IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| ALDEN SMITH and JOHN W. GOSSELIN, | ) | |
| Plaintiffs-Below, Appellants, | ) | |
| v. | ) | No. 255, 1982 |
| 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. | ) | |



# PLAINTIFFS' OPENING BRIEF

On Appeal From the Court of Chancery
In and For New Castle County
Civil Action No. 5642

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October 27, 1982

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Note: By stipulation and order, the record remains with the Register in Chancery.

Pages of the Appendix are referred to, thus: "(A-2)". Pages of the trial transcript found in the Appendix will at times include the witnesses' names for clarity, thus: "(A-261, Van Gorkom)." Pages of the transcript of the trial not included in the Appendix will be referred to by the page of the transcript and by the name of the witness in question, thus: "(TR 1000, Van Gorkom)". Pages of the transcripts of depositions will be referred to by the name of the deponent, thus: "(Van Gorkom 43)". Trial exhibits not included in this Appendix will be referred to by their PX or DX designation.

In quotations, underlining and matters in parentheses are added unless otherwise noted.

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## NATURE AND STAGE OF THE PROCEEDINGS

This was a class action brought for injunctive and other equitable relief by Alden Smith and John W. Gosselin, substantial common stockholders of Trans Union Corporation ("TU"), against TU, The Marmon Group, Inc. ("Marmon"), GL Corporation ("GL"), New T Co. ("NTC"), the directors of TU, and Jay A. Pritzker and Robert A. Pritzker ("the Pritzkers"), the owners of the parent company, Marmon, (1) to enjoin the proposed cashout merger of NTC into TU ("the merger") at a cashout merger price of $55.00 per share, and (2) to enjoin the issuance by TU of 1,000,000 shares of TU to the Pritzkers or their nominees at $38.00 per share. A motion for a preliminary injunction was denied by the lower Court in a letter opinion of February 3, 1981.

At the special meeting of the stockholders of TU on February 10, 1981, the stockholders voted in favor of the merger, which was subsequently consummated. Thereafter, the defendants agreed to the certification of Messrs. Gosselin and Smith as class representatives, the class to consist of all common stockholders of TU who did not opt out after notice. (Note-1)

After trial in September-October, 1981, the parties stipulated that the Pritzkers be dismissed with prejudice. (Note-2) After post-trial briefing and argument, the Chancery Court handed down a 15-page letter opinion on July 6, 1982 (A-9, 23), on which an order was entered on July 14, 1982 (A-24). From the foregoing opinion and order, the plaintiffs have appealed.

This is the Plaintiffs' Opening Brief.

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Note-1: Thus, the plaintiff class consists of 10,537 shareholders (out of a total of 12,844). The plaintiff class owned 12,734,404 shares of the stock (out of 13,357,758 shares outstanding) (Docket No. 100, filed June 5, 1981).

Note-2: By an opinion dated October 20, 1981, the Chancery Court also granted the defendants' motion for dismissal as to a deceased defendant, Robert W. Reneker, based on plaintiffs' failure within the prescribed time to substitute his estate as a party defendant.

## SUMMARY OF ARGUMENT

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

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

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

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

## STATEMENT OF FACTS

### A. The Plaintiffs

At the time of the merger, the plaintiff, Alden Smith, owned 54,000 shares of TU stock which he had acquired as a result of the stock-for-stock acquisition of his company, Smith & Loveless, by TU back in 1959 (TR 42-43, Smith). Mr. Smith's basis was "a little less than a dollar a share" (TR 63, Smith).

Mr. Gosselin owned 23,600 shares of TU stock and members of his family owned another 20,000 shares (TR 17, Gosselin) as a result of the stock-for-stock acquisition of a family-owned company, Phoenix Manufacturing Company, back in 1957 by Union Tank Car Company, the predecessor of TU (TR 12, Gosselin). The basis of Mr. Gosselin's stock was approximately $2.00 (TR 19, Gosselin). Mr. Gosselin had planned to retain his holdings of TU stock until the time of his death and, thus, avoid capital gains (TR 20, Gosselin). (Note)

Mr. Gosselin had originally worked for TU at the time that Phoenix was acquired by TU (TR 15, Gosselin): he had remained familiar with TU (TR 20-24, Gosselin) and he knew the value of the stock (TR 25-26, Gosselin). He said that, based on the continual increase in dividends and earnings since 1961, the value of TU stock for merger purposes was 13 to 15 times earnings. The most recent earnings were between $4.50 - $5.00 (TR 25-28, Gosselin).

Mr. Gosselin testified that he was shocked, angered and damaged by the decision of Mr. Van Gorkom and the Board to enter into a cashout merger agreement that provided for the sale of the stock of the

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Note: Mr. Van Gorkom well knew that there were many TU stockholders who had acquired their TU stock as a result of the acquisition by TU of their companies on a stock-for-stock basis (TR 597, Van Gorkom).

stockholders of TU at $55.00 per share (TR 29-30, Gosselin). Mr. Gosselin testified that he had sold all but a relatively small amount of his shares of TU and that he did so because there would be no further interest or dividends and he wanted to minimize the loss that had been visited on him by the sale of his shares at $55.00 per share (TR 33-34, Gosselin).

B. Background on Trans Union Company

Trans Union Company was a company which generated a cash flow from operations of more than $162 million annually. Its core was its railroad car leasing business conducted by its Union Tank Car Division (Van Gorkom 17). Union Tank not only produced enormous cash flow but its leasing produces depreciation and investment tax credits (TR 518, Van Gorkom). These tax advantages could be maximized from other operations that produce other taxable profits that can be sheltered or offset by TU's depreciation and tax credits (A-1039). Mr. Van Gorkom apparently believed that the collateral operations of TU were not able to "soak" up the accelerated depreciation and investment tax credits produced by Union Tank Car (A-1037-1040). (Note) TU was characterized in its Five-Year Forecast 1981-1985 as an "engine of cash" (PX 21) and was known as a "cash cow" (Van Gorkom 62). In the mid-1980's, the prospect that federal legislation would be passed further accelerating allowable depreciation suggested that the gap believed to exist between TU's tax advantages and its shelterable income would widen (A-1045; A-10700. However, even this prospective legislation did not pose a crisis or immediate problem for TU (A-1052): TU's problem, if it actually had one

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Note: Mr. Romans, TU's Financial Vice President, pointed out in an internal TU memorandum to Mr. Van Gorkom (TU's Chief Executive Officer) that TU's leasing operations had in fact soaked up all of TU's accelerated depreciation and investment tax credits (A-2182).

in August 1980, was how best to utilize the huge amount of cash it produced (PX 17).

### C. The Board of TU Consisted of Employees of TU and The President's Social and Business Friends

In 1963, Mr. Jerome Van Gorkom became the President and Chief Executive Officer of TU (Van Gorkom 9). Before 1980, he had become Chairman of the Board but continued as Chief Executive Officer (Van Gorkom 9). Bruce Chelberg (Mr. Van Gorkom's "designated successor"; Chelberg 110-112) was made President and Chief Operating Officer (Chelberg 8).

All of the outside directors were CEO's of other Chicago based companies and were either social or business friends selected by Mr. Van Gorkom (A-1228; A-1230; Van Gorkom 307-308; Browder 324; Morgan 23). The Board of TU had never voted down a proposal that had been made by Mr. Van Gorkom (A-1245-1252; TR 738-740, Johnson; Browder 213), except for Mr. Van Gorkom's proposal that TU be merged into Litton back in 1968 (PX 1, PX 4).

### D. TU's Situation in the Summer of 1980

In 1979, TU hired Boston Consulting Group to analyze TU (A-1049-1051; TR 743, Johnson; Van Gorkom 13). The report did not deal at all with alternate possible solutions to TU's problems in the 1980's and specifically did not in any way deal with the possible cashout of TU's stockholders, much less the fair price, including premium, that the TU stockholders should receive for the sale of 100% of TU (A-1051). TU management itself prepared a Five-Year Forecast for 1981-1985 dated July 17, 1980, which was presented to the Board at its July 1980 meeting (A-1882; Van Gorkom 13-14; TR 690, Johnson). This report was divided into what was called a "Hard-Nose Forecast" and an "Add-On Forecast". The

Summary of the Five-Year Forecast, in pertinent part, states (A-1882):

"III. SUMMARY

"Summarizing all of these combined effects, the Hardnose projection and Add-on programs define an annual income growth potential of about 20%, and we will still have some $195 million in spare cash for additional growth or other purposes between now and 1985, with the surplus growing rapidly from 1982 onward. However, the ITC (Investment Tax Credit) will still be a nagging problem and given that problem, TULI (Trans Union Leasing Company) would still appear to be constrained to a tax breakeven. Use of the cash surplus to generate taxable income, of course, could break the TULI inpasse.

"The remainder of this planning summary will deal with alternative uses of the surplus equity and the discussion of measures to ensure that the surplus becomes a reality. With respect to the surplus of $195 million, it should be noted that $66 million in acquisitions are already included operating unit Add-ons. We are talking about a large surplus after inclusion of an acquisition program similar in scope to our program of the last five years (about $100 million in acquisitions over the five years from 1975 through 1979).

"What to do with the 1982-1985 surplus?

"A number of alternatives exist:

"1) Stock repurchase. Assuming an average stock price of $50, we could repurchase about 30% of our outstanding stock. (Note) This, of course, could be reissued to support acquisitions at a later date.

"2) Dividend increases.

"3) A major acquisition program (if concentrated in tax-generators, this would allow for release of the TULI tax constraint).

"4) Combinations of the above.

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Note: (Double underlining added.) Significantly, $50 is the figure utilized. The $50 figure is the price (not for a controlling or 100% ownership) but for minority interests (i.e., "about 30% of our outstanding stock"). Mr. Meigs (A-624); Mr. Rosenbloom (A-1542); Mr. Van Gorkom (A-1079); and Mr. Johnson (TR 755) all agree the sale of 100% ownership commands a premium (i.e., the difference between the unaffected market price and the transaction price).

"It should be emphasized that despite the overall surplus, plan implementation will consume all available equity for the next several years. As a result, we have sufficient time to fully develop our course of action. (Note) In general, several factors should be noted:

"a) Alternatives need not be mutually exclusive (see comment under (1) above).

"b) The scope of an acquisition program geared to use of the surplus is considerably beyond our 'tuck-in' approach. To be successful, a great deal of effort should be expended over the next several years in defining the direction of such a program. If we entered new fields, risk minimization would require the careful accumulation of business and market intelligence, choice of a field or fields, selection of fields, and the development of a strategic approach before entry.*

* * *

"SUMMARY

"Trans Union remains an engine of cash. Given continued inflation and a normal economy once we get through the next year or so, there is every reason to expect rapid income growth as well as a cash surplus with which to grow even more rapidly or to increase returns to our stockholders. A critical decision will be the choice (or choices) as to the employment of that cash."

Neither the management nor the Board had ever considered the above Five-Year Forecast, much less adopted, by September 1980, an overall strategy or considered an alternative or combination of alternatives to deal effectively in the 1980's with TU for the benefit of TU's stockholders. The Board had not asked the financial officers of TU nor the Boston Consulting Group nor Salomon Brothers, TU's investment banker, for consultation, help or guidance on which alternative or combination of alternatives to adopt nor had they consulted with Salomon Brothers or

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Note: It should be kept in mind, in contrast to the precipitous merger agreed upon in less than a week from the time Mr. Van Gorkom first broached the subject to Mr. Pritzker that the Five-Year Forecast makes it clear that TU's situation was such that it had ample time to develop a considered course of action that would be in the best interest of TU's shareholders.

Boston Consulting Group on the possibility of a merger of TU and the consequent cashout of the stockholders or the fair price, including premium, that the stockholders should receive (A-1267-1268; TR 693, 744, Johnson; Wallis 28; Morgan 43; Bonser 20).

E. At the Meeting of August 27, 1980, a KKR Leveraged <u>Buyout Was Suggested But Rejected by Mr. Van Gorkom</u>

At the August 27, 1980 informal meeting of senior management, Mr. Romans, a Vice President and Chief Financial Officer of TU, said that the financial section had made a study showing the value of the TU stock was between \$55 to \$65 (A-1053, 1068; A-2327, Supplemental Proxy Statement). (Note-1) Mr. Romans also reported on the possibility of a leveraged buyout of TU based on an article from the media on a company known as Houdaille in which there was a description of a leveraged buyout by Kohlberg, Kravis, Roberts & Co. ("KKR"). Mr. Van Gorkom expressed his strong opposition (A-1265-1266) because such a transaction might involve a potential conflict of interest for management (A-1421; TR 1203, 1235, Pritzker). (Note-2)

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Note-1: Mr. Van Gorkom never himself inspected this study and did not have it available for the TU Board (TR 1043, Van Gorkom). This study was never produced, though called for by plaintiffs' Document Request No. 1 (A-45).

Note-2: A leveraged buyout is a transfer in which the management and others acquire the equity and the company is bought from the stockholders utilizing principally the assets of the company itself as security for the bank debt (A-1064-1066; TR 547-549, Van Gorkom; TR 1234-1235, Pritzker; Bonser 20). Mr. Van Gorkom admitted that he later learned that Mr. Romans and Mr. Bonser began working "night and day" on a leveraged buyout with KKR shortly after September 20, 1980 (A-1145), and admitted that Mr. Romans and Mr. Bonser were going to replace him (and Mr. Chelberg, the President and Mr. Van Gorkom's designated successor) in the new company that KKR was organizing for their leveraged buyout offer (A-1422-1423).

F. By September 14, 1980, Mr. Van Gorkom Had Decided (1) Against Approaching General Electric, (2) That $55.00 a Share Would Be Personally Satisfactory, and (3) Had Devised a Plan By Which Mr. Pritzker Could Buy TU Using TU's Cash Flow

Mr. Van Gorkom testified (A-1165) that General Electric Credit

> "... has the perfect answer to our problem. They have this huge income from the parent, so their leasing company can engage very broadly in leasing activities and still use all of its investment tax credit because it can use the parent's income from all these varied activities."

He also knew that General Electric Credit would have the ability to offer the TU stockholders a stock-for-stock deal as contrasted with the Pritzkers who could not give such a tax-free deal (A-1270). In spite of the foregoing, Mr. Van Gorkom never made or even really considered making any approach to G.E. as such (A-1273). In addition, without consulting with a single member of management or the TU Board (TR 693, Johnson), Mr. Van Gorkom determined that the sale price for the TU stock belonging to the stockholders should be $55.00 per share (A-1282-1283):

> "Q. Now in preparation for your meeting with Mr. Pritzker, you started with a price of $55. Is that correct?
>
> "A. That is correct.
>
> "Q. And you said that in your own case, you would not take $50, you would sell for $55 and $60 would be preemptive; is that correct?
>
> "A. I don't know if I said anything about $60. I did feel that $50 was too low and that $55 was something I would take. If I would take $55, I would obviously take $60 with more enthusiasm.

Having made this highly subjective personal determination of the $55.00 price based solely on what he personally would accept for his own TU shares, Mr. Van Gorkom said (A-1174):

> "So I sat down - I had my controller Peterson, without telling him why I wanted this information, because - what I said to him was, 'Pete, if we are really going to get serious about trying to sell the company, I would like to try to have a few calculations made to try and fix more firmly what a doable price is'. So I told him to take

the five year forecast and make a few adjustments. *** Then I told him to take the rest of the cash flow right out of the five year forecast, and assume that a price of $55 a share would require a total payment of $690 million. That's just simple arithmetic. The 12 1/2 million shares times the $55. It would take $690 million. I said you would have to put in at least $200 million. So I said use $200 million in equity and then the $490 million of borrowing.

