IN THE SUPREME COURT OF THE
STATE OF DELAWARE

ALDEN SMITH, et al., Plaintiffs Below, Appellants,	)	
v.	)	No. 255, 1982
JEROME W. VAN GORKOM, et al., Defendants Below, Appellees.	)	

MOTION FOR REARGUMENT

The individual defendants move for reargument. The Majority Opinion of January 29, 1985 (the "Opinion") has shocked the corporate world in its unprecedented holding that knowledgeable directors of a Delaware corporation, performing their statutory managerial function, may be exposed to catastrophic personal liability with respect to an arm's-length business decision where there were no charges or proof of fraud, bad faith, or self-dealing. We respectfully submit that critical errors of fact and law in the Opinion require reargument.

I. Critical Errors of Fact

The Opinion contains two overriding critical errors of fact. They are:

- Contrary to the factual findings by the Majority (Op., pp. 37-42), the merger documents executed on September 20 did *not* contain a prohibition against Trans Union ("TU") giving proprietary information to other bidders, and the evidence, including live trial testimony, is undisputed that as of September 20, the agreements as executed, provided, and the contracting parties (the TU directors and Pritzker) intended and understood that TU was free under such agreements to accept and recommend higher offers.
- The Opinion (Op., p. 52) erroneously fails to recognize the undisputed fact that after the October 10 amendments TU

had two *independent* contractual rights: (1) the right to terminate the Pritzker proposal if there existed an unconditional definitive agreement deemed more favorable by the TU Board *and* (2) the right to submit to the shareholders, with or without a recommendation for approval, any other offer deemed more favorable by the TU Board regardless of conditions.

As discussed hereinafter, these two overriding critical factual errors were caused by the Majority's erroneous factual findings on subordinate, but important, issues.

II. Critical Errors of Law

- The Majority's reliance (Op., pp. 43-44) on *Gimbel v. Signal Cos., Inc.*, Del.Ch., 316 A.2d 599 (1974), is completely misplaced. The Chancellor specifically held in *Gimbel* that the factors suggesting imprudence did "*not* . . . raise at [the preliminary injunction] stage a reasonable probability that the plaintiff will be able to pierce the 'business judgment' standard", the issue being "not one of method, but one of value." (emphasis added) *Id.* at 615.
- The directors' testimony about Brennan's advice at the September 20 meeting was not offered for the truth of the matters asserted, but to show what the directors understood and relied on, and is clearly not hearsay. D.R.E. 801(c). The same is true of the directors' testimony about counsel's legal advice at the January 26 meeting. (Op., pp. 61-62). Whether or not the advice was correct as a matter of law is irrelevant. The fact is that the directors received the advice, relied on it, and continued to recommend the Pritzker proposal.
- The Majority generally has failed to follow this Court's holding in *Levitt v. Bouvier*, Del.Supr., 287 A.2d 671 (1972), and specifically the holding that

> "[w]hen the determination of facts turns on a question of credibility and the acceptance or rejection of 'live' testimony by the trial judge, his findings *will* be approved upon review." (emphasis added). *Id.* at 673.

The Majority's rejection of the undisputed live testimony at trial and the Chancellor's findings based thereon is a denial of due process.

- The Opinion ignores the incorporation of federal disclosure standards [*TSC Industries Inc. v. Northway, Inc.*, 426 U.S. 438 (1976)] into Delaware law by *Lynch v. Vickers Energy Corp.*, Del.Supr., 383 A.2d 278, 281 (1978) (a case involving a tender offer by a self-dealing majority shareholder) and, by its application of the law to the facts, establishes new and erroneous disclosure precedent, unique to Delaware, without any reasonable standards or legal bounds.

