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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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

FILED SEP 21 2 10 PM '81 JOHN D. KELLY III CHANCERY

PLAINTIFFS' PRE-TRIAL MEMORANDUM OF LAW
ON THE ISSUE OF LIABILITY

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DATED: September 18, 1981

TABLE OF CONTENTS

TABLE OF CITATIONS

NATURE AND STAGE OF THE PROCEEDINGS

On December 19, 1980, plaintiff Alden Smith, then a substantial common stockholder of defendant Trans Union Corporation ("Trans Union"), filed this action. His complaint challenged the then proposed merger of New T Co. ("NTC"), a wholly-owned subsidiary of defendant The Marmon Group, Inc. ("Marmon"), with Trans Union ("the Merger"), whereby Trans Union would become a wholly-owned subsidiary of Marmon and Trans Union's stockholders would receive $55 for each share of their Trans Union stock. Plaintiff Smith sought and was granted expedited discovery in anticipation of a motion for preliminary injunction against the Merger. Throughout January, 1981, expedited document production and deposition discovery occurred both in Chicago and Wilmington.

The corporate defendants filed answers to the complaint on January 14, 1981. The individual defendants filed answers and moved to dismiss on January 20. Thereafter, plaintiff Smith filed a motion to file a proposed amended complaint which, inter alia, challenged the adequacy of the January 10, 1981 Notice and Proxy Statement for the February 10, 1981 Trans Union stockholders meeting to vote on the Merger. On January 27, 1981 Trans Union issued a purported Supplemental Proxy Statement to inform Trans Union's stockholders of, among other things, "certain facts [which] have been adduced in connection with pre-trial discovery taken in connection with

[this] pending litigation" (Supplemental Proxy at p. 1). Plaintiff Smith thereafter prepared a revised proposed amended complaint which identified many disclosure deficiencies that Trans Union's Supplemental Proxy had not cured and to otherwise conformed his pleadings to the facts as adduced through discovery.

On January 30, 1981 this Court held a hearing on plaintiff Smith's motion for a preliminary injunction against the proposed Merger, the Merger vote scheduled for February 10, 1981. In a February 3, 1981 memorandum opinion, this Court declined to grant plaintiff Smith's motion for a preliminary injunction such that, on February 10, Trans Union's stockholders met and voted in favor of the Merger. It was effected immediately thereafter.

In the interim between the Court's ruling on the prelminary injunction and the stockholder's meeting, plaintiff John W. Gosselin, another substantial stockholder of Trans Union, sought leave under Chancery Court Rule 4 to intervene as a party plaintiff in this action. On February 13, pursuant to Chancery Court Rule 23, plaintiffs filed their motion for class certification. On March 5, 1981 the Court, pursuant to stipulation, ordered that plaintiff Smith's amended verified complaint could be filed and permitted plaintiff Gosselin to intervene and adopt as his pleading the amended verified complaint. By Order of same date, the Court granted plaintiffs' motion for class certification such that

the class consists of all persons, other than defendants, who held shares of common stock of Trans Union on September 22, 1981, or at any time thereafter up to and including immediately prior to the effectuation on February 10, 1981 of the Merger of Trans Union into NTC. Prospective class members who desired to be excluded from the class were permitted to request exclusion on or before May 15, 1981. The holders of approximately 800,000 shares of Trans Union common stock requested exclusion, meaning that the certified class consists of the holders of approximately 11,200 shares of Trans Union stock.

On March 23, 1981 defendants Marmon, GL and the Pritzkers filed their answer to plaintiffs' amended verified complaint. On the same date defendant Trans Union and its defendant directors filed their answer to the amended verified complaint.