"We ran the figures both at the 12% interest rate on the $490 million and 14%. The 12% was probably not too realistic because interest rates were moving up so we concentrated really on the 14% but we ran it both ways.

"I said 'See how fast you can pay off the loan of $490 out of the cash flow from the company from the five year forecast and the sale of a few of those divisions.'

"So we put the numbers together in very rough form. He did it all himself.

"Q. This is Mr. Peterson?

"A. Mr. Peterson, with no help. I told him 'Don't get any of your staff involved in this. I don't want anybody involved except you.' I didn't even tell, I don't believe, Mr. Chelberg about this at the time.

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"So that if it had come out that we could pay it in less than five years, then I was going to use the next number 57 or 59, whatever I thought we could make this formula work out to but I decided to stay at $55.

"If I had reduced it to 52 or 53 I could have come up, I guess, with having the whole loan paid off in five years but I felt that $55 was important.

"First of all, I personally felt that I represented the shareholders, very definitely, because I was one of the larger shareholders. I had a very definite interest in getting the maximum amount of money from the stock, and I felt that I would not take less than 55 and therefore I felt that probably a tender by anybody might not be successful if it were below 55.

"So with the calculations that I have described and a couple of sheets from the five year forecast, all of which amounted to four or five sheets of paper, I went to call on Mr. Pritzker on September 13, a Saturday afternoon."

Mr. Van Gorkom continued (A-1092-1093):

"I knew I could trust his discretion. And, of course, he is even more sensitive about secrecy than I am. We both agreed that it wouldn't do either of us any good if it were known we were talking and so we kept - that was the reason I met him at his home. (Note-1)

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"And so then I proceeded to take him through these calculations. I said 'you know what our problem is' and I had talked to him about it repeatedly, and he knew it anyway. He didn't require a great deal of explanation.

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"I said, 'Now as far as you are concerned, I can, I think, show how you can pay a substantial premium over the present stock price and pay off most of the loan in the first five years' so I went through the numbers with him. (Note-2)

There was never any negotiation as to the price of $55.00 (A-1299-1300):

"Q. Well let's get back to my question.

"You suggested a price of $55 and Mr. Pritzker never countered with a lower price did he?

"A. Your statement that I requested a price of $55 is inaccurate Mr. Prickett. What I said to him is 'If you could pay $55 for this company, here is a way in which I think it can be financed.' I did not say we will sell this company to you for $55. That was obviously completely out of my authority. When you negotiate, you are prepared to set a price and agree on something. I wasn't there to do that.

"Q. Well you made a presentation that embodied the figure 55. That was the only figure that was ever mentioned between the two of you at any time. Isn't that correct?

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Note-1: Even at trial, Mr. Pritzker conceded that Mr. Van Gorkom's method was "rather unusual" especially as Mr. Van Gorkom was not even going to get an opinion on the price from an investment banker (TR 1206-1207, Pritzker).

Note-2: Mr. Van Gorkom not only subjectively selected the $55.00 price but he also made all the necessary assumptions and calculations to show Mr. Pritzker that a cashout merger at $55.00 would be advantageous to Mr. Pritzker.

"A. The $55 was selected for the reasons I have already stated as a way to prevent [present] this proposition. He said the price was too high, and we had some discussion on that as to why he thought it was too high and why I insisted on sticking with it, and that's the way it ended.

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"Q. Well you made a presentation that embodied the figure of 55. That was the only figure that was ever mentioned between the two of you at that time, isn't that correct?

"The Witness: That was the only number specifically mentioned.

***"

G. Events in the Week of September 15, 1980, Up to the Time of the Board Meeting

On Monday, September 15, 1980, Mr. Pritzker telephoned Mr. Van Gorkom to say he was interested in the $55.00 cashout merger proposal that Mr. Van Gorkom proposed that Mr. Pritzker make (A-1306). Mr. Pritzker claimed he needed more information (A-1307). Mr. Van Gorkom agreed to meet Mr. Pritzker privately in New York City on Tuesday, September 16, 1980 (A-1307), with Mr. Chelberg and Mr. Peterson (A-1308). Mr. Pritzker wanted still more information on TU: again, Mr. Van Gorkom had TU's consultant, Michael Carpenter of Boston Consulting Group, immediately fly down from Boston to consult with Mr. Pritzker (A-1310). (Note)

Some time during the week of September 15, 1980, Mr. Pritzker made a demand for 1,750,000 shares of TU's stock at market (A-1322). A negotiation resulted in the number of shares being fixed at 1,000,000 shares (A-1323-1324). However, there was no negotiation on the price: Mr. Van Gorkom agreed that the price should be just slightly higher than

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Note: In fact, Mr. Pritzker, with Mr. Van Gorkom's tacit approbation, at that point even hired TU's own consultant, Michael Carpenter to provide information on TU (A-1311-1314).

the market (A-1324). It was ultimately fixed on Friday night at $38 when the market closed at $37.25 (A-1324). (Note)

Mr. Van Gorkom testified that he was "astounded" and that events were moving with "amazing rapidity" (A-1101, 1316). Mr. Van Gorkom was busy with many matters other than the cashout merger of TU's shareholders by the Pritzkers (A-1317). Mr. Van Gorkom's actual reason for going to New York was to attend a dinner for the Champion directors on Wednesday night in New York, and to attend the Champion Board meeting on Thursday morning, September 18, 1980, (A-1315). In the meanwhile, Mr. Pritzker had gone back to Chicago accompanied by Bruce Chelberg and Michael Carpenter (A-1315). Mr. Van Gorkom came back to Chicago on Thursday, September 18, at Noon, to attend a meeting of the Chicago School Finance Board of which he was Chairman (A-1315).

It was in the late afternoon on Thursday, September 18, that he talked to Mr. Pritzker again (A-1100). About this time, he realized that Mr. Pritzker was going to make a cashout merger proposal embodying the price of $55.00 that he, Mr. Van Gorkom, had himself suggested to Mr. Pritzker (A-1318, 1334). However, Mr. Pritzker "insisted" that his attorney, Howard Handelsman, Esquire, a specialist in mergers and acquisitions, begin drafting the merger documents (A-1334). Mr. Van Gorkom did not turn to William Browder, a Vice President, a Director and previous head of the Law Department, nor the current head of TU's Law Department, William Moore; instead, he went outside TU and retained William Brennan, Esquire of Sidley & Austin on Friday, September 19,

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Note: Mr. Van Gorkom never explained why he agreed to a price for the 1,000,000 shares at $38 when the merger price was $55.

1980 (A-1329-1331). Mr. Brennan was simply told orally by Mr. Van Gorkom his understanding of the deal as it stood at that time (A-1331). (Note-1) (Note-2)

Mr. Van Gorkom then called a special meeting of the Board of TU at noon the next day, Saturday, September 20, 1980 (A-1107). He also summoned senior management to meet at 11:00 A.M. on Saturday, September 20, 1980 (A-1107). Mr. Van Gorkom did not ask TU's investment banker, Salomon Brothers, and in particular Ira J. Harris, a Chicago based Salomon Brothers partner who was a merger and acquisition specialist and on a first name basis with all the members of the TR Board (TR 748, Johnson) to attend. No one was told what the meetings were to be about (A-1109).

It is not clear just when Mr. Pritzker first informed Mr. Van Gorkom that his $55.00 cashout offer had to be acted on immediately (A-1111-1112):

> "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, because Jay Pritzker had said that he did not -- if the board was going to turn him down, he did not want an announcement made. And I told Jay, I said, 'In view of all the people that will know by Saturday, we will have to make an announcement on Monday morning no matter what the decision is unless the decision is to cancel the whole thing.' And frankly, I would have to say I wasn't even sure that we could avoid an announcement then, but we never got to that point.
>
> "So he said, 'Well, I don't want an announcement.' He didn't want to have his deal turned down and announced that it was turned down. So he said, 'We have to have a decision by no

Note-1: Mr. Van Gorkom testified (A-1133): "They [the merger documents] had been drafted largely by Mr. Pritzker's lawyer and reviewed by our lawyer, some times with discussions and some times not, in the haste to get it finished."

Note-2: On Friday evening, September 19, 1980, Mr. Van Gorkom and Mr. Chelberg went with Mr. Pritzker to Continental Bank (A-1107, 1320), one of TU's lead banks (A-1322). The outlines of the proposed transaction were disclosed to Continental's chief officers and they indicated informally that Continental could form a syndicate of banks that would finance the transaction at 14% (A-1107, 1322).

later than Sunday, say, because we are traded on the English Stock Exchange,' and we wanted to beat even their opening, which would be about midnight or so."

### H. Presentation of the Pritzker Merger to Senior Management

Throughout the entire week of September 15, 1980, no member of TU management had been told of Mr. Van Gorkom's secret approach and agreement (except, of course, Mr. Chelberg and Mr. Peterson, TU's Comptroller who had been told so that he could provide further information to Mr. Pritzker about TU) (A-1111). Neither the formal merger documents nor even a written summary of the terms of the merger were furnished to senior management in advance and no documents or written information of any kind were furnished to them at the meeting (A-1336). It was an informal meeting: no exact list of exactly who attended was kept but the senior officers of TU were present (A-1109; Browder 53-58). After Mr. Van Gorkom delivered his astonishing piece of news, there were "unpleasant reactions" by the assembled executives. Mr. Romans said that his department had done a study that showed the price range for the TU stock was $55 to $65 (A-1338; A-2327, Supplementary Proxy Statement). Mr. Van Gorkom never asked that these studies be made available for the upcoming Board meeting (A-1338). (Note)

### I. Presentation of the Pritzker Merger at the Special Meeting of the Board of Directors of TU on Saturday, September 20, 1980

Mr. Van Gorkom testified that he had told Mr. Browder and Mr. Moore to arrive early on Saturday, September 20, 1980 (A-1344; TR 1049, Van Gorkom):

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Note: Though called for by Plaintiffs' First Request to All Defendants for Production of Documents No. 12 served December 19, 1980, the study referred to has never been produced (A-45).

"A. I had them come down early but they did not see the documents. The documents were not ready when they got there. ...

"Q. And did you read them in their final form prior to the meeting?

"A. No, because I had no reason to think they had been changed from the night before.

"Q. I didn't ask you that. I asked you whether you read them.

"A. No I did not."

(A-1346):

"Q. Now did any member of the Board of Directors read the documents in the form you say they were in at the time of the beginning of the meeting of the Board on September 20, 1980?

"A. I don't believe that any of them read through the entire document.

"Q. Did any of them read through any part of it?

"A. I cannot answer that." (Note-1)

Mr. Brennan, the attorney whom Mr. Van Gorkom had selected to represent TU in drafting the merger agreement was present at the Board meeting (A-1118). He was not called as a witness by the defendants nor had his deposition been taken by defendants. (Note-2)

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Note-1: Mr. Van Gorkom testified affirmatively in his direct that none of the Board members had "gone over" the merger documents (A-1132). Mr. Johnson testified at trial that, at the meeting, he did not read the merger documents in draft or final form (TR 777, Johnson) and could not recall that he had ever read the merger documents (TR 779-780, Johnson).

Note-2: The lower Court was entitled to draw adverse inferences from the defendants' failure to call William Brennan, Esquire. Richard v. Jones, Del.Ch., 142 A. 832 (1928); Gammel v. Chandler-Hill Corp., Del. Supr., 103 A.2d 228 (1954); Jett v. Texas Company, D.Del., 73 F.Supp. 699 (1949), Anno. 5 A.L.R. 2d 893, 907-908 (1949), but made no mention of the significant absence of this critical witness.

The Special Meeting of September 20, 1980, lasted only about two hours, the approximate length of any regular TU Board meeting (TR 789, Johnson; Chelberg 148; Browder 78-82). (Note) Mr. Van Gorkom made the only presentation which took about twenty minutes (A-1371; Van Gorkom 143). No written summary of the merger was presented: instead, Mr. Van Gorkom simply told the Board orally what <u>he thought</u> the substance of the proposed merger agreement was (TR 708, Johnson). Mr. Van Gorkom testified (A-1347-1348):

> "Q. Now at the Board meeting you described the proposed transaction, did you not?
>
> "A. I did.
>
> "Q. You indicated the price was to be $55 per share?
>
> "A. I indicated that the price offered was $55 per share.
>
> "Q. Yes, okay. And that one condition was take it or leave it. It had to be decided before Sunday night as you have said, when the market opened in London?
>
> "A. 'Take it or leave it' has a pejorative tone it seems to me. I have explained that the reason that the decision had to be made was because we had to have a decision from the Board before the London Market Exchange opened.
>
> "Q. In any case, the shorthand way of it was that it was a decision that had to be made before Sunday night and you made that clear to the Board?
>
> "A. That is correct.
>
> "Q. And a collateral feature was that Mr. Pritzker was to get a million shares at $38 a share?
>
> "A. That's correct.
>
> "Q. And Mr. Pritzker was to have the right until October 10 to line up his financing?
>
> "A. Yes.

---

Note: All of the outside and inside directors were able to attend except for one inside director, Mr. O'Boyle, who was in the hospital recovering from an operation for heart trouble (Moore 115; O'Boyle 23). None of the inside or outside directors were investment bankers or financial analysts (A-2250-2251, and deposition of each director-defendant).

"Q. And there was no right in TU reserved to solicit bids, but there was the right to receive bids?

"A. Yes.

"Q. And finally there was no right in the deal as presented to give out private or proprietary TU information to bidders other than Pritzker?

"A. Yes."

The directors were hearing the news for the first time and were "surprised" (Chelberg 116; Morgan 52; Lanterman 76). There are no notes or documents at all as to what went on at that crucial meeting other than the official minutes (A-1865). These minutes were circulated in draft form and were then approved by the directors at the next meeting. All they state in regard to the merger is as follows (A-1865):

> "The Chairman introduced a proposal whereby the company would merge with a corporation owned by the Pritzker family of Chicago. Upon the merger becoming effective, each stockholder of the company would receive $55 per share in cash for each Trans Union share held. In addition, but as a separate transaction, the company would sell to a Pritzker designee one million newly issued shares of the company's common stock for a purchase price of $38 per share if financing for the merger satisfactory to the Pritzker interests had been obtained by October 10, 1980 or if the Pritzker Company waived the merger financing condition.
>
> "After discussion, upon motion made and seconded, the following resolutions were duly adopted:
>
> "Resolved that in the judgment of the Board of Directors of this company, it would be in the best interests of the company's stockholders for the company to accept the proposal of GL Corporation whereby (1) an indirect subsidiary of GL Corporation would be merged into this company and each stockholder of the company would be entitled to receive $55 in cash per share of common stock of this company held at the effective time of the merger and (2) this company would issue and sell to GL Corporation or its designee, one million authorized but unissued shares of common stock of this company at a price of $38 per share in cash, all on terms and subject to the conditions set forth or referred to in the letter dated September 20, 1980, including the condition relating to financing arrangements, from GL Corporation to this company presented to this meeting to which letter there is attached an

Agreement and Plan of Merger dated September 20, 1980 and a Supplemental Agreement dated as of September 20, 1980." (Note-1)

The following matters are undisputed from the testimony of the directors of TU.

