BEFORE THE SUPREME COURT OF THE STATE OF DELAWARE

ALDEN SMITH and JOHN W. GOSSELIN,

Plaintiffs Below, Appellants,

v.

JEROME W. VAN GORKOM, et al.,

Defendants Below, Appellees.

No. 255, 1982

Supreme Court
Dover, Delaware
February 24, 1983
10:00 A.M.

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BEFORE:

CHIEF JUSTICE DANIEL L. HERRMANN
JUSTICE JOHN J. McNEILLY
JUSTICE ANDREW G. T. MOORE, II

APPEARANCES:

WILLIAM PRICKETT, ESQ.
Prickett, Jones, Elliott, Kristol & Schnee,
For the Appellants.

ROBERT K. PAYSON, ESQ.,
Potter, Anderson & Corroon,
For the Individual Appellees.

A. GILCHRIST SPARKS, III, ESQ.,
Morris, Nichols, Arsht & Tunnell,
For the Corporate Appellee.

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CHIEF JUSTICE HERRMANN: Good morning, gentlemen.

MR. PRICKETT: Good morning, your Honor.

CHIEF JUSTICE HERRMANN: The Court will take up Smith vs. VanGorkom, et al., Messrs. Prickett, Payson and Sparks.

Mr. Prickett.

MR. PRICKETT: Your Honor, this is an appeal after trial from the dismissal of a class action originally brought to enjoin the cash-out merger of the public stockholders of Trans Union Corporation. There are a host of reasons why this Court should reverse and remand the case to the Court of Chancery. In the necessarily limited time available, I can't touch on all of these.

JUSTICE MOORE: Mr. Prickett, you will agree that this is not a situation that involves the fairness rule, won't you?

MR. PRICKETT: Oh, I agree.

JUSTICE MOORE: We are talking about either the applicability of the business judgment rule or that there was something here that had never brought the business judgment rule into play, is that correct?

MR. PRICKETT: Yes. I had proposed to

confine my argument to two points, one of which is does the business judgment rule exculpate the defendants for their conduct, and secondly, the aspects of this case that touch on disclosure. I would not propose to argue the five errors of law that are found in the Chancellor's opinion.

CHIEF JUSTICE HERRMANN: You rely on your briefs for those?

MR. PRICKETT: I would rely on the briefs.

CHIEF JUSTICE HERRMANN: Very well.

MR. PRICKETT: There are five of those, and there are five major factual errors that are recited in the brief, and I would not take the time to go over those, nor would I take my precious time to comment on the fact that critical to the defense of this case are certain documents that were not produced that are referred to that are relied upon and are not produced. I'm not going to argue that.

CHIEF JUSTICE HERRMANN: Like Cicero, you are telling us now what you are not going to say?

MR. PRICKETT: Yes.

CHIEF JUSTICE HERRMANN: Very good.

MR. PRICKETT: Now, like Plato, let me turn to what I am going to argue, and as I said, I think in

going over it the critical aspects of this case are twofold in number. They are critical not only to the outcome of this case, but they are important in the sense that they will be of importance to other cases, and the first is did the defendants meet the test of complete disclosure as required by Lynch, and more recently by the Weinberger decision? And second, can the defendants escape from liability by pleading the business judgment rule? And let me turn then to the first of these.

Make no mistake, this is a disclosure case. This case should be reversed and remanded because the record shows that the defendants did not disclose with complete candor the material facts to the stockholders of TU.

As indicated in your initial question, your Honor, this case is obviously different from Weinberger in many respects, but it is similar in that the record shows that this Court has held that an unflinching obligation of corporate fiduciaries to exercise complete candor still obtains. And in this case the defendants affirmatively attempted in this original proxy statement to withhold from the stockholders practically all of the information about the

material facts surrounding the inception, terms and manner of the transaction that was entered into on that day.

The proof of the incompleteness of the original proxy statement and the attempt to withhold material information from the stockholders is dramatical found in the supplementary proxy statement which was sent out on January 26, 1982. This second, or supplementary proxy statement, by the defendants' own admission includes facts denominated by them as material, and they were not included in the original proxy statement.

