IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ALDEN SMITH,

Plaintiff,

vs. Civil Action No. 6342

JAY A. PRITZKER, et al.,

Defendants.

Courtroom No. 1
Public Building
Wilmington, Delaware
Friday, January 30, 1981
11:00 a.m.

Before:

HONORABLE WILLIAM MARVEL, Chancellor.

Appearances:

WILLIAM PRICKETT, ESQUIRE,
Prickett, Jones, Elliott & Kristol
-and-
IVAN IRWIN, JR., ESQUIRE, and
BRETT A. RINGLE, ESQUIRE
Shank, Irwin, Conant, Williamson & Grevelle, of the Texas Bar
For the Plaintiff

ROBERT K. PAYSON, ESQUIRE,
Potter, Anderson & Corroon
-and-
THOMAS H. MORSCH, ESQUIRE
Sidley & Austin, of the Illinois Bar
For the Defendant-Trans Union Corp.

Appearances (Continued):

A. GILCHRIST SPARKS, III, ESQUIRE, and
S. SAMUEL ARSHT, ESQUIRE
Morris, Nichols, Arsht & Tunnell
For Defendants The Marmon Group, Inc.,
GL Corporation, and New T Company

Also Present:

WILLIAM MOORE, ESQUIRE,
General Counsel and Secretary,
Trans Union Corporation

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PROCEEDINGS

MR. PRICKETT: Good morning, your Honor.

Before we begin, may I present to the Court, and move their admission pro hac vice, my colleagues in this case, Ivan Irwin and Brett Ringle, of the Shank, Irwin firm of Dallas, Texas.

THE COURT: You are admitted, gentlemen, for the purposes of this action.

MR. IRWIN: Thank you, your Honor.

MR. RINGLE: Thank you.

MR. PAYSON: May I make some introductions too, Mr. Prickett?

MR. PRICKETT: Yes.

MR. PAYSON: Good morning, Chancellor.

I would like to introduce to the Court,

and move the admission of pro hac vice, Mr. Thomas Morsch of the firm of Sidley & Austin, a member of the Illinois Bar, and I would also like to introduce to the Court Mr. William Moore, who is general counsel and secretary of Trans Union Corporation. I do not move Mr. Moore's admission.

THE COURT: You are admitted, sir, and Mr. Moore is welcome.

MR. MORSCH: Thank you, your Honor.

MR. MOORE: Thank you.

THE COURT: You may divide your time, Mr. Prickett, roughly a half hour each.

MR. PRICKETT: Is the total time that the Court is allotting to both sides a half an hour each?

THE COURT: Well, not exactly, but thereabouts.

MR. PRICKETT: Yes, sir.

THE COURT: I don't expect to go on until 1:00 or 1:30.

MR. PRICKETT: I would then have from 11:00 until 11:30, is that correct, your Honor?

THE COURT: Yes.

MR. PRICKETT: Yes, sir.

May it please the Court: Let me first make clear what is before the Court and what is not before the Court.

This is not the time when the Court is being asked to decide a motion for class certification, nor is it a time when the Court is being asked to decide whether to grant a motion to dismiss as to certain defendants.

This is the time when the Court is asked to decide the plaintiff's motion for the issuance of a preliminary injunction.

In deciding how to present this motion I was called by an ordinary stockholder last night who asked me to explain to him what the case was about and what he was being asked to vote on in connection with the February 10th meeting. He asked me for a brief recitation of the plain facts of the matter, and this is what I told him:

"Sir, the story starts in the summer of 1980. At that time your company's board received a report from management with a five-year forecast. This report showed that the prospects for TU from 1981 to 1985 were far brighter than they had ever been before. In this document your company was described as an engin

of cash. The management told the board that in this period TU would generate about $250,000,000 of cash, and that this cash could be used to buy your stock, to pay you and your fellow stockholders double or triple the dividends that you had been receiving, or it could be used for TU to buy other companies that would produc even more cash and earnings for you and your fellow stockholders. In short, this report stated that the company was on the verge of its greatest economic prosperity."

The stockholder then said, "Well, I was never told this. I was told that the board recommended selling the company."

"Well," I replied, "it's hard to believe what the chairman and the board did after this glowing report. In point of fact, on Saturday, September 13th, the president and chief executive officer, Mr. Van Gork went to his good friend, Mr. Jay Pritzker, and entered into a secret agreement that was firmed up on Friday, September 19th, for a cash-out merger of the company including the sale of your stock and the stock of your fellow stockholders for $55 a share."

Stockholder: "Why did he suddenly and secretly do this?"

Answer: "He has never fully explained why he did it, but we did uncover the fact that he was worried that a group of management might themselves try to buy the company from the shareholders. Mr. Van Gorkom does tell us that he went to Mr. Pritzke for advice on how to sell the company, but at the same time he knew that Mr. Pritzker was not in a position to offer a tax-free exchange, but Mr. Van Gorkom never looked any other place before going to Mr. Pritzker. Mr. Van Gorkom, in addition, had without consultation with the management of TU or its investment bankers selected $55 as the price at which your shares and the shares of your fellow stockholders would be sold. He has never explained how he selected that price. It was simply his own private judgment. He never negotiated the price with Mr. Pritzker, and Mr. Pritzker readily agreed that $55 was a good price, and enthusiastically and speedily accepted it."

Stockholder: "I would have expected him to have gotten a tax-free deal so as to avoid capital gains for me and my fellow stockholders, and I certainly would have expected him to negotiate long and hard on any proposed cash price."

"Well, sir, the answer is that

Mr. Van Gorkom did more than that. He prepared a document from the confidential TU financial results, and presented it to Mr. Pritzker, and this document showed Mr. Pritzker that Mr. Pritzker could expect to pay back the borrowings that Mr. Pritzker would have to make in the amount of $490,000,000 in about five years from the earnings of your company."

Stockholder: "You mean Mr. Van Gorkom showed Mr. Pritzker how he could buy the company mostly with our money?"

Answer: "That's right. Mr. Pritzker basically accepted with enthusiasm the deal that Mr. Van Gorkom was presenting to him, but before he made his final acceptance privately to Mr. Van Gorkom, he, Pritzker, took the time to get advice from his own staff and from his bankers. But Mr. Van Gorkom did more than that. He made it even easier. He provided Mr. Peterson, TU's controller, to provide further confidential information to Mr. Pritzker, and even made Mr. Carpenter of the Boston Consulting Group available to Mr. Pritzker."

Stockholder: "So Mr. Van Gorkom gave Mr. Pritzker an inside look at our company including the details of the five-year forecast which has never

been disclosed to us?"

Answer: "That's correct. But Mr. Pritzk got even more than that. He demanded and got the right to buy 1,000,000 shares of TU stock at 38. There were no negotiations on the price, $38 being about the price --"

THE COURT: That price was above the market slightly.

MR. PRICKETT: By pennies, sir. By pennies. But they had just agreed that the value of the shares of TU --

THE COURT: Well, Mr. Pritzker could have gone into the market and bought shares, which is usually done when there is a proposed merger imminent.

MR. PRICKETT: He certainly could have, but here Mr. Van Gorkom gave him a million shares at $38 when he had just concluded --

THE COURT: That's not exactly a gift.

MR. PRICKETT: No. It's a gift in the form of a sale at 38 when the stock is going to be trading at 55 as soon as this deal is announced, so it's not a gift of $38 per share, but it's a gift of the difference between 55 and 38.