1. <u>There were no questions by the Board on how the $55.00 price had been set</u>:

Mr. Van Gorkom testified (A-1348-1349):

> "Q. And do you recall being asked at your deposition the following question on page 152 of line 8:
>
> "'Q. Were there questions raised by the Board as to how the cash merger price of $55 was arrived at?'
>
> "And your answer. "A. I don't recall.
>
> "Q. Did you give that answer to that question?
>
> "A. I must have." (Note-2)

2. <u>It was not disclosed to the Board that the terms of the merger had been proposed by Mr. Van Gorkom</u>:

Mr. Van Gorkom did not disclose to the Board that he had in fact structured the terms that resulted in the Pritzker offer. Mr. Johnson, the only director called by the defendants as a witness other than Mr. Van Gorkom, testified (TR 798, Johnson):

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Note-1: Thereafter, the minutes recite seven specific detailed resolutions (A-1865). These other seven resolutions were prepared later by the Corporate Secretary, William Moore (A-1371). The directors could not recall whether these seven subsidiary motions were suggested even in substance at the meeting (Morgan 70; Bonser 69; Chelberg 72).

Note-2: The foregoing is confirmed by the deposition testimony of the directors (Morgan 55; Bonser 41; Reneker 42-49). The fact that the $55.00 price had been determined solely by Mr. Van Gorkom was first disclosed to the Board at its January 26, 1981 meeting (A-2326).

"Q. Fair enough. Let me withdraw it. It was kind of chopped up.

"Did Mr. Van Gorkom indicate that he had said that as a starting point he was going to multiply 12 million times 55 to get the total price and then demonstrate how Pritzker could pay it?

"A. I don't recall that.

3. There were no questions as to the adverse tax implications for the TU stockholders who had acquired their shares in tax-free mergers:

Mr. Van Gorkom testified (A-1351):

"Q. Let me do it a little more simply:

"Were you asked on your deposition, page 152, line 16:

"'Q. Were there any questions by the Board members as to what the management had determined the tax implications would be for those stockholders who had acquired their TU shares in a tax-free merger?'

"A. Not that I recall. There may very well have been but I don't recall.'

"Did you give that answer?

"A. I must have. (Note)

4. There were no questions as to how the price for the one million shares was arrived at:

Mr. Van Gorkom testified (A-1351-1352):

"Q. Right. Now, do you recall any question of the Board on how the price for the million shares was determined?

"A. Do you mean do I recall a specific question addressed to me in so many words?

"Q. Yes, by a member of the Board.

"A. I don't -- I told you already that I do not remember any specific statements made by people -- I do remember -- well I remember maybe three or four out of the entire meeting.

---

Note: Mr. Johnson's testimony confirms that no attempt was made to determine the tax consequences to TU's shareholders (TR 762-766, Johnson).

5. <u>There were no questions as to why there had been no opinion or valuation by TU's investment banker</u>:

Mr. Van Gorkom testified (A-1352-1353):

"Q. Do you remember indicating that there had been no affirmative valuation by an investment banker?

"A. Yes.

"Q. And were you asked by members of the Board as to why Salomon Brothers had not been consulted on this transaction?

"A. No, not Salomon Brothers specifically.

"Q. And all the members of the Board were familiar with Ira Harris, were they not?

"A. Yes, I believe they all know Mr. Harris. (Note)

"Q. And they all knew that he was resident in Chicago?

"A. Yes.

"Q. They all knew that he was a specialist in merger and acquisitions?

"A. Yes.

"Q. Didn't any of them ask you as to why Ira Harris specifically had not been consulted?

"A. No, not that I recall.

6. <u>There was no question by the Board as to whether it would be possible to obtain the advice of TU's investment banker</u>:

Mr. Van Gorkom testified (A-1352-1353):

"Q. Did any member of the Board ask whether it would be possible to have Mr. Ira Harris or some member of Salomon Brothers come to that meeting or an adjourned meeting, to review the proposed merger?

"A. You are directing your question now specifically to Salmon Brothers?

---

Note: (TR 748, Johnson):

"Q. And he [Ira Harris] was on a first-name basis with most of the members of the Board of TU?

"A. Correct."

"Q. Yes.

"A. The answer is no, not that I remember.

"Q. And was there an affirmative decision by the Board not to attempt to obtain the opinion of an investment banker before making this decision?

"A. There was.

"Q. Did anybody ask whether it would be possible to adjourn the meeting of the Board until Sunday at which time it might be possible to obtain the opinion of an investment banker?

"A. Not that I recall.

7. <u>There was no request for a studied opinion of the chief financial officer of the corporation on the value of the TU shares</u>:

Mr. Van Gorkom testified (A-1357-1358):

"Q. *** Did Mr. Romans say at the meeting, the special meeting of the Board on September 20, 1980, that he could not say that $55 was unfair?

"A. That is one thing I am sure he said.

"By Mr. Prickett:

"Q. Did he also say that in his opinion the fair price range was between $55 and $65?

"A. I don't remember that specifically but he could very well have said that."

8. <u>There was no disclosure to the Board that a study of the value of TU stock was in existence</u>: (Note)

Mr. Van Gorkom did not disclose that a study of the value of the TU stock had been made by Mr. Romans' department nor was the study ever presented to the Board (A-1337-1338):

"By Mr. Prickett:

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Note: The Summary of the Five-Year Forecast presented to the Board on July 17, 1980, stated that one possible alternative was to redeem 30% of the outstanding stock at "an average stock price of $50" (A-1896), thus showing that management had determined that the value for a <u>minority</u> interest was in the area of $50.

"Q. Now did Mr. Romans say anything about what he thought the price range for TU stock under those circumstances should be?

"A. At that time, I think he discussed a range of $55 to $65.

"Q. Did he say that his department had done some studies in connection with the price range?

"A. He said they had done some work on it, yes.

"Q. Did you ever ask that you be furnished with that work at that time?

"A. I did not ask for it at that time.

"Q. Did you ever indicate to the Board later that morning that there were studies that had been made by Mr. Romans' department?

"A. I don't recall doing that specifically because Mr. Romans was there to speak for himself.

"Q. And were the studies that Mr. Romans referred to ever called for by the Board?

"A. I don't believe so."

No adjournment was requested to obtain the work of Mr. Romans' department (A-1353).

9. <u>There was no presentation of an evaluation of the premium paid in comparable situations</u>:

Mr. Van Gorkom testified that no valuation or calculation was presented as to premium paid in comparable situations (A-1354-1355). (Note)

"Q. Now had you ever made any calculation of what the market was paying in comparable situations by way of a percentage premium?

"A. There is no such thing as a comparable situation.

---

Note: Mr. Van Gorkom defined premium (A-1355):

"Q. And what is the premium paid in a transaction such as the merger that you were engaged in -- does that represent some increment of value?

"A. I think in my opinion it represents the premium someone is willing to pay for control."

"Q. I see. Well, do I take it that you have never had figures assembled either by Peterson or Romans or yourself on mergers and acquisitions that were taking place in that time in order to determine the range of premiums that were being paid in mergers going on at that time?

"A. We did not have such a study made.

10. <u>There was no discussion by the Board as to whether Mr. Pritzker would actually withdraw his offer if it was not acted on by Sunday night</u>:

Mr. Van Gorkom testified (A-1360):

"Q. Now was there any discussion that you recall of the Board as to whether Mr. Pritzker would actually withdraw his offer if it were not acted on by Sunday night, whether this was a threat or for real?

"A. I don't recall if there was any discussion on the subject."

11. <u>There was no discussion of what private companies might do if Mr. Pritzker withdrew</u>:

Mr. Van Gorkom testified (A-1360):

"Q. Was there any discussion or evaluation of whether other private companies that were in similar circumstances to the Pritzkers might be interested if Mr. Pritzker did in fact withdraw if the Board did not approve by Sunday night? Do you have any recollection of discussion along that line?

"A. Would you read that question again please? My mind was wandering.

"(The Court Reporter read back as requested.)

"The Witness:

"As you have asked the question, no I do not have."

12. <u>There was no evaluation as to what public companies such as General Electric Corporation might do if Mr. Pritzker did withdraw</u>:

Mr. Van Gorkom testified (A-1361):

"Q. Did anybody ask for an evaluation as to the possibility the public companies, such as General Electric Credit Corporation, seeking to do a transaction with TU if Mr. Pritzker did in fact, withdraw if it wasn't acted on by Sunday night?

"A. Not that I recall."

13. It was not disclosed to the directors that Mr. Van Gorkom had gone with Mr. Pritzker and discussed the Pritzker proposal with TU's bank:

Mr. Johnson testified (TR 823-824, Johnson):

> "Q. Mr. Van Gorkom and Mr. Pritzker had talked to the Continental Bank together about this deal?
>
> "A. I didn't know that Mr. Van Gorkom went to the Continental Bank. ...
>
> "Q. ... when were you told by your attorneys?
>
> "A. Last night. ...
>
> "Q. All right. And are you a director of the Continental Bank?
>
> "A. Yes, sir."

### J. Though the Board Made No Determination of the Fairness of the Pritzker Offer, the Board Voted in Favor of a Merger Agreement That Required the Board Affirmatively to Recommend the Merger to the Stockholders and In the Mistaken Belief That TU Had the Right to Accept a Better Offer

Mr. Van Gorkom testified (A-1358):

> "The question was, as I said to the Board, nobody knows whether the $55 is the highest price we can obtain here but we are asked to determine very quickly and it might be very much better if we had a lot of time but we are being asked to determine do we turn this offer down here or do we let the shareholders have the right to turn it down or accept it as they see fit."

#### (a) Mr. Van Gorkom Led the Board to Believe That the Board Did Not Have to Determine the Fairness of the Merger Price

Mr. Van Gorkom testified that the Board was not being asked to determine the fairness of the $55 price. Mr. Van Gorkom explained to the senior management just before the Board meeting on Saturday, September 20, 1980, that the Board was simply being asked whether the offer should be passed along to the stockholders (A-1113-1114):

"Anyway, I said, 'What we are doing today when we go to the board is not asking the board to decide that $55 is the highest price that can be obtained. ... I said, 'The real decision the board is going to be asked to make is should they decide to turn this down, or should they let the stockholders decide whether they should turn it down. They are not going to be deciding whether $55 is absolutely the best price that could ever be obtained for this stock. They're going to be deciding that since the stockholders have the main economic interest in whether this company is sold or not, they should be the ones to make the decison.'"

Mr. Van Gorkom also said (A-1358-1360):

"Q. And you did assure the board that there was ninety days to obtain other offers?

"A. Yes. What I said was, having talked to the lawyers and knowing something about how these things must progress, that there would be a prolonged period. If the board did decide to let the stockholders decide, there would be a prolonged period of somewhere around ninety days before the proxy statement would actually be sent out, and that during that period other people would have a chance to bid on the stock. ***"

In spite of what Mr. Van Gorkom said he had told the TU Board, the actual resolution of the Board in the minutes of September 20, 1980, states (A-1865):

"Resolved that in the judgment of the Board of Directors of this company, it would be in the best interests of the Company's stockholders for the company to accept the proposal of GL Corporation whereby an indirect subsidiary of GL Corporation would be merged into this company and each stockholder of the company would be entitled to receive $55 in cash per share of common stock of this company held at the effective time of the merger ..."

Moreover, the <u>actual</u> terms of the Merger Agreement which the Board approved in the foregoing resolution specifically required the Board to (not only submit the Merger Agreement to TU's stockholders) but recommend approval to the stockholders and use its best efforts to get the TU stockholders to vote for the merger (A-1940, Section 2.03):

"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 votes therefor." (Note)

Section 2.03 was never changed. The Board, in accordance with the provision of Section 2.03, recommended the merger, including the $55.00 price, to the stockholders of TU in TU's original Proxy Statement of January 19, 1981 (A-2216), though the Board never made any determination of the fairness of the $55 price itself or seek any professional advice from TU's investment banker or a financial analyst on September 20, 1980, or at any time between then and January 26, 1981.

(b) The Board Was Led to Believe TU Had the Right to Accept a Better Offer in Lieu of the Pritzker Merger Agreement

Though he had not read the Merger Agreement, Mr. Van Gorkom represented to the Board that the Merger Agreement (even prior to the October amendments) gave TU the right to accept a better offer (A-1135). Though the merger documents that the Board was asked to approve did not specifically reserve to TU the right to accept better offers (A-1387-1388), Mr. Van Gorkom said that made no difference. In his view, the directors always have the legal right to disavow a signed merger agreement in favor of a better offer because of "their fiduciary obligation to the stockholders" (A-1385).

Mr. Johnson testified that he had been led to believe that TU had the right to accept a better offer (TR 836, Johnson):

> "*** All I am telling you is when I voted, I think I knew what I was voting for. I have a clear understanding on September 20th that if we got a better deal, we had a right to take it. And if they didn't put that in the agreement, then the management did not carry out the conclusion of the Board. And I just don't know whether they did or not."

Mr. Johnson also testified (TR 846, Johnson):

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Note: Mr. Johnson was not "sure" even at trial whether Section 2.03 was part of the original Merger Agreement that he had voted for (TR 843, Johnson).

"A. There is no question but what the board did. We approved and recommended the Pritzker proposal subject to the right to receive and substitute a recommendation of a better offer. It is clear what the board did. Whether it got in the language, I really don't know. And if it isn't there, I don't know why. But I do know that the final agreement is the controlling agreement. ..."

(c) Though There Is Nothing in the Record to Substantiate It, TU's Board Claims That It Made Its Acceptance of the Pritazker Proposal Conditional (1) On the Acceptance by Pritzker of the the Right to Distribute Proprietary Information to Alternate Bidders and (2) "Clarification" of TU's Right to Accept, But Not Solicit, Other Offers

The acceptance of the TU Board of the Pritzker Merger Agreement was allegedly conditioned on Mr. Pritzker's accepting two conditions. First, removal of the condition that had allegedly been inserted by Howard Handelsman, Esquire, Mr. Pritzker's lawyer, in the original merger documents prohibiting the sharing of TU's proprietary information with other potential bidders (TR 618, Van Gorkom). Second, (though the Board members claimed that TU already had the right to accept alternate offers) the Board claims that they requested a "clarification of that right" (A-1133).

The original form of the Merger Agreement containing the alleged prohibition against sharing of information was not produced in accordance with plaintiffs' First Request Directed to All Defendants dated December 19, 1980, nor was it produced at trial (A-1374-1375). (Note) Thus, there is no evidence in documentary form as to the alleged prohibition against sharing proprietary information with an alternate bidder (A-1374-1375). Furthermore, even the revised minutes of the Board meeting of September 20, 1980, make no reference to the existence of the alleged prohibition, nor to any Board action conditioning the Board's acceptance

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Note: The Merger Agreement appearing in the Original Proxy Statement is a "composite" of the September 20, 1980 Merger Agreement and the October 10, 1980 amendments (A-2226; A-2302). No explanation is ever provided by the defendants as to how and when this happened or by whose authority.

of the offer on removal of that "phantom" prohibition (PX 26).

The second alleged condition that the Board is supposed to have insisted on is the right to accept (as opposed to solicit) alternate bids. Again, there is absolutely no documentary evidence on what was in the contract prior to the time when it was allegedly changed, nor is there is any reference in the TU minutes to any Board insistence, discussion or resolution or other action relating to TU's alleged right to accept alternate offers (A-1374-1375; A-1865). So far as the amendment giving TU the right to accept alternate offers, it is supposed to be contained in the following underlined portion of subparagraph (a) of section 2.03 of the Merger Agreement:

> "The Board of Directors shall recommend to the stockholders of TU that they approve and adopt the Merger Agreement ('the stockholders' approval') and to use its best efforts to obtain the requisite votes therefor. <u>GL acknowledges that TU directors may have a competing fiduciary obligation to the shareholders under certain circumstances</u>."