On May 21, 1981, the plaintiffs having applied for trial, this Court set trial in this matter to commence on Tuesday, September 22, 1981, setting aside two full weeks for trial. A discovery cut-off was established. Since the preliminary injunction hearing, the plaintiffs have taken the depositions of William B. Moore (Trans Union's Corporate Secretary), Donald B. Romans (Vice President-Financial), Jack R. Kruizenga (President of Trans Union's most important division, the Union Tank Car Company) and Henry R. Kravis of Kohlberg, Kravis & Roberts ("KKR") which, at one time, made a $60 per share

proposal for Trans Union. On September 9, plaintiffs also took the deposition of defendants' expert, Arthur H. Rosenbloom of Standard Research Consultants. The defendants have taken the deposition of plaintiff John W. Gosselin. The parties have designated trial exhibits and deposition testimony they expect to rely upon at trial. Objections to certain designations have also been filed. This, therefore, is plaintiffs' pre-trial memorandum. In filing this memorandum, plaintiffs respectfully request post-trial briefing and oral argument.

ARGUMENT

I. PRELIMINARY MATTERS

A. The Class Has Been Certified.

In its February 3, 1981 memorandum opinion denying plaintiff Smith's Motion for a Preliminary Injunction (p. 5) the Court seemed to view plaintiff Smith's tax situation as an impediment to injunctive relief. The Court went so far as to say:

> "....and while other stockholders of Trans Union have no doubt received their stock in so-called tax-free exchanges, I consider it significant that no other stockholder of Trans Union has sought to intervene in this proceeding in opposition to the merger in issue."

Two days later, plaintiff Gosselin, also a substantial stockholder of Trans Union, moved to intervene. Defendants took his deposition. Thereafter, on March 5, 1981, the Court signed an agreed to Order designating Messrs. Smith and Gosselin as class representatives and certifying <u>all</u> owners of common stock of Trans Union as of February 10, 1981 as members of the class. Thus whatever the personal financial or tax consequences be for Mr. Smith or Mr. Gosselin, they are irrelevant in these proceedings. Of approximately 12 million common shares held by class members, members owning approximately 11.2 million shares have elected to remain as members of the plaintiff class.

B. <u>This Court is Not Now Bound by the Findings Contained in its Opinion of February 3, 1981.</u>

Any findings of fact or conclusions of law made by this Court in denying interlocutory relief are not binding upon this Court at the trial of this case. "Based, as they usually are, on incomplete evidence and a relatively hurried consideration of the issues, these provisional decisions should not be used outside the context in which they originally were rendered." 11 Wright & Miller, <u>Federal Practice and Procedure: Civil</u> §2950 (1971). This principle is applicable whether the preliminary injunction motion is granted or denied. <u>Wyrough & Loser, Inc. v. Pelmor Labs, Inc.</u>, 376 F.2d 543, 548 (3d Cir. 1967) (preliminary injunction granted); <u>Bursten v. Phillips</u>, 351 F.2d 616 (9th Cir. 1965). Moreover, the context in which the issues are framed for the Court on a preliminary injunction hearing -- represented by such narrow categories as "probability of success", "balancing of equities", and "irreparable harm" -- differs from the context in which such information is presented to the Court at trial, which involves the application of facts to legal principles of liability and of damages. Still further, new witnesess have been deposed and additional evidence will be presented. Plaintiffs, therefore ask the Court to consider anew the facts and issues to be presented at trial.

II. THE TRIAL RECORD WILL PRECLUDE THE DIRECTOR DEFENDANTS FROM UTILIZING THE BUSINESS JUDGMENT RULE AS A DEFENSE FOR THEIR HASTY AND IMPROVIDENT RATIFICATION OF THE MERGER AGREEMENT.

A. <u>To Invoke the Protection of the Business Judgement Rule the Defendant Directors Must Show That They Met the Prerequisites.</u>

The defendant directors of Trans Union may claim that their actions are immune from judicial review because of the "Business Judgment Rule". (For purposes of its preliminary injunction opinion, the Court applied the presumptions of the Business Judgment Rule to the defendant directors.) However, as will be demonstrated at trial, Trans Union's directors have excluded themselves from the Rule's protection by failing to meet the conditions that are an absolute prerequisite to the successful invocation of the Rule.

The Business Judgment Rule is only available to corporate fiduciaries if the following conditions are shown to have been met:

> (1) The defendant directors have exercised due care in authorizing the challenged transaction;
> (2) The directors did not abuse their discretion by authorizing a transaction not reasonably believed to be in the best interest of the corporation and its stockholders; and
> (3) The directors authorized the transaction in good faith.