The stockholder asked: "Why didn't

Mr. Van Gorkom, if he was going to sell a million shares to Pritzker, get a better price?"

"The answer, sir, is that they had agreed that $55 was a fair price for your stock, but Mr. Van Gorkom simply never thought of that, and just agreed to Mr. Pritzker's demand for a million shares at $38."

Stockholder: "What was the reason for this?"

Answer: "Mr. Pritzker demanded it, and Mr. Van Gorkom agreed."

"Well, why was this done?"

Answer: "Well, it was a guarantee to Mr. Pritzker that he would have a profit of at least $17,000,000 if somebody else made a better bid."

Stockholder: "So it was a no-lose situation for Mr. Pritzker?" And my answer was, "That' right."

Stockholder: "Well, what did my board of directors do about all this?"

Answer: "They approved it. Mr. Van Gork kept it entirely secret from them, and then he called a special meeting on a Saturday morning for them to be informed about it and consider it. He never advised

them in advance of what the meeting was about, nor gave them any documents such as he had given to Mr. Pritzker Mr. Van Gorkom also summoned the senior management who knew nothing about the matter, and told them of the Pritzker deal just before the board meeting. The senior management was opposed, thought the whole deal was a bad one, and that the price was too low, but the board was never told that senior management opposed the proposal, the Pritzker proposal.

"Mr. Van Gorkom had, of course, gotten no authorization or direction from the board to do what he privately had done, and the board had no knowledge before the meeting at all of the matter. Mr. Pritzker demanded, and Mr. Van Gorkom agreed, that it was a take-it-or-leave-it proposition, so that the board was told at the meeting that they had to accept it at that very meeting, or certainly before the weekend, or Mr. Pritzker would withdraw it.

"Now, Mr. Van Gorkom was the only person who spoke at the meeting at all. In fact he was the only one, really, who knew anything about it."

The stockholder said: "But the board represents the stockholders."

Answer: "Wrong in this case. Dead wrong

The board consisted of employees of TU all of whom were nominated by Mr. Van Gorkom to the board, and all of whom, as I say, were employees and dependent on their jobs and futures to Mr. Van Gorkom."

Stockholder: "Well, what about the outside directors?"

Answer: "Well, all of the outside directors were business friends and social friends of Mr. Pritzker whom he had also nominated and had elected to his board. Thus he controlled the board and dominated it, and they had never voted a single proposition down that Mr. Van Gorkom had ever made with one exception. Ten years before Mr. Van Gorkom had tried precisely the same thing. He tried to sell the company to Litton. There the board had a month or six weeks to consider it, and when they had time to conside it, they indicated that they would oppose it, and Mr. Van Gorkom withdrew it. So in this prior example where they had time to consider it, they turned it down but other than that, this dominated board consisting of employees and friends of Mr. Van Gorkom had never opposed anything that he ever wanted done."

THE COURT: You said they were friends of Mr. Pritzker. I think you misstated yourself.

MR. PRICKETT: That's right. I did indeed, your Honor. And I've got to be fair. The board members were not friends of Pritzker's --

THE COURT: The only thing in common between Mr. Pritzker and any of the directors is that apparently Mr. Pritzker and Mr. Van Gorkom were both interested in opera.

MR. PRICKETT: Yes, I think that's correct, and perhaps some of the others were interested in opera. But I don't represent to you that the outside board members were friends or business associates of Mr. Pritzker. What I do say is that the outside members of the board were all business and social friends of Mr. Van Gorkom. They all found their way onto the board because he selected them, he nominated them, and they were approved.

Now, getting back to the meeting of the board, it was Saturday noon. There was nobody present at that meeting except the directors and a few members of management. Salomon Brothers, who had been TU's investment bankers, were not asked to the meeting, were not told about it, had issued no advice of any kind on what might be the correct way to handle the future of TU if it were to be merged, or who would be a proper

party, and they were not asked, and the board never asked that Salomon Brothers be consulted.

There was no formal inquiry by the board as to how management, which had just been told about this deal, felt about it, and it was not disclosed in fact that they just really had learned about it just before.

I said that there were members of management present. One in particular was there. He was Mr. Don Romans, the vice president, financial, of TU. He had previously said at an informal meeting, not in the context of any proposal, that he thought the stock was worth between $50 and $60. He had never made any study, so far as we can tell, of the value of the stock for merger purposes, and at the meeting they turned to him and said, "Mr. Romans, what do you think?" He had had no time to think about it. He had had no studies made, and all he could say was at that point he could not say that $55 was unfair. He said that he thought at the board meeting the range was between 50 and 60, or 55 and 65, depending on whose testimony you believe, because some directors said he said 55 and 65, and others said he said 50 to 60. All he could say was that it wasn't unfair.

The stockholder said: "Well, what do the minutes say about this very important meeting?" And I had to say that the minutes don't say anything. "There's only one line in the whole book that refers to this, and it says, 'after discussion it was approved,' and then there were eight specific resolutions."

It is known from the testimony that's been taken in this case that no director suggested that any amount of time be taken to consider this. It was affirmatively decided that they would not consult an investment banker such as Salomon Brothers or the Boston Consulting Group who had been retained at large expense to advise the company. And there was no inquiry as to the availability of a tax-free merger, though the board knew to a man that the Pritzker proposal would involve heavy capital gains for each and every stockholder.

"Well," the stockholder said, "how long did this meeting take?" And the reply was that the whole meeting including the presentation by Mr. Van Gorkom took about two hours on a Saturday afternoon. The directors never even read the merger documents. None of them did. One of them may have skimmed it.

The stockholder said: "Did anybody stick

up for the stockholders at that meeting?" And the answer had to be, "No, nobody did. There was simply a motion that the proposal that Van Gorkom had put together and agreed to be approved, and so there was an oral vote of 'aye', and it turned out later that one man, Mr. Bonser, an employee, didn't have the guts to stand up and say he didn't approve it. He just stood silent."

The stockholder said: "Well, did the board do anything to protect my rights," and the answer had to be, "Well, as Mr. Van Gorkom presented the Pritzker deal, it prevented anybody from making another bid for TU, so the board suggested that their approval be conditioned on Mr. Van Gorkom obtaining the right from Mr. Pritzker to solicit other bids. So Mr. Pritzker was approached, and he agreed graciously to allow TU not to solicit bids, but to be allowed to receive bids, and they were also allowed to get the information that had been made so freely available to Pritzker voluntarily by Van Gorkom."

"Well," the stockholder said, "what happened after that?" I said, "Senior management, having a chance to consider what Mr. Van Gorkom had done and its full implications, to a man opposed the

proposal, and said they were going to resign if this deal went through. Faced with this, Mr. Van Gorkom didn't consult the board. He again went privately to Mr. Pritzker and negotiated another deal, and this deal was that TU would have the right to go out for the first time now and solicit other bids."

Now, I'll get back to the conditions on that, but anyway, the board was reassembled, and Mr. Van Gorkom said Mr. Pritzker has gractiously agreed to amend the deal that we make so that we can now go out for the first time and solicit bids. Of course by that time Mr. Pritzker had his financing lined up. Mr. Pritzker had begun to clear the regulatory hurdles, and of course he was in a position now to go forward with his deal. He had a big head start, and he had a headlock on this deal, so he could say sure, go out and solicit if you want, but there were conditions put on that that made it impossible for anybody else effectively to make a bid.