The Board adjourned without setting a time to reconvene when it would be known whether these two alleged changes would be accepted by Mr. Pritzker (PX 26).

Mr. Johnson testified (TR 808-809, Johnson):

> "Q. But you assumed that in fact if you did vote for this merger, you would have an opportunity to accept a better deal?
>
> "A. That was the understanding. That wasn't as assumption. That was specifically agreed to at the insistence of the Board.
>
> "Q. Okay. Now you say that that was the understanding. I take it that you mean by that that that was an understanding that you had as a member of the Board as of the time you left the room?
>
> "A. Correct.
>
> "Q. Do you know whether that understanding was ever reflected in the document that was signed that day?

"A. I believe it was. There was some specific language that referred to the fiduciary responsibility of the directors, which we were all familiar with, but I think I recall some discussion of something of that nature should be there because otherwise what prompted us to insist on the privilege of tendering information to other interested parties? And consistent with that it was understood and agreed, and the action of the Board was that we would -- while we were approving for submission to the shareholders the Pritzker offer of 55, we could withdraw that approval and approve a new deal if we thought it was better, and that opportunity to do that was preserved specifically." (Note)

## K. Events Following the Adjournment of the Special Meeting of the Board

Following the adjournment of the Special Meeting of the Board, Mr. Van Gorkom claimed that he talked by telephone to Mr. Pritzker who agreed to the alleged conditions required by the Board (A-1372-1373; A-1375). Mr. Van Gorkom testified that he must have told Mr. Brennan to make the changes (A-1375).

On September 20, 1980, Mr. Van Gorkom was hosting a black tie party in the TU building marking the opening of the 1980 Lyric Opera Season (A-1376). It was in the middle of this party that Mr. Van Gorkom signed the contract. Mr. Van Gorkom testified (A-1378-1379):

"Q. And what time did that party get underway, roughly?

"A. Five-thirty. ...

"Q. And the documents were finished at seven o'clock; is that correct?

"A. That's my recollection.

"Q. And they were signed by you and Mr. Pritzker that night; is that correct?

"A. That's correct. ...

---

Note: Later in his cross-examination, Mr. Johnson pointed to the above underlined phrase in Section 2.03(a) as the terminology that was supposed to have been inserted as a condition of acceptance by the Board to reflect its right to disavow the Pritzker merger offer and accept a better offer (TR 839-841, Johnson).

"Q. Well, you did not read them?

"A. I did not read them.

"Q. And did any member of the Board read them before you signed them?

"A. They did not."

TU issued a press release dated September 22, 1980, announcing that TU "had entered into definitive agreements to merge with an affiliate of Marmon Group, Inc." (PX 30). (Note)

### L. Revolt of Senior Management and Amendment to the Merger Agreement

Later in September 1980 when senior management had the time to appreciate what Mr. Van Gorkom had proposed and the Board had so casually agreed to, they revolted "en masse". Specifically, Mr. Jack Kruizenga, head of the Union Tank Car operations of TU, told Mr. Browder (the person closest in management to Mr. Van Gorkom) to tell Mr. Van Gorkom that unless the merger was called off, 15 resignations of key personnel would be laid on Mr. Van Gorkom's desk (A-1395-1399).

Mr. Van Gorkom again went alone to Mr. Pritzker (A-1399). Mr. Pritzker _himself_ suggested that the Merger Agreement be amended to give TU the right to solicit offers and that the employees agree to stay on for six months after the merger to work under the new management (A-1399-1400).

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Note: Mr. Van Gorkom agreed that the TU press release did not even imply that TU had reserved the very limited right to accept (but not solicit) other offers and could legally provide the requisite information to parties interested in making a higher bid (A-1381). Mr. Van Gorkom saw no reason why TU had any affirmative obligation to notify would-be offerors that TU had the very limited right to receive offers and provide information to alternate offerors (Van Gorkom 175-177). Mr. Van Gorkom said that he knew of no document that alerted the financial or corporate world to the fact that TU had the limited right to accept alternative offers (Van Gorkom 179).

Mr. Van Gorkom came away believing that he had single-handedly obtained a most significant concession for TU. Mr. Pritzker said of the amendment (TR 1280, Pritzker): "It would not make a substantial difference that I could see." Mr. Van Gorkom testified as to what he thought he had obtained (A-1401):

> "Q. And then did you indicate that Mr. Pritzker had suggested that there would be the free unfettered right on TU's part to solicit or shop the deal until January 31, 1981?
>
> "A. I did.

What Mr. Van Gorkom thought he had gotten -- the free unfettered right on TU's part to "shop the deal" until January 31, 1981, was not at all what in fact was provided in the October 10th amendments. Again, Mr. Van Gorkom did not devote the requisite attention to the amendments (A-1401-1402):

> "Q. And then did Mr. Handelsman with Mr. Moore and Mr. Browder draft amendments to the agreement?
>
> "A. I don't know who drafted them but obviously their lawyers and ours did draft them.
>
> "Q. And did you look at the amendment at the time that it was drafted?
>
> "A. I'm sure I did.
>
> "Q. And when you say our lawyer, do you mean Mr. Brennan again?
>
> "A. I don't really know who did it, Mr. Prickett. I don't know whether Mr. Browder and Mr. Moore did it, or whether they brought Brennan in since he had been in the original drafting or not. I just don't know.
>
> "Q. And what was the nature of the amendments of the agreements?
>
> "A. I would have to refer to the documents to see specifically what they were, but in essence, they did exactly that: they gave us the right to openly solicit offers down through January 31."

Mr. Van Gorkom testified that he thought that he had gotten the unconditional right to solicit offers (A-1402).

Mr. Van Gorkom testified that the terms of the actual amendments were very complex (A-1405). (Note-1)

### M. The Special Meeting of the Board of Directors of TU of October 8, 1980, and the Amendments

Mr. Van Gorkom then called another special meeting of the Board of Directors of TU for Wednesday, October 8, 1980, at 8:00 A.M. (Note-2) This special meeting was brief: only two subjects were taken up -- first, approval of the concept of the amendments that Mr. Van Gorkom had again agreed to single-handedly with Mr. Pritzker. The second was a resolution retaining Salomon Brothers ostensibly to try to get additional bids (TR 860, Johnson). Again, Mr. Van Gorkom made the only oral

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Note-1: "Q. Those are the only two conditions that the alternate offer can have in it, isn't that right?

"A. No, no. You have to go back to the beginning of that article which starts out - (e) says this agreement and plan of merger may be abandoned and the merger may be abandoned by the action of the Boards if all of these things take place. We would accept another offer but we couldn't abandon the plans already in effect. It is a very complex, frankly, way of handling it. I haven't read these documents for almost a year now but that is my clear understanding. ***"

Mr. Van Gorkom finally said (A-1409):

"In other words, it is not conditioned on more than the stockholders' approval or lack of restraining order. But our ability to accept offers from other companies was unlimited. It was just that we could not abandon the presentation of a proxy if Mr. Pritzker insisted on it."

Note-2: Significantly, this meeting was not held at the headquarters of TU: rather, because there was to be a later meeting that morning of IC Industries and three of the directors (Messrs. Johnson, Morgan and Van Gorkom) were also directors of IC Industries, the meeting was called for the Board Room of IC in Chicago (TR 866, Johnson).

presentation to the Board (TR 870, Johnson). The actual merger amendments were not reviewed by the Board (TR 870-872, Johnson).

However, the "complex" terms of the amendment as set out in GL's letter and attachments of October 10, 1980 (A-2125), were far different from what Mr. Van Gorkom represented them to be to senior management and the Board. What TU got in the complex amendments was a very limited right to solicit alternate bids. The right to obtain alternate bids was limited to a tight time restraint (February 10, 1981). In addition, Mr. Pritzker retained his original contractual advantages that made it impossible for any alternate bidder to bid on equal footing with the Pritzkers (A-2125). Mr. Pritzker still had the right to purchase one million shares at $38.00, thus making the acquisition of TU significantly more expensive for other bidders. TU was given the illusory right to complete a merger or sale with a third party. Any other proposal could not contain any of the standard and usual contractual conditions that a buyer would require: rather, it could only contain two conditions: first, that it be subject to stockholder approval and, second, that it not be subject to injunction (A-2125). Unless another bid was certified by the Board as a better bid, the Pritzkers had the right to have their merger submitted at the same time (A-2125).

The Board at the brief special meeting of October 8, 1980 (with Mr. Pritzker's specific permission), also belatedly authorized the Chairman to retain Salomon Brothers (PX 48). While Salomon Brothers had been TU's investment banker for many years (TR 632, Van Gorkom; Higgins 30-34), Salomon Brothers not only had done significant work for the Pritzker interests in the past but, at that very point of time, had an ongoing business relationship with the Pritzkers (A-2123-2124). Nevertheless, Salomon Brothers (rather than another investment banker without a conflict) were retained for a fee of $500,000.00 and a percentage of any possible increase in the offer to TU's stockholders (TR 633, Van Gorkom; Browder 285-286). (Note-1)

N. Mr. Van Gorkom's Opposition to the KKR Proposal Deprived the Stockholders of the Possibility of an Offer of $60.00 Per Share

Mr. Romans, Mr. Bonser, Mr. Kruizenga and other members of TU senior management got in touch with KKR shortly after September 20, 1980 (Bonser 98). (Note-2)

In spite of Mr. Van Gorkom's stated opposition, Mr. Henry Kravis (A-1423; Van Gorkom 248) presented on December 2, 1980, a written offer to Mr. Van Gorkom for a leveraged buyout of TU in which the stockholders would receive $60 a share (or $5 more than the Pritzker offer) (A-1423).

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Note-1: Significantly, Salomon Brothers was never asked to make any evaluation or give an opinion on the fairness of the Pritzker merger proposal and never did express any opinion on the fairness of the Pritzker proposal to the stockholders of TU (Higgins 36-40; Browder 285-286) though the retention agreement specifically gave TU the right to such an opinion without additional cost (A-2120-2121). No explanation has ever been given as to why Mr. Van Gorkom and the Board did not require that Salomon Brothers do an evaluation and give the opinion of the worth of the stock of TU (TR 245-246, Van Gorkom). It was a gross dereliction on the part of the Board not to have obtained a fairness opinion from Salomon Brothers for the TU shareholders especially as it could have been obtained at any time prior to February 10, 1981, without additional expense. Of course, the reason why Salom Brothers were never asked for their opinion is obvious. Salomon Brothers were never asked to assist TU in connection with the only third party to make an actual offer (i.e., the KKR $60.00 offer) nor did Salomon Brothers play a role in Mr. Van Gorkom's effort in January 1981 to interest G.E. Salomon Brothers drew up elaborate lists of companies which might be interested but were unable to produce anyone who would bid in opposition to Salomon Brothers' clients, the Pritzkers.

Note-2: Mr. Van Gorkom knew that Mr. Romans and Mr. Bonser were going to be the top officers in the new company (Van Gorkom 309; Bonser 102, 104) and that he, Mr. Van Gorkom, was not going to be invited either to be an equity participator or an officer (A-1422-1423; Van Gorkom 196; Chelberg 215).

The KKR offer was only conditioned on completing the bank and equity financing which was represented to be 80% complete (A-1426). Mr. Van Gorkom categorically stated that the KKR offer was not an offer at all but was rather an intent to make an offer (A-1427). (Note)

Jack Kruizenga actually ran Union Tank (Van Gorkom 199). He was a member of management participating in the KKR proposal (Van Gorkom 266). Mr. Kruizenga withdrew from the KKR deal and the KKR deal fell apart (A-1434). About three hours after presenting the offer, Mr. Kravis telephoned Mr. Van Gorkom and withdrew the KKR offer (A-1433; Van Gorkom 266).

The minutes of the TU Board at the regular meeting of December 2, 1980, dealt with the formal steps necessary to conclude the Pritzker proposal. There is no mention of the KKR offer or its withdrawal (PX 84). All the minutes say is "The Chairman then gave an oral report on the activities and progress of Salomon Brothers in seeking to obtain other offers for the acquisition of the company."

Neither Mr. Van Gorkom nor the Board made any effort whatsoever to see if the $60.00 KKR offer could be reinstated (A-1434-1435). Salomon Brothers was never asked to investigate. Mr. Van Gorkom took the

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Note: Mr. Van Gorkom differentiated the Pritzker situation which had given the Pritzkers until October 10 to line up financing by saying that he, Mr. Van Gorkom, had determined that the Pritzkers could obtain the requisite financing (A-1427). Mr. Van Gorkom knew nothing about KKR or about Olympia and York or the Reichman family and made no investigation of their ability to obtain the balance of the financing (A-1428; Chelberg 229-230).

Mr. Van Gorkom also rejected a proposed press release announcing the KKR offer: it would "chill" other offers. When asked about the press release of September 22, 1980, announcing the "definitive agreement" with the Pritzkers (PX 30), Mr. Van Gorkom said that press release served to encourage other bidders A-1430-1431).

position that it was up to the offeror to come back to him rather than for Mr. Van Gorkom to pursue the offer, though he did not even know the reason at the time why the $60.00 offer had suddenly been withdrawn (Van Gorkom 275). (Note)

O. Because of the Board's Previous Acceptance of the Pritzker Merger Proposal, General Electric Did Not Make an Offer and TU Had To Go Through With the Pritzker Merger

On December 19, 1980, the entire situation changed radically: this lawsuit was filed charging Mr. Van Gorkom and the Board with having failed to discharge their corporate and fiduciary responsibilities to TU's shareholders in their entire handling of the Pritzker cashout merger of TU's stockholders at $55.00 which Mr. Van Gorkom had single-handedly thought up and engineered and which the Board had so casually agreed to in their two-hour Saturday afternoon meeting on September 20, 1980. Suddenly the record shows frantic but belated efforts by Mr. Van Gorkom to get G.E. to bid against the Pritzkers. Mr. Van Gorkom testified (A-1165):

> "*** But General Electric Credit wanted to acquire us I believe because in recent years, of course, it had become a very big leasing company, but included in the assets they lease are thousands of railway cars that they have started to lease, largely, I imagine, because they have used the investment tax credit because they have so much income from the parent company. <u>In other words, they have the perfect answer to our problem. They have this huge income from the parent, so their leasing company can engage very broadly in leasing activities and still use all of its investment tax credit because it can use the parent's income from all of its varied activities</u>."

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Note: Mr. Van Gorkom was given no direction by the Board to follow up on KKR (Johnson 75). Some said they regarded it as a "closed matter" (Lanterman 96). Mr. Johnson even said the KKR deal was "not worth going into" (Johnson 76). There was no offer to the KKR group of a "guarantee" similar to the sale to Mr. Pritzker of 1,000,000 TU shares at market. The idea simply never occurred at that point to Mr. Van Gorkom or to any member of the TU Board of Directors (A-1435-1437; Van Gorkom 278; Lanterman 96).

On January 16, 1981, Mr. Bossidy of General Electric Credit Corporation sent Mr. Van Gorkom a draft merger agreement (PX 110). Mr. Van Gorkom, when pressed, finally admitted that the merger agreements in draft form contemplated a stock-for-stock and cash offer at $57 a share with a $60 cash alternative (A-1461).