CHIEF JUSTICE HERRMANN: Well, did the supplement come in time to bandage up the damage?

MR. PRICKETT: Well, your Honor,that is one of the legal points that I said I would not discuss, but let me pause on it.

CHIEF JUSTICE HERRMANN: Well, if my answer is in your briefing I'll find it.

MR. PRICKETT: Well, it seems to me that it clearly did not. Our statute requires a minimum of 20 days notice. They mailed out a proxy statement that they admit was incomplete, and then shortly before the meeting they file a supplementary one that attempts

to bandage it, as you say.

CHIEF JUSTICE HERRMANN: All right.

MR. PRICKETT: We don't think it's timely, it was incomplete, and in fact they suggest in that very second statement that it was this very lawsuit and the discovery in the lawsuit that prompted them to disgorge these facts, albeit belatedly, and in our view incompletely.

As I say, 8 Delaware Code, 251 requires timely notice, and we think that the Court should make it clear that complete candor includes timely candor. You can't withhold and then at the last minute publish -- bring yourself into complete candor but do it in such an untimely fashion that you are depriving the people of timely information.

But let me point out that even the supplementary proxy statement does not meet the test of complete candor. Our briefs contain an enumeration of the material facts that are omitted even from the supplementary proxy statement. The following are only three important examples of wherein this second proxy statement does not fill the bill.

First, as in the Weinberger case, there was no disclosure of the haste with which the board

acted. As in Weinberger, it would have been material to the stockholders in evaluating whether to vote or not to know the haste with which the whole deal was cobbled up, and particularly the Saturday afternoon, September, meeting at which the board met, voted and adjourned all in the space of two hours.

JUSTICE MOORE: Mr. Prickett, actually isn't it part of the real world that many times business transactions are consummated in a relatively short period of time, and that there is no magic period within which one can say they have either acted prudently or not?

MR. PRICKETT: No. I think that's correct. That is, you could have a meeting in which you could sell the DuPont Company in 20 minutes provided that in the year before that you have assembled the information, you have studied it, you have had committees of the management, you have had your independent bankers inform you and when the formal judgment is done it may take 20 minutes.

JUSTICE MOORE: Why does a man who, let's say, has been with his company for 25 years need to hire somebody to spend two and a half weeks studying his company and then tell him what he already knows?

MR. PRICKETT: Well, I think that's critical. Mr. VanGorkom, to take him first, had been with this company for 20 years, 25 years. He knew the company inside and out. What he did not know, and what so clearly comes out was that he did not know what the company was worth when it was being sold as an entirety. Sure he had done a lot of little deals where he picked up paint companies and pump companies, sutff like that. He had never sold a big company like this. What he did not understand was the difference between selling a minority interest and selling the whole company.

JUSTICE MOORE: In other words, you say he didn't understand the full concept of control premium?

MR. PRICKETT: He didn't understand it at all. He still didn't understand it at trial. And when h got ready to do this, he sat down and said how do I determine the price? What would I take for my shares? That's a minority interest. And it took when they finally got around to hiring an appraisal guy, Arthur Rosenbloom -- How long did it take him to figure it out ex post facto? It took him three months and a lot of calculations to figure out what it was worth, because this is not just a question of I know the company, et cetera, and I can pick it out and set a number on it.

It is a very careful transaction that you have got to have a lot of information on. And neither VanGorkom nor the board that suddenly comes in on a Saturday afternoon had ever considered what this company was worth as a whole, and they got no information on it, and they simply agreed. And the only guy who knew what it was worth was Pritzker. Why? He had done it all his life. He could figure that in his head. And the minute he saw that they were going to offer it for $55, it didn't take him long to figure out. He's a specialist. He does it all the time.

CHIEF JUSTICE HERRMANN: Was this special facet of the deal, the shares at $38 per, was that something that was new to VanGorkom as of that weekend?

MR. PRICKETT: You mean the sale of the million shares?

