IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| ALDEN SMITH and JOHN W. GOSSELIN,<br><br>Plaintiffs-Below, Appellants,<br><br>v.<br><br>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,<br><br>Defendants-Below, Appellees. | ) | No. 255, 1982 |

PLAINTIFFS' REPLY BRIEF

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

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## NATURE AND STAGE OF THE PROCEEDINGS

The Plaintiffs' Opening Brief correctly states the nature and stage of the proceedings. (Note)

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

Pages of the Plaintiffs' Opening Brief will be referred to, thus: "(PB 20)". Pages of Defendants' Answering Brief will be referred to, thus: "(DB 20)". Pages of the Plaintiffs' Appendix are referred to, thus: "(A-2)". Pages of the Defendants' Appendix will be referred to, thus: "(B-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.

In the last sentence of the footnote on page 52 of Plaintiffs' Opening Brief, the word "no" between the words "was" and "similar" was omitted. Thus, the sentence should read: "In view of the celerity and secrecy of Mr. VanGorkom there was <u>no</u> similar opportunity ...".

## SUMMARY OF ARGUMENT

### A. Plaintiffs' Response to Defendants' Summary of Argument

Defendants' summary:

> "1. This is a case in which plaintiffs challenged the exercise of business judgment by an independent Board of Directors. There were no allegations and no proof of fraud, bad faith, or self-dealing by the directors."

Plaintiffs' Response: Agreed.

Defendants' summary:

> "2. The offer by the Pritzkers to acquire by merger all of the stock of Trans Union Corporation at a price of $55 per share was first presented to the Company's Board of Directors on September 20, 1981. After the initial consideration of the merger proposal on September 20, 1980, the Board considered certain aspects of the proposal again on October 8th. On January 26, 1981, the Board again reviewed the entire history of the proposal. During three of the four months that the proposal was under consideration by the Board, a better offer was sought by Salomon Brothers and by a management group that wanted to obtain operating control of the Company. Salomon Brothers contacted more than 150 potential purchasers, but no other offer was ever received. Having tested the adequacy of the Pritzkers' offer in the marketplace and having reviewed once again all relevant factors, on January 26, 1981, the directors voted unanimously to recommend approval of the proposed merger to Trans Union's stockholders."

Plaintiffs' Response: The offer by the Pritzkers was orally presented without any advance notice to the company's Board of Directors at a special Saturday meeting on September 20, 1981, on a take-it-or-leave-it basis. Without consultation or reviewing any documents (including the merger agreement) in two hours, the Board voted to authorize the signing of a definitive agreement with the Pritzkers that required the Board, *inter alia*, to recommend the proposal to the stockholders of Trans Union, including the $55.00 price. The Board did not consider (1) the alternatives, (2) the adequacy of the $55.00 price, and (3) bound Trans Union to a contract that did not permit Trans Union to solicit other bids. In October, the Board did not consider the Pritzkers' contract again: all it did was to authorize the President, Mr. VanGorkom, to agree to amendments that belatedly permitted Trans Union to solicit other bids. The presence of the definitive merger agreement with the Pritzkers and the lead which the Pritzkers had obtained effectively precluded any other offers for Trans Union. On January 26, 1981, this suit having been filed, the Board went through a cosmetic ritual that was designed to make it appear to the Court that the Board had reconsidered the Pritzker merger. TU was, however, contractually bound to recommend the merger, including the $55.00 price, to the stockholders.

Defendants' summary:

> "3. On February 10, 1981, Trans Union's stockholders, no one of whom owned as much as 5% of the Company's stock, met to decide whether it was in their best interest to approve the proposed merger and accept the cash offer for their stock that represented a per share premium of $17.75, or almost 48%, over the last closing price before the announcement of the merger proposal; a per share premium of $21.12, or more than 62%, over the average of the high and low prices at which the stock traded during the nine-month period prior to the announcement of the merger; and an aggregate premium over market of more than $222,000,000 to the holders of Trans Union's 12,512,956 shares. The stockholders voted overwhelmingly in favor of accepting the merger proposal. That approval renders the merger transaction immune from minority stockholder attack. Also significant is the fact that no stockholder filed a petition for appraisal pursuant to 8 Del.C. §262."

Plaintiffs' Response: The Proxy Statement issued January 19, 1981, failed to include (as the Supplementary Proxy concedes) many "material" facts. The Supplementary Proxy Statement issued January 26, 1981, belatedly contained some, but not all, material facts which were known at the time the original Proxy Statement was published. The omissions and misstatements to the stockholders in the Proxy Statement vitiates the stockholders' vote for the merger since the stockholders were not timely or fully informed of material facts. Furthermore, 10,537 out of 12,844 shareholders owning 12,774,404 shares out of a total of 13,357,758 shares are members of the plaintiff class.

Defendants' summary:

"4. The business judgment rule, which was properly applied by the Chancellor, allows directors wide discretion in the matter of valuation and affords room for honest differences of opinion. In order to prevail, plaintiffs had the heavy burden of proving that the merger price was so grossly inadequate as to display itself as a badge of fraud. That is a burden which plaintiffs have not met."

Plaintiffs' Response: The business judgment exception is not applicable since the record shows that the directors did not take the time or go to the effort to inform themselves of the most elementary facts before voting to approve the merger. Since the business judgment exception is not applicable, the plaintiffs did not have to prove gross inadequacy of price but rather that the price in itself was inadequate and unfair.

Defendants' summary:

"5. Tacitly conceding that he could not succeed in an attack upon the business judgment of the directors or the judgment of the overwhelming majority of the stockholders, Smith amended his complaint on the eve of the preliminary injunction hearing by adding an attack on the adequacy of the Proxy Statement. However, at trial plaintiffs utterly failed to show that the Proxy Statement, either standing alone or as supplemented after the January 26, 1981 Board meeting, contained any misstatements or omissions of facts that would have been viewed by a reasonable investor as having significantly altered the total mix of information made available to the stockholders."

Plaintiffs' Response: The plaintiffs' original complaint was filed December 19, 1980. The original Proxy Statement was issued January 19, 1981. Thus, the original complaint could only then be amended at that time to include the fact that the Proxy Statement was not only incomplete but was deceptive and misleading. Frankly conceding that known "material" facts had been entirely omitted from their original Proxy Statement, the defendants belatedly issued, on January 26, 1981, a Supplementary (and also incomplete) Proxy Statement at a time so close to the meeting that many of the stockholders never received it before the meeting and none of the stockholders was given the statutorily required notice.

B. Plaintiffs' Response to Defendants' Counterstatement of Facts

The plaintiffs' Statement of the Relevant Facts is complete and will not be repeated. However, certain comments on the defendants' Counterstatement of Facts must be made.

The defendants say (DB 10):

> "One possible solution was for Trans Union to make a major acquisition that would generate $150 million additional taxable income, which VanGorkom estimated would be sufficient to enable the Company to take full advantage of accelerated depreciation and investment tax credits (A 1055)."

The impression given is that Mr. VanGorkom or the management or the Board of Trans Union had made an in-depth study of that possible solution. There is nothing in the record to suggest that the management, much less the Board, ever considered the possibility of making a major acquisition (or a significant number of smaller acquisitions). Defendants' Five-Year Forecast did suggest a program of acquisitions be considered in the next "several" years (A-18821). (Note)

The defendants say (DB 11):

> "During a discussion at the August 27 management meeting of the possibility of selling Trans Union, the Chief Financial Officer, Donald Romans, stated that he had made some preliminary calculations aimed at determining an appropriate selling price (A 1067-68)."