Mr. Van Gorkom then went to Mr. Pritzker and attempted to persuade him to stand aside so that the General Electric offer could be considered (A-1464):

> "*** But in any case, it never came to that, because when push came to shove, Mr. Pritzker stood on his contract and would not release you, is that correct?
>
> "A. That is correct.
>
> "Q. And GE indicated that in the presence of the Pritzker merger agreement was such that they would not want to go forward. That was one reason, isn't that correct?
>
> "A. That was one reason they gave us."

Mr. Van Gorkom also admitted that General Electric could not make an offer within the time parameters of the Pritzker proposal (February 10, 1981) because it would take G.E. sixty days to clear Hart-Scott-Rodino (A-1465). Actually, G.E. backed off making any proposal at all in large part because they did not want to get in a bidding war with the Pritzkers (A-1469):

> "Q. Right. In any case, that all became academic because in mid-January GE, or GE Credit informed you that they were not going to make a bid of any kind, stock, cash or anything else.
>
> "A. That's right.
>
> "Q. And they indicated that there were two reasons for that. One was the image problem that you had spoke about and Mr. Welsh had and the other was they didn't want to get in a bidding war with Mr. Pritzker?

"A. That's what they said." (Note)

Thus, in late January 1981, TU had a firm merger contract with Mr. Pritzker. The Board could not leave the decision to the TU shareholders without any recommendation. TU's Board was bound by Section 2.03 of the Pritzker contract to recommend the merger at $55.00 to TU's stockholders. The Board did recommend the Pritzker cashout merger at $55.00 in the original proxy statement of January 19, 1981, though the TU Board had never made any determination of the fairness of the $55.00 merger price, nor had they had any determination made by an investment banker or financial analyst (A-1476).

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Note: There were then vain attempts by Mr. Van Gorkom to interest other companies, including Borg Warner, Bendix and Genstar (A-1470), but nothing developed from any of these last minute overtures. Finally, in desperation, Mr. Van Gorkom went back to KKR in mid-January 1981 (A-1471). Though Mr. Kravis met with Mr. Van Gorkom, Mr. Kravis pointed out that, at that time, there simply was not time to put a KKR offer back together (A-1471).

# A R G U M E N T

## I. THIS COURT SHOULD REVERSE OR REMAND BECAUSE THE LOWER COURT'S OPINION IS PREMISED ON IMPORTANT FACTUAL MISTAKES

### A. Standard and Scope of Review

Mistakes as to significant uncontradicted facts are found in the lower Court's short letter opinion dismissing the plaintiffs' case. On appeal, this Court has the authority to reverse if on review of the record this Court finds that the lower Court's opinion contains significant factual errors. *Levit v. Bouvier*, Del. Supr., 287 A.2d 671 (1973); *Marta v. Nepa*, Del. Supr., 385 A.2d 727 (1978); *Application of Delaware Racing Assoc.*, Del. Supr., 213 A.2d 203 (1965); *Weinberg v. Baltimore Brick Co.*, Del. Sup., 112 A.2d 517 (1935).

### B. A Review of the Letter Opinion of the Court Below Reveals Six Misstatements as to Significant Uncontradicted Facts Appearing in the Record (Note)

#### 1. Contrary to What the Lower Court States, the TU Board Never Considered the Alternative of Purchasing One-Third of the TU Stock at $50.00 a Share or Indeed Any Other Alternative

The lower Court said (A-10):

> "Another possible solution *which was considered by the board of directors* as a means of remedying Trans Union's fiscal problems was to have the corporation purchase its own stock at an average price of $50.00 per share, such purchases to be made so as to acquire 30% of Trans Union's outstanding stock which could be later reissued to pay for acquisitions."

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Note: A comparison of the lower Court's letter opinion of February 3, 1981, denying a preliminary injunction (A-215) and the lower Court's letter opinion after trial strongly suggests that the lower Court did not review the trial record at all but simply slightly tailored its own original letter opinion (utilizing in places almost verbatim portions of the Defendants' Post-Trial Brief).

The lower Court is in flat error. (Note-1) No exhibit or deposition or trial testimony suggests or even intimates that the Board of TU took up or considered the possible repurchase of any amount of TU stock or indeed any of the other alternatives suggested by management in the Five-Year Forecast as possible solutions to TU's long range problems in the 1980's. (Note-2)

2. Contrary to What the Lower Court States, Kohlberg, Kravis and Roberts & Company Did Not Submit a "Buyout Scheme" in August 1980

The lower Court said in a footnote (A-11):

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

There is nothing in the record, either in documentary evidence or in testimony, that provides any basis for the foregoing statement. The plain fact is that Kohlberg, Kravis and Roberts & Company ("KKR") did

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Note-1: This "possible solution" was contained in the Summary of TU's Five-Year Forecast prepared by the management of TU and was available to the Board at its July 17, 1980 meeting (A-1895-1897; PX 21; TR 690, Johnson), but the repurchase of the stock was never considered by TU's Board. In this connection, the lower Court, in its superficial review of the true worth of TU's stock, makes no mention of this July 1980 disinterested determination by TU's financial officers that a one-third minority interest was worth $50.00 per share (in contrast to the fact that Mr. Pritzker was able, with Mr. Van Gorkom's help and Board approval, to obtain 100% interest for only $55.00 a share, including the premium that is part of the price for control).

Note-2: The lower Court had previously stated "And while other solutions designed to remedy Trans Union's fiscal troubles, such as making a major acquisition which would generate up to $150,000,000 a year of taxable income, thereby enabling Trans Union to take full advantage of accelerated depreciation and investment tax credits were considered, the cost of acquiring such a company was estimated to be approximately $750,000,000, or more than the current value of Trans Union's assets." The record is too clear for contradiction or even misunderstanding: neither the Board nor management had ever "considered" any of the other "alternatives" to a cashout merger at $55.00 which Mr. Van Gorkom single-handedly thought up and then suddenly proposed on Mr. Pritzker's behalf on September 20, 1980.

not submit a "buyout scheme" to TU in August 1980: KKR did make a written offer of $60.00 on December 20, 1980.

The lower Court then proceeded to make a second significant factual error, saying (A-11):

> "And while Mr. Van Gorkom would have benefited by such a buyout in a stock for stock exchange inasmuch as he owned 60,000 shares of Trans Union stock with a low basis as well as an option to acquire 15,300 additional shares, giving him a strong incentive to go along with such a proposition, which would have resulted in deferring substantial capital gains for him, he had not liked such a proposal on principle." [sic.]

The KKR leveraged buyout both in theory and in terms of the December 2, 1980 written offer never was a stock-for-stock transaction: from the outset and throughout it was always strictly a cash proposal, albeit $5.00 more than the Pritzker proposal. (Note)

Though the KKR matter was fully tried (A-1424, et seq.), briefed and argued (A-521, et seq.), the lower Court never dealt with KKR. Instead, in a footnote, the lower Court makes the significant factual errors. Then, without ever considering whether the actual record shows that the defendants failed to live up to the applicable standard, Graham v. Allis-Chalmers, Del. Supr., 138 A.2d 125 (1963), the lower Court summarily dismisses the entire issue on the totally extraneous finding that Mr. Van Gorkom's adamant opposition to the KKR offer did not stem from the fear he would be "booted" out of his position as Chairman was not correct simply because Mr. Van Gorkom was scheduled to retire at age sixty-five (A-11). Thus, the lower Court never dealt with the real question at issue -- that is, why did Mr. Van Gorkom and TU's Board fail to follow up on a cash offer that was $5.00 better than the Pritzker offer until it was too late?

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Note: Actually, the lower Court has confused the $60.00 KKR cash offer of December 2, 1980, with the GE draft offer in January 1981 for $57.00 in a stock-for-stock exchange with a $60.00 cash alternative (A-1485; PX 110).

### 3. Contrary to What the Lower Court States, Mr. Van Gorkom Alone Made the Subjective Determination of the $55.00 Cashout Price and Also Provided All of the Assumptions on Which Mr. Peterson Made Arithmetical Computations for Mr. Van Gorkom

The lower Court said (A-12):

> "In casting about for a possible private purchaser and having in mind Jay A. Pritzker, a business and social acquaintance, Mr. Van Gorkom had Trans Union's controller, Carl Peterson, calculate whether or not it would be reasonable for a prospective purchaser to acquire Trans Union for as much as $55.00 per share or a total price of $690,000,000." (Note)

What Mr. Van Gorkom testified was (A-1086):

> "*** Then I told him [Mr. Peterson] to take the rest of the cash flow right out of the Five-Year Forecast, and assume that a price of $55.00 a share would require a total payment of $690,000,000. ***"

Furthermore, before even asking Mr. Peterson to make the mathematical calculations for him, Mr. Van Gorkom had himself, without any input from anyone either within or without TU, determined on an entirely personal and subjective basis that the cashout price should be $55.00 (A-1282-3):

> "Q. Now in preparation for your meeting with Mr. Pritzker you had started with a price of $55, is that correct?
>
> "A. That is correct.
>
> "Q. And you said that in your own case you would not take $50, you would sell for $55 and $60 would be preemptive, is that correct?
>
> "A. I don't know if I said anything about $60. I did feel that $50 was too low and that $55 was something I would take. If I would take $55, I would obviously take $60 with more enthusiasm. (There was a short pause.)
>
> "By Mr. Prickett:

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Note: The source of the foregoing is not the record. The lower Court has simply incorporated the following from page 16 of the Defendants' Post-Trial Brief (Docket Entry 153): "In preparation for a possible meeting with Pritzker, Van Gorkom directed Trans Union's controller, Carl Peterson, to calculate whether it would be reasonable for a purchaser to buy Trans Union for as much as $55. per share or a total price of $690,000,000 (TR 570-571)."

"Q. Now I think you indicated that this decision that you wouldn't take $50 but it would sell at $55 and that if you would sell at $55 you would be delighted with $60 was a subjective judgment.

"A. Of course.

"Q. And that in fact you indicated on your deposition that determinations of value such as that are highly subjective.

"A. I agree."

The lower Court compounded its error by saying (A-12):

> "In response to such a request, Mr. Peterson assumed that such a purchaser would contribute $200,000,000 in equity and would borrow $490,000,000 at an interest rate of 14%." (Note)

Actually, as Mr. Van Gorkom testified, all the assumptions were solely those of Mr. Van Gorkom himself (A-1086):

> "Then I told him [Mr. Peterson] to take the rest of the cash flow right out of the Five-Year Forecast and assume the price of $55 a share would require a total payment of $690,000,000. That's just simple arithmetic. The 12 1/2 million shares times $55. It would take $690,000,000. I said you would have to put in at least $200,000,000. So I said use $200,000,000 in equity and then the $490,000,000 of borrowing."

Mr. Peterson's sole function throughout was the almost menial task of doing the "just simple arithmetic" for Mr. Van Gorkom (A-1087).

The lower Court also finally said in this connection A-13):

> "Reviewing Mr. Peterson's calculations, Mr. Van Gorkom suggested that $55.00 per share would be a fair price for Trans Union's stock. In response, Mr. Pritzker asked Mr. Van Gorkom

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Note: Here again the source the lower Court has used is not the record but pages 16 and 17 of the Defendants' Post-Trial Brief, which states (Docket Entry 153): "The calculations made by Peterson assumed that a purchaser would contribute $200 million in equity and borrow the $490 million balance at an interest rate of 14 per cent (TR 571, 988)." The lower Court, contrary to the record, makes it appear that it was Mr. Peterson who made the assumptions rather than Mr. Van Gorkom.

> if he would consider a price of $50.00 per share, a suggestion which Mr. Van Gorkom rejected." (Note)

The actual record shows that the lower Court is factually incorrect in several important respects. First, as pointed out above, Mr. Van Gorkom himself first subjectively determined the $55.00 price. He presented Mr. Peterson with the $55.00 price and directed Mr. Peterson to make the arithmetical computations based on the $55.00 price. It was not the other way around as the lower Court suggests (based on the Defendants' Post-Trial Brief). Secondly, contrary to what the Defendants' Post-Trial Brief and the lower Court's opinion suggests, the record shows that there were no negotiations on the $55.00 cashout price that Mr. Van Gorkom had single-handedly and subjectively decided was to be the price (A-1300):

> "Q. [Mr. Prickett] Well you made a presentation that embodied the figure $55. That was the only figure ever mentioned between the two of you at the time, isn't that correct?
>
> "A. [Mr. Van Gorkom] The $55 was selected for the reason I have already stated as a way to prevent [present] this proposition. He [Mr. Jay Pritzker] said the price was too high, and we had some dicussion on that as to why he thought it was too high and why I insisted on sticking with it, and that's the way it ended. ***
>
> "Q. Well you made a presentation that embodied the figure of $55. That is the only figure that was ever mentioned between the two of you at that time, isn't that correct?

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Note: Again, the source for what the lower Court said is pages 17 and 18 of the Defendants' Post-Trial Brief, where the following is found (Docket Entry 152): "Van Gorkom then reviewed Peterson's calculations with Pritzker and indicated that he thought $55 per share would be a fair price for Trans Union stock (TR 576, 1202, 1227). Pritzker indicated that the price looked high to him and inquired whether Van Gorkom would consider $50 per share. Mr. Van Gorkom indicated he would not (TR 577-78, 1202)."

[The Witness]

"A. That was the only number specifically mentioned. ***" (Note-1)

The foregoing factual errors on the part of the lower Court are significant. Though Mr. Van Gorkom agreed that the $55.00 price was solely the result of his own subjective determination and the assumptions used to do the computations presented to Mr. Pritzker were also his, the lower Court mistakenly holds that both the $55.00 price and the assumptions used in the arithmetical calculations were attributable to Mr. Peterson, TU's controller. (Note-2)

4. Contrary to What the Lower Court Said, the Record Shows That Mr. Van Gorkom Delibeately Kept TU's Board Entirely in the Dark Until After He and Mr. Pritzker Had Reached an Agreement

The lower Court said (A-15):

> "An agreement having been reached between Mr. Van Gorkom and Mr. Pritzker, Mr. Van Gorkom called a special meeting of the directors of Trans Union for noon Saturday, September 20, 1980 to be preceded by a meeting of senior management at 11:00 a.m., the board and senior management having been informed

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Note-1: Having on Sunday, September 14, 1980, taken the $55.00 figure under consideration, Mr. Jay Pritzker called Mr. Van Gorkom on Monday, September 15, 1980, and promptly snapped up the $55.00 figure without negotiating or even making a counteroffer (A-1306).

Note-2: The lower Court also makes it appear throughout its opinion as if both management and the Board had under active consideration several different alternatives for TU and that members of management, other than Mr. Van Gorkom, were involved in the formulation of the agreement for a cashout merger proposed by Mr. Pritzker. While Mr. Peterson was brought in to do the arithmetic and Mr. Chelberg, the President and Mr. Van Gorkom's "designated successor", was also included, the whole matter was kept a total secret from TU's Board, its management and its investment banker, Salomon Brothers. Mr. Van Gorkom determined the $55.00 price, made all the assumptions, made the agreement with Mr. Pritzker single-handedly, and then, on Saturday, September 20, 1980, presnted it on a take it or leave it basis to the management and the Board of TU. Thus, the Board never considered any of the many alternatives to the Pritzker cashout merger including, of course, the primary alternative -- that is, doing nothing, there being no "emergency" that required dramatic action by TU (A-103).

that Mr. Pritzker had demanded that his offer be acted on before the opening of the market in London on Monday, September 22."