III. Critical Factual and Legal Errors Require Reargument

A. The September 20, 1980 Board Meeting

The Opinion erroneously states (Op., p. 16):

> "Based solely upon Van Gorkom's oral presentation, Chelberg's supporting representations, Roman's oral statement, Brennan's legal advice, and their knowledge of the market history of the Company's stock, the directors approved the proposed merger agreement. However, the Board *later claimed* to have attached two conditions to its acceptance: (1) that Trans Union reserved the right to accept any better offer that was made during the market test period; and (2) that Trans Union could share its proprietary information with any other potential bidders." (emphasis added)

The first sentence of the quotation ignores the unrebutted evidence as to the directors' collective corporate experience, including experience with acquisitions and divestitures, and the directors' intimate knowledge of TU, its history and its prospects. It specifically ignores the directors' knowledge of the BCG study and the Five-Year Plan, which showed historic and projected earnings and cash flow, book values, and other financial data. Indeed, the Opinion relegates the directors' experience and expertise to a footnote (Op., p. 42, fn. 21). The fact is that the directors were currently informed about TU and its "fair value." *See, Schiff v. RKO Pictures Corp.*, Del.Ch., 104 A.2d 267, 279 (1954).

The second sentence of the quotation is clearly wrong in that it suggests that the directors did not require at the September 20 Board meeting the two conditions mentioned. The record is undisputed. All of the witnesses who testified on this point stated that the directors voted to approve the transaction only if the two conditions were incorporated into the agreement. (A 1132-33, 1365-66; B 1114-15, 1372-76, 1431-32, 1447, 1529-30). Plaintiffs' counsel has repeatedly represented to this Court that the draft of the merger agreement from which Mr. Brennan read at the September 20 Board meeting was never produced and those representations were relied upon by the Majority to support an inference that all of the directors lied about their focus on Pritzker's proposal and their insistence on the two critical changes. There is obviously nothing wrong with the common practice of discarding drafts of an agreement which are later changed and a revised agreement executed. Certainly no adverse inferences should be drawn from the fact that a *draft* of a later executed document may have been discarded months prior to the commencement of litigation. *Compare,* D.R.E. 1004(1) (Evidence of contents of lost or destroyed *original* document admissible). Moreover, as noted at the oral argument on June 11, 1984 (Trans., p. 102), after the trial of this case, various drafts of the merger documents were produced to plaintiffs' counsel. *See,* Exhibit A hereto. Those documents show that there was at least one draft of the agreement which expressly prohibited the disclosure of proprietary information and which did not contain the "competing fiduciary obligation" language (Op., p. 40). This is reflected in Section 2.03(a) of the draft on which the number "9" appears on the first page. Exhibit A, second draft in sequence, p. 14. Moreover, there is no basis for the Majority's statement (Op., p. 39) that "[Van Gorkom] concedes that the Agreement which he signed on the evening of September 20 barred Trans Union from furnishing to interested parties any information about the Company other than that already in the public domain." There was never any such concession, and the agreements, as signed, contained no such prohibition (A 1952-94).

The undisputed trial evidence (in addition to the drafts produced to plaintiffs' counsel after trial) shows that, notwithstanding "the urgent time constraints imposed by Pritzker" (Op., p. 31), the prohibition against disclosing proprietary information to third parties *was deleted* from the draft agreement and the "competing fiduciary obligation" langauge *was added* to the agreement before it was signed. (A 1983). The significance of the "competing fiduciary obligation" language is generally understood by corporate practitioners. As recently stated in *The Review of Securities Regulation*, Vol. 17, No. 21 (Dec. 19, 1984) at p. 783, fn. 23 (Exhibit B hereto):

> "Some merger agreements leave the issue [of whether a Board can change its recommendation] open by qualifying the 'recommend approval' covenants with language such as '*consistent with its fiduciary duties.*' " (emphasis added).

In accordance with the Board's express mandate, after September 20, TU had the right to accept and recommend any offer better than Pritzker's, as well as the right to provide any information about TU which a potential offeror might desire.