Contrary to what the defendants seek to suggest, there was no formal (or even informal) management meeting at which the "<u>possibility of selling</u>

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Note: As the plaintiffs' original Statement of Facts mades clear (PB 6-8), there were a number of different solutions available to Trans Union but none was ever considered by the management or by the Board, but all the Board did was to meet briefly on a Saturday afternoon in September and quickly, without in-depth consideration, adopt the take-it-or-leave-it proposal which Mr. VanGorkom presented on behalf of Mr. Pritzker.

Trans Union" was seriously studied or considered. The August 27th meeting was at best a casual informal discussion among some members of management (A-1053; 1068; 2327). While Mr. Romans did state that his department had made some preliminary calculations of the price for the sale of 100% of Trans Union, the calculations that he made were never presented to management nor were they presented to the Board at the meeting nor were they produced at the trial (A-45). In addition, in the original Proxy Statement, it was not disclosed that Mr. Romans had made calculations that showed a price range of between $55.00 to $65.00 (A-1067-1068).

The defendants say (DB 12):

> "VanGorkom first weighed the merits and likelihood of being acquired by a public company as opposed to a private purchaser (ibid.)."

Mr. VanGorkom "claimed" at trial that he had first considered the possibility of Trans Union being acquired by a public company (A-1076-1077). However, these were purely private "thoughts": he never took any concrete steps by which to determine whether, if Trans Union were to be acquired, it would be in the stockholders' best interests to be acquired by a public company (i.e., a company that could offer a stock-for-stock deal and thus minimize and avoid capital gains) before precipitously proposing a plan, which Mr. Pritzker snapped up, to buy TU at $55.00. (Note)

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Note: In fact, Mr. VanGorkom testified that GE, a public company, "had the perfect answer to Trans Union's problem" in view of their ability to absorb TU investment tax credit write-off (A-1165). If GE had the "perfect answer", then Mr. VanGorkom could have and should have explored the possibility of TU's being acquired by GE before going privately to Mr. Pritzker and showing him how to buy TU at $55.00, using TU's cash flow to pay for 100% of the TU stock.

The defendants say (DB 12):

> "Moreover, there were certain advantages to exploring, on a preliminary basis, the possibility of the sale of Trans Union to a private company before exploring sale to a public company."

Mr. VanGorkom did not explore "on a preliminary basis" the "possibility" of the sale of Trans Union to a private company: Mr. VanGorkom went straight to Mr. Pritzker and directly proposed that Mr. Pritzker buy all of the stock of TU at $55.00 per share. Mr. VanGorkom did not explore "on a preliminary basis" at all: he presented Mr. Pritzker with a definite plan on how to do it (A-1299): "What I said to him is 'If you could pay $55 for this company, here is a way I think it can be financed'."

Along the same lines, the defendants say (DB 13):

> "Van Gorkom was confident that discussing a possible sale of Trans Union with Pritzker would be, at the very least, informative preparation for discussions with the owners or management of other potential purchasers (A 1083, 1085)."

Mr. Van Gorkom did not discuss a "possible sale" with Mr. Pritzker. As the record plainly shows, he suggested to Mr. Pritzker that Mr. Pritzker present a merger at the very price that he, Mr. VanGorkom, had himself subjectively decided was the proper price -- that is, the $55.00 a share that Mr. VanGorkom had decided he would accept for his shares. (Note)

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Note: In this connection, the defendants make no mention anywhere in their lengthy brief of the fact that the $55.00 price was solely the result of the subjective determination of Mr. VanGorkom as to what he would take for his own stock. It is a fact that Mr. VanGorkom owned a substantial number of shares of the stock (as well as options). Thus, he had an economic interest in receiving the maximum price for the sale of TU. But the fact that Mr. VanGorkom at the close of his career decided that his own individual interests would be best served by a sale of his shares at $55.00 does not in any way prove that (a) $55.00 was a fair price or (b) that $55.00 in cash was in the best interests of all of the stockholders (c) especially the many stockholders who were forced to pay capital gains forthwith instead of enjoying a tax-free exchange in a stock-for-stock deal. In other words, the fact that Mr. VanGorkom himself was foolishly willing to take far less than his TU stock was actually worth in a 100% transfer of control does not insulate him from answering for his lack of requisite care as to TU's stockholders for whom he was a corporate fiduciary.

The defendants say (DB 13):

> "In preparation for a possible meeting with Pritzker, VanGorkom 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 (A 1087-88)."

Again, the defendants seek to spread the responsibility for what Mr. VanGorkom actually engineered single-handedly by giving the impression that Mr. Peterson made some of the assumptions and determinations. As pointed out in the Plaintiffs' Opening Brief and as confirmed by the record, all of the assumptions and determinations were made by Mr. VanGorkom alone (A-44). All that Mr. Peterson did was to do the mathematical computations for Mr. VanGorkom (A-1174).

The defendants say (DB 14):

> "VanGorkom then reviewed Peterson's calculations with Pritzker and indicated that he thought $55 per share would be a fair price for Trans Union's stock (A 1093; B 1331, 1336). Pritzker indicated that the price looked high to him and inquired as to whether VanGorkom would consider $50 per share. VanGorkom indicated that he would not (A 1094-95; B 1311)."

There is a contradiction in the testimony between Mr. VanGorkom and Mr. Pritzker. Mr. VanGorkom testified at trial that the only figure that was ever mentioned between them was $55.00 (A-1299-1300). Mr. Pritzker claims that he inquired as to whether Mr.VanGorkom would consider $50.00 per share (B-1311). However, that "inquiry" (if it was in fact made) was quickly brushed aside and Mr. VanGorkom's subjective determination of a $55.00 price was speedily agreed to by Mr. Pritzker (who obviously knew a good thing). Thus, there never was any negotiation whatsoever on the all important question -- the per share price for 100% of TU.

In a footnote, the defendants say (DB 14):

> "Plaintiffs incorrectly state that 'by September 14, 1980, Mr. VanGorkom had decided (1) against approaching General Electric' (PB 9). In fact, GE was not in the picture until November, 1980, its interest having been sparked by Pritzker's offer and Salomon Brothers' search. See pp. 35-39, _infra_."

The fact of the matter is that Mr. VanGorkom had in fact decided not to (and in fact did not) approach any public company, including GE, at the time that he improvidently went on Sunday, September 13, 1980, to see Mr. Pritzker privately at his apartment to propose that Mr. Pritzker buy TU at $55.00 a share. (Note)

The defendants say (DB 14):

> "Pritzker also questioned the concept that, were an offer made, Trans Union would nonetheless be free to accept a better offer. He said he would not want to be a 'stalking horse' just to permit a potential bidding contest (B 1310). Pritzker advised VanGorkom that the only way he could see the Pritzkers making an offer under the conditions VanGorkom insisted upon would be if Trans Union would permit the Pritzkers to buy 1,750,000 shares at the market price, which at that time was about $37 per share so that, if someone made a higher bid, the Pritzkers would at least have some compensation for having issued what amounted to a 'put' to Trans Union (B 1312).

The evidence is that the Pritzkers' demand for the collateral right to buy 1,750,000 shares at market was made some time during the frenetic week between the initial private meeting of Sunday, September 13, 1980, and the Saturday, September 20 meeting at which the Board accepted the Pritzkers' take-it-or-leave-it proposition (including the right to

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Note: Though Mr. VanGorkom stated at trial that GE had the "perfect answer" to Trans Union's "problem" (A-1165), Mr. VanGorkom did not approach GE or any other public company, choosing rather to go to Mr. Pritzker and show Mr. Pritzker that he could buy TU for $55.00 per share using TU's own immense cash flow to pay for his purchases. GE was in fact belatedly invited to bid on TU in November 1980 but by then it was too late. The Pritzkers were well along toward the successful consummation of the transaction (all their financing was in place and they had cleared Hart-Scott-Rodino). GE ultimately backed off making a better offer (including a stock-for-stock exchange) in part because they did not want to get in a bidding war with the Pritzkers (A-1464-1469).

purchase a million shares at market) (A-1322-1324). (Note)

The defendants say (DB 16):

> "On Friday, September 19, attorneys for the Pritzkers and Trans Union began drafting merger documents (A 1101-02)."