The right of anybody else to make a bid was conditional on two things. They could only have two conditions. One, they only had an out if the stockholders voted it down, or if it was enjoined. They couldn't put in a condition such as the normal

conditions in a bid of this size; warranties, representations, changes, all of the things that Mr. Pritzker already had in his bid. So there was that problem.

The second thing was, though the Pritzker proposal was in place, there was only effectively from October 30th through December 31st for somebody to put the bid in. Salomon Brothers, which, as I say, had never been consulted, and incidentally has never given an opinion on the fairness of the price, was brought in at that point to help TU. Salomon Brothers extracted $500,000 as the price of their service to make a two-month search, and they say we contacted a hundred companies, and we did this, and we did that, but they only had 60 days in which to do it, and TU was a special kind of a company, and there were restrictions on the companies that could utilize TU's advantages.

Salomon Brothers went out, and they have a huge list of a hundred of the 500 Fortune companies, but they never got anything, and so we didn't get anything out of the $500,000 that was then spent for Salomon Brothers to make a search. They never produced an offer.

THE COURT: If they had produced an offer and the thing had been consummated, Salomon would have

received $2,500,000?

MR. PRICKETT: Yes. They would get a cut of the deal. But if they didn't produce anybody, they were going to get $500,000, and they were sent off on a mission impossible, but they were going to get $500,000 for their trouble.

Now let me turn to the KKR deal.

THE COURT: You've gone about 25 minutes now.

MR. PRICKETT: I recognize that, sir.

As I say, the inception of all this was due to the threat of a KKR deal. What happened? There was one offer produced, and it was through the KKR group, but Mr. Van Gorkom effectively throttled that deal. Mr. Johnson, one of his outside directors, said oh, it wasn't even worth looking into, though in fact $60 was offered by KKR conditioned only on getting the financing. They never pursued that. They never offered the KKR group the $38 deal that the Pritzkers had gotten. They just didn't want that to happen, and they never referred it to Salomon Brothers to follow up on.

There was one party that was really interested: GE, one of the giants in this country,

and they were prepared to make an offer of $57.50 in stock, a cash-free deal, or $60 in cash. They looked a it, and then they withdrew. They said, according to Mr. Van Gorkom -- and I've never talked to GE, so I don't know what they say -- but Mr. Van Gorkom says they didn't want to buy Trans Union, but he was forced to admit that they didn't want to get in a bidding war with the Pritzkers, so that the Pritzker deal had scared off a giant like GE. They didn't want to get in a bidding war with them. Why? Because the Pritzkers were there. They had a deal. And anyone who wanted to make a deal for this had to buy a million shares that now belonged to the Pritzkers at $38, and if you got in a bidding war you had to spend hundred cent dollars in place of the Pritzkers who spent 92-cent dollars. So GE, the only real prospect, backed off, and that was because this improvident deal had been made.

Now, my stockholder said: "Well, I got a proxy statement that didn't tell me anything about what you're telling me. It just said the board was in favor of this." I said, "Well, when all of this came out in the lawsuit the board was assembled, it reviewed all of the things that had come out in the

lawsuit, and having reviewed all of those things, they said we've considered all this, and we ratify our own inaction before, and we still recommend it."

Now, then they sent out another proxy statement, and the stockholder said, "You mean the proxy statement that came out on Monday and that I got yesterday?"

Answer: "That's precisely right. On Monday they met, and they sent out a proxy statement, and in this proxy statement there was a recitation of everything that has come out in this lawsuit and the attempt of the board to say we ratify everything we didn't do, and we now recommend it."

Now, this is not an updating proxy statement. It is a completely new proxy statement, and it is an attempt at the last minute by this board to attempt to convince the Court that it has looked at the deal, it has shopped the deal, and it is a good deal, but it is not a complete disclosure, and the proxy statement is fatally defective in that it is not timely. Delaware law requires 20 days notice so that the stockholders at least have the time to consider what they are being asked to vote on, and the proxy statement, which is incomplete as shown in our brief, is not even

timely.

THE COURT: Well, Section 251 of Title 8 -- 251(c) refers to the agreement being furnished to the stockholders.

MR. PRICKETT: Well, they are entitled at the time they get the agreement to get the complete information. You can't send out a proxy statement with completely new information two days before the meeting and say we've now informed the stockholders, and they are to vote in two days. So that the supplementary proxy statement, which is in fact a new proxy statement is not timely under Delaware law.

Now, the stockholder asked me: "What will the Delaware courts do faced with this situation," and I said, "Well, the Court of Chancery has always considered one of its duties as protecting stockholders They are the owners of the corporation, and they requir on the part of management and the board complete candor and fair dealing."

I said, "What has happened here, I think it's cumulatively wrong, and what is attempted to be done is the manipulation of corporate machinery; that is, the assembling of a board and a rubber stamping, or a bootstrap attempt at a last minute meeting to cure

what has now been established through this lawsuit. They haven't given 20 days notice. They haven't made complete disclosure."

In point of fact, the Wall Street Journal has been more helpful to the stockholders in knowing what's going on in this situation than the proxy statements of the management. That's where we really learn what's going on.

Now, there has been no considered judgment by the directors of the basic transaction. Furthermore, this deal is unfair to the stockholders. There is no fairness opinion even from Salomon Brothers who were paid $500,000, that suggests that 55 is fair. There is a report before the Court -- it's uncontradict -- by the financial analyst firm of Duff and Phelps. Time precludes me from reviewing that report, but it's uncontradicted, and it shows that in the first place, the best interests of the stockholders would be served by having this merger terminated so that they could enjoy rather than the Pritzkers what the future of TU holds. That is, here on the verge of this tremendou expansion, this huge stream of cash, the best thing for them to do would be to have the merger called off, and have the money paid out in dividends, or have anoth

company bought, or have the company rebuy their stock. They have been stockholders for years, and the management says that the stock has never fairly reflected the price. Now the company has millions of dollars in prospects. Let them buy the stock back up again, or go out and buy other companies for the benefit. But to sell this company in a taxable deal for the stockholders is manifestly unfair.

Now, there are two other points that I will touch on, and then I'll conclude:

It is suggested in an attempt to drag this thing over to a class certification question that Mr. Smith, the plaintiff, is not interested in this case. That is totally incorrect. Mr. Smith, like every other stockholder who knows what's going on, is opposed to this deal, and if they were fairly told what I've told the Court today, they would vote to a man against it because it's against their interests. But if there is to be a merger, he wants a tax-free merger. He doesn't want to give away everything he gets in capital gains. But if there's going to be a cash merger, at least he wants fair value for his shares. He doesn't want them secretly traded on a Sunday to a friend of Mr. Van Gorkom.

Now, the last person I come to is Mr. Pritzker. Mr. Pritzker has submitted an affidavit, and I won't touch on the fact that the affidavit is signed, or the details of that, but it's perfectly clear that Mr. Pritzker wants this deal so bad he can taste it. He threatens the Court. He says if you don't approve this, I'll go away, and this is a precise what he did to the board. He says I'll pick up my marbles and I'll go away, and therefore, you ought not to enjoin it because I will go away. But he doesn't quite say that in his affidavit. He says he might go away. Personally we doubt that he will go away, but it would be in the best interests of the stockholders if he would go away, and then TU could take the time and consider what is best for its stockholders. Is it best to double or triple the dividend, and have the stock reflect that this company is so rich it doesn't know what to do with all its money? Would it be best to acquire some companies? Would it be best to buy back some of the stock?