Evidence at trial that any one of these criteria were lacking precludes invocation of the Business Judgment Rule and requires judgment against the defendant directors for

consequent damages. In addition to the foregoing the Business Judgment Rule is circumscribed by two important limitations: (1) the director must have no personal interest in the transaction; and (2) he must have paid informed attention to his duties. As regards the latter limitation, it has been said:

> "The business judgment rule thus only protects a director from the consequences of a decision if, among other things, the decision was made on the basis of all relevant facts, including those facts he or she should have known had due care been exercised. A director who does not take a reasonable amount of trouble [to] acquire the relevant and available facts relating to a proposed transaction cannot defend the challenged action on the ground that he or she exercised business judgment. <u>It is one thing to make a decision, and another thing to make an informed decision. It is only the latter type of decision that the business judgment rule protects</u>." (citations omitted) (emphasis added)

Arsht, <u>The Business Judgment Rule Revisited</u>, 8 Hofstra L.Rev. 93, 119-120 (1980). See also, <u>Casey v. Woodruff</u>, 49 N.Y.S.2d 625, 643 (N.Y.Sup.Ct. 1944); Arsht, <u>Fiduciary Responsibilities of Directors</u>, <u>Officers and Key Employees</u>, 4 Del.J.Corp.L. 652, 660-1 (1979); <u>Resource Document on Delaware Corporation Law</u>, 2 Del.J.Corp.L. 176, 186 (1977).

The Business Judgment Rule does not apply where, as here, corporate directors have failed to pay informed attention to their duties. In <u>Kaplan v. Centex Corp.</u>, Del.Ch., 284 A.2d 119, 124 (1977), this Court stated:

> 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 plaintiff argues, the difficulty here is that evidence does not show that this was done. There were director-committee-officer references to the realignment but none of these, singly or cumulatively, show <u>that director judgment was brought to bear with specificity on the transactions</u>. (Emphasis added).

Any presumption of good faith is rebutted altogether where directors have made "an unintelligent or unadvised judgment". <u>Mitchell v. Highland Western Glass Co.</u>, Del.Ch., 167 A. 831, 833 (1933). The Rule also loses force when the transaction is superficially presented and hastily adopted, indicating much less than careful scrutiny by the Board. The Court will examine carefully transactions where there are indications that the directors may not have investigated it thoroughly prior to a vote, particularly where the result may have a substantial impact on the corporation or its stockholders. <u>Gimbel v. Signal Cos., Inc.</u>, Del.Ch., 316 A.2d 599, 614, <u>aff'd</u>, Del.Supr., 316 A.2d 619 (1974) (sale of substantial assets).

B. <u>The Trial Record Will Show That the Defendant Directors Did Not Meet the Required Standard of Care and Diligence to Invoke the Protection of the Business Judgment Rule as a Defense for Their Hasty Ratification of the Actions of the President in Agreeing to a Cash-Out Merger at $55 Per Share.</u>

The case at Bar involves a most significant corporate transaction -- a cashout merger whereby Trans Union's public

stockholders have been eliminated from the enterprise at a point when their company ("an engine of cash"; G-837, Trans Union's Five-Year Forecast 1981-1985 under cover letter dated July 19, 1980 from Carl W. Peterson to Trans Union's Board of Directors) was known by the Chief Executive Officer and the Board to have a sound financial position and excellent prospects. The Pritzker merger proposal was not carefully considered by an informed Board and then skillfully negotiated with the offerors. On the contrary, it was hastily and secretly concocted. Then, without prior notice, it was presented on a take-it-or-leave-it basis to an unprepared Board. Without even seeking an extension of time in order to learn the full facts, to determine the views of Trans Union's management, or to obtain the advice of independent experts, the Trans Union Board approved the Merger in a special two hour Saturday afternoon meeting. No intelligent or advised judgment was made. Much greater care than that taken by the Trans Union Board has, in the past, suggested "imprudence" to this Court. Gimbel, supra, 316 A.2d at 615.

Recognizing the improvident haste of Van Gorkom and Trans Union's directors, the Trans Union management forced Van Gorkom to make an attempt to cure the defects of the Pritzker deal by amending the Merger Agreement. But the Pritkzers did not modify the significant aspects of their "deal." Their token concessions did not cure the major defects of the Merger Agreement Trans Union's directors had so hastily agreed to.