Actually, the Pritzkers had their merger expert, Howard Handelsman, Esquire, begin drafting the merger documents some time before Friday, September 19, 1980 (A-1133-34). However, it was only on Friday, September 19, 1980, that Mr. VanGorkom retained James Brennan, Esquire and gave Mr. Brennan orally his understanding of the "deal" (A-1331). The merger documents were not the product of a joint drafting effort: the merger documents were drafted by the Pritzkers' attorney.

The defendants say (DB 20-21):

> "Armed with this wealth of business experience, complete and contemporary information about Trans Union, and lengthy service as directors of the Company, the Board met on September 20, 1980 to consider the Pritzkers' merger proposal."

No matter how elaborately the defendants recite their own corporate vitae and connections and no matter how the defendants "hoke" up the documentary information that the Board had regularly received in the past, the plain fact of the matter is that the whole Board (and indeed management) was not only deliberately kept entirely in the dark about the Pritzker proposal until it was sprung on them at 12:00 Noon on

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Note: The defendants also say (DB 16):

> "In those negotiations, VanGorkom sought to increase the price for the stock and to reduce the number of shares to be issued (A 1103-05; B 1359-60)."

There is absolutely nothing in the record to show that Mr. VanGorkom "sought to increase the price of the stock" to be issued to Pritzker. On the contrary, it never occurred to Mr. VanGorkom to demand a higher than market price for the million shares that were sold to Mr. Pritzker (A-1324).

Saturday, September 20, 1980, but none of them was furnished with so much as a single scrap of written information at the meeting itself. Not one out of all of those supposedly outstanding corporate giants ever deigned to go to the bother on that Saturday in September to read the merger documents. The foregoing even includes Mr. VanGorkom himself (A-1344-1346).

The defendants say (DB 21):

> "On the morning of September 20, 1980, VanGorkom met with the senior executives of Trans Union, including the 'inside' directors (except O'Boyle, who was hospitalized) (A 1107-1112). At that meeting, the Pritzker offer was discussed 'at great length' (A 1115)."

TU senior management was summoned to a meeting at 11:00 A.M. and the directors were called for a 12:00 Noon meeting. Thus, the transaction was discussed at the management meeting at the very most for only one hour. Thus, in view of the fact that the matter at issue was a $720,000,000 transaction, it is an exaggeration for defendants to suggest that it was discussed at "great length". (Note)

The defendants state almost verbatim that Mr. VanGorkom told the TU Board at the September 20, 1980 meeting (DB 20):

> "At the Board meeting Van Gorkom reviewed all aspects of the proposed transaction and repeated the explanation of the Pritzker offer that he had earlier given to senior management (A 1115-16, 1350; B 1522-23, 1424, 1447-48). The terms of the Pritzker offer, as explained by VanGorkom, were: an offer to pay $55 per share in cash for all outstanding shares of Trans Union stock; the offer was subject to the Pritzkers obtaining the necessary financing by October 10, 1980; if the financing contingency were either met or waived by the Pritzkers, then Trans Union was required to sell, and GL (or a Pritzker designee) was required to purchase, one million newly issued shares of Trans Union stock at $38 per share; Trans Union could receive, but could not actively solicit, competing offers; only published information would be furnished by Trans Union to potential competing bidders; and the Pritzker offer had to be acted upon by Sunday evening, September 21 (A 1136; B 1109-11, 1183)."

Note: The Special Board Meeting itself lasted only about two hours -- the length of a regular Board meeting (TR 189, Johnson).

The foregoing brief oral presentation by Mr. VanGorkom was all the information that the Board was ever given on the Pritzker offer. They asked for nothing more. Not even a summary of the terms of the merger was made available to them, nor did any of the directors (including Mr. VanGorkom) ever take the time or make the effort to read the actual merger documents. The Board did not receive any inside or outside advice on the fair value of the Trans Union stock in a 100% transfer of control. Nor were the directors told that the $55.00 price was solely the subjective determination of Mr. VanGorkom of what he would take for his own stock. The directors were not told that Mr. VanGorkom had gone all on his own to Mr. Pritzker and outlined for Mr. Pritzker how Mr. Pritzker could, for only $55.00, using TU's own cash flow, pay for the stock of the TU shareholders. (TR 823-824, Johnson)

The defendants say (DB 23):

> "The deadline imposed by the Pritzkers for action on their offer did not inhibit the exercise of informed business judgment by the directors, all of whom were very familiar with the financial condition of and future prospects for the Company (B 1119-20, 1217). The deadline was an express condition of the Pritzkers' offer, and the directors believed that the offer would be withdrawn if not acted upon (A 1117; B 1119-20, 1218, 1423, 1470-71, 1500)."

The deadline that the Pritzkers imposed was not Saturday, September 20, 1980, but rather Sunday, September 21, 1980. Thus, the defendants were given 36 hours to consider the matter. The TU Board did not even take any substantial part of the time that was in fact available to them even under the Pritzkers' "take-it-or-leave-it" deadline. They held a brief two-hour meeting and adjourned sine die. (Note)

The defendants say (DB 23):

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Note: TU's Five-Year Forecast had specifically suggested a number of alternatives and made it clear that (A-1882) "... we have sufficient time to fully develop our course of action ... To be successful, a great deal of effort should be expended over the next several years in defining the direction of such a program."

> "The condition prohibiting active solicitation of competing offers was not deemed to be significant, because the directors understood that the entire financial community would know that Trans Union was for sale upon the announcement of the Pritzker offer, and anyone desiring to make a better offer was free to do so (A 1134-35; B 1259, 1450, 1544-45)."

The overall justification by the defendants for the approval of the Pritzker merger was based on the claim that the proposed sale of TU was subject to a ninety-day free market determination. Yet the defendants here admit that they voted to accept a merger contract that specifically prohibited TU from soliciting any better offers. They also authorized a press release that stated that TU had entered into "definitive agreements" with the Pritzkers (PX 30; A-1381) (making it impossible for the directors to "understand" that the financial community would know TU was for sale, as opposed to having been sold).

The defendants continue (DB 23-24):

> "In any event, that condition became academic when it was removed three weeks later on October 8, 1980 and Trans Union issued a press release stating that it was soliciting other bids (A 1146-47; B 299)."

The "condition" to which the Board had agreed did not become "academic". If nothing else, it shows that the defendants originally agreed to a merger contract that "locked" TU in by precluding TU from taking any active steps to obtain a more favorable merger for its shareholders. Furthermore, as a practical matter, in the intervening three-week period, the Pritzkers had solidified their hold on TU.

The defendants say (DB 24):

> "Having heard VanGorkom's explanation of the Pritzkers' offer, and Brennan's explanation of the merger documents, and having <u>fully discussed</u> the matter, the directors did insist upon two interrelated modifications to the Pritzker proposal (A 1132-33, 1365-66; B 1114)." (Note)

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Note: The defendants continue to try to gloss over the fact that in spite of plaintiffs' formal request for production of the original form of the document, the document that is supposed to reflect the state of the contract before the Board's modification was never produced either in response to plaintiffs' request for production or at trial (PB 48; A-1371).