If, as stated in the Opinion, the "competing fiduciary obligation" language "cannot be construed" to incorporate the right to accept and recommend any better offer (Op., p. 40), then one must look to extrinsic evidence. All the testimony, *including the live testimony of Mr. Pritzker*, which was accepted by the Chancellor, shows such was the intention of the contracting parties. The language was inserted after the September 20 meeting and before the documents were signed. (A 1133, B 1372-76, 1432).

The Opinion states (Op., pp. 29-30) that:

> ". . . the Board had before it nothing more than Van Gorkom's statement of his understanding of the substance of an agreement which he admittedly had never read, nor which any member of the Board had ever seen."

The statement is wrong. The record is undisputed that 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 Board meeting (A 1132-33). Moreover, copies of the merger documents were at the meeting and their substantive contents were explained to the directors not only by Van Gorkom, but also by Brennan who "spoke from the documents" (A 1347).

The Majority's rejection of the importance of the premium over market is contrary to universally accepted valuation techniques. With deference, the Majority's initial error with respect to the premium issue was in relating its perception of "the historically depressed TU [stock] market price" (Op., p. 32) to the concept of premium *over actual market price*. While the directors of TU may have thought that the stock market should have recognized more value for TU's stock in light of consistently improving financial results, the fact is that the market did not. More than 12 million shares of TU stock were actively traded in a free and open market and the average high and low price of that stock was only $33.44 per share over the *five* years preceding Pritzker's offer (A 2227). Contrary to the Majority's suggestion (Op., p. 33), in the parlance of the business, financial and legal communities the entire concept of "premium" is comparative and has meaning only when an offer is compared with *actual* market prices, not some hypothetical "value." *See e.g., Rosenblatt v. Getty Oil Co.*, Del.Ch., 8 Del.J. Corp.L. 366, 400 (1983) (exchange ratio represented a "65% premium over the *market* price" of the minority's shares); *Tanzer v. Int'l Gen'l Inds, Inc.*, Del.Ch., 402 A.2d 382, 389 (1979) (merger offer "represented a premium of 29% over the closing *market* price" of the stock).

The Majority compounds its error by concluding that the directors of TU "sold" the company on September 20, 1980 (Op., pp. 28-29). Nothing could be further from the truth, the record, or the law. After full consideration of Pritzker's offer, the directors of TU decided that the offer was fair (A 1113-14, 1117, 1130, 1358; B 1171-72, 1208) (in and of itself a determination of fair value) and approved it, subject to the market test which they knew would occur over the next 90 to 120 days. It was a reasoned response to the deadline imposed by Pritzker as well as insurance that Pritzker's offer would not be lost during the market test. The market proved that the directors' decision was correct. In fact, after the announcement of Pritzker's proposal (prior to the shareholders' overwhelming approval), the market price of TU stock rose to $58.25 per share (A 2227), $3.25 *more* than Pritzker's offer. Thus, the investment community, including sophisticated risk arbitrageurs, recognized that Pritzker's offer was subject to a market test—*i.e.*, the potential of a competitive bid or tender offer. The Majority has consistently ignored the critical fact that Pritzker's proposal was *always* subject to a tender offer as well as a higher merger offer. As stated in *The Review of Securities Regulation*, *supra*:

> "The signing of a merger agreement may signal the beginning rather than the end of a contest for control of a target corporation. As soon as the agreement is made public, companies that had shown no interest previously may approach target management with an alternative merger proposal; or they may bypass management and make a tender offer at a price higher than that provided for in the merger agreement." (Ex. B, p. 779).

See also, Edelman v. Phillips Petroleum Co., Del.Ch., C.A. No. 7899, Walsh, V.C. (Feb. 12, 1985), pp. 12-13 (Exhibit G hereto) ("Mesa's *announcement* of its tender offer had put Phillips 'in play' and it was reasonable to expect that other suitors might come forward either in concert with, or in competition to, Mesa's efforts").

The market ultimately proved that Pritzker's offer provided the most advantageous transaction available to all shareholders of TU. On September 20, the directors approved Pritzkers' offer, based on their knowledgeable belief that it was fair, but reserved the ultimate decision for the shareholders after a meaningful market test. Far from being grossly negligent, the directors made an informed business decision with due care under difficult time constraints.