Specifically, Trans Union did not get the right to seek more favorable bids until October 10, 1980. Then Trans Union received very limited rights and these were only under the stifling conditions imposed by the Pritzkers' merger agreement, which remained in full force and effect. For example, Section 2.03 of ARTICLE II of the Supplemental Agreement, while permitting other bids, set an unrealistic January 31, 1981 deadline. Indeed, that purported "deadline" was itself deceptive. Page 4 of the Salomon Brothers solicitation memo (G-227) provided:

> It is requested that any offers be communicated to Salomon Brothers as soon as possible and, in any event, no later than January 1, 1981. (Note)

Second, "chilling" contractual conditions were contained in ARTICLE V, paragraph (e) of the Supplemental Agreement. In order for Trans Union to terminate the Pritzkers' merger agreement, a competing offer was not only required to be higher, but was also required to contain no conditions for consummation other than stockholder approval and the absence of a court order restraining the transaction. Otherwise, pursuant to Section 2.03 of ARTICLE II of the Supplemental Agreement, a competing offer,

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Note: The defendant directors never obtained the opinon or an investment banker on the value of the Trans Union shares at the time of their hasty approval of the merger. Another dereliction on their part lies in the fact that though they had the right without additional cost to obtain an opinion on the value of the Trans Union stock from Soloman Brothers. They never availed themselves of that option nor did they do so for the guidance and benefit of the stockholders.

although higher, would not prevent the submission of the Pritzkers' merger agreement to Trans Union stockholders. The evidence will show that GE was prepared to make a stock-for-stock offer at $57 (with a cash alternative) but the Pritzkers refused categorically to waive any rights whatsoever under the amended Merger Agreement. Specifically they would not release the Trans Union Board from the (?) of the terms of the amended Merger Agreement in order to accept the higher GE offer. As a result, no competing offer could be submitted in time for the stockholder vote on February 10, 1981.

Third, the agreement to sell 1,000,000 Trans Union shares to the Pritzker trusts for $38 per share meant that any other offeror would have had to pay a minimum penalty of $17,000,000 to the Pritzkers in order to out-bid them. This penalty was the difference between the per-share price of a higher competing bid and $55, multiplied by the 1,000,000 shares. A competing bidder would have been required to purchase approximately 13,500,000 shares while the Pritzkers could acquire Trans Union by purchasing only 12,500,000 shares. To stay on an equal footing, a competitive bidder would have had to offer $1.00 for each $.92 offered by the Pritzkers. This was not the true competitive bidding the Courts of Delaware have encouraged. See, e.g., Thomas v. Kempner, C.A. No. 4138 (Del.Ch., May 22, 1973). (Trans Union's proxy materials did not disclose the anti-competitive impact of this special arrangement with the Pritzkers.) Moreover, since no higher

bidder was able to overcome these obstacles, Trans Union's assets were wasted because the Trans Union defendants permitted the Pritzkers to purchase 1,000,000 shares at a price ($38 per share) more than $20 below their face value.

Other improvident aspects of the Merger Agreement, as inadequately corrected by the October 10, 1980 Supplemental Agreement, will be demonstrated at trial. Moreover, several actions which followed the Supplemental Agreement demonstrate both lack of good faith on the part of some defendants (i.e. Van Gorkom) and the defective nature of the underlying agreement with the Pritzkers. They include: (a) Van Gorkom's course of action inhibited implimentation of the KKR proposal to pay $60 per share to Trans Union's stockholders in a merger; (b) the Pritzkers' unwillingness to forego the benefits of their deal inhibited a better offer from General Electric; and (c) defendant directors' failure to disclose much of the underlying circumstances surrounding the original negotiation and adoption of the agreement with the Pritzkers until this litigation forced them to do so by supplementing their original proxy statement.