CHIEF JUSTICE HERRMANN: For $38, yes.

MR. PRICKETT: Well, it's unclear in the record when Pritzker, knowing his market, put the additional hooker in and said I want a million shares and I want them at market.

JUSTICE MOORE: When he wanted more than a million?

MR. PRICKETT: When he wanted more than a

million, and VanGorkom proudly told us I got him down from a million seven to a million.

CHIEF JUSTICE HERRMANN: Did that come into that initial conversation at the home?

MR. PRICKETT: Well, it's hard to tell.

CHIEF JUSTICE HERRMANN: All right.

MR. PRICKETT: There are no notes of the initial conversation. It's Pritzker and VanGorkom. But from all you can make out from the record, the initial deal was struck in the sense of Pritzker called up and said yes, I want it at 55. Then sometime during that frenetic week he got in touch and said I want a million seven hundred at market. VanGorkom tells us I argued about the total number of shares, but it never occurred to argue about the price. When the deal was put together on Friday night by Hank Handelsman, a specialist in this thing, there was a supplemental agreement at market of a million shares.

Now I can't tell you any more closely as to when that hooker was put in.

CHIEF JUSTICE HERRMANN: What does the record show as to the spread between what VanGorkom knew about his company and what other members of the board knew about that company?

MR. PRICKETT: Well, VanGorkom tells us that --

CHIEF JUSTICE HERRMANN: I know he was in the know, and knew the company well. What about the othe directors?

MR. PRICKETT: Well, let me say that the others were chief executive officers except for one academic type of other companies, and I think it's fair for me to say that they were well informed about the company. But the critical thing was that they had never considered this type of deal. Sure they had considered how to raise money, how to run the thing. They knew that there was a long term problem about the disparity, but they had never focused on this problem. Nobody had. And suddenly on Saturday afternoon at 12:00 noon they are told take it or leave it.

CHIEF JUSTICE HERRMANN: All right. Proceed with your argument now.

MR. PRICKETT: All right. Now, I said that as in Weinberger it was critical to the stockholders in evaluating the board's recommendation that they know the haste with which this was all put together. That was not disclosed even in the second proxy statement.

Secondly, there was no disclosure of what

the alternatives were if the stockholders turned the Pritzker proposal down at $55. The management had told the board of directors in the fiwe-year forecast, look, there are a lot of alternatives that TU can do. It can pay out a lot of dividends, it can redeem some of the stock, it can buy other companies. There were a lot of alternatives, and none of these are disclosed to the stockholders. They are simply told there is a $55 cash offer from Pritzker. Take it or leave it. That should have been disclosed.

But the most critical thing that is omitted throughout bears a remarkable similarity to Weinberger. There was in the summer of 1980 a five-year forecast prepared. It was presented to the board. No in-depth conversation of it. What that report emphasized was the incredibly large cash flow that TU had, and that it was projected.

Now, this five-year forecast and the critical thing about this huge cash flow was never disclosed to the stockholders. The management knew about it the board knew about it, and Pritzker knew about it. He tells us that's why he bought the company. But as the stockholders were asked to consider this, this critical piece of information, this document was never

disclosed to them, and they never knew that the singular feature about TU, its cash flow, was going to increase to the tune of $195,000,000. They were told about earnings, but they weren't told about the critical thing.

JUSTICE MOORE: But the defendants say that when you talk about cash flow you are talking about sort of an amorphous type of thing that can lead to more problems if you talk about it than by just letting the stockholder who is relatively informed analyze the financial statements and see for himself what the cash flow is likely to be.

MR. PRICKETT: Well, in the first place I don't think there was anything that was furnished to the stockholder, even a sophisticated one, that would give him the succinct information that everybody else knew, and that is that this company was going to produce a mountain of cash.

Now, it didn't have to be broken down on a per share basis or anything else, but that was what everybody else was in on and the stockholders were never told that.

JUSTICE MOORE: What do they call it, cash engine, or something like that?