Now, let's suppose Mr. Pritzker does go away, and we don't think he will, but if he does, what will happen? GE has said it's not going to get in a bidding war with Mr. Pritzker, but if he goes away and

the decks are cleared, then TU can take its time and take a look, can solicit GE, can solicit KKR, can solicit Genstar that we now know about from the Wall Street Journal, and get a decent offer.

We suggest that the Court in Thomas vs. Kempner did precisely that. It said the management has improvidently gotten itself into a situation where ther is no out for it. And in the contract that they signed Pritzker can walk away. He has an out if there is litigation, but the management has none. They have no choice, so that the stockholders have been gotten into a situation where the management can't walk away from this deal. It has no litigation out. There are better offers. There are alternatives, and only the Court can protect the stockholders.

It is for this reason that we come before the Court and suggest that if there was ever a case where the Court of Chancery exercised its powers properly to protect stockholders in a Delaware corporation from what their board, and particularly their chief executive officer, has done, this is the case, and therefore we ask that the Court exercise its powers, and enjoin the meeting of stockholders, and enjoin the consummation of this disasterous merger.

Thank you, your Honor.

THE COURT: Thank you, Mr. Prickett.

Mr. Payson.

MR. PAYSON: Thank you, Chancellor.

THE COURT: Have the defendants some way of dividing their time?

MR. PAYSON: Yes, your Honor. In light of the time which Mr. Prickett took, I would propose to take 15 to 20 minutes, and would ask the Court's indulgence to hear Mr. Sparks for approximately the same time.

THE COURT: Very well.

MR. PAYSON: Chancellor, I was working on a brief yesterday, and didn't really have time to focus on Mr. Prickett's brief until last night. I enjoyed it very much, as I enjoyed his argument today, because frankly, I enjoy good fiction.

The characters in a good work of fiction are three or fourfold. They generally start with a villain. The villain in this case, according to Mr. Prickett, is Mr. Van Gorkom surrounded by his cronies, the remaining members of the board of Trans Union; Mr. Van Gorkom who in July at a meeting of the board of directors saw and discussed various financial

projections, who at a meeting in August with the rest of the directors saw the results of a lengthy study from the Boston Consulting Group, who thereafter decided after hearing from internal management that the shares of his company might be worth $50 to $60 a share, that the best way for the stockholders of his company to realize the approximate value of the company was for him to propose a merger with Jay Pritzker.

Mr. Van Gorkom personally owns approximately 60,000 shares of Trans Union common stock, and the remaining inside directors own approximately 52,000 shares more. If they honestly believe that this company could be sold for approximately $5 more a share, why on January 26th of this year, after having a complete presentation by counsel of Mr. Prickett's argument concerning the facts and the alleged lack of disclosures, vote in favor once again of a proposal which would have cost them almost $600,000 individually Why would the outside directors who, after hearing all of the advice from counsel at this meeting and the parade of horribles as they are outlined in detail in Mr. Moore's affidavit, why would they continue to recommend that the stockholders approve this merger when they were specifically advised that they didn't

have to make any recommendation? They were advised you can tell the shareholders we don't know what's fai but since it's such a huge premium over the pre-announcement market price, you, the shareholders, shoul decide the issue. Those are the villains, your Honor.

The innocent victims are usually portraye in a fictional piece of work, and here we have the innocent victims, the shareholders. The shareholders who have the chance to receive approximately $18 a share more than that at which the market has recently valued their stock. That, your Honor, represents a total of more than $222,000,000.

In most works of good fiction there is some evil conspirator, the Svengali-like figure who appears throughout a John LeCarré book, and here comes Mr. Pritzker. Mr. Pritzker, who was willing to pay $726,000,000 for a company which the market had valued at $466,000,000, almost $300,000,000 more than the marketplace had determined was the value of this company. This is the same Svengali-like figure who agreed to amend the merger documents so as to permit the company to go out and solicit bids from interested people, and that those bids would be available to be received by the companies after affirmative solicitatio

for some three or four months; Salomon Brothers retaine to test the market by the company, paid a substantial amount to find a bidder, but to be paid significantly more if a bidder were to be found.

THE COURT: Salomon Brothers were not asked to evaluate the Pritzker offer actually.

MR. PAYSON: That's correct. They were never asked for a fairness opinion.

We then come to the hero, the man who comes in on the white stallion, one Alden Smith who because of his own personal tax situation may well prefer to see the value of Trans Union stock decline, and he's the one who seeks to prevent his fellow shareholders from deciding whether they want the substantial premium over market which Mr. Pritzker has offered.

This case has become a disclosure case, your Honor. It is not a Thomas vs. Kempner case. As your Honor will recall, you decided that case and granted the temporary restraining order. As you also know, I was in the case, so that we both know that there were competing offers before the shareholders. They were both for cash, and one offer was for more than the other. Notwithstanding the fact that this Court found the offers to be identical, and the fact

that one was for more money than the other, the directors continued to recommend the lesser offer.

THE COURT: That was the White & Hill offer.

MR. PAYSON: That's correct, your Honor. The White & Hill offer was at some 23-1/2 million dollars. Another group came in with a substantially identical offer on paper, but for 27 million.

This is not a Gimbel vs. Signal case, your Honor, where the sale of assets was approved by the board of directors after a meeting of approximately two hours, and where that sale was not contingent upon shareholder approval. There was a serious question in that case whether the board had an updated study of proven oil reserves of the wholly owned subsidiary of the Signal companies. Chancellor Quillen expressed concern as to whether or not the board on its own without shareholder approval could have fully evaluated the complex oil reserves that were presented in that case.

This case, your Honor, comes down to a disclosure case. The proxy statement is some 76 pages long supplemented with appendices. The proxy statement has now been supplemented by direction of the board of

directors which gives the shareholders the complete picture, all germane information with respect to the merger.

Mr. Prickett really focuses on his allegation that the directors, or that the proxy material should have disclosed cash flow projections. The SEC, as pointed out both in our brief and Mr. Sparks' brief, has seriously questioned the use of historical cash flow figures as being confusing, not understandable by shareholders, and probably irrelevant. In this case the Court will find at Page 39 of the proxy statement a complete historical analysis of the company's cash flow from 1975 through the first nine months of 1980. It shows generally that for that period the cash flow of the company has increased. The proxy statement also advises the shareholders that the company's net income per share by 1985 may well be over $12 a share. There is no reason why an interested stockholder cannot compare the projections as to net earnings --

THE COURT: What page are you referring to?

MR. PAYSON: On Page 39 there is a consolidated statement of source and use of funds, and

it shows total from continuing operations, source of funds, for example in 1975 -- and this is about six lines down, your Honor -- total cash flow, although cash flow is not in there, total from continuing operations, $100,000,000. In 1976, $106,000,000. Going on to 1979, $162,000,000. And in the first three quarters for 1980, $135,000,000.

In addition, at Page 3 of the proxy statement is the statement: "The company's business plan prepared in July 1980 contains projections which were furnished to GL and by Salomon Brothers to other potential business combination entities as referred to below, and would indicate that its net income might increase to approximately $153,000,000 in 1985."

It is speculation, but the company wanted its shareholders to know what the projections were for the next few years.