C. The Limited Protections of the Muschel Rule are Not Available to the Defendants.

Moreover, the belated January 26, 1981 meeting of Trans Union's Board of Directors to "absolve" their prior mistakes did not bring them within the limited protections of Muschel v. Western Union Corp., Del.Ch., 310 A.2d 904 (1973). Unlike

Muschel, the Trans Union/Pritzker merger was a "hastily concocted plan", not the result of any exhaustive or thorough internal, let alone external, studies. No screening of other alternatives took place before entering into the Pritzker merger agreement. There was no detailed examination or evaluation of the proposal. It was neither carefully considered nor skillfully negotiated.

Also, Trans Union's directors had failed to obtain for themselves an "escape clause" comparable to that which the Western Union directors decided not to exercise. In fact, Trans Union's directors were so reckless as to fail to exact from the Pritzkers an escape clause comparable to the one they gave the Pritzkers.

* * *

The trial record will establish that the director defendants are not entitled to the defense of the Business Judgment Rule because no business judgment was exercised, at the crucial time the Trans Union directors originally approved the Merger Agreement. Afterwards, it was too late. The record will show that the defendant directors have breached their fiduciary duties to the common stockholders of Trans Union and that they are liable for the consequent damages.

III. TRANS UNION PROXY MATERIALS WERE INADEQUATE AND UNTIMELY, RENDERING THE STOCKHOLDER VOTE A NULLITY.

A. The Applicable Standard is "Complete Candor" as to All Material Facts.

Because they stood in a fiduciary relationship to their stockholders, the defendant directors of Trans Union had a duty to disclose "all germane facts" about the Merger in seeking their approval for the Merger. "Completeness, not adequacy, is both the norm and the mandate..." Lynch v. Vickers Energy Corp., Del.Supr., 383 A.2d 278, 281 (1977). In Lynch, the Supreme Court found this duty of complete candor had been breached because tender offer materials contained incomplete information on asset values. Here, plaintiffs will show that Trans Union proxy materials were even more deficient in providing the germane facts necessary for stockholders to intelligently vote on the merger.

"Complete candor" requires disclosure of all facts a reasonable stockholder would consider important in making an informed decision.

> "[A] duty to exercise complete candor in its approach to the minority stockholders of TransOcean for a tender of their shares, means a duty to make a full disclosure of all of the facts and circumstances surrounding the offer for tenders, including the consequence of acceptance and that of refusal, and insofar as the price offered is concerned that it not be one which would induce the acceptance of an unconscionable bid by an unwary stockholder at a price below the market or otherwise reasonable under the facts and circumstances attending such offer for tenders of stock." (Emphasis added.)

Lynch v. Vickers Energy Corp., Del.Ch., 351 A.2d 570, 573 (1976). See also, Bell v. Kirby Lumber Corp., Del.Supr., 413 A.2d 137, 148 (1980), wherein the Court found that the exclusion of an expert asset valuation from an appraiser's final report "would have been a breach of complete candor" under the rule of Lynch. Defendants cannot satisfy their obligation of "complete candor" unless all the facts a reasonable stockholder would consider important in making an informed decision to ratify the transactions at issue have been disclosed. Michelson v. Duncan, 386 A.2d 1144, 1154 (1978). See also Kaplan v. Goldsamt, Del.Ch., 380 A.2d 556, 565 (1977). And Compare TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

B. The Original Proxy Statement and the Supplemental Proxy Statement Failed to Meet the Standard of "Complete Candor".

The defendants breached their duty of "complete candor" by issuing imcomplete and misleading proxy materials. By defendants' own admission, Trans Union's January 19, 1981 Proxy Statement was inadequate. (Supplement to Proxy Statement, p. 1.) Due to the efforts of plaintiffs' counsel, Trans Union's January 27 Supplemental Proxy attempted to cure some of the disclosure defects. (Supplement to Proxy Statement, p. 2). (Note) But not all. At trial, plaintiffs

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Note: The plaintiffs' efforts have already been successful in that the defendants were made to recognize the total inadequacy of the original proxy statement.

will show that the February 10 Trans Union's stockholders vote was procured by defective proxy materials which withheld many germane facts.

What follows is a list of some of those facts and why they were germane to the Merger vote.