MR. PRICKETT: Engine of cash, a cash cow. Sure, everybody knew that. Pritzker knew it. That's why he bought the company, but the stockholders who were being asked to vote on this were never told. And it was in a five-year report which the directors had,which Pritzker had, which everybody else had, but it was not disclosed to the stockholders, and so they were asked to vote on this without knowing the alternatives, without knowing the haste with which it was put together, but critically they were not told the critical thing that would have told them, hey, don't sell this thing for $55. There is a mountain of money coming. Everybody knew it but the stockholders.

JUSTICE MOORE: Is this report really the same thing as that Arledge and Chitiea report that we had to contend with in Weinberger? That was a document that was prepared by directors of the target company who were in the management of the acquiring company.

MR. PRICKETT: Well, your Honor quite correctly cautioned me at the outset. This is not Weinberger. But the similarity is this. The management prepares a significant document that is important for the stockholders, and it has critical information on it. It is disclosed to the directors.

Now, we don't have the majority cash-out situation, but we have a document that's critical. It is shared with the directors, and it is shared with Pritzker. He knows all about this, but it is not shared with the stockholders. And to that extent it is the same sort of significant information which the standard of complete candor we think requires be disclosed to the stockholders so that they can bring an informed judgment to bear on the question.

JUSTICE McNEILLY: Was it shared with other prospective purchasers?

MR. PRICKETT: It's hard to tell from the record before the Court. Initially Pritzker got complete access to everything that they had including this sort of thing.

Now, they went on to --

CHIEF JUSTICE HERRMANN: We are staying with the record, are we?

MR. PRICKETT: Yes, sir.

CHIEF JUSTICE HERRMANN: With what you are about to say?

MR. PRICKETT: Oh, yes.

CHIEF JUSTICE HERRMANN: Very well.

MR. PRICKETT: I don't think the record

discloses whether it was shared with GE and perhaps some other people.

JUSTICE MOORE: Was it shared with Salomon Brothers so that they had it in their packet of materials?

MR. PRICKETT: I can't tell, your Honor. That may be and may not be. But -- and I would have to go back into the record to tell whether that was actually in that package of information. I can't believ that GE, which got to the point of making a draft offer of $57 with a cash alternative didn't have all that information. They had spent since November looking at the thing with complete access.

The point is that everybody was in on the game except the stockholders who were then asked to vote on it and were kept in the dark about the central question of their company, that is what was it going to do. It was going to produce a mountain of cash, and they weren't told that.

Now, it does not have the pejorative connotations of the Arledge-Chitiea, but it does share in the fact that it is not complete disclosure, which is the hallmark of dealing with your stockholders. Tell them what's material. If you have it, Lynch says give

it to the stockholders if it's material. Don't withhold it. And here it was withheld. It was critical information in determining whether to accept the $55, and that's why I say that this case is a disclosure case.

Let me turn to the business judgment rule aspect of the case, and I will skip over and come to the defenses.

Strike the word "defenses." I will come to the reasons why the defendants say that in spite of the really scandalous haste with which they met on a Saturday afternoon, passed this thing and adjourned, that the business judgment rule still protects them.

Now, the first reason that they advance is that there were three separate occasions when the board considered the deal. That is they admit, I think, in effect that the Saturday afternoon two-hour meeting was not the sort of action that comes within the protection of the business judgment rule, because they did nothing to inform themselves and make an informed decision. But they say we met on other occasions, two other occasions.

Now, I invite the Court's attention to what actually happened on the subsequent meetings. The first meeting was in October. They met at 8:00 A.M. at

the Illinois Central board meeting. They only did two things. They considered the substance of proposed amendments to the agreement. They didn't reconsider is this a good deal or a bad deal. All they did was to consider some proposed amendments and agree. They also hired Salomon Brothers at that time. They did not meet, and they did not reconsider the deal, so that the attempt to say the business judgment rule may not apply to the first meeting, but because we considered it a second time it should apply just doesn't work because the minutes show they did not reconsider the deal.

JUSTICE MOORE: Don't the minutes reflect a long laundry list of the January meeting, all of the factors that were considered?