I would like to concentrate a little bit on the meeting of January 26, 1981, which I attended. At that meeting Mr. Prickett's -- or the parade of horribles was recounted in detail to the directors. The directors were advised that whether or not they understood it at the September 20th meeting, in fact Mr. Van Gorkom had gone to Mr. Pritzker with a $55 per

share proposal; that Mr. Pritzker had asked for 1.75 million shares at market, which was $37.25, but that Mr. Van Gorkom had negotiated that figure to 1,000,000 shares at $38, not a matter of a few cents as Mr. Prickett would suggest.

I don't have the time to go in detail over what was gone through at the meeting. The Moore affidavit is only eight pages long, and I respectfully urge the Court to read that in detail so that it will know exactly what and how carefully the board considere for the recommendation that the Pritzker deal be permitted to go to the shareholders, and that the shareholders be permitted to decide their own fate.

Mr. Prickett has come in with the affidavit of Duff and Phelps. We suggest strongly that that report reflects a number massage and not an objective evaluation of the company. It is not contradicted by an expert hired by any of the defendant but it is contradicted by the express and directed test of the market done by Salomon Brothers. Over 100 major corporate entities and groups throughout the United States were contacted. Not one suggested that the million shares which has now been issued to a Pitzker designee had any effect on their interest in

the company. Not one --

THE COURT: Those shares were issued on January 28th, I gather.

MR. PAYSON: That's my understanding, your Honor.

MR. SPARKS: That is correct.

MR. PAYSON: That transaction has been closed.

Not one entity until KKR this past Monday morning suggested that they didn't have sufficient time. It comes with ill grace from KKR since it made a proposal on December 2nd subject to financing, represented that financing could be obtained in two or three weeks, then withdrew the offer some three hours later.

This Court has --

THE COURT: Of course it's conceivable that a better offer might come through before February 10th.

MR. PAYSON: That is conceivable, your Honor. It will be difficult to evaluate whether in fact a more favorable offer has been received, but it is possible, and whatever actions may be dictated by such an offer will be undertaken.

This Court has repeatedly held that the

market is the real test evaluation and the only objective gauge of value. In this case that applies in two respects. In the first place, this stock has never --

THE COURT: Well, I've held that on several occasions, and I also have been reversed on several occasions.

MR. PAYSON: I have never second guessed the Court.

This Court and the Supreme Court have said that the market value of stock is the primary test in looking to the value of an ongoing industrial concern. In this case the market value of Trans Union stock prior to the announcement of the merger, or the proposed merger, and since January 1, 1975, has never been above $39.50 per share. In addition, the test of the market done in connection with Salomon Brothers' solicitation of offers is the best indication of whether a price better than $55 per share can be found. It is not a hired expert trying to convince this Court in a brief affidavit that some figure other than that tested by the market may be fair.

Mr. Prickett suggested that if the Pritzker deal goes away GE may come back. That may be

possible. GE may come back with $57 which because of antitrust problems and other problems may be received by the stockholder six months from now with an interest rate of 20 percent. We now have $55 per share in cash in hand if, but only if the stockholders want it. And in that respect, your Honor, it is clear in this case that there is no controlling or majority stockholder. Singer, Tanzer, Roland International simply have no application in this proceeding. I know of no Delaware decision where there has been an injunction entered against an arm's length merger, or the vote on such a merger, where there is no indication whatsoever of any self dealing or control, and in this case the opposite of self dealing applies because of the insiders' ownership of a substantial amount of stock, some 115,000 shares.

Why on earth would Mr. Van Gorkom approve this deal in his own mind if he thought somewhere he could get $5 more per share? That decision would cost him $300,000. It makes no sense especially when it is clear from the record that there is no commitment or understanding between Mr. Pritzker and any entity which he controls and any officer or director of Trans Union.

Let me add one more thing, your Honor:

The plaintiff also alleges, I think in his amended complaint, that there are a number of contacts which should have been more fully disclosed to the shareholders. It is uniformly held that mere contacts as opposed to firm offers need not be disclose to shareholders because they might be in fact more confusing than informative.

I call the Court's attention to Bucher vs. Shumway, which appears at Federal Securities Law Report, Paragraph 97, 142, recently affirmed per curiam by the Second Circuit; Scott vs. Multi-Amp Corp., which appears at 386 Fed. Supp., 44, and Elgin National Industries vs. Chemitron decided by Judge Steel in 1969 which appears at 299 Fed. Supp., 367.

Finally, your Honor, in order to give Mr. Sparks an opportunity to speak I would close with the following:

The first paragraph of the conclusion in the plaintiff's first brief states: "If the instant motion is denied, the Pritzkers and Mr. Van Gorkom will be permitted to carry through their merger plan."

I would restate that, your Honor, to read as follows:

"If a majority of the shareholders of

Trans Union, having been first informed of all relevant facts, approve the proposed merger, all stockholders of Trans Union collectively will receive more than $222,000,000 more than their stock has recently been valued at in the open market. On the other hand, if the proposed merger is enjoined at the behest of a shareholder whose tax situation is at best aberrational and who actually may want TU's stock to decline in value, all other stockholders may well be deprived of an opportunity which will not appear again in the foreseeable future."

We can guess, and we can speculate that maybe somewhere out there is an entity or corporation who might pay more at some time. The directors were faced, and were faced on September 20th and at their later meetings, and especially at the meeting on January 26th, with whether or not the shareholders should be given the opportunity to vote their own destiny. That is all we're waiting for; the shareholde vote. There is no reason to take that personal decisio away from the shareholders.

THE COURT: Thank you.

MR. PAYSON: Thank you, Chancellor.

THE COURT: Mr. Sparks, why do you think

this merger was proposed by Mr. Van Gorkom? The company was apparently making money. There was no great urgency apparently, although there are reasons for the merger set forth in the proxy statement. Why do you think it was recommended?

MR. SPARKS: Your Honor, I understand in the record what Mr. Van Gorkom has said, and I think it makes a lot of sense. On that issue he has said he has stood by as well as other TU stockholders for years and watched this stock trade at a price which at least for the last six years has never gone above $40 a share. Mr. Van Gorkom believed that in the hands of certain types of companies, maybe companies who could afford to pay for it, this company was more valuable than $40 a share, or the $37 a share which it had been trading at or below in the year 1980. He therefore sought an opportunity to get his stockholders what he thought was something closer to and within the range of the appropriate value for the stock of the company, and he went to Mr. Pritzker, and in effect a deal was struck subject to stockholder approval, subject to board approval which sought to get for the stockholders what Mr. Van Gorkom thought, what the board thought was closer to what they ought to have in a range of a fair

price for this company. That, your Honor, is why, after reading his testimony, I believe Mr. Van Gorkom went to Mr. Pritzker when he did.

Your Honor, I am before the Court --

THE COURT: Well, apparently many of these stockholders if this merger is consummated will be required to pay large capital gains.