B. The October 10, 1980 Amendments And Their Effect

The Opinion states:

> "After October 10, Trans Union could accept from a third party a better offer only if it were incorporated in a definitive agreement between the parties, and not conditioned on financing or on any other contingency." (Op., p. 52).

The statement is wrong. The undisputed record shows that the October 10 amendments, authorized by the Board on October 8 (PX-48), *specifically* permitted TU's Board to actively solicit and to accept *and* recommend to shareholders any offer which it deemed to be better than Pritzker's. We urge the Majority to review carefully those amendments (A 2314-16, 2306) (Exhibit C hereto). In its Opinion, the Majority has confused TU's contractual right unilaterally to *terminate* the Pritzker transaction with the independent contractual *right of the Board to accept and recommend any better offer to TU's shareholders.* That confusion has led the Majority erroneously to conclude that a market test was not feasible.

Pursuant to the October 10 amendments, TU's Board was free to solicit, accept and recommend to the stockholders *any* more favorable offer for a merger, consolidation or sale of assets prior to February 1, 1981. There were no restrictions whatsoever imposed by the Pritzkers relating to the conditions which might appear in any third party offer. (Ex. C., p. A 2315). The only requirement which the Pritzkers did insist upon was that their merger proposal be presented to stockholders simultaneously with that of any third party. Such a requirement, of course, was of no moment if another offer were perceived by TU's stockholders as being better than the Pritzker offer. Moreover, if anyone had made a tender offer at more than $55 per share, Pritzker's proposal would have been defeated. In addition, if there were a more favorable, unconditional agreement from a third party, TU could terminate the Pritzker proposal. (Ex. C., p. A 2306).

The Opinion states that

> "the extension of the market test period to February 10, 1981 was circumscribed by other amendments which required Trans Union to file its preliminary proxy statement on the Pritzker merger proposal by December 5, 1980 and use its best efforts to mail the statement to its shareholders by January 5, 1981. Thus, the market test period was effectively reduced, not extended." (Op., p. 51).

There is absolutely no basis for the Majority's conclusion. In fact, as the September 20 press release stated, prior to the October 10 amendments the shareholders' meeting was originally to be held in "December or early January." The October 10 amendments gave the Board not only the right to solicit a better offer, but also more time to do so. The requirement that *preliminary* proxy material had to be filed with the SEC had nothing to do with the search for a better offer. Those drafts could have been changed at any time before they were mailed to shareholders if a better offer were made, and would have to have been filed in November had the meeting date not been postponed. Moreover, even though the agreement required TU to use its best efforts to mail the proxy material by January 5, 1981, as it turned out such material was not mailed until January 19, 1981, and a supplement was mailed on January 26.

The Majority compounds its erroneous conclusion that TU's Board was "locked" into the Pritzker agreement after October 10 (Op., p. 52) by totally disregarding not only the availability of the tender offer technique, but also the search for a better offer conducted by Salomon Brothers. The record is absolutely clear that Salomon Brothers prepared a detailed written presentation concerning TU (B 146-293), that it devoted the time and effort of more than 50 partners and employees to the market test, that it contacted over 150 companies about acquiring TU, and that it would have earned a fee of more than $2.1 million if it had been successful in obtaining a price of only $1.00 per share above Pritzker's proposal. To suggest that Salomon Brothers, a nationally recognized investment banking firm, would expend meaningless efforts is to ignore business reality, and the clear language of the October 9 press release which announced to the world that TU was up for sale to the highest bidder. No one contacted by Salomon Brothers expressed concern about the 1,000,000 shares or indicated that there was insufficient time to make an offer (B-1466-69). Moreover, contrary to the Majority's finding (Op., p. 17), Pritzker did not buy the 1,000,000 shares, which could not be voted on the merger, until January 28, 1981.