The record is clear that the merger terms were not "fully discussed" (see PB 19-25). Furthermore, the defendants' claim that the merger documents were amended in order to reflect TU's alleged right to accept a better offer simply will not withstand judicial scrutiny. The alleged language that the defendants claim was supposed to have been included in order to "clarify" the right which TU had all along to accept a better offer is as follows:

> "Provided however that GL and NTC acknowledge that the Board of Directors of TU may have a competing fiduciary obligation to the stockholders under certain circumstances." (Note)

The defendants say (DB 25):

> "Thus, the primary issue considered by the directors at the September 20, 1980 special meeting was the fairness of the offered price."

First, it was never disclosed to the directors (1) that the source of the $55.00 price was Mr. VanGorkom's own subjective determination of what he would take or (2) that $55.00 was not a negotiated price. Second, the directors did not have any expert information, let alone advice, on what the proper premium should be in the case of the transfer of 100% of control. Third, contrary to what the defendants now assert, Mr. VanGorkom assured the Board that they did not have to make an actual determination of fairness: there would be a ninety-day market test (A-1358-1360).

The defendants say (DB 26):

> "The directors recognized that the offered price would be tested in the market for at least three months (A 1117-18, 1359-60; B 1172, 1208)."

The actual rationale of the directors was not that the $55.00 price was

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Note: The plaintiffs suggest that if any such right was in fact retained by TU, any competent associate could have drafted a clause that would have made such an important matter crystal clear (i.e., "Notwithstanding anything contained herein, TU's Board retains the right at any time at its option to terminate this Merger Agreement in order to accept an offer which in the sole opinion of TU's Board is a better offer than the offer of the Pritzkers.").

fair (since they had no basis or information on which to make such a determination). Rather, they blandly assumed that the $55.00 price would be "tested in the market for at least three months", though this was not actually possible. The Pritzkers had already obtained a firm contract that gave them a lead over all other possible bidders and made it impossible for the $55.00 price to be "tested in the market". (Note-1)

The defendants also say (DB 26):

> "Also, the directors, who knew Trans Union intimately, were in a better position than an investment banker to determine the fairness of the offered price (B 1122, 1502)."

Not one of the members of the TU Board was qualified to make the determination of what was the fair price in terms of a premium for control of the transfer of 100% of the stock of TU. (Note-2)

The defendants say (DB 35):

> "Following the October 8 Board meeting, the investment banking firm of Salomon Brothers was retained by Trans Union to search for offers better than that of the Pritzkers."

No explanation has ever been offered as to why it took a revolt of management for TU to retain an investment banker. (Note-3)

The defendants say (DB 43):

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Note-1: Indeed, even after the October 10 amendments, when GE sought to make a better offer, Mr. VanGorkom found to his dismay and horror that Mr. Pritzker had him contractually bound and would not stand aside for a better offer (A-1464).

Note-2: When TU was preparing for trial, it finally hired Standard Research Consultants which took three months to make a determination of the appropriate cashout price by elaborate calculations (A-1562, et seq.).

Note-3: In addition, when it was finally decided to seek the help of an investment banker, why was Salomon Brothers, which had a conflict of interest since it had ongoing business dealings with the Pritzkers, chosen (A-2123-2124)? It is little wonder that Salomon Brothers' efforts produced nothing and that Salomon Brothers was not involved in the KKR offer (Higgins 36-40) or in the GE negotiations.

> "VanGorkom was surprised to learn that KKR had done nothing after December 2 to pursue the financing needed to make an offer (A 1186-87)."

Mr. VanGorkom had stated clearly on December 2, 1980, his haughty opposition at the time to any KKR offer and did nothing at that time to encourage KKR (A-1427). As KKR made it clear, it is necessary to have the cooperation of management in order to make a leveraged buyout work (Kravis 16). Neither Mr. VanGorkom nor the Board did anything by way of a "sweetener" similar to the million-share sweetener that he had given to the Pritzkers to encourage the KKR offer of $60.00 per share (A-1435-1437). Of course, Mr. VanGorkom "changed his tune" after he and the Board were sued: he then tried by every means possible to get an alternate offer from GE and he himself then got back to KKR whom he had spurned so haughtily at the December 2 meeting (A-1471). It was too late by then to put the KKR offer back together (A-1471). Mr. VanGorkom's alleged "surprise" is simply another example of his failure to act reasonably on behalf of TU's shareholders.

The defendants say (DB 44):

> "The January 26 Board meeting lasted almost four hours (A 1193; B 1509)." (Note-1)

At that point, the Board was contractually bound to the Pritzkers: there was no alternative for the Board but to carry out their contractual obligation to recommend the Pritzker transaction to the stockholders, including the $55.00 price. (Note-2)

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Note-1: This four-hour meeting is in contrast to the original meeting of September 20, 1980, which did not last more than two hours (TR 789, Johnson).

Note-2: The January 26 meeting was really a "window dressing" review in an attempt to shore up the total absence of consideration at the original meeting. The meeting was generated by the fact that the plaintiffs had brought a class action suit against the directors and Mr. VanGorkom. In addition, as can plainly be seen by the Supplemental Proxy Statement that emanated from this meeting, the defendants recognized that their Original Proxy Statement concealed from the stockholders many "material" facts known at the time the Original Proxy Statement had been issued.

# ARGUMENT

The plaintiff will follow the sequence and numbering of the Defendants' Answering Brief in this Reply Brief.

## I. BECAUSE OF THEIR MANIFEST FAILURES TO EXERCISE DUE CARE, THE CASUAL APPROVAL OF THE PRITZKER MERGER BY THE DEFENDANTS DOES NOT COME WITHIN THE EXCEPTION THAT IMMUNIZES A BUSINESS JUDGMENT FROM ATTACK

### A. Where the Lower Court is Wrong on Factual Matters, This Court Will Reverse

Contrary to what the defendants say, this Court will reverse on review if the Court finds that the lower Court's opinion contains significant factual errors. (See cases cited in Plaintiffs' Opening Brief (PB 40).)

### B. The Defendants Concede That the Chancellor's Opinion Contains Misstatements of Important Factual Matters Contained in the Record (Note)

#### 1. Contrary to What the Defendants Say, the Directors Did Not Consider Alternatives Including the Possibility of the Purchase of One-Third of TU's Outstanding Stock at $50.00

The Chancellor's opinion makes it appear that the Board considered at the Saturday, September 20, 1980 special meeting alternatives to the Pritzker "take it or leave it" merger proposition (A-16). The plaintiffs repeat that the Chancellor is wrong: the Board minutes do not reflect any such consideration (A-1865). The testimony of those present

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Note: The defendants say (DB 48): "Plaintiffs' argument heading claims that the Chancellor's opinion contains six significant misstatements of fact but only five numbered points are identified in their brief." There is in fact not one but several other misstatements (as well as ambiguities) in the Chancellor's brief letter opinion of July 6, 1982. However, in the end, because of space of limitations, the plaintiffs selected only the five most important of these errors.

at the September 20, 1980 meeting confirms that there was no consideration of the alternatives (PB 18-29).

The defendants cleverly attempt to justify the Chancellor's error by pointing out that technically the Five-Year Forecast had been presented to the Board on July 24, 1980 (DB 49). In the minutes of the meeting, however, there is only one single sentence that is applicable and which states "The Board reviewed and discussed *** the Five-Year Plan Summary for 1981, 1985, copies of which were ordered filed with the Secretary of the Company." There is not even the slightest suggestion in the vast trial record that the Board actually considered the various alternatives, much less fixed on a plan or determined which alternative was the best. This is especially significant since the summary itself clearly advises the Board that (A-1882) (1) there was no emergency or crisis facing TU and (2) that "several" years' careful planning and thinking should be devoted to the matter in order to determine which of the alternatives would be best for TU and its stockholders. It should be noted that the alternatives suggested to the Board and management in the Five-Year Forecast do not include sale of the company (A-1882).