MR. SPARKS: Your Honor, Mr. Prickett said that, but there is nothing in the record to support that. Like any other cash merger, this transaction will have varying impacts taxwise upon stockholders. Mr. Smith's tax impact arises not actually from his ownership of stock. A large portion of his tax impact and his opposition to this deal arises from the fact that 15 years ago he sold half of his holdings in TU, Trans Union, short, and he has deferred for 15 years through a tax gimmick the payment of $215,000 in federal income taxes. What is going to happen to Mr. Smith if this transaction goes through is that the long and short positions that his broker carries on 50,000 shares are going to be liquidated, and he can no longer take advantage of this tax gimmick. He's going to have to pay a $215,000 tax bill on stock that he sold, effectively sold 16, 17 or 18 years ago. The only othe

stockholder that we know, your Honor, who is in that position is the former partner of Mr. Smith, a Mr. Lovelace, who at about the same time did the same thing. He read in Fortune magazine about this tax gimmick, sold the stock short, but kept the short contract open, and pledged as security 50,000 shares. And I'm speaking now of numbers of what Mr. Smith did, 50,000 shares of TU stock as collateral for that short position. But in effect they removed themselves from any economic risk with respect to those securities because when the stock price went up calling for a loss on the short, the long position became more valuable, and vice versa. If the stock went down calling for a loss on the long, the short became more valuable. It's a perfect hedge.

THE COURT: Well, let's not waste time on that.

MR. SPARKS: You're right, your Honor. Let's move on.

I'm before the Court, your Honor, as the representative of GL, New T Company, The Marmon Group and Jay and Robert Pritzker, and the only claim in the complaint against my clients is a single allegation that they somehow fraudulently conspired with TU to

bring about the proposed merger. Yet not one fact has been adduced in support of such a theory, and it has been abandoned by the plaintiff.

For more than four months now GL has stood by with substantially all its working capital and credit committed to this transaction incurring not only commitment fees, but being limited in its ability to pursue other ventures. All this while Trans Union sought to find a bid higher than offered by GL. Finally the opportunity for which GL bargained to place its $55 merger proposal before Trans Union stockholders was approaching, and the only thing standing between that opportunity for TU stockholders to speak upon the proposed merger is this action in which one stockholder with a peculiar tax problem seeks to have this Court substitute his views with respect to the merger for those of TU's directors and its stockholders.

First and foremost, your Honor -- and it hasn't been mentioned here today -- but first and foremost it's my view that this Court should focus upon plaintiff's other inability to satisfy his burden of proving an irreparable injury in this case which outweighs that to TU's stockholders and to GL if that stockholder meeting or the proposed merger is preliminaril

enjoined.

Your Honor, in 140 pages of briefing plaintiff devotes exactly two pages to the irreparable injury issue which is, of course, one of the two conditions he must satisfy in order to have this Court enjoin this merger, and that's because, your Honor, just as he had nothing to say this morning, he had nothing to say about that issue in his brief.

If a preliminary injunction issues in this case, the status quo will not, and cannot be maintained. To the contrary, Trans Union stockholders will suffer an enormous injury, and GL will lose the benefit of the bargain it struck five months ago with TU. Why is this? This isn't just because of an idle threat by Pritzker that he's going to abandon the merger. It is because of a financial reality of this transaction.

GL has a financing commitment for $450,000,000 of the $688,000,000 purchase price. That financing commitment was made in September and October. It is at a 14 percent rate of interest, your Honor, and it expires on March 31, 1981. If the merger is not consummated by March 31st, that commitment will be lost. Obviously at today's interest rates, if that commitment

could be replaced at all, it would be at much higher rates.

Assume that it could be replaced, which is doubtful, but assume that a commitment with interest at the current prime rate of 20 percent could be obtained to replace the lost March 31st commitment if the merger is enjoined. Your Honor, the per annum cost of the $450,000,000 loan, the per annum interest cost would increase by $27,000,000 a year. With that large added cost, the merger as a practical matter would no longer be economically feasible for GL. And since it is unlikely that a final injunction hearing could be held, a decision rendered, and the merger consummated by March 31st, a preliminary injunction by force of economic fact would force GL to abandon the merger, and that's what we're facing.

Your Honor, GL would thus have forever lo the benefit of the favorable special purpose financing which it had achieved, and would lose its good faith arm's length contract to merge with Trans Union. More important, or just as important -- and I don't think the Court, incidentally, in the absence of any even colorable claim against GL or the Pritzkers for wrong-doing -- the Court must take into account their interes

as one contractual party in this transaction in addition to the stockholders' interests. The stockholders, your Honor, are also the indirect beneficiarie of GL's favorable financing because that's what lets the deal go forward at this point in time. And they would lose the enormous $220,000,000 premium offered in the merger if an injunction is granted here with absolutely no assurance that a comparable offer, or for that matter any offer, will be forthcoming if this one goes away.

Now, weighed against these enormous losses to TU stockholders and the damage to GL we have only plaintiff's speculation that a higher bid might be forthcoming. Plaintiff himself has testified that he believes TU's stock will go down by at least $10 a share, which translates with the numbers we're dealing with to $120,000,000 in gross figures if the merger is abandoned.

Of course the real damage that plaintiff perceives if the merger goes through has nothing to do with the issues he raises in this case. As explained in the briefs, for plaintiff it amounts to the fact that the effectuation of the merger will cause him to realize that $214,000 capital gain liability which he

incurred by reason of a $787,000 profit he made in the early '60's on which he has never had to pay tax. Moreover, if the merger is blocked, and the price of TU stock goes down, which Mr. Smith hopes it will do if the merger is blocked, he'll be able to shelter $2,000,000, or approximately $2,000,000, of recent capital gains sales he made on an orange grove by liquidating his short position.

In short, the harm plaintiff sees in the merger arises out of his peculiar tax planning problems resulting from his sale of TU stock and the sale of an orange grove, and has nothing to do with the interests of TU stockholders, and it certainly is not the type of harm that weighs at all against the enormous detriment to TU stockholders and to GL if the preliminary injunction is granted.

In short, your Honor, the Court need not even reach the merits of what we have heard argued this morning between Mr. Prickett and Mr. Payson under these facts. Not only has plaintiff failed to meet the irreparable injury requirement, but he has also failed to show a reasonable probability of success on the merits.

I will not review or go over the matters

which Mr. Payson so ably argued this morning. It is clear that there have been thorough board consideration and when the merger was presented on September 20th to Trans Union's board, which is composed of leaders of industry and persons and inside people very familiar with the company, that board was as up to speed as it possibly could have been. It had just been exposed one month before to the five-year forecast and to the Boston Consulting Group's study. It knew what its company was about. It had the $55 offer before it, and it was perfectly capable, and did make a decision that that was an offer that should be accepted.

Then with the aid of Salomon Brothers, which was spurred on by its tremendous incentive contract, TU and Salomon continued a vigorous campaign to find a higher bid, and they haven't found any. Notwithstanding that, contrary to what Mr. Prickett suggested, the merger agreement did not prevent TU's board from accepting any offer, and did not prevent it from changing its recommendation if it found such other offer to be better than GL's.

There is no limit on the conditions that any bidder may place before Trans Union in that merger agreement, and a suggestion to the contrary by --

THE COURT: Because that had to be added to the original agreement?

MR. SPARKS: Your Honor, the merger agreement permits Trans Union to solicit other bids. These are bids for the sale of all, or substantially all, of the company, which is what we're talking about here. These bids can come in in any form with whatever conditions the bidder chooses to place upon them, and Trans Union's board is then free to evaluate that business, and to make a recommendation to its stockholders as to whether the GL bid should be voted up or voted down, and that right continues as of today.

The conditions that Mr. Prickett referred to in his argument relate to the ability of Trans Union to terminate this merger agreement and deny the stockholders the right to consider the merger offer. Only certain bids with certain limited conditions allow Trans Union to say that this bid won't be voted on at all by the stockholders. But any bid can come in, be considered by Trans Union's board of directors, and Trans Union can change its recommendation and say we think this other bid is better, and, stockholders, we think you ought to hold on and vote the GL bid down, and they are free to do that under the merger contract.