The record is to the contrary. Neither the Board nor management was informed prior to the meeting of Saturday, September 20, 1980, of the Pritzker matter or the Monday deadline.

5. Contrary to the Lower Court's Opinion the Record Shows That the Board Did Not Decide or Vote to Recommend the $55.00 Price to the Stockholders

The lower Court said (A-15):

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

Again, the lower Court is incorrect. The minutes of September 20, 1980 (A-1864) show that the Board did vote in favor of a resolution authorizing the merger. But, nothing in the minutes or the depositions or live testimony of those attending that meeting even suggests that the Board specifically considered the adequacy of the $55.00 price. On the contrary, Mr. Van Gorkom told the Board all that they had to decide was whether to submit the Pritzker offer to the stockholders (A-1358-1359):

> "The question was, as I said to the Board, nobody knows whether $55 is the highest price we can obtain here, but we are asked to determine very quickly, and it might be much better if we had a lot of time, but we are being asked to determine do we turn this offer down here or do we let the shareholders have the right to turn it down or accept it as they see fit. That was the major issue, because while Mr. Romans felt the stock was worth more, neither he nor I could determine or say at that moment with any certainty what the value was.
>
> "Q. And did you assure the Board that there were 90 days to obtain other offers?
>
> "A. Yes. What I said was, having talked to the lawyers and knowing something about how these things must progress, that there would be a prolonged period, that the Board did decide to let the stockholders decide, there would be a prolonged period somewhere around 90 days before the proxy statement would actually be sent out and that during that period other people would have a chance to bid on the stock. ***"

Neither at the time of the Board meeting of September 20, 1980, nor at the time of the actual signing of the merger agreement later that day did Mr. Van Gorkom or any member of the Board read the merger agreement either in the form that it is claimed was originally presented nor in the form in which it was signed. (Note) Thus, though the Board did not know it, Section 2.03 of the merger agreement specifically required the following (A-1930, PX 25, Sec. 2.03):

> "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 votes therefor."

The TU Board did not pass on the $55.00 price at the September 20, 1980 meeting. TU's Board was informed and believed that all they were being asked to do was to decide whether to submit the Pritzker proposal to the TU stockholders. However, unknown to them, buried in the merger agreement that they did hastily authorize without ever reading was a specific requirement that the Board recommend the Pritzker cashout price

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Note: On December 19, 1980, the plaintiffs requested production of the original form of the merger agreement <u>without</u> the two conditions that the TU Board claims to have insisted or required (A-45). This document was never produced. Though the matter was raised at trial, the lower Court never ruled on the failure of the defendants to produce the original form of this important document (A-1371). The lower Court does not refer in its opinion to the failure on the part of the defendants to produce this important document even at trial. In fact, the lower Court's vindication of the Board is premised in large part on defendants' unsubstantiated claims that the two allegedly unsatisfactory conditions were actually present in the merger as agreed to by Mr. Van Gorkom and presented by him to the TU Board for its approval. To put it another way, Mr. Van Gorkom had agreed to a merger agreement that would have prohibited TU from accepting any other offer whatever or sharing any proprietary information with any third party. Thus, the defendants claim that it was the Board that insisted on modifications that gave TU the limited right to <u>accept</u> (but not solicit) other offers and the elimination of the prohibition against the sharing of TU proprietary information. The "missing" document is critical to the defendants' defense and the lower Court's opinion.

of $55.00 to TU's stockholders and that they use their best efforts to get the stockholders to vote in favor of the Pritzker merger.

* * *

The lower Court's short letter opinion is premised on important factual misstatements as to uncontradicted facts in the record. Not only is the record itself clear on these points but the plaintiffs' post-trial briefs pointed out with specific page references to the record those very matters as to which the lower Court is so obviously in flagrant error. The errors delineated in the foregoing are not simply irrelevant technicalities nor typographical errors: rather, these are important factual matters. Individually and collectively, these factual errors show that the lower Court was not only not familiar with the record in this case but was seriously mistaken on the critical facts. This Court should reverse or remand since the lower Court's opinion is bottomed on factual premises that are clearly incorrect.

## II. THE COURT BELOW ERRED AS A MATTER OF LAW IN EXONERATING THE DEFENDANTS UNDER THE BUSINESS JUDGMENT RULE WITHOUT DETERMINING WHETHER THE THRESHOLD CONDITIONS OF DUE CARE AND PRUDENCE WERE SATISFIED

### A. Standard and Scope of Review

The trial Court erred in its application of the business judgment rule. The standard and scope of review as to the Court of Chancery's conclusions of law is whether that Court erred as a matter of law. Rohner v. Niemann, Del. Supr., 380 A.2d 549 (1977).

### B. The Board Did Not Meet the Applicable Standard of Care in Approving the Cashout Merger of TU's Stockholders

#### 1. The Business Judment Rule is Not Applicable if the Record Shows That the Threshold Conditions of Due Care Are Not Met

In Graham v. Allis-Chalmers Manufacturing Co., Del. Supr., 138 A.2d

125 (1963), Justice Wolcott set out the basic standard by which the conduct of officers and directors of a Delaware corporation is measured:

> "From Briggs [Briggs v. Spaulding, 141 U.S. 132, 11 Supr. Ct. 924, 35 L.Ed. 662 (1891)] case and others cited by the plaintiffs, e.g., Bowerman v. Hamner, 250 U.S. 504, 39 Supr. Ct. 549, 63 L.Ed. 1113; Gambel v. Brown, 4 Cir., 29 F.2d 366; and Atherton v. Anderson, 6 Cir., 99 F.2d 883, it appears that the directors of a corporation in managing the corporation's affairs are bound to use that amount of care which ordinarily careful and prudent men would use in similar circumstances."

The defendants seek to shield their precipitous approval of the Pritzker merger by claiming that their decision is immune from judicial review because of the business judgment rule. But the business judgment rule protects officers and directors only if it is shown that the threshold requirements of care and prudence have been exercised. Arsht, Fiduciary Responsibilities of Directors, Officers and Key Employees, 4 Del.Corp. L.Journal 652 at 661 (1979), states:

> "If the directors acted without sufficient information, and I mean by sufficient information that they did not consider the relevant facts that were available to them when they made their decision and as a result passed an unintelligent or unadvised judgment, the transaction is capable of successful challenge and the directors are indeed liable for the resulting damage."

See, also, Resource Document on Delaware Corporation Law, 2 Del.Corp. L. Journal 176, 186 (1977); Arsht, The Business Rule Revisited, 8 Hostra L.Rev. 93 (citing Lutz v. Boas, Del. Ch., 171 A.2d 381 (1961); 3 Fletcher, §1040, pg. 44, et seq. In Kaplan v. Centrex Corp., Del. Ch., 284 A.2d 119, 124 (1971), the Court said:

> "Application of the [business judgment] rule of necessity depends upon a showing that informed directors did in fact make a business judgment authorizing the transaction under review. And, as the plaintiff argues, the difficulty here is that the evidence does not show that this was done. There were director-committee-officer references to the realignment but none of these singly or cumulatively showed that the director judgment was brought to bear with specificity on the transactions."

The business judgment rule does not apply where the directors have made "an unintelligent or unadvised judgment". Mitchell v. Highland-Western

Glass, Del. Ch., 167 A. 831, 833 (1933).

The record in this case shows that when measured by the standards set out in the above cases and authorities, the defendants' hasty approval on Saturday, September 20, 1980, of Mr. Van Gorkom's proposal on behalf of the Pritzkers for a cashout merger of TU's stockholders at $55.00 falls far short of meeting the threshold requirements before the business judgment rule becomes applicable as a shield for the defendants' conduct. To hold (as the Court below did) that the business judgment rule is applicable in this case would totally remove any necessity whatsoever for officers and directors to exercise due care and take the time and make the effort so as to make an informed judgment on behalf of the stockholders. (Note)

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Note: If this Court upholds the defendants in this case, this Court will have approved as being within the ambit of the business judgment rule a situation where the Board, inter alia, agreed to a cashout merger of the company's stockholders (a) in a Saturday afternoon special meeting lasting only about two hours, (b) did so in the face of the fact that the Board had been deliberately kept in the dark and had never previously considered a cashout merger or any of the other long term alternatives, the considered adoption of which might or might not be in the best interests of TU's owners, (c) did so without receiving or calling for any oral or written information on the origins, much less the adequacy of the $55.00 cashout price, (d) did so without attempting to consult with its long term investment advisor who was proximately available, and, on the contrary, affirmatively decided to approve the merger without consultation either with its investment advisor or with the financial officers of the company, (e) did so though there was no corporate economic crisis or emergency warranting immediate action or, (f) if the Board had been deliberately placed in a "take it or leave it" dilemma by Mr. Van Gorkom, took only two out of the approximately forty-two hours that were available to the Board, (g) did so without ever reading the agreements prepared by the Pritzkers' counsel, (h) did so without understanding the terms of the merger and the legal implications for TU and its stockholders, (i) did so without keeping adequate corporate records or minutes of its proceedings reflecting the alleged qualifications on which the Board claims to have attached to its acceptance, (j) adjourned without waiting to see if its alleged qualifications would be accepted and, if they were not, what further action might be required of them in the best interests of the stockholders, (k) authorized a press release that stated that TU had entered into a definitive merger but did not alert possible bidders that TU was entitled to receive alternate bids.

*Gimbel v. Signal Company*, Del. Ch., 316 A.2d 599, *aff'm.* 316 A.2d 619 (1974), is a case in which Chancellor (now Justice) Quillen preliminarily enjoined a sale of assets. He did so because, on the record before him he found that the plaintiffs had demonstrated the probability of success on their claim that the Board of Signal had acted recklessly and without the care and prudence required. The *Gimbel* case is authority for a finding of liability in this case. In *Gimbel*, the Board had had the sale of the very assets in question under consideration for some time and had before it a wealth of information on the value of the assets in question. In this case, the Board had never previously had the cashout sale of all of the stock of TU under consideration and had no information whatsoever on the value of 100% of the TU stock. In *Gimbel*, there was advanced information of the purpose of the meeting two days before the meeting itself. In contrast, all information was deliberately withheld both from management and the Board by Mr. Van Gorkom. (Note) In *Gimbel*, the Board had the benefit of detailed valuation studies of the assets by experts (albeit, as the Court found, slightly out of date). In the present case, the Board had never had any valuations of 100% of the stock of TU (including the amount that should be paid as a premium for control). Beyond that, no expert investment banker or even the financial officers of the company itself were consulted in advance or at the time of the Board meeting. The TU Board, though it had the requisite time and TU's financial officers and its

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Note: In *Gimbel*, the directors also had been given some advance indication of the impending transaction by the attorneys for the plaintiffs who protested the proposed sale of assets and demanded the right to be heard. In view of the celerity and secrecy of Mr. Van Gorkom, there was similar opportunity to lodge a protest either by the management or by representatives of the TU stockholders, and a fortiori, no injunctive action was possible.

long time investment advisor were available, specifically declined to avail themselves of those sources of advice and guidance. In Gimbel, an outline of the terms of the transaction was provided to the Board. In the present case, no written outline or information about the terms of the merger was made available to the directors or called for by them. In Gimbel, the Board engaged in an in depth discussion of the implications of the transaction. In the present case, the Board did not consider or discuss any of the origins, alternatives or implications of the Pritzker merger.

In short, in Gimbel, the Court of Chancery, on a record that contained far more evidence of an informed decision, held that the consummation of the sale of assets should be preliminarily enjoined because there was a probability that the plaintiffs could ultimately prove that the defendants had acted recklessly and had not taken the time or trouble to inform themselves on the decision involved. Gimbel is thus authority for reversing the lower Court and holding the directors liable for having approved the Pritzker merger without exercising the requisite degree of care and prudence.

In Bennett v. Propp, Del. Supr., 187 A.2d 405 (1963), Chief Justice Southerland held that the prompt decisive action by a board of directors was justified if they acted reasonably and if two conditions were satisfied: "prior ignorance" and "immediate emergency". In the present case, there was no corporate emergency requiring that the Board act immediately such as existed in the Bennett case. (Note) If the TU Board had been placed in something of a time bind by Mr. Van Gorkom

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Note: TU's Five-Year Forecast (A-1909, PX 21) stated clearly that there was no emergency whatsoever and that there was ample time for a mature and considered evaluation of the several alternatives that TU could follow in carrying out what was in the best interest of TU's stockholders in the 1980's.

(i.e., the need to act lest the $55.00 offer be withdrawn or expire before the TU shareholders could act on the merger), this was an "emergency" that was created deliberately and solely by Mr. Van Gorkom. (Note-1) But even if the TU directors found themselves in an emergency created by Mr. Van Gorkom, they still were under an obligation to act reasonably under the circumstances. As previously shown, the TU directors did not act reasonably -- if nothing else, they did not utilize even the time that was available and they took no steps to assemble the information and advice that was readily available to them so that they could ultimately come to an informed decision under the circumstances. They did absolutely nothing except to pass forthwith the requested resolution, authorizing the cashout merger of the TU stockholders. Having done so, they adjourned sine die and went about their separate Saturday afternoon business or pleasures.

2. The Lower Court Did Not Review the Record to Determine Whether the TU Board Had In Fact Met the Threshold Conditions for the Application of the Business Judgment Rule

The lower Court did not measure the conduct of the defendants by the standard of Graham v. Allis-Chalmers, supra. Instead, the Court skips entirely over what happened on Saturday, September 20, 1980, and then exonerates the defendants on extraneous matters. (Note-2)

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Note-1: In Bennett, the officer who deliberately created the corporate emergency was held liable: in like manner, Mr. Van Gorkom (and indeed Mr. Chelberg) should be held liable since Mr. Van Gorkom not only acted without prudence but in fact deliberately engineered a "squeeze play" on TU's Board dictated by his own subjective judgment that $55.00 was a right cashout price for all the stockholders of TU.

Note-2: In its opinion of February 3, 1981, denying a preliminary injunction, the lower Court noted (A-218): "While plaintiff with considerable skill makes much of the apparently casual manner in which the merger here in issue was developed and agreed on, ..." In its post-trial pinion, the lower Court made no reference to the "casual manner" of the defendants.

After citing familiar Delaware decisions that stand for well known propositions of Delaware corporate law, the lower Court says (A-21):

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

Having alluded to the issue (does the record show that the defendants met the threshold conditions for application of the business judgment rule?) the lower Court exonerated the conduct of the defendants on totally extraneous matters.

The lower Court acknowledged that in _Gimbel_, _supra_, Signal had in fact been preliminarily enjoined because of the showing of recklessness on the part of the Signal directors. But the lower Court said that _Gimbel_ is not applicable because the preliminary injunction was issued solely if it were not, "it might well dispose of the case" (A-20). Just what the Chancellor means by the foregoing is unclear but _Gimbel_ is authority for holding the defendants liable.

The lower Court then went on to say (A-21):

> "Furthermore, in the case of Gimbel v. Signal Co., supra, no effort had been made to determine whether or not another company would offer a higher price for the corporate assets in issue, while in the present case the proposed merger in issue was tested in the marketplace for at least 90 days with no tangible result, and I am satisfied that such a test of value supports the fairness of the premium offered over market price in the merger here involved. Furthermore, I consider it significant that whereas the proposed Pritzker merger had been considered by the board of directors of Trans Union on three separate occasions, namely on September 20, 1890, October 8, 1980, and on January 26, 1981, in the case of

> Gimbel v. Signal Co., supra, the proposed sale of the assets of a major subsidiary of Signal Co. was considered only once."

