintiffs mistakenly contend that 8 Del.C. §141(e) "does not extend to reliance upon officers' oral opinions of an important proposed transaction" (PSB 20). In support of this contention, plaintiffs rely not upon the statute itself or cases interpreting that statute, but upon a section of Israels, Corporate Practice, §9.02 (3rd ed. 1974), which deals with the role of attorneys as directors and does not cite a single Delaware case. Section 141(e), however, is not limited to certain types of officers' reports. Indeed, this Court's opinion in Cheff v. Mathes, Del.Supr., 199 A.2d 548 (1964), makes clear that §141(e) extends to a variety of reports from officers in either informal, formal, oral or written form. See Defendants' Opening Supplemental Brief, 11-12.

II. STOCKHOLDER RATIFICATION IS A SEPARATE AND COMPLETE DEFENSE IN THIS CASE.

As this Court made clear in Michelson v. Duncan, Del.Supr., 407 A.2d 211, 219 (1979), "[i]t 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." Choosing to ignore this Court's dispositive ruling on the subject, plaintiffs, while never saying so in as many words, apparently contend that because a corporate merger under Section 251 of the Delaware General Corporation Law requires both director and stockholder approval, the doctrine of stockholder ratification is inapplicable. Plaintiffs have cited absolutely no authority for this novel and newfound contention. Indeed, there is no such authority, for the courts of Delaware have consistently recognized the curing effect of stockholder ratification in situations where the challenged corporate transaction required both director and stockholder approval.

In Schiff v. RKO Pictures Corp., Del.Ch., 104 A.2d 267 (1954), plaintiffs brought a derivative action to rescind a proposed sale of corporate assets which, as required by 8 Del.C. §271(a), had been approved by the directors and stockholders. Relying upon this Court's opinion in Gottlieb v. Heyden Chemical Corp., Del.Supr., 91 A.2d 57 (1952), the court held that the same principles of stockholder ratification applied regardless of whether only director approval or both director and stockholder approval were statutorily required to complete the transaction:

> Where there was stockholder ratification, however, the Court will look into the transaction only far enough to see whether the terms are so unequal as to amount to waste, or whether, on the other hand, the question is such a close one as to call for the exercise of what is commonly called "business judgment." In the former case the Court will reverse the decision of the stockholders; in the latter it will not. [quoting Gottlieb, supra].
>
> ...It is true that the Gottlieb case involved a stock option and that the Delaware statute authorizing options does not explicitly call for both director and stockholder approval, as does the sale of assets statute. However the stock option plan in the Gottlieb case required both

> and so the principles announced by the Court would seem equally applicable.
>
> Because of the stockholder vote, I conclude that plaintiffs to be successful have the burden of showing that the disparity between the money received and the value of the assets sold is so great that the Court will infer that those passing judgment are guilty of improper motives or are recklessly indifferent to or intentionally disregarding the interest of the whole body of stockholders.

Id., 104 A.2d at 271-272 (emphasis added).

Likewise, in MacCrone v. American Capital Corp., D.Del., 51 F.Supp. 462 (1943), Judge Leahy held with regard to a proposed merger which had been approved by a majority of the stockholders:

> We apply here the Delaware decisional and statutory law. Under that law, where the required statutory majorities have the right to merge two or more corporations, there is a presumption of bona fides of purpose with a resultant burden on dissidents to demonstrate that the terms of the merger are so unfair as to amount to constructive fraud [omitted footnote]. 'Where fraud of this nature is charged, the unfairness must be of such character and must be so clearly demonstrated as to impel the conclusion that it emanates from acts of bad faith, or a reckless indifference to the rights of others interested, rather than from an honest error of judgment' [omitted footnote].

Id., 51 F.Supp. 466 (emphasis added). See also Gottlieb v. Heyden Chemical Corp., supra, 91 A.2d at 58 ("It is axiomatic in such cases [of stockholder ratification] that the courts will not substitute their own 'business judgment' for that exercised in good faith by the stockholders.") (emphasis added).

Plaintiffs also argue that defendants illegally "delegated" their authority to approve the merger (PSB 26). That argument is clearly makeweight and the cases to which plaintiffs refer the Court are totally inapposite. In each of those cases, directors intentionally and specifically attempted to delegate their decision-making authority to others. Those cases simply have nothing to do with the issue presently before the Court.

There is no question that here the directors thought they were acting (and indeed did act) on the proposed merger, and did not delegate that responsibility to anyone.[1]

Turning to plaintiffs' next argument, defendants do not take issue with the proposition that stockholder ratification, to be effective, must be on an informed basis (PSB 28, 29).[2] Defendants do take issue, however, with the arguments which plaintiffs make thereafter in applying this proposition to the facts of this case.