And, your Honor, if another bid, firm bid, did come in and it was truly in fact better than the bid that GL has made, there is no question that the GL bid would lose.

We have contracted for the right to go forward to the stockholders with our bid, and in a very unusual contract we have subjected ourselves to the risk over a four-month period while we have tied up our credit and our capital that somebody else is going to come in and outbid us. Now that we are getting down close to the meeting date, one stockholder comes in and says wait a minute. I've got tax problems, and I want to get in the middle of that arm's length contractual agreement. That's what we're looking at here today.

This transaction and the price being paid have had a double test in the market. This stock has been traded on the New York Stock Exchange for year I think it's since 1914. In the last six years, in an issue with over 12,000,000 shares outstanding, the price has never gone above $40 a share. Added to that we have Salomon out there beating the bushes trying to find a higher offer. They have not found one.

Your Honor, I don't believe this Court ha

really ever faced a situation clearer than this one, or a circumstance more clear than this one where the stock price being offered has been objective, where it has been so objectively tested, and to lay against that the Duff and Phelps report really should just have no weight at all under those circumstances. I'm not going to touch on that report, your Honor, other than to point out that it has been thoroughly discredited in light of that firm's conclusion just two and a half years ago that the market accurately reflected the value of a share of Trans Union stock in a report which has been the subject of discovery and the subject of a couple of affidavits filed by two Duff and Phelps persons, the gentleman who testified and his superior, who would seek to minimize the impact of that letter. The fact of the matter is, your Honor, that it was an analysis two and a half years ago where Trans Union was the client in which Duff and Phelps started from the market, analyzed the company, concluded that the market was a fair indication of value, and then applied a 35 percent discount to that because the stock was restricted. And now two and a half years later they come back and say that somehow the stock is worth $67.50 a share, which is higher than even those management

members at Trans Union, who have been seeking to fashion a leverage buy-out, have suggested the company stock was appropriately worth.

Moreover, your Honor, this is an arm's length merger, and we have looked through the cases. We haven't found a case in which this Court has enjoined an arm's length merger. And of course in this type of case plaintiff must show constructive fraud to prevail on his claim that the $55 price is too low. Everything in this case, every fact points in the other direction, indicates that this $55 price at the time it was offered, and today, is well within whatever range one could conclude spans the reasonable price. It is certainly not a price that no reasonable man could conclude was fair or appropriate. Ten reasonable men on Trans Union's board came out the other way. They concluded it was within that range of fairness and reasonableness, and we ask now for the opportunity to have this transaction placed before Trans Union's stockholders where they will have the same opportunity to make their own investment decision with respect to it.

THE COURT: What about the 20-day provision of 251?

MR. SPARKS: Your Honor, 251 provides that there shall be 20 days notice of the time, place and purpose of a meeting of stockholders which is to consider a merger. The original notice that went out on January 21st, dated January 19th, for the notice of special meeting of February 10, 1981, says: "A special meeting of the stockholders of Trans Union Corporation will be held at 9:30 a.m. on Tuesday, February 10, 1981, for the following purposes:

"1. To consider and vote upon an agreement and plan of merger pursuant to which New T Co., a Delaware corporation, would be merged into Trans Union, and each outstanding share of common stock of Trans Union would be exchanged for $55 in cash, all as described in the accompanying proxy statement and the agreement and plan of merger and related agreements as amended included a Appendix 1."

Your Honor, what I just read satisfies the requirements of Section 251(c). It gives notice of the time, place and the purpose of the meeting. And for plaintiff to turn what TU has done on its head and suggest that somehow the filing of supplemental proxy material to give even more information to the plaintiff and to the stockholders somehow requires an injunction

with respect to this meeting I find to be incredible. Indeed I would think that this Court and any court would wish to encourage companies to communicate as fully as possible with respect to events and facts as they become known and as they develop.

What Trans Union has done in its supplemental disclosure, which I would urge your Honor to read, and read carefully, is to literally put its own stockholders in the board room, and far from being a target for preliminary injunction, Trans Union should be commended by this Court for the candor and thoroughne of those disclosures.

In short, your Honor, plaintiff cannot show either an irreparable injury which outweighs that which is going to be suffered by GL, and suffered by Trans Union stockholders if a preliminary injunction is granted, nor can he show a reasonable probability of success on the merits. As to irreparable injury, he hasn't even tried, as we see it, to make such a showing. For that reason alone, this Court should deny the application for a preliminary injunction made on behalf of Mr. Smith.

THE COURT: Thank you.

MR. PRICKETT: Your Honor, may I respond

briefly?

THE COURT: Yes.

MR. PRICKETT: I'll be summary in my responses.

Mr. Payson begins by literary illusion. He suggests that Mr. Van Gorkom is the villain, and that his outside directors are his cronies. I think he overexaggerates. I think Mr. Van Gorkom is a very foolish man. I think he was motivated by the fear that he was going to be kicked out of his office by insurgent headed by Romans.

THE COURT: Well, he's compelled to retire rather soon.

MR. PRICKETT: Yes. But he didn't want to be put out by Romans and that group before he retired. He far preferred to sell the company to the Pritzkers, and honorably make a deal that looked good to him. So on a Sunday afternoon, without talking to anybody, this old man who is about to retire went out and sold the company.

Now, I don't suggest that he's a villain. I suggest he's a very foolish man who does a thing so hastily and so ill conceived panicking, as he obviously did, that the Young Turks were going to replace the old

man who had dominated the company so long.

Now, "cronies" is a little bit strong for the characterization of the directors, but they were pals of his. He nominated them. He sat on their board. He played golf with them. They played golf with him. He voted for their deals, and they voted for his, and that's exactly what happened here.

Second, it's suggested that there was a high premium. There is a premium, but it is nowhere near the premium that the marketplace in a free transaction has granted in comparable situations, and there is a constant parade of big numbers that suggest this and that, but it's not comparable, and it wasn't fair. That is, if Van Gorkom had done it right, he might have gotten $60 or $65, and then he would have gotten a fair cash price. But a cash price wasn't what his stockholders needed. What his stockholders needed if this was going to be done, rather than letting them share in the future of the company, was a tax-free deal. But he didn't do that. He went around, and before even thinking about this made a deal at his own particular number before anybody could think about it.

It's suggested that the stockholders are innocent stockholders. They are indeed, and they are

the owners of this business, and there's absolutely no reason why because Mr. Van Gorkom wants a deal that he thinks is a good deal to protect his own position that they should be subjected to involuntary capital gains.

Now, it is suggested that Mr. Pritzker is a Svengali. I think that's a little strong, but nevertheless, he really did do a superb job of conning this old man out of the company on a Sunday afternoon. He not only got it at a super price, but he put a kicker in there. He couldn't lose. He's going to get $17,000,000 even if somebody buys it. So that I think his powers of persuasion are monumental, and he's gotten a superb deal at the cost of the stockholders.

It is suggested that this case is a disclosure case. It is a disclosure case, and but for our discovery, all of this sordid history would never have come out. But it hasn't come out fully yet. There is still not full disclosure.

It is also suggested that this is not a Thomas case. It is a Thomas case. This board has gotten itself into a contractual corner where it can't consider another offer at this point. It's got to go forward with Pritzker, and that's precisely what happened in Thomas, and it's precisely what the Court

did for the stockholders there. It gave them an opportunity to get a fair offer.