Finally, there is no support for the Majority's conclusion (Op., p. 55) that GE "was prepared" to make an offer, or the insinuation (Op., p. 54) that Van Gorkom caused Kruizenga to withdraw from the KKR group. In the first place, although GE and TU had been "talking," on January 21, 1981, the Chairman of GE advised Van Gorkom that GE would not make an offer (A 1182-83). Secondly, as Kruizenga himself testified (B 1485-88), and as Justice McNeilly noted (Op., p. 83, fn. 1), Kruizenga had withdrawn from the KKR group *prior* to KKR making the conditional offer to Van Gorkom because of Kruizenga's view of the Reichmans.

The Majority's conclusions concerning the October 10 amendments (Op., pp. 51-52) are without factual or legal support. The evidence is undisputed that those amendments were favorable to the shareholders, were not the result of gross negligence, did not impose additional burdens, and improved the already existing market test. That test showed conclusively that Pritzker's offer was fair.

C. The Shareholders Were Informed

The value of having a single disclosure standard both for federal securities purposes and for Delaware, the home of many national corporations, is obvious. And, until the Majority's Opinion, the corporate bar and the Delaware courts had concluded that there was only one such consistent standard. Thus, in *Lynch v. Vickers Energy Corp.*, Del.Supr., 383 A.2d 278, 281 (1978), this Court incorporated federal disclosure standards in defining "germane" information as "information such as a reasonable shareholder would consider important in deciding to sell or retain stock." That standard comes from *TSC Industries Inc. v. Northway Inc.*, 426 U.S. 438 (1976). In *TSC*, the United States Supreme Court held that for an omission to be deemed material

> ". . . there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.* at 450.

The Court also observed:

> "The potential liability for a . . . [disclosure] violation can be great indeed,[*] and if the standard of materiality is unnecessarily low, not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information — a result that is hardly conducive to informed decisionmaking." *Id.* at 449.

In *Michelson v. Duncan*, Del.Supr., 407 A.2d 211 (1979), this Court continued to follow *TSC* when it rejected claimed omissions which "(a) were not factual assertions; (b) in some

* Compare the Majority's "*ad hominen* argument" comment at page 64 of the Opinion.

cases were not factually correct: (c) were inconsistent with management's position; or (d) called for legal conclusions." *Id.* at 222. *See particularly*, *Kaplan v. Goldsamt*, Del.Ch., 380 A.2d 556, 565 (1977), which describes the "long standing view of the Delaware courts" with respect to disclosure and notes that such view" comports with the recent expression of the United States Supreme Court in *TSC*. . . ." *See also*, the Court of Chancery cases cited and discussed hereinafter.

The Majority Opinion has departed from the foregoing standards. Even accepting the Majority's characterizations, the types of omissions and statements criticized (Op., pp. 68-72) are not facts which are material in the " 'total mix' of information made available" to shareholders. *TSC*, *supra*, 426 U.S. 450. In fact, Delaware cases, based at least in part on federal precedent, and federal cases have held that disclosure "deficiencies" similar to those found by the Majority were *not* material.

Although five disclosure deficiencies were enumerated by the Majority, we will address them under three headings because the first three all concern the perceived failure of the directors to "properly" determine the "value" of TU or to disclose the method of determining such value:

(1) *Value Determination Disclosure*. The first deficiency identified by the Majority is the directors' failure to confess that they had inadequate information as to the intrinsic value of TU, coupled with the Proxy Statement reference to intrinsic value which the Majority perceived to be "artful" drafting, thereby suggesting that the directors *knew* the intrinsic value of TU (Op., p. 68). In fact, the language seized upon by the Majority was nothing more than a statement of the directors' honest *belief* that the intrinsic value of TU's assets was higher than book value. For the directors to have disclosed that they had not considered specific valuation techniques (which they had not) as opposed to their efforts to produce real value for the shareholders (as reflected in the proxy materials) would have required the directors to engage in "self-flagellation" or to concede "their failure to deliberate as a board upon, or to properly consider, the merger proposal prior to their acceptance of it," disclosures not heretofore required under Delaware or federal law. *Weinberger v. United Financial Corp. of California*, Del.Ch., C.A. 5915, Hartnett, V.C. (Oct. 13, 1983), p. 24 (Exhibit D hereto). *Ac-*