2. The Chancellor, as Defendants Concede, Was Flatly in Error as to When KKR Made a Proposal

The defendants concede that the plaintiffs were right, saying (DB 50):

> "Plaintiffs are correct that KKR did not submit a proposal in August, 1980." (Note)

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Note: The defendants are driven to suggest that the Chancellor's "confusion" may have been caused by the plaintiffs by stating in their post-trial brief "At the meeting of August 17, 1980, a KKR leveraged buyout was (A-244) suggested but rejected by Mr. VanGorkom". The foregoing is correct: but the Chancellor remains wrong on a most important holding; that KKR made an offer in August, 1980. The significance lies in the fact that the Chancellor apparently somehow justified Mr. VanGorkom's subsequent precipitous proposal of a cashout deal because he mistakenly thought there had been a KKR offer.

### 3. The Defenants Concede That All of the Assumptions, As Well As the Origins of the $55.00 Price, Were Mr. Van Gorkom's

The defendants next are forced to concede that the plaintiffs are correct that, contrary to what the lower Court stated, it was Mr. VanGorkom single-handedly who made the subjective determination of the cashout price of $55.00 and all the assumptions (DB 51-52):

> "There has never been any dispute that Peterson made his calculations based on assumptions established by VanGorkom, and the Chancellor's opinion does not state otherwise."

The defendants attempt to mask the fact that it was solely Mr. VanGorkom's subjective decision that resulted in the $55.00 price by saying that no one was "better qualified" than Mr. VanGorkom. If nothing else, a comparison of Mr. VanGorkom's (DB 52) "seat-of-the-pants" determination of the merger price with the elaborate methodology utilized by Mr. Arthur Rosenbloom of Standard Research in order to calculate the appropriate price for the transfer of 100% of control shows Mr. VanGorkom was totally unqualified to determine the proper price for transfer of 100% of the stock of TU. (Note)

### 4. The Defendants Concede That the Lower Court Was Wrong As to When the Board Learned of the Deadline

The defendants also concede that the Chancellor was wrong on when the Board learned of the deadline (A-15), but attempt to "muddy" the significance of the Chancellor's error by saying (DB 53):

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Note: The defendants also attempt to insinuate that there was an arm's length negotiation that resulted in the $55.00 price (DB 52-53). Mr. Pritzker and Mr. VanGorkom did not get their stories straight. However, the most that can be said was that Mr. Pritzker may have "floated" a $50.00 price that Mr. VanGorkom categorically brushed aside and that Mr. Pritzker did not press it, recognizing that he had a good deal which he promptly gobbled up in less than one week (DB 53).

> "We have no quarrel with plaintiffs' observation that the Board first learned of Pritzker's deadline at the meeting held on September 20, 1980 (PB 46-7). While the Chancellor's syntax might have been more precise, his finding as to when the Board first learned about the deadline (A 15) is consistent with the undisputed fact that the directors knew about Pritzker's deadline at the meeting of September 20."

The point is that the Board neither knew the deadline or indeed anything else about the Pritzker merger until the meeting itself. This important corporate matter had been deliberately concealed from all Board members (including the Executive Committee) until it was sprung on them (and management) for an immediate decision on September 20, 1980.

### 5. The Defendants Are Incorrect That the Board Made Any Determination That $55.00 Was Fair But They Did Recommend the Merger to the Trans Union Stockholders

The defendants have changed their story. At trial, the defendants essentially said that they did not have to make any determination of the adequacy of the price because there would be a ninety-day test in the market (A-1358-1359). Now, they claim they did make a determination of the price (DB 53). But there was absolutely nothing before the Board or presented to it on which it could make a decision on such a complex matter (i.e., the value of TU's shares in the context of a 100% transfer of control). There was no documentary information or advice or the opinion of the financial officers of the company (except for Mr. Romans' "off-the-cuff" statement that the range was between $55.00 to $65.00). Nor was the advice and opinion of Salomon Brothers, TU's investment advisers, available or even sought on the adequacy of $55.00. The Board did not even learn that the $55.00 price was solely the subjective determination of their near retirement Chief Executive Officer based on what he himself would personally take (TR 798, Johnson; B-1509; DB 44). On the other hand, the defendants are faced with the unpleasant fact that the merger agreement, which none of them nor Mr. VanGorkom ever read, specifically required the Board to recommend the merger, including the $55.00 price, to the stockholders and to use their best efforts to get the stockholders to vote for it (A-1940, Sec. 2.03). Mr. VanGorkom in effect assured the Board that there was no necessity of passing on the fairness of the $55.00 price since there would be a ninety-day "market test" of the price (A-1113-1114; 1358-1360).

Now the defendants are claiming that the Board did actually determine the fairness of the $55.00 price on September 20, 1980. If so, on what basis? What information did they utilize other than their own "seat-of-the-pants" reaction, similar to what Mr. VanGorkom had used as he made his subjective determination of what the price should be? Reasoned judgment is the absence of acting without obtaining the requisite facts.

C. The Failure of the Board to Take Any Steps to Inform Itself About the Pritzker Merger or Even Utilize the Available Time Precludes Their Reliance on the Business Judgment Rule

The record of what transpired at the brief meeting on Saturday, September 20, 1980, shows that the business judgment rule has no application because the defendants failed individually and collectively to take over the most rudimentary steps to inform themselves on the momentous matter they suddenly had to deal with. (Note) The defendants are relegated to relying on the unsupported general conclusions of the

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Note: *Inter alia*, (1) they failed to read the merger documents, (2) they failed to ask even the most elementary questions, (3) they failed to consider or weigh their alternatives, (4) they failed to record in their minutes two terms they claim to have conditioned their acceptance on, (5) they failed to obtain the opinion or advice of the financial officers of the company or of its investment bankers, and (6) they failed to take the time to understand the legal and practical implications of the merger agreement they voted to authorize Mr. VanGorkom to sign.

Chancellor (A-21-22) (Note) who never addressed the question at the heart of the case: did the defendants take the time or make the requisite effort such that their decision authorizing the signing of the merger agreement is within the ambit of the business judgment rule (DB 55).

The defendants in effect concede that the record of the brief meeting on Saturday, September 20, 1980, negates the possibility of holding that the defendants are protected by the business judgment rule. Therefore, they say (DB 56):

> "As detailed in the Statement of Facts, it is undisputed that Trans Union's highly qualified directors, all of whom were well-informed about the affairs and prospects of Trans Union, met on three separate occasions to consider initially whether to recommend, and subsequently to review the wisdom of their decision to recommend to Trans Union's stockholders that they vote in favor of the merger, and even directed that certain changes be made in the merger documents."

The defendants' claim that they considered the Pritzker merger three times is blatantly untrue. On September 20, 1980, the directors voted to enter into a "definitive" contractual agreement with the Pritzkers. That contract bound Trans Union. On October 8, 1980, the Board did not reconsider their original decision: all they did was to meet briefly to vote to authorize management to sign a limited amendment that (for the first time, but belatedly) gave TU the right to solicit alternate offers within a short time period. Finally, on January 26, 1981, having been sued, the Board then met and purported to review and ultimately approve their own precipitous decision of Saturday, September 20, 1980. But, on

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Note: "I therefore conclude that given the market value of Trans Union's stock, the business acumen 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 of the stock in question, that the Board of Directors of Trans Union did not act recklessly or improvidently in determining on a course of action which they believed to be in the best interests of the stockholders of Trans Union."

that date, the Board was legally powerless to do anything else: the Board was in a contractual straitjacket of their own making that absolutely required the Board (no matter what the Board had by then learned, largely through this lawsuit) to recommend the merger, including the $55.00 price, to TU's stockholders. Not only that, the Board had agreed on September 20, 1980, to use their best efforts to get TU's stockholders to vote for the Pritzker cashout merger at $55.00.