First, plaintiffs reargue that 8 Del.C. §251(c) requires that a proxy statement be sent to stockholders 20 days prior to the date of the stockholders' meeting. It does not. See Defendants' Answering Brief at pp. 63-66. Equally misleading is plaintiffs' citation to American Pacific Corp. v. Super Food Services, Inc., Del.Ch., C.A. No. 7020, Longobardi, V.C. (December 6, 1982) (PSB 29) for the proposition that the supplemental proxy statement was not mailed far enough in advance of the meeting. In that case, the court based its decision on the fact that the supplemental proxy statement itself was misleading, and on affidavits that suggested that the shareholders might not have enough time to consider the supplemental materials. There was no such proof in this case.

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1 Even assuming that there had been delegation in this case, plaintiffs' suggestion that there could be no stockholder ratification because this alleged delegation was illegal completely misapplies the concept of illegality in the context of stockholder ratification. In Kerbs v. California Eastern Airways, Inc., Del.Supr., 90 A.2d 652, 659 (1952), this Court held:

> ...illegal action of a Board of Directors is absolutely void only when that action is ultra vires, a gift of corporate assets to directors, illegal in purpose, or fraudulent. (emphasis added).

Plaintiffs' reliance upon Clarke Memorial College v. Monaghan Land Co., Del.Ch., 257 A.2d 234 (1969) is also misfounded (PSB 26). The director resolution delegating authority in that case was never submitted to stockholders. That case nowhere states that stockholders cannot ratify directors' delegation.

2 It does not appear to us that the Court's supplemental written questions were directed to disclosure issues. Nonetheless, we respond briefly to the arguments made by the plaintiffs.

Plaintiffs also claim that TU's proxy materials omitted material facts.[1] One of the "facts" which plaintiffs contend the proxy materials failed to disclose is that the $55 price was the "result of a contractual commitment" (PSB 30). This statement finds no support in either the law or the facts of this case. As a matter of law, without reference to the language in the merger agreements, defendants were not required to continue to recommend the Pritzker offer if circumstances changed. Rather, defendants had a fiduciary duty to, and in fact did, continue to consider the Pritzker offer in light of changing circumstances and what they perceived to be the best interests of the stockholders. See Great Western Producers Co-Op v. Great Western United Corp. and Jewel Companies, Inc. v. Pay Less Drug Stores Northwest, Inc., supra.

The facts show that the original agreement between TU, GL Corporation and NTC dated September 20, 1980, provided:

> The Board of Directors of TU shall recommend to the stockholders of TU that they approve and adopt the Merger Agreement (the "Stockholders' Approval") and shall use its best efforts to obtain the requisite vote therefor; 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.

A 1983. This "best efforts" requirement is identical to that which the court in Great Western, supra, held as a matter of Delaware law to be subject to an implied condition

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1 At page 30 of their brief, plaintiffs recite these alleged omissions. None of these alleged omissions was argued by plaintiffs in their initial briefs to this Court.

that directors will not breach their fiduciary duty.[1] Here, defendants recognized that a better offer might be forthcoming, and they insisted that the merger agreement contain language which acknowledged their right and fiduciary duty to recommend a better offer.

Moreover, the amendments to the agreement dated October 10, 1980, expressly provided that the directors' recommendation of the merger was conditioned upon a continuation of their belief that the merger was in the best interest of TU's stockholders. Included in the amendments was the statement that:

> It is the present intention of the Board of Directors of TU to recommend the approval of the Merger Agreement to the stockholders (the "Stockholders' Approval"), unless another offer or proposal is made which in their opinion is more favorable to the stockholders than the Merger Agreement. (emphasis added).

A 2315. Consistent with the conditions in the agreement, the directors of TU did continue to review the proposed merger to determine whether it remained in the stockholders' best interest. See page 14, supra.

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1 The Court said:

> The 'best efforts' obligation required that United and its board of directors make a reasonable, diligent, and good faith effort to accomplish a given objective, viz., security holder approval of the purchase agreement. The obligation, however, must be viewed in the context of unanticipated events and the exigencies of continuing business development and cannot be construed to require that such events and exigencies be ignored or overcome at all costs. In short, the 'best efforts' obligation was tempered by the directors' overriding duties under §§141(a) and 271(a) of the 'General Corporation Law of the State of Delaware.'
>
> We therefore hold that the 'best efforts' clause did not bind United's board of directors to recommend security holder approval of the purchase agreement when, subsequent to the execution of the agreement and the directors' initial determination under §271(a), the directors inquired into changed circumstances and determined, pursuant to the exercise of their independent good faith judgment, that the terms of the purchase agreement were no longer in the security holders' best interests. 613 P.2d at 878-79.