cord, Weingarden & Stark v. Meehan Oil Co., Del. Ch., C. A. 7291 & 7310, Berger, V.C. (Jan. 2, 1985), p. 7 (Exhibit E hereto); *Biesenbach v. Gunther*, 3d Cir., 588 F.2d 400, 402 (1978). As Chancellor Seitz said in *Schiff v. RKO Pictures Corp.*, Del.Ch., 104 A.2d 267, 279 (1954):

> "After all, who is to say, within limits, how much consideration constitutes thorough consideration, *especially when the parties are already familiar with the problem.*" (Emphasis added).

In short, the TU directors had no duty to tell the shareholders that they had not properly considered value when the directors believed the contrary.

The second deficiency perceived by the Majority was the failure to disclose the fact that Romans' rough calculations (which, as disclosed in the supplemental materials, indicated that the price offered *was* at the low end of the range of fair value) were intended as a justification for a leveraged buy-out, rather than a determination of value. However, contrary to the assumption implicit in this finding and elsewhere in the Opinion, the determination of a price that a prospective purchaser would pay in a leveraged buy-out *is a determination of value* of a corporation as an on-going concern. A leveraged buy-out involves the purchase of an on-going concern. There is no deficiency because the statement is true.

The third deficiency identified by the Majority is the characterization of the premium as "substantial" without relating the 48% premium to some hypothetical value rather than *actual stock market price* (Op., p. 70). Reasonable shareholders understand that, by definition, the term "premium" means a comparison of the offered price to actual market price, rather than to some other method of determining "value". And, by any definition, a 48% premium is clearly "substantial." Thus, in *TSC*, *supra*, the seminal authority on federal disclosure law, the Supreme Court, in commenting on the directors' characterization of an offer representing a 19% premium over market price as "substantial," held: "We certainly cannot say as a matter of law that these premiums were *not* substantial"(emphasis added). 426 U.S. 459. In addition, the directors cannot be held liable based on mere "statements of opinion." *Darvin v. Bache Halsey*

Stuart Shields, Inc., S.D.N.Y., 479 F.Supp. 460, 464 (1979), *approved*, *Zerman v. Ball*, 2d Cir., 735 F.2d 15, 21 (1984). TU's stockholders were free to compare the historical and current market prices of TU stock [as set out at page 5 of the original Proxy Statement (A 2227)] with Pritzker's offer and decide whether the premium was substantial enough for them to accept it. *Weinberger v. UOP, Inc.*, Del.Ch., C.A. 5642, Brown, Ch. (Jan. 30, 1985), p. 22 (Exhibit F hereto); *Weingarden*, *supra*, pp. 7-8.

(2) *Leveraged Buy-Out Disclosure.* The Majority's fourth criticism of the proxy materials is that they failed to disclose that the merger price was established "because it made feasible a leveraged buy-out" (Op., p. 70). However, the very language from the Proxy Statement quoted by the Majority to support that conclusion is, in a nut-shell, a description of a leveraged buy-out. The quoted language is that the merger price was determined in part, from

> "Mr. Van Gorkom's belief that loans could be obtained from institutional lenders . . . which would *justify* [*i.e.*, make feasible] the payment of such a price." (Op., p. 71.)

That language describes the financing generally understood to be part of a leveraged buy-out. If the Majority proposes "to brand language as misleading then as a starting point . . . [it must begin] with accepting that which [the proxy statement] actually says." *Kaplan v. Goldsamt*, *supra*, 380 A.2d 563.