The lower Court is wrong for several reasons. First, in Gimbel, contrary to what the lower Court says, United Aircraft had previously negotiated to buy the assets in question. Gimbel, supra, at pg. 611. Second, as previously shown, there could be no "test in the marketplace for at least 90 days". The TU "cash cow" had already been sold by the Board on September 20, 1980. The combined contractual, financial and temporal advantages (including the sale of one million shares at $38.00) which the Pritzkers secured by the Board's precipitous action on September 20, 1980, made it impossible for anyone to bid for TU on equal terms. If nothing else, the TU press release of September 20 blatantly told the world (including any would be bidders) the actual truth; that TU had entered into a "definitive" merger agreement (A-2074). Third, the Pritzker merger was never "considered" by the TU Board "on three separate occasions". (Note) On September 20, 1980, the TU Board clearly did not "consider" the Pritzker proposal for a $55.00 cashout merger. The Board did not have any basis for considering or forming an opinion on the value of one hundred percent of the TU shares.

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Note: The lower Court also says of Bennett v. Propp, Del. Supr., 187 A.2d 405 (1962), (A-20): "On the other hand, in the case of Bennett v. Propp, supra, the directors of the corporation involved had no alternative but to approve the purchase of almost 200,000 shares of their corporation's own stock by the corporation's president who had made such a commitment in order to retain control of the corporation. On the other hand, in the case at bar, the board of directors of Trans Union was free to turn down the Pritzker proposal when it was submitted to a vote on September 20, 1980, on October 8, 1980, and on January 26, 1981." TU was contractually bound as of September 20, 1980, and, thus, the TU Board could not be "free to turn down the Pritzker proposal" on October 8, 1980, or on January 26, 1981.

Furthermore, the Board was assured that they were not being asked to consider the adequacy of the $55.00 Pritzker merger price; all they were told was they were being asked to decide whether or not to submit the Pritzker proposal to the TU stockholders, being assured that in the 90-day period the "market" would do what they were not doing (that is, "consider" and evaluate the Pritzker cashout merger price of $55.00). On October 8, 1980, the Board did not "consider" the Pritzker proposal; all the TU Board "considered" at that brief early morning meeting was the alleged substance of the amendments graciously permitted and suggested by Mr. Pritzker himself (A-1399). (Note) Finally, at the time of the meeting of January 26, 1981, the Board could not "consider" the Pritzker offer. On that date, TU was contractually bound hand and foot to Pritzker with no "out" possible for the Board, no matter what they, the Board, "considered" at that point of the impending merger, including the cashout price of $55.00. This lawsuit having been filed and with liability for their "casual" Saturday afternoon handling of the Pritzker merger now staring them in the face, the TU Board (with the help of their attorneys) tried by retrospective approval of their own improvident action on Saturday 20, 1980, to pull themselves up into the safety of the business judgment rule by appearing to <u>again</u> "consider" the whole deal. The meeting on January 26, 1981, was not to "consider" the Pritzker proposal made on September 20, 1980 at all. Though labeled as updated advice to TU stockholders about the withdrawal of GE, the real

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Note: The special early morning meeting of the TU Board was held at 8:00 A.M. on October 8, 1980; the actual amendments were not available at that meeting or at least were not reviewed by the Board. These "complex" (A-1405) amendments were only actually dated and signed October 10, 1980. The amendments supposedly opened up to TU the right to solicit bids. Thus, these amendments had nothing to do with the underlying Pritzker merger agreement which had been previously approved by the TU Board on Saturday, September 20, 1980.

purpose of the belated "supplementary" proxy statement was, as the defendants admitted, because a host of "material" facts had been omitted from the original proxy statement (A-2325). (Note)

The lower Court's opinion never does deal with the threshold question as to whether the record shows that the defendants exercised the requisite care necessary to bring their actions within the ambit of the business judgment rule. The Chancellor avoids that issue entirely and rules based on entirely irrelevant factors that the Board of TU did not act recklessly, saying (A-13):

> "I therefore conclude that given the market value of Trans Union's stock, the business accumen of the members of the board of Trans Union, the substantial premium over market offered by the Pritzkers and the ultimate effect on the merger price provided by the prospect of other bids for the stock in question, that the board of directors of Trans Union did not act recklessly or improvidently in determining on a course of

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Note: As part of their self-serving approval of their own prior action, the Supplementary Proxy Statement concludes (A-2329): "The Board further reviewed the fact that after intensive efforts extending over three months to solicit a more favorable offer, none has been forthcoming. Therefore, the Board again voted to recommend the approval of the merger." The defendants' attempt at ex post facto justification is circuitous: in September, 1980, they made no determination at all of the adequacy of the $55.00 offer (though they approved a resolution that required them to recommend the $55.00 price to TU's stockholders). They also authorized the signing of a definitive merger agreement with the Pritzkers, giving the Pritzkers contractual, temporal and monetary advantages that made it difficult if not impossible for any other bidder to bid on equal terms with the Pritzkers for TU. Then, in January, 1981, they attempt to ratify their own blind acceptance of the $55.00 price by saying that no better offer had been recieved.

action which they believed to be in the best interests of the stockholders of Trans Union." (Note)

* * *

The business judgment rule is not applicable in this case since the record conclusively shows that the defendants did not take the time or make the requisite effort to obtain the information on which to make an informed judgment. This Court should reverse the lower Court and impose liability on the defendant directors for having improvidently approved the Pritzker cashout merger on September 20, 1980.

## III. THE LOWER COURT AGAIN APPLIED THE WRONG STANDARDS AND WAS OTHERWISE IN ERROR IN APPROVING DEFENDANTS' INADEQUATE AND UNTIMELY MERGER PROXY MATERIALS

### A. Standard and Scope of Review

In approving the defendants' proxy materials, the Chancellor applied (1) an erroneous disclosure standard and (2) failed to apply the notice requirements of 8 Del.C. §251(c). *Lynch v. Vickers Energy Corp.*, Del. Supr., 383 A.2d 278 (1978) ("*Lynch I*"), embodies the law applicable to disclosure. On appeal, this Court's function is to correct the lower Court's erroneous legal decisions. *Northwest Industries, Inc. v. B. F. Goodrich Co.*, Del. Supr., 260 A.2d 428 (1969).

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Note: (a) The market price of TU's stock was about $37.25 on September 19, 1980: that fact does not show that the defendants used due care in approving a cashout price for 100% of TU's stock on September 20, 1980. (b) The "business accumen" of the TU Board (none of whom were investment bankers or financial analysts) does not avoid the necessity on their part for meeting the standard of care set out in *Graham v. Allis-Chalmers*, *supra*. (c) As to the "substantial premium", it was shown by evidence at trial, that when actually measured by premium paid in comparable transactions, the premium actually paid for 100% of the stock of TU did not measure up. The phrase "the ultimate effect on the merger price by the prospect of other bids for the stock in question" is unintelligible. The fact is that the precipitous action of the Board effectively precluded other potential bidders from making competing offers.

B. The Chancellor Applied an Erroneous "Adequacy" Test

In passing on the disclosure aspects of TU's merger proxy materials, the lower Court repeated an error it has made before. In Lynch I, this Court reversed a finding by the same Chancellor that defendants had satisfied their fiduciary duty by making "adequate" disclosure. This Court stated:

> "A second reason why we think that the Court of Chancery was mistaken in applying the law was that it incorrectly substituted a 'disclosure of adequate facts' standard (351 A.2d at 575) for the correct standard, which requires disclosure of all germane facts. Completeness, not adequacy, is both the norm and the mandate under present circumstances."

This Court (and indeed the Court of Chancery itself) has previously held that "complete candor" is what is required of directors. Michelson v. Duncan, Del. Supr., 407 A.2d 211, 22 (1979); Tuckman v. Aerosonic Corp., Del. Ch., C.A. No. 4094 (May 20, 1982), Memorandum Opinion at pg. 24, 28. Yet, in this case, unless the Court below is reversed, it will have succeeded in reinstituting a previously rejected standard on the degree of candor required by the Delaware Courts of directors.

In both his February 3, 1981 preliminary injunction opinion (A-215) and his July 6, 1982 post-trial opinion, the Chancellor applied the standard of "adequacy", rather than "completeness". In summarily overruling the plaintiffs' disclosure allegations, the Chancellor's July 6, 1982 opinion states (A-22):

> "I also conclude that the stockholders of Trans Union were fairly informed as to the pending merger, including those terms surrounding the issuance of 1,000,000 shares of Trans Union stock to the Pritzkers as a condition to the merger here in issue, which transaction, I believe, did not affect the vote of the stockholders which proved such merger, or stand in the way of possible bids by other interested parties." (pg. 14-15)

The Chancellor did not find that defendants had disclosed all facts germane to the merger. Rather, he applied the adequacy standard, holding that TU's stockholders had simply been "fairly informed".

C. The Chancellor Applied an Erroneous "Materiality" Test

Moreover, the lower Court applied a different standard of materiality than set forth in Lynch I. The lower Court required that the plaintiffs show that misrepresented or omitted facts affected the vote on the merger. (Note-1) Thus, he concluded that the stockholders were "fairly informed" of the terms of the issuance of 1,000,000 shares of Trans Union to the Pritzkers, and held that this "did not affect the vote of the stockholders which approved such merger" (A-22). (Note-2) But, Lynch I requires disclosure of all information which "a reasonable shareholder would consider important" in deciding how to vote. 383 A.2d at 281. Lynch does not require that the undisclosed information be so material as to necessarily affect the vote. In Lynch I, this Court held that the Chancellor erred in making his own judgment of the weight undisclosed germane facts should be accorded. Only the stockholders are permitted to make such qualitative judgments. Id. at 280-281.

D. Defendants' Merger Proxy Materials Were Untimely and Inadequate as Well as Incomplete

Even if this Court were now to decide that Lynch I is no longer to be the disclosure standard in Delaware, the trial court erred in concluding that defendants satisfied their disclosure obligations to TU's

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Note-1: In Lynch I, this Court defined materiality and set out the trial court's limited role as follows: "The Court's duty was to examine what information defendants had and to measure it against what they gave to the minority stockholders, in a context in which 'complete candor' is required. In other words, the limited function of the Court was to determine whether defendants had disclosed all information in their possession germane to the transaction in issue." 383 A.2d at 281.

Note-2: Contra, Mobil v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981).

stockholders.

1. Defendants Did Not Disclose Material Facts Within the Time Required by 8 Del.C. §251(c) (Note-1)

In far less than 20 days before the February 10, 1981 special meeting of its stockholders, TU mailed a January 26 "Supplement to Proxy Statement" ("the Supplemental Proxy Statement") (A-2324). The significance of its timing and contents can not be overstated. First, the Supplemental Proxy Statement states frankly that TU's original Proxy Statement mailed January 21, 1981, was inadequate because, *inter alia*, it withheld "material" information known to defendants before January 21 (A-2325):

> "Since the mailing of the [January 21] Proxy Statement, certain events have occurred and certain matters have come into greater focus which the Board of Directors of Trans Union believes stockholders should be informed of before determining how to vote on the Merger. Among such events is the indication by General Electric Credit Corporation that it would not make an offer to acquire Trans Union. In addition, certain facts have been adduced in connection with pretrial discovery taken in connection with pending litigation seeking, among other things, to enjoin the Merger, which may be deemed to be material to stockholders in determining how to vote on the Merger." (Note-2)

None of the "material" facts that are disclosed for the first time in the Supplemental Proxy Statement relate to events that occurred after the mailing of the Original Proxy Statement on January 19, 1981. On the contrary, all, or virtually all, of the "material" facts relate to matters that occurred well before the filing of this lawsuit and, thus, were "material" facts known to the defendants when they approved and issued the original Proxy Statement (A-2216).

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Note-1: Under 8 Del.C. §251(c), a stockholder merger vote requires 20 days notice.

Note-2: Page 2 of the Supplemental Proxy credits plaintiffs' counsel with prompting disclosure of much that had been withheld (A-2325). But, the point here is that the disclosure came too late.

At the preliminary injunction stage, plaintiffs sought postponement of the February 10, 1981 Special Meeting to give TU's stockholders the full 20 days notice they were entitled before the merger vote. The Chancellor refused, rejecting (as he again did at trial) the plaintiffs' claim that 8 Del.C. §251(c) requires 20 days notice (A-220).

To permit such a result to stand would emasculate both §251(c) and Lynch I. It would mean a corporation could with impunity mail stockholders a pro forma notice precisely 20 days before the date of the merger vote and then mail stockholders the actual germane particulars on the eve of the meeting. (Note) The requirement of "complete candor" could be totally circumvented if such a device were judicially approved. Courts have repeatedly postponed meetings and other transactions to satisfy stockholders' need for time to receive, consider and act on material information. For example, recently, in M. J. Whitman & Co. v. The Cyprus Corporation, W.D. Pa., Civil Action No. 82-28 (February 9, 1982), a copy of which is attached, the Court directed that a supplemental proxy statement be disseminated, along with the original "so both, together will give full information as if both were in reality the one complete proxy". The Court's February 9, 1982 order approving the supplementary materials set the shareholder vote for March 12, 1982,

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Note: The requirements of twenty days notice is not a technicality. Present mail service is very slow. In addition, many stockholders keep their stock in street name or in depositories. Thus, even if the full 20 days notice is given, many stockholders do not actually receive notice. Of course, when "material" facts are deliberately withheld until just before the meeting, it has the intended effect of not providing any notice whatever to many stockholders and of providing notice to other stockholders only after they have already voted their proxies. This Court should not countenance or approve such manipulation of the corporate machinery. Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971), rev'g. Del. Ch., 285 A.2d 430 (1971); Condec Corp. v. Lunkenheimer Co., Del. Ch., 230 A.2d 769 (1967); Martin Marietta Corp. v. The Bendix Corp., Del. Ch., C.A. 6942, 1982 (Sept. 19, 1982).

more than a month afterwards. In Jacobs v. Pabst, D.Del., (C.A. No. 82-449, July 21, 1982), a copy of which is attached, Chief Judge Latchum found that two material facts had not been disclosed in tender offer materials, one of which was the possible application of 8 Del.C. §160(c) to preclude the voting of shares. He ordered that the tender offer not go forward until corrective disclosures had been made "in order to provide the shareholders with the relevant and material information to make an informed investment decision".

Here, the Chancellor disregarded the twenty-day requirement of §251(c), and permitted the meeting to go forward less than two weeks after the Supplemental Proxy Statement had finally disclosed facts to the stockholders previously deliberately withheld.