At pages 31-32 of their supplemental brief, plaintiffs argue, in a transparent effort to create an issue which might vitiate the effect of stockholder ratification, that "defendants acceptance of such a shockingly inadequate price [i.e., $38 per share for the one million shares] for TU's stock is waste."[1] Plaintiffs then proceed to quote a portion of this Court's opinion in Gottlieb, supra, in an effort to support this statement. Defendants agree that, were a claim of waste properly before the Court, Gottlieb states the appropriate standard for determining whether it has occurred:

> ...Where there is stockholder ratification, however, the burden of proof is shifted to the objector. [citation omitted]. In such a case the objecting stockholder must convince the court that no person of ordinarily sound business judgment would be expected to entertain the view that the consideration furnished...is a fair exchange for the options conferred.

Id., 91 A.2d at 58 (emphasis added).

Here, the $38 per share price for which defendants contracted to sell to the Pritzkers one million shares of TU stock was above the market price (A 1106). Plaintiffs cannot in good faith argue that this price constituted "waste" and that "no person of ordinary sound business judgment" would consider that price to be fair consideration. Moreover, once the merger received stockholder approval and was completed, this $38 figure became meaningless. What the Pritzkers paid for the one million shares did not affect the $55 price which the stockholders received as a result of the merger. All the sale of the one million shares meant once the merger was completed was that the Pritzkers owned 100 percent of a company with $17 million more in cash than it otherwise would have had, and the Pritzkers had $17 million less in cash themselves.

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1 Plaintiffs' supplemental brief is the first time they have argued that this price was a waste of corporate assets; the argument was never advanced below or in the previous briefs before this Court, and cannot be considered now on appeal. Wilmington Memorial Co. v. Silverbrook Cemetary Co., Del.Supr., 297 A.2d 378 (1972); Equitable Trust Co. v. Gallagher, Del.Supr., 77 A.2d 548 (1950). Moreover, plaintiffs have no standing to litigate a claim of waste. Lewis v. Anderson, Del.Supr., No. 343, 1982, Horsey, J. (April 18, 1984).

Plaintiffs end their brief by referring the Court to a handful of cases discussing instances of fraud or dishonesty on the part of directors, and then rashly conclude that "[a] breach of the duty of due care cannot be cured by less than a unamimous vote of the stockholders" (PSB 33, 34). In support of this proposition plaintiffs offer no case law, but refer to a hornbook, Henn, Corporations, §195, p. 380 (2d ed. 1970). The hornbook author cites two cases in support of his conclusion that breaches of the duty of due care cannot be ratified, Continental Securities Co. v. Belmont, N.Y.App., 99 N.E. 138 (1912), and Alcott v. Hyman, Del.Supr., 208 A.2d 501 (1965). Neither of those cases even approach making that statement.[1] However, the case to which Henn refers as contra authority, Smith v. Brown-Borhek Co., Pa.Supr., 200 A.2d 398 (1964), is squarely on point and expressly rejects the proposition which plaintiffs espouse.

In Smith, the Pennsylvania Supreme Court unequivocally held that stockholder ratification is a complete defense to a charge that directors failed to exercise due care:

> We repeat; nowhere in his complaint does the plaintiff allege that there has been fraud, self-dealing, personal profit or intentional dissipation or waste of corporate funds....
>
> Plaintiff in his oral argument before this Court repeatedly emphasized that the alleged mismanagement by defendants consisted of their negligent failure to exercise their duties, and not of affirmative negligence or the deliberate exercise of bad judgment or intentional wrongdoing.
>
> * * *
>
> It is clear that defendants' aforesaid actions as directors and officers of Brown--Borhek Company could be legally ratified, even after suit had been brought.

Id., 200 A.2d 401-02 (emphasis in original); see also, Wolgin v. Simon, 8th Cir., 722 F.2d 389, 394 (1983) ("Although these acts may have constituted a breach of fiduciary duty or may have been imprudent, they are acts which may be ratified by

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1 Apparently recognizing this error, it is significant that plaintiffs, while citing Henn for this proposition, nowhere in their brief even mention the Delaware case, Alcott, upon which that author relies.

the shareholders."); Michelson v. Duncan, Del.Ch., 386 A.2d 1144, 1153, aff'd in part, rev'd in part, Del.Supr., 407 A.2d 211 (1979) ("A breach of common law fiduciary duties is, however, cured by stockholder ratification.").

For the foregoing reasons, we submit that plaintiffs have failed to make any cogent argument as to why stockholder ratification is not a complete defense in this case.

CONCLUSION

For the reasons stated in Defendants' Supplemental Briefs 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.

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