(3) *Supplemental Proxy Statement Disclosure.* The fifth and final criticism by the Majority is addressed to the Supplemental Proxy Statement issued on January 27, the day after the last directors' meeting at which the merger was considered. The criticism seems to be directed solely at the timing of the disclosure, a point on which decision is expressly withheld. Clearly under any fair reading of the Delaware statute, the disclosure was legally and equitably timely. The supplemental mailing was not so untimely as to raise any issue of inequitable conduct. *See e.g.*, 8 Del.C. §222(b) which provides: "Unless otherwise provided in this Chapter, the written notice of any meeting shall be given not less than *ten* . . . days before the meeting to each stockholder entitled to vote" (emphasis added).

Limitations of space do not permit us to comment on each of the disclosure deficiencies which the Majority may have found in the Supplemental Proxy Statement. However, it is clear that no material facts were omitted from the 113 pages of proxy materials mailed to the shareholders, including the "laundry list" of information supplied in the Supplemental Proxy Statement which detailed plaintiffs' *allegations* in this action, as well as the Board's discussion of all material events, *as the directors understood them*, from September 20, 1980 through January 26, 1981. As stated by Chancellor Brown in *Field v. Allyn*, Del.Ch. 457 A.2d 1089, 1100 (1983), *aff'd per curiam*, Del.Supr. 467 A.2d 1274 (1983), in rejecting a claim of incomplete disclosure:

> ". . . I find no substantial likelihood that [such] disclosure would have been viewed by a reasonable investor as significantly altering the total mix of the information made available. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 96 S. Ct. 2126, 48 L.Ed. 2d 757 (1976); *Lynch v. Vickers Energy Corporation, supra*. They are simply representative of the usual handful of nondisclosure allegations that are typically thrown into a shareholder action such as this just in case one of them might accidently hit the mark. Here, they do not."

The Majority has, in effect, created a whole new Delaware disclosure law which parts company with established federal securities laws. The Delaware and federal disclosure laws should be uniform and harmonious. However, the Majority's disclosure standards are far stricter than any requirement of federal or state law to date, and may well violate the United States Constitution. It is impossible to pretend that the standards laid down by the Majority are still consistent with *TSC*, *supra*. The consequences for those preparing proxy statements and other materials to be submitted to stockholders of Delaware corporations are certain to be of major concern.

We submit that if the Proxy Statement and the Supplemental Proxy Statement are tested against the disclosure standards firmly established by federal and Delaware precedent prior to the Majority Opinion, there can be no doubt that the merger was ratified by informed shareholders. Justice Christie said it simply (Op., p. 88): "[T]he record supports a conclusion that the defendants acted with the complete candor required by *Lynch v. Vickers Energy Corp.*, Del.Supr., 383 A.2d 278 (1978)."

CONCLUSION

We respectfully submit that, given the national importance of the decision to the goverance of Delaware corporations, given the confusion it has already caused among those who counsel Delaware corporations, given the 3-2 division of this Court in overruling the Chancellor, and given the factual and legal matters presented herein, reargument is required in the interests of justice. Alternatively, in light of the undisputed facts of record as shown above, this Court could affirm the Chancellor on the ground that the market test was effective and conclusively proved that the price of $55 per share for TU as a going concern was fair and represented the value of TU on September 20, 1980. Similarly, this Court could affirm the Chancellor solely on the grounds that the original and supplemental proxy materials met the appropriate disclosure standards and that the duly informed shareholders of TU ratified the directors' actions and accepted Pritzker's offer.*

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February 18, 1985

* Finally, if the Court does not accept the foregoing alternatives, in light of the focus of the Majority, which has changed so drastically from that of the Chancellor, the case should be remanded to the Court of Chancery for an evidentiary hearing (perhaps on specific issues to be delineated by this Court and detailed findings of fact), including expert testimony as to the feasibility of the market test.

CERTIFICATE OF COUNSEL

Pursuant to Supreme Court Rule 18, the undersigned certify that the foregoing Motion For Reargument is presented in good faith and not for delay.

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