MR. PRICKETT: All right. Now I come to the January meeting.

What is the situation in January? And does that meeting which has a long recitation and it's proudly suggested that on this occasion they met for four hours, and therefore at least timewise they devoted okay. What's the situation?

They are in a contract with the Pritzkers. There is no out for them.

JUSTICE MOORE: The stockholders could

vote it out. There was no breach of contract?

MR. PRICKETT: Oh, no, no. The stockholders could vote it out, but the board couldn't back out. The board was bound. They had entered into an agreement that at that point was only subject to stockholder ratification. They had been sued, so what do they do? They all get together and they have a big meeting in which they recite all of the things that have happened, and at that point long after they have authorized a definitive agreement they purport to go through the thing. But could they at that point say we have reconsidered the deal, and we are not going to go forward with it? They would have been sued for breach of contract because they had entered into the deal, and you can't say well, I entered into the deal, and then two months, three months later I sat down and figured out whether it was good, because you couldn't back out then.

JUSTICE MOORE: Didn't they have a right, though, to go after a better proposal than Pritzker was making?

MR. PRICKETT: They had the right -- They had a limited right, a very limited right which they finally got in October to go after another deal,

but that didn't mean that their original decision which didn't give them that right was entitled to the shield of the business judgment rule because they considered it three months later. And in point of fact, when they did consider it in January, they had no option. They couldn't back out then. They would have been sued. In fact they tried it. GE had a better deal in draft form. They went to Mr. Pritzker and said can we get out, will you step aside from the contract? And while it was politely said, it was no way. That's my deal, and I stand on it, and they found to their horror that they were bound by the deal, and had to go through with it.

CHIEF JUSTICE HERRMANN: Including the million at $38?

MR. PRICKETT: Oh, sure. Sure, that was collateral. He was going to get that no matter what happened. They couldn't back out of that. That was a collateral deal and they were going to get that. Worse than that, they were bound by the deal that they had authorized in September, and Pritzker said to them I don't care how good your deal is with GE, I got my deal and you are going to go through with it.

CHIEF JUSTICE HERRMANN: By the time they met in January, how old was the litigation?

MR. PRICKETT: We filed it December 19th, and we had taken substantial discovery, and we had prepared briefs looking to enjoin the merger. They knew then --

CHIEF JUSTICE HERRMANN: Without looking at any record, do you know when the notice of the January meeting was sent out?

MR. PRICKETT: Yes. It was sent out January 19th.

CHIEF JUSTICE HERRMANN: The notice went ou January 19th?

MR. PRICKETT: Yes.

CHIEF JUSTICE HERRMANN: A month after the litigation?

MR. PRICKETT: Yes, sir.

CHIEF JUSTICE HERRMANN: All right. You may proceed now.

MR. PRICKETT: Well just to pick that up, in December they met and approved the formalities for the February 10th meeting, and a proxy statement came out January 19th that did not include any of the material that was later to be included in the supplementary proxy statement. So they knew at the time all of the things that had happened, and they sent

out a perfectly routine proxy statement that didn't include all that stuff, and then realizing that they had sent out a proxy statement that was grossly deceptive, they got together, cobbled up a second one and sent it out on the 26th, shortly before the meeting. And as I have indicated in the disclosure argument, even that second statement does not meet the test clearly of not of timely candor, but it is not complete candor because omits at least three critical items as well as a whole list of other things that would give the stockholders an educated look at the merits of the deal that they were proposing. And of course what is -- The board of directors had gotten itself into a hell of a hole.

CHIEF JUSTICE HERRMANN: If we will excuse the expression.

MR. PRICKETT: Sorry, your Honor. That slipped out. They had gotten themselves into a legal corner. At that Saturday meeting without reading the thing they had gotten themselves into a contract that obligated them to recommend the deal to the stockholders. Then the management protested and they got the right to go out and solicit. But if nothing happened on that, and nothing did in the end, they were still back in the hole. They had gotten themselves into a situation where

they had to recommend it, and that's what happened. In the end they were forced at that January 26th meeting to say this is a fine deal, though they had never gotten anybody to look at the deal, and they didn't even know until the January meeting where that price had come from, and it came out of Mr. VanGorkom. Why? Because he wanted to sell out. He wouldn't take 50. He thought 60 would be super, and 55 was a good price. And so that was the way that price came about, and that was the deal that was recommended to the stockholders.