(1) <u>The Proxy Material Projected Income, But Not Cash Flow.</u>

Mr. Van Gorkom testified: "Public companies are judged almost entirely on their earnings. But the great strength of our company is its cash flow." (Mr. Van Gorkom p. 61.)

Trans Union's proxy materials failed to inform stockholders of the Company's enormous cash flow and the unprecedented and ever-increasing cash flow projected in Trans Union's July 1980 business plan. This omission is compounded by Trans Union's emphasis on net income and projected net income in the proxy materials, although, Trans Union's own management admitted income figures do not reflect the inherent value of Trans Union's stock. (Of course, the Pritzkers had been given full access to Trans Union's financial affairs and thus were fully aware of the enormous cash flow.

On July 17, 1980, Trans Union's Senior Vice President - Controller, Carl W. Peterson, submitted to the Trans Union Board of Directors the Trans Union Five-Year Forecast for the years 1981-1985 (the "Forecast"). The Forecast projected steadily increasing net income from 1981 to 1985, culminating

in projected net income in 1985 of $153,000,000 (the Forecast, p. 2).

In addition, the Forecast projected cash flow of $963,100,000 after dividends and debt repayment, of which $712,800,000 would be available for operations and with the remaining $250,300,000 available as <u>unused</u> cash. The Forecast concludes that there are four ways to utilize the unused cash: (a) repurchase stock from stockholders; (b) increase dividends to stockholders; (c) undertake a major acquisition program; or (d) pursue some combination of the above.

At the end of the Forecast, the Trans Union Board of Directors is told that the Company remains "an engine of cash", that 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" and that the Company has the financial capacity to better serve its stockholders than ever before.

The January 27, 1981 defendants finally amended and supplemented Trans Union's earlier proxy material to disclose that the Forecast contained projections which indicated that Trans Union's net income might increase to approximately $153,000,000 in 1985. However, Stockholders were <u>not</u> told of the more important projection: that Trans Union would generate the enormous cash flow figures set out above. Neither were Stockholders told of corporate strategies available to expand Trans Union and increase returns to

stockholders. The only cash flow information contained in the Proxy Materials was the historical Source and Use of Funds Statement found at page 39. Stockholders were not informed of the benefit Trans Union and its stockholders could derive from the projected $250,000,000 cash surplus Trans Union would generate.

Conspicuously absent is any disclosure to stockholders of the projected cash flow which is the real strength of the entity the stockholders are being asked to sell. The duty of "complete candor" requires that the stockholders be given the entire story, not merely imcomplete information. By excluding from the proxy statement the projected cash flow, stockholders are deprived of the opportunity to know that their company is on the threshold of (a) greater liquidity, (b) greater opportunity to accept new investment opportunities, and (c) greater chance to receive greater dividend distributions than at any time in the Company's entire history.

Defendants own expert, Arthur H. Rosenbloom of Standard Research Consultants, confirmed the materiality of cash flow in his deposition. In his view, price/cash flow multiplies were the best evidence of the value of Trans Union's principal business, rail car leasing:

> "A. The price/cash flow multiple examines the cash flow generated from continuing operations versus the price of the stock of that particular company at or around the valuation date.

Q. And that multiple is characterized as the best evidence of value?

A. For rail car leasing.

Q. Would you tell me how you determine that that was the best evidence of value for rail car leasing?

A. Our examination of Trans Union's rail car leasing operations indicated that <u>a material portion of its value related to the cash flow it was able to generate</u> and we believed that in order to give appropriate recognition to that cash flow compenent, that it would be appropriate to use a price/cash flow multiple.

Q. So that there was a judgment that <u>so far as rail car leasing was concerned, the price/cash flow multiple was the best indication of value</u>.

A. Yes.

Q. And therefore you would use that in determining the evidence of value of the rail car leasing division of TU?

A. That's correct.

Q. So far as earnings was concerned?

A. Yes."

(September 9, 1981 Rosenbloom Dep., at p. 116, 117). (Emphasis added).

Such highly germane cash flow information was not presented to Trans Union's stockholders.