The defendants also say in a footnote (DB 56):

> "Plaintiffs' effort to focus attention on only the September 20, 1980 Board meeting is misleading, but does not alter the fact that the Board considered the merger at that as well as two other separate meetings. _Compare_, _Muschel_ _v._ _Western Union_ _Corp._, Del. Ch., 310 A.2d 904 (1973)."

While not in point for many reasons, the plaintiffs welcome a comparison between this case and the _Muschel_ case. In _Muschel_, the Board had the entire matter under consideration for about two years. In addition, in _Muschel_, the plaintiff sued to get the Board to reconsider and the Board then did reconsider its prior decision and affirmed it.

The defendants then attempt to distinguish _Gimbel_ _v._ _Signal_ _Companies_, Del. Ch., 316 A.2d 599 (1974), _aff'd_ _per_ _curiam_, Del. Supr., 316 A.2d 619 (1974). As plaintiffs pointed out in their original brief (PB 52, et seq.), in _Gimbel_, there was a wealth of information that was made available to the directors. In contrast, the TU Board had all advance information deliberately withheld from them and demanded none. In _Gimbel_, the Court of Chancery preliminarily enjoined the transaction even though the Court found that the plaintiffs seemed unlikely "... to pierce the business judgment standard". This case is a far stronger case for the plaintiffs than _Gimbel_. The TU directors here acted without any information whatsoever.

So far as Bennett v. Propp, Del. Supr., 187 A.2d 405 (1962), is concerned, all the defendants can say is (DB 58):

> "In this case, VanGorkom did not commit Trans Union to anything. He simply presented the Board with a proposal from the Pritzkers which the Board was free to reject. In this respect, plaintiffs' contention that VanGorkom created an emergency (PB 54) is ludicrous. It was Pritzker, not Van Gorkom, who demanded that a decision be made by the Board with respect to his proposal before the opening of the London Stock Exchange on Monday morning, September 21, 1980."

Mr. VanGorkom can not be recast at this time in this corporate tragedy as a simple messenger from Mr. Pritzker to the TU Board. Mr. VanGorkom single-handedly initiated and engineered the whole Pritzker proposal. Indeed, what Mr. VanGorkom presented to the Board as a proposal from Mr. Pritzker was, in fact, simply Mr. VanGorkom's own proposal which had been adopted, lock, stock and barrel, by Mr. Pritzker. Mr. Pritzker added two mandatory "kickers" which Mr. VanGorkom also agreed to incorporate and present to the TU Board: first, the "take-it-or-leave-it" deadline and, second, a million share stock purchase at market. Thus, it was Mr. VanGorkom alone who placed the TU Board in the position that it faced at noon on Saturday, September 20, 1980. (Note)

The defendants then recognize the vulnerability of their situation and therefore seek legal refuge in the approval by the stockholders, saying (DB 58):

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Note: If nothing else, this Court should not encourage management to run corporate squeeze plays on the board at the expense of the stockholders simply because the Chief Executive Officer suddenly decides in the twilight days of his career that he would like to be cashed out.

> "The fact that the shareholders overwhelmingly approved the merger 'is properly entitled to great weight.' Porges v. Vadsco Sales Corp., Del. Ch., 32 A.2d 148, 151 (1943)." (Note)

Porges supports plaintiffs rather than defendants. In Porges, the stockholders were fully informed of all material facts in a timely manner. Thus, the defendants' attempt to avoid responsibility for their conduct based on the vote of the stockholders they were to represent is misplaced: as the record clearly demonstrates, the TU plaintiffs were never informed with that degree of candor that is required even in the defendants' belated Supplementary Proxy Statement.

Finally, the defendants cite this Court's opinion in Michelson v. Duncan, Del. Supr., 407 A.2d 211, 224 (1979) (DB 58):

> "[T]he entire atmosphere is freshened and a new set of rules invoked where a formal approval has been given by a majority of independent, fully informed stockholders ... . [quoting Gottlieb v. Heyden Chemical Corp., Del. Supr., 91 A.2d 57, 59 (1952)]."

The key words are "fully informed stockholders". This Court went on to define "fully informed", saying (at pg. 220):

> "Shareholder ratification is valid only where the stockholders so ratifying are adequately informed of the consequences of their acts and the reasons therefor. The settled rule in Delaware is that 'where a majority of fully informed stockholders ratify action of even interested directors, an attack on the ratified transaction normally must fail.' (emphasis added). Gerlach v. Gillam, Del. Ch., 37 Del. Ch. 244, 139 A.2d 591 at 593 (1958).
>
> "Whether the shareholders were informed, and thus their ratification valid, turns on the fairness and completeness of the proxy materials submitted by the management to the HFC shareholders prior to the annual meeting in April, 1977. Plaintiff attacks the adequacy of that notice, which the Court below found to be complete and fair."

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Note: The defendants also cite Lewis v. Hat Corp. of America, Del. Ch., 150 A.2d 750, 753-54 (1959) (DB 58). In Lewis, it is clear that the stockholders were fully informed before ratifying the directors' act ("... proxy statement was explicit ...", pg. 753).

The Court, after discussing the alleged proxy violations, reapproved the applicable standard originally set out in Lynch v. Vickers, Del. Supr., 383 A.2d 278 (1977), saying (at pg. 222):

> "The Vice-Chancellor rejected each of plaintiff's contentions and found the proxy and accompanying resolution fully complied with the requirements set forth by this Court in Lynch v. Vickers Energy Corporation, Del. Supr., 383 A.2d 278 (1977) requiring not merely adequate but complete disclosure of all relevant matters. The Vice-Chancellor stated:
>
> > "'It is my opinion, however, that there was complete candor in the disclosure of the facts which a reasonable stockholder would consider important in making an informed decision to ratify the transactions at issue, and that defendants have met the burden of showing complete disclosure of all the germane facts. Cahall v. Lofland, Del. Ch., [12 Del. Ch. 299], 114 A. 224 (1921), aff'd Del. Supr., 118 A. 1 (1922); Lynch v. Vickers, supra. I find that the stockholders were informed of the essential facts surrounding the instant suit. They were provided with the complete text of plaintiff's complaint, and, all alleged wrongs for which ratification was sought were enumerated in detail.' 386 A.2d at 1154."

When the defendants' inadequate disclosure in this case is measured by the above standards and requirements, the defenses of stockholder ratification vanish "into thin air".

* * *

The defendants' attempt to drag their "casual" Saturday afternoon approval of the Pritzker - VanGorkom "take-it-or-leave-it" cashout merger at $55.00 into the protective safety of the business judgment rule fails. The record is too plain for contradiction that the Board never took either the available time or obtained the requisite information to make an informed judgment on the momentous matter so suddenly brought before them. Nor can the defendants escape liability by claiming that the TU stockholders ratified the defendants' improvident acts. Again, the record plainly shows that the stockholders were not fully informed. TU's original Proxy Statement omitted known material facts. The Supplementary Proxy Statement was not only legally untimely but, as a practical matter, would not reach many stockholders before the meeting. In addition, it was in itself still incomplete and misleading. The lower Court should be reversed.

D. The Defendants Concede That the Chancellor Applied the Wrong Standard in Connection With Information Applied To or Given by the Directors to the Stockholders

The defendants, in effect, concede that the Delaware standard of disclosure found in Lynch v. Vickers Energy Corp., Del. Supr., 383 A.2d 278, 281 (1978), was again not followed by the Chancellor. They can only attempt to excuse this palpable legal error by cryptically stating that the Chancellor "was not operating in a vacuum" (DB 59). (Note-1) The defendants did not even attempt to make a response to the fact that the Chancellor compounded his legal error as to disclosure by applying the erroneous standard of materiality (PB 61).