CHIEF JUSTICE HERRMANN: Mr. Prickett, pardon me just a moment. Your half hour is gone. If you wish to save 10 minutes for rebuttal you ought to close this pretty soon.

MR. PRICKETT: Precisely what I was going to do, your Honor.

It seems to me that apart from the five legal errors that we think have got to be corrected by this Court and the five major factual errors, the two points that I have argued are important to this case and to the stockholders who were misled into voting for this, but these points transcend this case. It seems to us that the Court has got to make it clear since the Court below did not do so that for the business judgment

rule to be applicable, those who would invoke it must show affirmatively that they did what was reasonable to inform themselves so that what is within the business judgment rule is an informed decision, and if it's an informed decision, it deserves the protection of not being hindsighted. But if they haven't taken the time or the trouble to do it, the business judgment rule does not apply.

JUSTICE MOORE: And having acted reasonabl to inform themselves, what standard thereafter would you apply? Gross negligence?

MR. PRICKETT: Yes. I think you have got to -- If you get to that point the cases well establish what is the measure. You are not going to hindsight them and substitute. It's only where it's gross negligence or fraud, self-dealing, or something like that, that will vitiate it. Otherwise there is an ambit, there is a perameter within which the courts wisely will not hobble or second guess a businessman or corporate leaders. But that's not the case here. You never get there because the threshold is not met.

JUSTICE MOORE: As I understand your argument, the business judgment rule is not even applicable here because they never acted in a way to

inform themselves, and thus there was no business judgment to be brought to bear.

MR. PRICKETT: It was not an informed decision. The business judgment rule protects the informed decision even if it turns out to be wrong, but if you don't take the trouble to read the thing, how can you claim that you have made an informed decision, and how then can you claim the protection? But if you don't read it, you don't get any information on it, and you simply meet, pass it and adjourn on a Saturday afternoon, you can't say that you have made an informed judgment. So that we are not attacking the business judgment rule, and we are not saying that it isn't applicable in the proper case. We are saying you never reach that point because the record clearly demonstrates it.

We also say, as I said at the outset, this is a disclosure case. Critical to the outcome so far as the stockholders were concerned was full candid, timely information, and that was not present in this case, and therefore this case should be reversed and remanded to the Court of Chancery.

Thank you.

CHIEF JUSTICE HERRMANN: All right.

Mr. Payson, each of you have 20 minutes, as I understand it now.

MR. PAYSON: Thank you, Chief Justice.

CHIEF JUSTICE HERRMANN: Will Mr. Sparks argue?

MR. PAYSON: Yes. I will attempt to discuss the business judgment rule as it applies to the facts of this case, and Mr. Sparks will speak to the disclosure aspects and to any valuation question should the Court have questions on that subject.

CHIEF JUSTICE HERRMANN: Very well.

MR. PAYSON: I represent the individual defendants in this action. They are the former directors of Trans Union Corporation

I think we must focus first on what this case is not. It is not a Sterling vs. Mayflower nor a Weinberger vs. UOP type action. There was no majority stockholder in this case. In fact no share --

JUSTICE MOORE: I think you have gotten that concession.

MR. PAYSON: Thank you, sir.

I think Mr. Prickett has also conceded that there are no issues of fraud, bad faith or self-dealing.

CHIEF JUSTICE HERRMANN: Well, there is an overtone, as I get it from Mr. Prickett, that VanGorkom wanted this price for his personal reasons. This was his price and his chosen situation from his own pocketbook point of view.

MR. PAYSON: That to me seems to be perhaps the best test. When a man has been chairman of the board of a company for some 10 years, formerly its chief financial officer, a man who knows the company better than anybody in the world who has 75,000 shares, his life savings, decides that that price is fair to him, it seems to me that that is an objective determination by an owner of property that what somebody has offered is in fact a fair price.