It's suggested this is not a Gimbel case. Well, it's not a sale of assets case obviously. The relevance of Gimbel is that there the board, faced with a deal of similar dimensions and with far more information -- at least in Gimbel they had some advance warning, and they were told what they were going to do. There this Court said there is not that degree of prudence and consideration that a transaction of this size merits. The stockholders are entitled to the considered judgment of the directors, not simply hugger-musher rush into that.

That's the basic problem here, your Honor. The stockholders have never had the benefit of a considered judgment by the board. They simply rubber stamped it, and then at every stage they have played pick-up; that is, they have tried to put a Band-Aid on each situation culminating when they assembled counsel, all the counsel present in this room for GL, and they've tried to bootstrap themselves into saying well, we've looked at it all now. It's all come out, and we ratify it all. You can't do that, your Honor.

The suggestion that 251 does not encompass

giving the stockholders fair notice of what is done simply won't wash. You've got to give them 20 days notice, and when you give them a proxy statement, if you accept Mr. Payson's or Mr. Sparks' argument, I suppose what you could do is give notice, and then on the 19th day put out a proxy statement and say they have had fair notice because technically we have complied with the law. Condec doesn't say that. It says you can't utilize the corporate machinery to rig the thing, and particularly with stockholders you've got to be fair and candid, and you can't monkey around issuing proxy statements and holding board meetings at the last minute, and then send out proxy statements to the stockholders that attempt to correct all the past defalcations.

Now, there is a suggestion that this was an arm's length negotiation, that this is an arm's lengt merger. That is precisely what it is not, and that is the basic complaint.

This deal was struck in a home on a Sunday afternoon. It wasn't completely struck. The terms got worse during the week, but it wasn't arm's length. Arm's length means two equals who, well advised and with full information, trade off back and forth, and

it is not a secret deal made by a scared senior executive and a financier who is interested in taking over a company who makes a deal privately, doesn't disclose it to anybody. That's not arm's length at all, and that's not what this deal is. That was compounded by the fact that when they made this deal, they made it in such a way -- I don't think Mr. Van Gork ever realized that -- probably doesn't even realize it now -- that the deal was made in such a way that nobody, but nobody, could get in after the Pritzkers were there. They were on top of it, and sure, they could let anybody else come in, but the conditions in the thing made it impossible for anybody else effectively to make any other bid. So that in the first place, it wasn't an arm's length transaction, and secondly, everybody was foreclosed from coming in.

So we haven't had any bidding, your Honor. We have had a deal that was closed on Sunday the 13th, ratified on Sunday the 20th, and no real opportunity for the market free and open, to consider what TU was really worth. The deal closed then, and the market knows full well that there is no possibility of getting in there and making a better offer for their stock, and GE said so. They recognized what had happened.

Now, there is talk about the tax situation. It's not directly relevant, but it is suggested that everybody's tax situation is the same. The directors all knew that this transaction would involve disasterous capital gains for all shareholders because they are going to pay capital gains on between -- Suppose you bought at 37, and this deal goes through. You pay capital gains at 55. But they knew more than that. They knew that many shareholders had gotten their shares in tax-free considerations. Not Mr. Smith alone, but a lot of them. So they knew it was for worth.

THE COURT: You eventually have to pay capital gains. You can't go on putting it off forever.

MR. PRICKETT: That's correct. But there is no reason --

THE COURT: And it's not as much as ordinary income tax.

MR. PRICKETT: Mercifully they didn't get us into that kind of a deal.

But there is no reason why just because on a Sunday afternoon Mr. Van Gorkom stops around to see his friend, that the stockholders should then be put in a deal where they are going to have to pay capital

gains. It's worse for some than others.

But if we are mentioning taxes, you've got to see that there is a disparity here because so far as the Pritzkers are concerned, this thing is a sweetheart. It ends up $17,000,000 tax-free for them. So that the stockholders are going to get c-apital gains All of them are going to get some. Some worse. But the Pritzkers are going to end up $17,000,000 richer if somebody else comes in tax-free. That is a consideration that has led courts to enjoin mergers.

Now, it is suggested that we have abandoned claims against GL. We have not by any means. But what we are presenting here is a motion for preliminary injunction. When and if the time comes, we'll sort out the claims against GL, but we've not abandoned them by any means.

Now let me close by suggesting that what is before the Court, as I said at the outset, is the motion for preliminary injunction. We are now not even into February, and while I don't suggest to the Court that it take on the burden of setting a trial date now, this Court has always recognized the necessity of the situation, and if necessary, the matter can be decided as other matters of equal importance have been. The

record is full. We have taken a lot of discovery, and we are ready for trial. We will try this case anytime so that it can be decided finally, promptly. And we have at least until March 31, 1981, before the Pritzkers favorable financing flies away. But that is not the determinative thing, your Honor. The question is whether the law of Delaware has been complied with, and we suggest that on this record it has not.

Now, I knew that somebody would attempt to make a little bit of hay out of the Duff and Phelps report of 1978. Your Honor, I also urge you to look at that because the two reports are perfectly consistent. They are directed to different objectives, and it's fundamental, and perhaps the defendants don't understand it.

The market price of TU's stock has been 37, 38 over the last couple of years. Duff and Phelps was asked what is a proper discount for lettered stock, and they said about 35 percent, which would give a figure of $20 for that stock figuring the discount. But that's not the question here. Everybody agrees that TU was trading about 37 to 38. It's what is the proper price when you're buying 100 percent of the stock, and what will the marketplace give for that.

And Duff and Phelps addressed itself to determining what was a proper merger price, and that price is not $55 that was arbitrarily selected on a Sunday afternoon. It is a price which free of this secret deal the marketplace will pay for TU when it doesn't have the restrictions and conditions that are imposed by the Pritzker merger and it has full knowledge and information of the fact that this engine of cash, this cash cow, is on the verge of really realizing a tremendous economic growth. And it is for that reason that this deal, though it was not an arm's length deal, should be enjoined. It should be preliminarily enjoined, and if we go to trial, it will be firmly and completely enjoined so that the stockholders of TU get a fair shake on what is one to them in connection with their company. That is, that they be allowed to remain as shareholders rather than being arbitrarily cashed out in a cash-out merger, or if there is to be a merger, the merger is one that does not visit upon them the penalty of a catastrophic capital gains tax.

Your Honor, we think this case is clearly one in which the Court of Chancery will exercise its demonstrated power and demonstrated regard for the stockholders of a Delaware corporation. We ask,

therefore, that the Court issue a preliminary injunction against the proposed meeting of stockholders on February 10, 1981, and the consummation of that merger.

THE COURT: Thank you. I'll take the application under advisement, and decide it promptly.

Thank you.

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CERTIFICATE

I, HENRY D. SKOGMO, one of the Official Court Reporters of the Court of Chancery of the State of Delaware, do hereby certify that I acted as said Official Court Reporter at the trial of the cause herei and that the foregoing pages numbered 1 to 64 inclusive constitute a full, true and correct record of the proceedings heard before the Chancellor of the State of Delaware on the date herein indicated.

IN WITNESS WHEREOF I have signed my name this 4th day of February, A.D., 1981.

Official Court Reporter
Court of Chancery of
the State of Delaware

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Typed by:
Marian L. Wagner