1. TU's Original and Supplementary Proxy Statements Were Deficient and Untimely

(a) The Defendants Failed to Disclose TU's Cash Flow

The defendants say (DB 60):

> "Plaintiffs complain that the proxy materials did not inform the shareholders about Trans Union's projected cash flow (PB 65)."

True; no matter what the defendants now say, it was not disclosed to the stockholders that TU's unique feature was its enormous cash flow ("an engine of cash" or "cash cow"). TU's immense cash flow was material and should have been brought to the attention of the stockholders. Galveston H. & S. A. R. Co. v. Texas, 210 U.S. 217, 226 (1908). (Note-2) Furthermore, the SEC has reversed its position: cash flow is now considered appropriate information. Codification of Financial Reporting Policies [of the SEC], 202.2 Fed.Sec.L.Rpt. (CCH) 972,962 (July 19, 1982):

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Note-1: Clearly so: the Chancellor should have been "operating" within the well stated principles of Delaware law (i.e., applying Lynch to the facts in this case).

Note-2: The defendants seek to obfuscate the point by throwing in to their brief a host of out-of-date SEC accounting minutiae.

> "One of the principal reasons given for presenting 'cash flow' is that the income measurement model currently prescribed *** does not accurately reflect the economic performance of certain types of companies, ***."

TU is such a company where the traditional income measurement model does not accurately reflect its economic performance. As such, market price, a measure strongly influenced by income performance, is likewise not reflective of the value of TU stock (Duff & Phelps Report, A-107). Everyone but the stockholders knew that TU's principal strength lay in its ability to generate cash. Clearly, the owners (i.e., the stockholders) are entitled to be told this most material fact.

(b) The Proxy Statement Did Not Advise the TU Stockholders of Other Alternatives

The defendants say (DB 62):

> "Plaintiffs also complain that the proxy materials should have advised the stockholders with respect to various alternatives to the merger. For example, plaintiffs suggest that the shareholders should have been told that one alternative considered in the Five Year Forecast was the purchase by Trans Union of one-third of its outstanding shares at $50 per share in the years 1982-1985 (PB 66). Why a shareholder would have been interested in that future and less attractive alternative (see p. 49, fn., supra) when considering a present offer of $55 per share defies imagination."

The test of disclosure is not the limits of the imagination of the defendants' attorney. What is required is full disclosure of all facts that might be material to a stockholder in determining whether to vote in favor or against the proposal. (Note) As it was, neither the one-

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Note: If TU stockholders had been told that management had one alternative which was the purchase of one-third of the shares of TU at $50.00, they might well have concluded that a present total cashout at $55.00 was an unattractive proposal especially since a future one-third buyout would allow for orderly planning by the TU stockholders whereas the $55.00 cashout mandated immediate capital gains taxes. Even more important is the fact that if $50.00 per share was an appropriate price for a minority interest (i.e., one-third of TU's stock), then $55.00 was clearly inadequate for a 100% interest.

third stock repurchase nor any other alternative was presented to the TU stockholders. Thus, the TU shareholder was given to believe that the only course open for him was to accept a $55.00 per share cashout from the Pritzkers (or be relegated to $38.00 per share market price for the foreseeable future). The management in the Five-Year Forecast presented the Board with several alternatives and combinations of alternatives but these were not disclosed to TU's shareholders (A-1882).

E. The Supplementary Proxy Statement Violated 8 Del.C. §251

The defendants' view is that 8 Del.C. §251(c) is fully satisfied if the time, place and purpose of the meeting is stated, saying (DB 64):

> "Since notice of the time, place and purpose of the meeting had been given in the original Proxy Statement, and since the original proxy materials were disseminated more than 20 days prior to the meeting, the Chancellor correctly concluded, in denying Smith's request for a preliminary injunction, that 'the proxy material furnished to the Trans Union stockholders complied with the requirements of 8 Del.C. §251(c) ...' (A 220). The Chancellor implicitly reached the same conclusion in his posttrial opinion, and this Court should affirm that conclusion."

The defendants are obviously incorrect. Lynch v. Vickers , supra. (Note)

Since the filing of the Plaintiffs' Opening Brief, Vice Chancellor Longobardi handed down, on December 6, 1980, an opinion in American Pacific v. Super Food Services, C.A. No. 7020, enjoining the holding of

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Note: The defendants' attempt to rely on Electronics Specialty Co. v. International Controls Corporation, 2nd Cir., 409 F.2d 937, 944 (1969), (DB 66), and Nicholson File Co. v. H. K. Porter, 341 F.Supp. 508, 513-512 (1972), aff'd. 1st Cir., 482 F.2d 421 (1973), is unwarranted. Both Electronics and Nicholson were federal securities cases, not arising under 8 Del.C. 251(c). These cases did not involve an untimely second proxy statement containing information well known to management. Electronics involved a withdrawal offer in connection with an over tender of shares ("Appended to the withdrawal offer were copies of the complaint in this action and Judge McClean's opinion", pg. 944). Nicholson involved a simple extension of the time for withdrawal.

a stockholders meeting scheduled for December 6, 1982. (A copy of the opinion is attached marked Exhibit "A".) The Vice Chancellor found that (pg. 5-6):

> "On November 10, 1982, Plaintiff AMPAC announced its opposition to Super Food's slate of directors and the by-law and charter amendments. On November 19, 1982, they filed suit in this Court challenging, among other things, the legality of the anti-takeover amendments under Delaware law. Thereafter, the Defendants, as if in response to the complaint, mailed to the stockholders an undated document captioned "Supplemental Information." (This was apparently mailed around November 24, 1982.) Super Food's Board noted that it might not have had authority to amend the by-laws by their new Section 7.1. They also noted an apparent error in their Proxy Statement relative to the vote necessary to enact Section 3.3 and advised stockholders that it could be adopted by a simple majority of the quorum of shares represented at the annual meeting. They did not note, however, the apparent contradiction between the supermajority requirement for the amendment of by-laws found in Section 7.1 and their statement that a majority of the quorum would suffice to amend by-law Section 3.3. Based on the affidavits of Dennis Mensch, an employee of The Carter Organization, a proxy solicitation expert, many of Super Food's stockholders will not receive this supplemental information, for whatever it is worth, in time enough to affect their votes at the annual meeting on December 7, 1982. The number of shares so affected is a staggering 43.66%."

The Vice Chancellor enjoined even the holding of the meeting (as the Chancellor should have done in this case), saying (pg. 9):

> "What is important, what is crucial is that this may be Plaintiffs only real opportunity for a proxy fight. Their right to that battle cannot be diminished by an uninformed or misguided electorate. In Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971) the Supreme Court held that advancement of a stockholder meeting date in an attempt to undermine a dissident stockholder's ability to wage a proxy contest required injunctive relief. Should we do less in this case when that right is diminished by an admittedly ill advised and inadequately informed electorate.

Similarly, in this case, the Supplementary Proxy Statement was mailed to stockholders in less than the statutorily required 20 days and at a time when many of the stockholders would never receive it before the meeting. Also, as in the American Pacific case, the Supplementary Proxy Statement remained incomplete and misleading.

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The lower Court should be reversed since it was in flat legal error in two respects as to the standard of disclosure under Lynch I, supra. The lower Court also erred in holding that the requirements of 8 Del.C. §251(c) were met by a Supplemental Proxy Statement dated January 26, 1981, for a February 10, 1981 meeting.

F. The Plaintiffs Are Entitled to Rescissionary Damages

In this section of their brief, the defendants make only the briefest reply to the Plaintiffs' Opening Brief (DB 66-69). First, they say that the Chancellor did not have to reach the question of damages since they again claim that the defendants' conduct is insulated by the business judgment rule. Second, the defendants focus on but one part of the plaintiffs' proof of damages and relying on Weinberger v. UOP, Del. Ch., 426 A.2d 433 (1981), seek to justify the lower Court's decision.