CHIEF JUSTICE HERRMANN: But don't you have to know what his needs may be at the moment, or what his tax situation may be at the moment? Aren't those things that the court -- that are involved in when a person decides that's a good price for me? It's a question in my mind. I don't know that any of this is in the record.

MR. PAYSON: Yes. We know he was a low basis stockholder so he would be paying long term capital gains as many other shareholders would.

CHIEF JUSTICE HERRMANN: But your position then is a good price for him is a good price for everybody else, all other stockholders?

MR. PAYSON: No, sir, because he went far beyond that. In his initial meeting with Jay Pritzker Mr. VanGorkom took some calculations done by Mr. Peterson which showed that with an injection of capital of about $280,000,000, that the cash flow of this company could amortize a debt in approximately five years. That's what Mr. VanGorkom hoped. In fact the amortization of the debt which Mr. Pritzker would have to incur was going to be for more than five years, which was discouraging to Mr. VanGorkom because he was afraid that he could not justify a price of $55 per shar beyond his own feeling that that would be fair to him.

Mr. Pritzker said well, how about $50. This $55 is awfully high. The market is only 37. VanGorkom said no, it's going to be 55. But more importantly he said and we want this deal, transaction or proposed transaction to be tested in the marketplace. It was that fact which made this transaction perhaps unique. From the very outset Trans Union Company received offers from outside entities or persons, and could give those persons, anybody who was interested,

the same information that Mr. Pritzker had obtained from the company.

JUSTICE MOORE: You are speaking of the negotiated type transaction there. It was also the fact that they were clearly open to a tender offer, wasn't it?

MR. PAYSON: At any time anybody could hav come in with a $60, for example, cash tender offer.

JUSTICE MOORE: Now, throughout all of this there was never a tender offer.

MR. PAYSON: That's correct.

JUSTICE MOORE: And as I understand it from the facts, the closest anybody came to a proposal was really the GE Credit offer, is that right?

MR. PAYSON: Yes.

CHIEF JUSTICE HERRMANN: Were they open to solicitation of offers as well as receiving offers?

MR. PAYSON: At the meeting on September 2 the board required that Trans Union be permitted to receive offers, but they could not actively solicit. On October 10th the merger agreement was amended so as to expressly provide for the active solicitation of offers from anybody who might be interested together with giving anybody who might be interested all relevant

information.

CHIEF JUSTICE HERRMANN: Including the million at $38?

MR. PAYSON: No. But somebody could have come in and said I'll make a deal at 60, but you'll have to give me two million at 37.

I believe, Chief Justice, that the million shares is really a non-issue in this case. Mr. Pritzker made it clear that he didn't want to be a stalking-horse. He was going to have to put hundreds of millions of dollars of capital, tie that capital up for a period of three to four months while things cleared the SEC and the Hart-Scott-Rodino requirements. He said if somebody out there is going to take a shot at me and offer maybe a dollar or two more, I want to be reimbursed for my time and my expense and the fact that I have tied up hundreds of millions of dollars in capital. He said I want 1,750,000 shares at market, which was, I think, $37.

After negotiations with VanGorkom they agreed on 1,000,000 shares at 38, which was above market.

It's important to note that it was not an option. It was a contract. If no transaction had

ultimately been consummated, and the stock price had fallen, for example, to 35, Trans Union had the right to go to Mr. Pritzker and say you owe us $38,000,000 for 1,000,000 shares even though the price of the stock is now 35. That didn't happen. Importantly the million shares could not be voted with respect to this transaction.

It was part of Mr. Pritzker's proposal --

JUSTICE MOORE: Well, it was a protection to him, that's what it was, wasn't it?

MR. PAYSON: Exactly.

JUSTICE MOORE: Just a sure way of protecting himself from someone who was going to outbid him, and having done what he did, he wanted the financial protection. Isn't that what you are saying?