2. Despite the Supplementation of Their Original Proxy Statement, Defendants Still Withheld Material Facts From the TU Stockholders

Despite the belatedly supplementation of their original Proxy Statement, defendants still withheld and misstated many material facts. (Note) Neither in his preliminary injunction opinion (A-2324) nor in the opinion after trial did the Chancellor mention or rule on any of these omissions. All were swept aside in his cursory (and erroneous "adequacy") ruling. Because space prohibits discussion of each of

Note: The defendants' Original Proxy Statement of January 19, 1981, was false and misleading in giving the erroneous overall impression that the TU Board had maturely considered the merger, including the fairness of the $55.00 cashout price. For example, the second page of the "Summary of Proxy Statement" says (A-2220): "The Board believes that the merger is fair and equitable to Trans Union stockholders and unanimously recommends that the stockholders approve the merger."

the defendants' many disclosure deficiencies, only two can be briefly described. (Note)

### (a) TU's Enormous Cash Flow

TU's proxy materials failed to inform its stockholders of the immense potential benefits available to them out of projected cash flow which they lost (and the Pritzkers gained) as a result of the merger. Although TU's Five-Year Forecast (A-1882) had informed the TU Board as early as July 1980 of TU's projected net income <u>and</u> projected cash flow for each of the years 1980-1985, TU's proxy materials divulged <u>only</u> projected net income (A-2225, et seq.). Totally absent was any disclosure whatsoever of the projected cash flow which was the real strength

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Note: A partial list, however, of the more important ones includes the following: (a) TU's stockholders were not fully informed of the impossibility of TU's obtaining a better offer for TU's stock because of the contractual limitations even under the October 10th amendments, (b) the Supplementary Proxy Statement informed shareholders that TU's ability to optimize the use "tax benefits" would be ascerbated if proposals to change the Federal Income Tax Law on accelerated depreciation without informing stockholders that TU was not compelled to take accelerated depreciation, (c) the Supplemental Proxy Statement failed to disclose that any new bidder seeking to top the Pritzker offer would be required to bid for 13,500,000 TU shares as opposed to 12,500,000 shares that the Pritzkers would have to bid on, (d) the Supplemental Proxy Statement advised stockholders that discussions were continuing with another potential acquiror but failed to identify the acquiror, the nature of the proposed competing bid or any other information by which a stockholder could intelligently assess the "blind" alternative referred to, (e) never advised stockholders that the tax advantages available to the off-shore Pritzker trusts in connection with the purchase of the 1,000,000 TU shares at $38.00 from TU, (f) the TU shareholders never were informed of the valuable registration rights given by TU to the Pritzker interests in connection with the purchase of 1,000,000 shares of authorized but unissued stock, (g) TU stockholders were not informed of the extent to which officers and directors of TU would receive a personal benefit by being allowed to be cashed out on options not then exercisable in the event of the merger. Disclosure was only made of the exsitence of the option; not of the extent to which TU directors would personally benefit from cashing in their options even though they were not then exercisable.

of the "engine of cash" (A-1882) the stockholders were being asked to sell. (Note) By excluding from the proxy materials the projected cash flow, stockholders were deprived of the opportunity to know that their company was on the threshold of (a) greater liquidity, (b) greater opportunity to accept new investment opportunities, and (c) greater chance to receive greater dividends than at any time in the company's entire history. This was especially improper when TU's cash flow was recognized by its management and the Pritzkers as its most attractive feature.

(b) Alternatives Which Were Available to TU and Its Stockholders

Defendants' merger proxy materials were entirely silent on the alternatives available to TU stockholders if the merger did not go through. Thus, TU's stockholders were made to evaluate the $55.00 per share offer without being told that the company could have an unused cash buildup by 1985 which could have been used in several ways to serve the economic best interests of the stockholders (A-1882). The stockholders were not told that TU's own Five-Year Forecast stated that one alternative was for TU to buy one-third of the TU stock at $50.00 a share (A-1896). This attractive alternative was certainly a material fact that a stockholder would want to know about in deciding how to vote on a $55.00 cashout merger. Stockholders should also have been told that, through its utilization of unused cash flow as projected, TU could have adopted a policy of maximizing a payout of earnings to stockholders which would have a favorable impact on the price of their stock. Stockholders should have been told of all alternatives and prospects

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Note: Mr. Van Gorkom testified (A-1082): "Our greatest asset was the heavy cash flow that results from the leasing operation primarily itself."

available to them. Tanzer v. Haynie, 405 F.Supp. 650, 656 (S.D. N.Y. 1976).

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Contrary to the lower Court's ruling, the TU stockholders were owed the duty of complete candor. They were never given all the material facts as they were entitled to under the applicable Delaware law. Shareholder approval of the merger having been obtained in the absence of full disclosure is meaningless. This Court should reverse the lower Court.

## IV. THE LOWER COURT SHOULD BE REVERSED ON DAMAGES SINCE IT HAS EMPLOYED A CLEARLY ERRONEOUS STANDARD

### A. Standard and Scope of Review

Instead of reviewing the record to measure rescissory damages pursuant to Lynch v. Vickers ("Lynch II"), Del. Supr., 429 A.2d 497 (1981), the lower Court used an erroneous measure of damages of its own fashioning while totally disregarding the actual damage evidence. This Court should make its own finding on damages. Sergeson v. Delaware Trust Co., Del. Supr., 413 A.2d 880 (1980); Weinberg v. Baltimore Brick Co., Del. Supr., 112 A.2d 517 (1955).

### B. The Lower Court Upheld the Fairness of the $55.00 Cashout Price Solely Because in Its Opinion the Premium Was Substantial

The plaintiffs' motion for injunctive relief having been summarily denied by the lower Court, the plaintiffs presented full evidence on rescissory damages pursuant to Lynch II. Harmon v. Masoneilan International, Inc., Del. Supr., 442 A.2d 487 (1982). Instead of determining the fairness of the $55.00 cashout price, however, the lower Court simply restated some very rough premium percentage calculations of its own originally found in its opinion of February 3, 1981 (A-215, 218). Thus, the lower Court said (A-21):

> "It further appears that the merger price offered to the stockholders of Trans Union represented the premium of 62% over the average of the high and lower prices at which Trans Union stock traded in 1980, a premium of 48% over the last closing price and a premium of 39% over the highest price at which the stock of Trans Union had traded at any time during the prior six years." (Note-1)

Contrary to the lower Court's subjective determination that the percentage of premium per se made the cashout price of $55.00 fair, the evidence at trial showed that premium is actually the price that a buyer pays and a seller receives for the sale of control that passes with the transfer of 100% of the stock of the company (A-108; A-1335; A-1673-1675). (Note-2) In determining the value of control and the premium that should be paid for it, the percentage of what has been paid in the "marketplace" in comparable transactions is one way in the business

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Note-1: The lower Court later justified the defendants' failure to obtain professional advice on the adequacy of the $55.00 price and his own subjective determination of the fairness of the price by saying (A-22): "Furthermore, no Delaware case has been cited which requires dependence on expert testimony in order to arrive at a fair present value of a corporate security in a merger proceeding such as the one under consideration and this includes the formula used to arrive at intrinsic value in appraisal proceedings taking place after a merger."

Note-2: The lower Court studiously avoided any reference to the basic fact that the $55.00 price was simply the subjective personal determination of Mr. Van Gorkom. The lower Court also makes no mention of the fact that the trial record was studded with telltale evidence showing that the $55.00 price was inadequate. For example, Mr. Romans, the Chief Financial Officer of TU, said that he thought the appropriate price range for TU's stock was between $55.00 and $65.00, TU's Five-Year Forecast published in July 1980 stated that one of the alternatives open to TU was the purchase of a 30% minority interest for $50.00 per share. Articles in the financial press indicated that the value of the TU stock was above $65.00 (A-2076; PX 34). The revolt of senior management was generated in part by the unfairness of the $55.00 price. KKR had made an initial offer of $60.00. Finally, General Electric Credit Corporation made a draft opening offer of $57.00 in a stock-for-stock transaction with a $60.00 cash alternative. The fact that the GECC offer was never finalized was not because of the price -- rather, it was because of GECC's image problem and a decision by GECC not to get into a bidding war with the Pritzkers (i.e., a competitive upward spiral of offers starting at $60.00 a share).

world that the adequacy of premium is measured (A-108; A-626, et seq., A-1675-1678). The lower Court has simply decreed that, because the percentage of premium over various previous market prices was "substantial" in its view, the price of $55.00 was fair.

The Chancellor also justified his decision by saying (A-21):

> "Furthermore in the case of Gimbel v. Signal Company, supra, no effort had been made to determine whether or not another company would offer a higher price for the corporate assets in issue while in the present case, the proposed merger in issue was tested in the marketplace for at least ninety days with no tangible result and I am satisfied that such a test of value supports the fairness of the premium over market price in the merger here involved." (Note-1)

There was no "test" in the marketplace for ninety days because TU had signed a "definitive" merger agreement with the Pritzkers on September 20, 1980, which made it impossible for any other bidder to catch up with the Pritzkers. Nevertheless, there were "tangible results". (KKR made a $60.00 written offer and there was the tangible draft offer of GE:) These "tangible results" showed that the TU stock was worth a great deal more than $55.00 but the "definitive merger" agreement with the Pritzkers effectively blocked other potential bidders.

The lower Court said:

> "Next, while both plaintiffs and Trans Union engaged the services of financial experts to determine the intrinsic value of the shares of Trans Union at the time of the merger here in issue (Note-2), I am satisified that the efforts to reach a fair value of the stock here in issue on the basis of discounting projected cash flows is not an appropriate method of determining the fair present value of the securities here in

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Note-1: Actually, in <u>Gimbel</u>, United Aircraft had previously been negotiating for the same assets, <u>Gimbel</u>, <u>supra</u>, at pg. 611.

Note-2: The foregoing could lead one to believe that TU had engaged a financial expert "at the time of the merger" (i.e., either September 20, 1980, or by February 10, 1981). That is incorrect: TU first engaged a financial expert in May 1981, long after the consummation of the merger when Arthur Rosenbloom, Esquire of Standard Research Consultants, solicited TU and cut his firm's bid by $5,000.00 in order to obtain the job of testifying for TU on the fairness of the $55.00 cashout price at the trial (A-1562-1570). Mr. Rosenbloom, though he spoke to or had access to the following persons or parties who were knowledgeable about the true value of TU stock, deliberately never asked what the value of the TU stock was: Mr. Romans (A-1602), KKR (A-1586), Salomon Brothers (A-1593), Oppenheimer & Co. (A-1596), General Electric (A-1589).

issue, the present value of which would have to be arrived at by such a method of valuation fluctuating substantially, depending on the discount rate employed, Weinberger v. UOP, Del.Ch., 426 A2d 133."

The lower Court makes several errors. First, the lower Court gives the erroneous impression that the plaintiffs' expert, Milton Meigs, CFA, relied solely on a discounted cash flow analysis in determining that the fair price range for TU's stock was between $65.00 and $70.00, disregarding the fact that Mr. Meigs made and presented four different financial analyses (in addition to a discounted cash flow analysis) both in his affidavit and at trial (i.e., price earnings ratios, book value and dividend payout, a going concern valuation, and a premium test) (A-105-116; A-624, et seq.). (Note-1) These analyses, together with his discounted cash flow analysis, confirms what the extrinsic evidence also shows -- that is, that the fair value of the TU stock in a 100% transfer of control was in the range $65.00 and $70.00 per share (A-779).

More importantly, the Court of Chancery has again totally rejected the entire concept of cash flow and its analysis as one acceptable method of measuring the value of the stock of a going concern such as TU. But see Tri-Continental Corp. v. Battye, Del. Supr., 74 A.2d 71 (1950). (Note-2) In the world of business, one recognized method of determining the value of a company is to determine its cash flow in

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Note-1: Arthur Rosenbloom also made some financial analyses using alternate methods based on earnings, dividends and assets in addition to an attempt to do a discounted cash flow analysis (A-1771-1861). Significantly, when Mr. Rosenbloom subjectively weighted the foregoing analyses (6:3:1), he came up with a figure of $51.00 which he denominated as the "Fair Market Value" of TU's shares in January-February 1981 (A-1852). As his calculations showed (A-1819-1852) and as he reluctantly admitted, the $51.00 figure was without premium (A-1631). Mr. Rosenbloom's discounted cash flow calculation (even with a subjective 4% risk factor) came out to $55.05 (A-1854).

Note-2: The lower Court itself recognized the significance of cash flow in the sale of TU saying (A-12): "Mr. Van Gorkom accordingly concluded that a private company would not be able to pay as much for Trans Union as a private company which could use Trans Union's substantial cash flow without being constrained by debt-equity ratios, price earnings ratios or a dilution of earnings resulting from an acquisition."

years to come and then to discount the cash flow back to its present worth. For example, the pre-merger study that Mr. Romans, Chief Financial Officer of TU, had made (and which was never produced) showing the value of TU stock in a cash merger was between \$55.00 and \$65.00 was based on a discounted cash flow analysis (A-1600). Weinberger v. UOP, Inc., Del. Ch., 426 A.2d 1333 (1981), notwithstanding, the discounted cash flow method is a widely accepted and widely used method of financial analysis in the corporate field by courts, investment bankers, financial analysts, the SEC and businessmen (A-646-650). (Note-1)

The lower Court's categorical rejection of the entire discounted cash flow method is based on the lower Court's mistaken adoption of the Court's view in Weinberger that a discount factor is purely subjective and "fortuitous". Actually, as set out in Mr. Meigs' Affidavit (A-111-112) and amplified in his trial testimony (A-656, et seq.), the 14% discount factor was not a subjective determination at all: rather, there was solid evidence that established each component that made up the appropriate discount rate (i.e., (1) a real interest rate of 3%, (2) an inflation rate of 9% and (3) a risk premium of 2% based on the proven "beta" characteristics of the TU stock). (Note-2) Moreover, in a traditional classic appraisal valuation, the selection of an appropriate multiplier or weight factor is not only difficult and imprecise but is

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Note-1: See Tanzer v. I.G.I., Del. Ch., C.A. 4945 (Dec. 23, 1975); Fliegler v. Lawrence, Del. Supr., 361 A.2d 218 (1976); Austin v. Loftsgaarden, 8th Cir., 675 F.2d 168 (1982); Codification of Financial Reporting Policies [of the S.E.C.], §202.2, Fed.Sec.L.Rpt. [CCH §72,962, July 18, 1982]; Rosenbloom, A Hypothetical Going Private Transaction, 6 Del.J.Corp.Law 601, 605 (1981).

Note-2: Mr. Rosenbloom's own discounted cash flow analysis with 3% as the real interest rate and 9% as the appropriate inflation rate confirms the correctness of Mr. Meigs' determinations as to these two components of the discount factor. Mr. Rosenbloom admitted that his own risk factor of 4% was purely his "judgment" (A-1661).

truly a subjective judgment. See Gibbons v. Schenley Industries, Del. Ch., 389 A.2d 460 (1975); Bell v. Kirby Lumber Co., Del. Supr., 413 A.2d 137, 143 (1980); Application of Delaware Racing Assoc., Del. Supr., 213 A.2d 203 (1965); Levin v. Midland Ross Corp., Del. Ch., 194 A.2d 50 (1963). It would be incongruous for the Courts of Delaware to continue to shun the use of a valuation method commonly used and accepted for many years in the business world solely on the incorrect grounds that the discount factor is subjective in preference to Courts' traditional appraisal analysis which does truly depend on a subjective multiplier or weight factor.

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The lower Court's determination that the $55.00 cashout price was fair was not based on a review of the evidence or an application of the standards found in Lynch II. Rather, it was based on a rough calculation that the premium was, in the lower Court's view, substantial and was therefore per se adequate. This Court has before it a full record on the evidence on rescissory damages. The Court should reverse the lower Court and fix the damages in this case.

## CONCLUSION

For the reasons stated above, this Court should reverse the lower Court and enter judgment for the plaintiffs in the amount of the fair value of the stock of TU.

Respectfully submitted,

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By ______________________

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