Contrary to the defendants' assertion (DB 67), the record clearly establishes that the defendants were guilty of numerous breaches of their fiduciary obligations to the TU stockholders. If nothing else, they did not take the time or effort to assemble the information available in order to make a rational business judgment. Lynch v. Vickers, Del. Supr., 429 A.2d 497 (1981), and Harmon v. Masoneilan International, Inc., Del. Supr., 442 A.2d 887 (1982), both hold that rescissionary damages are the appropriate measure in cases in which there has been a breach of fiduciary duties by corporate defendants. The defendants' reliance on Mitchell v. Highland Western Glass Co., Del. Ch., 167 A.2d 831, 833 (1933), and Cole v. National Credit Assoc., Del. Ch., 156 A. 183 (1931), and Muschel v. Western Union Corp., supra, is misplaced. While it is necessary for plaintiffs to show gross disparity of price in cases absent a breach of fiduciary duty, that principle is not applicable in cases such as the present one where the record establishes that the business judgment rule is not germane. The foregoing being so, the lower Court should have gone forward and made a determination as to what damages were appropriate under Lynch II, supra and Masoneilan, supra.

As it was, all the lower Court did, as indicated (PB 67-68), was to make some rough premium percentage calculations based on similar rough calculations found in its opinion of February 3, 1981 (A-215, 218).

In point of fact, the Chancellor, having made his own rough premium calculations, totally disregarded all of the evidence that was submitted to him for evaluation and determination on the value of the TU stock. As appears in the record (A-105-116; A-624, et seq.) and as delineated in the plaintiffs' original brief (PB 70), Milton Meigs, CFA, made four different comparative analyses to determine the value of the stock of TU in terms of a transfer of 100% of control. TU, not having made any such objective determination itself and not having had any objective determination made for it by Salomon Brothers or indeed anyone else qualified to make such a determination prior to the merger, finally hired Arthur Rosenbloom of Standard Research in April, 1981. (Note) As the record shows, Mr. Rosenbloom made an elaborate analysis in order to determine the value of the shares of TU in terms of a transfer of 100% control. If nothing else, the Court below should have recognized that, in order to make such a determination, those who are expert and knowledgeable in the field are required not to make simply a rough premium percentage calculation such as the Court did, but, rather, to make a comparative

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Note: The fact that TU retained a financial analyst for trial is significant: it shows that TU's Board really knew that their claim that Mr. VanGorkom's subjective determination of $55.00 as the appropriate price in a cashout merger involving transfer of 100% of control of TU would not withstand judicial scrutiny without ex post facto buttressing by a hired expert witness.

analysis to determine the fair price. In short, Mr. VanGorkom orignally made a subjective seat-of-the-pants calculation to come up with $55.00. The Board gave a spur-of-the-moment approval of the price and the lower Court has put its judicial sanction on this rough-and-ready method of determining the fair value of the shares belonging to the TU shareholders. Those knowledgeable of financial analyses went through the detailed steps to make an objective determination of the value of the shares. Though their results, and indeed methodology, were different, the work of both shows that valuing shares in a transfer of 100% of control is not a determination that can be properly done at a short Saturday afternoon meeting without detailed information or professional guidance.

The defendants do focus on one item of the Plaintiffs' Opening Brief, saying (DB 68):

> "Finally, plaintiffs complain about the Chancellor's rejection of the discounted cash flow valuation method and, specifically, his conclusion that such method 'is not an appropriate method of determining the fair present value of the securities here in issue, the present value which would have been arrived at by such method of valuation fluctuated substantially depending on the discount rate employed' (A 22)."

Important to the calculation under the discounted cash flow method is the determination of the appropriate discount rate. The determination of that factor in any professionally prepared discount cash flow analysis is not "fortuitous" at all. For example, Mr. Meigs of Duff & Phelps carefully determined the appropriate discount rate for TU (A-656-659). (Note)

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Note: As noted in the Meigs report, "One classic method of financial analysis used to determine value is to identify the present and future discretionary operating cash flow which will be available to an acquiror and then to discount these cash flows to a present value. The discount rate utilized must be such as to give proper recognition or weight to (1) the risk realized on the cash flows, (2) alternative investment returns, and (3) the time value (interest rate factor) of weighting the cash flow." (A-110-111)

Mr. Meigs, in his detailed study of TU, applied concepts long accepted by financial analysts in determining the appropriate discount rate. As indicated in the Duff & Phelps report (A-111-112):

> "The present value was calculated using a 14% discount rate. The 14% discount rate was selected after careful consideration and evaluation of a number of factors including (1) a real interest rate of 3%, (2) inflation of 9% a year through 1985, and (3) a risk premium of 2%. Cross checks that confirm that TU's weighted cost of capital is about 13% and (2) the investor market return on TU's stock prior to the announcement of the proposed merger was about 14%. The cumulative value of TU's discretionary cash flow for 1981 through 1984 discounted to their present value at 14% per year is 183.9 million. The fifth year projected cash flow is used to develop a terminal value (i.e., the value on all future discretionary cash flows). For the terminal value of calculation, subsequent growth and inflation are reduced substantially to 2% and 5% respectively. The resulting terminal value in 1985 for all subsequent discretionary cash flow when discounted back to the present value of 14% is 665.5 million based on 12,513,000 shares outstanding December 19, 1981. Thus the total value of TU based on discounted cash flows is 849.4 million. From this analysis, the value of the common stock of TU is not less than $67.88 per share."

It should be noted that the defendants' own expert, Arthur Rosenbloom, not only agreed with Mr. Meigs' methodology (except as to terminal value) but agreed on the 3% as a real interest rate and an inflation rate of 9%. However, Mr. Rosenbloom in fact, by making a "judgment call" rather than an analysis, came up with a risk factor of 4%. In contrast, the determination of risk factor of 2% was not a "fortuitous" determination by Mr. Meigs: rather, he analyzed the risk factor inherent in the TU stock and determined its "beta" factor (PB 71). This was an analytical approach on the risk factor rather than a subjective or fortuitous determination.

* * *

This is a case in which defendants did breach their fiduciary duty to the stockholders of TU by failing to take the time or the trouble to examine the Pritzker merger proposal. In view of the foregoing, the

Court should have determined what the rescissionary damages were as a result of the defendants' action. Instead, the lower Court simply made a subjective premium percentage determination and concluded that the price was fair.

Since there is a full record on the evidence on damages, this Court should determine damages itself or should remand to the lower Court for recalculation of damages.

## CONCLUSION

For the reasons stated in this Reply Brief and in the Plaintiffs' Opening Brief, the opinion of the lower Court should be reversed and judgment should be entered for the plaintiff class in the amount of their rescissionary damages.

Respectfully submitted,

PRICKETT, JONES, ELLIOTT,
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December 20, 1982

OK Mrs. Zeller
OK Petros
Jan Reece
[illegible] to confirm

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| ALDEN SMITH and JOHN W. GOSSELIN,<br><br>Plaintiffs Below Appellants,<br><br>v.<br><br>JEROME W. VAN GORKOM, et al.,<br><br>Defendants Below, Appellees. | ) | No. 255, 1982 |

O R D E R

This 19th day of April, 1983,

IT IS ORDERED pursuant to Rule 4 (d) of this Court:

(1) That the above captioned case be and it is hereby scheduled for rehearing and determination by the Court en Banc, without further briefing and upon a priority basis; and

(2) That the case be scheduled for rehearing by the Court en Banc on May 16, 1983, at 11:30 a.m.

[signature]
Chief Justice