Trans Union's Board of Directors had before it two critically important measurements of projected economic performance for Trans Union. Stockholders were entitled to the benefit of <u>both</u> measurements in order to cast an informed vote on the Pritzker proposal. By disclosing only projected

net income and not revealing projected cash flow, defendants breached their duty of complete candor, particularly when Trans Union's senior executives consistently recognized that the real economic strength of Trans Union was in its ability to generate enormous cash flow.

(2) <u>The Proxy Materials Did Not Inform Trans Union's Stockholders of Available Alternatives</u>.

Trans Union's Proxy Materials were silent as to alternatives available to stockholders if the Merger were voted down. Stockholders were asked to approve the $55 Merger price without knowing that the Company would have unused cash built up by 1985, which could have been used in several ways to better serve their economic interests.

If the Merger had been voted down, Trans Union's enormous projected cash flow could have been used to take advantage of many available alternatives. One alternative (maximizing the payout of earnings to stockholders) which would have been doubly attractive to stockholders. It would have: (1) increased dividends, and (2) had a favorable impact on the stock price of Trans Union.

Trans Union failed to advise its stockholders of the alternatives available to help stockholders realize the inherent value of their shares. These very alternatives were recognized as available in the Company's own July 1980 business plan, but never were disclosed to the stockholders. Stockholders are entitled to know all prospects and

alternatives available to Company rather than being presented with a cash-out merger on a take or leave it basis as if it were the only alternative open to the Company. Tanzer v. Haynie, 405 F. Supp. 650, 656 (S.D.N.Y. 1976).

(3) The Proxy Materials Failed Adequately to Disclose the Impediments to Other Offers Created by the Improvident Pritzker Deal.

Defendants' materials were materially misleading in failing to describe adequately and accurately the impediments which other potential purchasers faced in competing with the Pritzker merger contract. Many of those impediments are discussed earlier in this Memorandum. It was a dereliction of their duty for Trans Union's directors to permit those impediments. They are doubly culpable for failing to disclose them to the Trans Union stockholders.

Stockholders also were misled by the recitation of the engagement of Salomon Brothers, the solicitation time provided and Salomon's claim to have contacted 100 companies without the receipt of a single firm offer. The majority of the contacts were public companies which could not undertake such a transaction in the limited time provided. Neither was the impact on competitive bids of 1,000,000 extra Trans Union shares in the hands of the Pritzkers disclosed. Such lack of complete candor about the conditions imposed on any higher bidder precluded an informed stockholder decision on the Merger.

(4) <u>The Proxy Materials Gave Misleading Tax Information.</u>

In a December 5, 1980 memorandum to Mr. Van Gorkom, Mr. D.B. Romans, Trans Union's Chief Financial Officer, demonstrated to Trans Union's CEO that the notion that its rail car leasing business lacked sufficient taxable income to utilize its investment tax credits was incorrect. Nevertheless, Trans Union's Supplemental Proxy Materials told the stockholders that the Company's taxable income was insufficient for it to obtain optimum benefit from the utilization of such "tax benefits". In the face of Mr. Roman's Memorandum such a representation was incorrect at the very least, "complete candor" required that Trans Union's stockholders be told of their Chief Financial officer's determination that the rail car leasing business had more than covered its taxable income requirements. Specifically the Supplemental Proxy Materials stated that the rail car leasing business constituted Trans Union's principal operations and was responsible for the generation of the investment tax credits and other "tax benefits" inherent therein and then went on to include the bald statment that "... the Company's taxable income has been insufficient for it to obtain optimum benefit from the utilization of such 'tax benefits'". The foregoing was misleading because it failed to inform the stockholders that the leasing of railroad tank cars, had more than enough taxable income to absorb available tax credits and

other benefits. Stockholders were entitled to know what Mr. Romans told Mr. Van Gorkom: "Shortfalls in taxable income have not come from the basic leasing business, but form other diversifications."

The Proxy Materials also failed to advise Trans Union's stockholders of the tax advantages that would acrue to the offshore Pritzker Trusts as the result of the sale of the one million shares purchased at $38 per share. (Note). Neither were they informed of the full value of the tax benefits then available to Trans Union and its public stockholders but transferred to Pritzker interests upon consummation of the Merger.

(5) Trans Union's Proxy Materials Failed to Provide "Due Notice".

8 Del.C. § 251(c) requires that "due notice" of the time, place and purpose of any meeting to vote on a merger must be mailed to each stockholder "at least 20 days prior to the date of the meeting". As shown by its own date, Trans Union's January 27 Supplemental Proxy Statement only gave at most 15 days notice of facts manifestly in existence and known to the defendants at the time the original January 21 Proxy Statement was drawn up, reviewed and mailed.

Note: They also were not told of the valuable registration rights given to the Pritzker interests in connection with their purchase of the one mllion shares.

The Supplement was not merely an update. It disclosed, for the first time, material events which had occurred <u>prior</u> to January 20, 1981, and purported (as if frankly admitted to) correct misleading statements in the original Proxy Statement. A few examples:

<u>Proxy Statement</u>	<u>Supplement</u>
Advised stockholders that in September 1980 Trans Union a Pritzker entity entered serious discussions with respect to the proposed merger.	Disclosed that Van Gorkom approached a Pritzker and entity to investigate into Pritzker interest in the the proposed merger.
Disclosed only that the Pritzker entity had agreed enter into a $55 per share cash merger subject to to financing.	Disclosed that Van Gorkom suggested the $55 per to share price in part on the basis that, (in addition an equity contribution,) the Pritzker entity could obtain financing (to be repaid out of Trans Union's cash flow) which would justify the payment of the $55 price.
Silent.	Disclosed that prior to the September 20, 1980 meeting of the Trans Union Board of Directors, Van Gorkom met with senior management of Trans Union to advise them of the Pritzker merger proposal, and that a that meeting, several members of senior management, including Mr. Donald Romans, Executive Vice-President and Chief Financial Officer, indicated concern as to whether the $55 price was in the best interest of stockholders. <u>(Did not disclose the "palace revolt" lead by Mr. Kruizenga that lead to the</u>

	<u>Supplemental Agreement and the retention of Salomon Brothers.)</u>
Silent	Disclosed that at the September 20, 1980 meeting of the Board of Directors of Trans Union, Romans could not say that $55 per share was unfair, and that he had prepared a preliminary report which reflected the value of Trans Union in the range of $55 to $65 per share.
Informed stockholders that the Trans Union Board of Directors unanimously recommended the Pritzker proposal.	After the September 20, 1980 meeting of the Trans Union Board of Directors, Mr. Bonser, Director and Executive Vice-President of Trans Union, stated that he did not vote with respect to the merger.
Silent.	Disclosed that Thomas P. O'Boyle, Director and Senior Vice-President Administration of Trans Union, did not attend the September 20, 1980 meeting.
Silent.	Disclosed that following the execution of the Pritzker agreement, Kohlberg, Kravis, Roberts & Co. proposed to acquire TU for $60 per share.
Silent.	Disclosed that in mid-January 1981, General Electric Company ("GE") indicated to Trans Union that its subsidiary, General Electric Credit Corporation ("GECC") was interested in acquiring Trans Union in a transaction which would allow stockholders to choose be-

> tween receiving $57.50 per share for their stock or exchanging their Trans Union stock for GE stock on a nontaxable basis. The GECC proposal was conditioned upon termination of the Pritzker proposal. The Pritzkers rejected a request that their offer be terminated. The GECC offer will not be made because, in part, of GECC's unwillingness to become involved in a bidding contest for Trans Union."

Under the specific statutory requirements of §251(c), no stockholder meeting or vote on the merger should have taken place until a full 20 days after the mailing of the Supplemental Proxy.

Thus the stockholder vote in favor of the Merger in no way insulates the defendants from liability in this action and should be treated as a nullity.

CONCLUSION

The trial record will establish that the defendants have violated their duty to Trans Union's stockholders:

(a) The defendant directors failed to investigate and consider all aspects of the cash-out merger;

(b) The defendants failed to meet the standard of complete candor in dealing with the stockholders of Trans Union;

(c) The original Proxy Statement was incomplete, false and misleading. The Supplemental Proxy Statement was untimely and was also incomplete, false and misleading.

A judgment of liability as to all defendants should be entered by the Court.

PRICKETT, JONES, ELLIOTT, KRISTOL
& SCHNEE

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