MR. PAYSON: That's correct, Justice Moore. But perhaps unique to this case -- I have not seen it in other cases. I have seen it in the form of an option where the proposed acquiror gets an option to purchase, say, a million shares, but in this case it was a contract which also had benefits to Trans Union. They never came about because the deal was ultimately consummated.

After the October 10th amendments to the

contract permitting active solicitation, Trans Union retained Salomon Brothers under terms that would have given Salomon Brothers -- if they had been able to find a purchaser for only one dollar more per share, they would have been entitled to two and a half million dolla as their fee. They also had I think about 250,000 shares in their arbitrage operations so that that provided them with an additional incentive.

JUSTICE MOORE: Mr. Prickett, though, says that another thing that wasn't disclosed to the stockholders, and sort of cooled Salomon Brothers' ardor was the fact that they were Pritzker's investment bankers, and that there was an inherent conflict of interest there that -- so they would have made $2,000,000, or whatever, in this transaction. Their connection with the Pritzker family was such that that money would not have meant much in the long run. How do you respond to that?

MR. PAYSON: I believe, but I will let Mr. Sparks respond to this, that the relationship between Salomon Brothers, Trans Union and the Pritzker entities was disclosed in the first proxy statement. There was a full disclosure of whatever conflict there was.

Mr. Prickett has changed his tone a little

bit. In the court below he said that the fix was in with Salomon Brothers. In all events there was a disclosure of the relationship between Salomon Brothers and the Pritzkers, I believe, and I will ask Mr. Sparks to confirm that in his argument.

JUSTICE MOORE: Can you strongly rely on the Salomon Brothers arrangement if they had such a close tie to the Pritzker family, that it would not really be in their interests to go out of their way and sell this transaction over and above the Pritzker offer?

MR. PAYSON: In the first place, there is no record support for this supposed close tie between Salomon Brothers and Pritzkers. More importantly is what Salomon Brothers did. They contacted between 100 and 150 corporations throughout the United States trying to interest them with an offering brochure which is set forth in our appendix, and I believe Mr. Sparks will point out the pages. They couldn't have tried any harder, and in fact they got General Electric Credit Corporation very interested in possibly acquiring Trans Union. It fell through for whatever reasons, and we don't really know the reasons other than as articulate by General Electric, and those articulations are reported in our supplemental proxy statement.

I don't know what more Salomon Brothers could have done. It contacted everybody, every entity which it thought might have any interest whatsoever, narrowed it down to three or four people or entities which expressed interest.

JUSTICE MOORE: Well, investment bankers can be very aggressive when they want to be, and a lot of times they can just sort of play the game. I guess what Mr. Prickett is saying is that that's window dressi How do you respond to that?

MR. PAYSON: There is no evidence in this record that Salomon Brothers was not as aggressive as it should have been under the circumstances. The only evidence in the record is that Salomon Brothers did everything that it could under the circumstances, and I think that record answer is the response to Mr. Prickett's arguments.

CHIEF JUSTICE HERRMANN: Mr. Payson, did you say you were going to address disclosure to the stockholders?

MR. PAYSON: No. Mr. Sparks is going to address that.

CHIEF JUSTICE HERRMANN: All right. I misunderstood that.

JUSTICE MOORE: He's addressing the business judgment rule.

CHIEF JUSTICE HERRMANN: Business judgment, yes.

MR. PAYSON: Chief Justice, you asked Mr. Prickett what information the other directors other than Mr. VanGorkom had about Trans Union.

CHIEF JUSTICE HERRMANN: On Saturday.

MR. PAYSON: Yes. In the first place, five of the Trans Union directors were also members of management. The other five were outsiders who were either chairmen themselves of their own major companies. Mr. Johnson, for example, was chairman of the board of I. C. Industries which is a four and a half or five billion dollar company. Time doesn't permit me to go into all the business and financial acumen of all of these people, but it is set forth at length in our brief.

Significantly --

JUSTICE MOORE: This wasn't a case of brothers-in-laws and sisters and cousins by the dozen who were peopling the board. These were actually well-qualified and well-experienced businessmen?

MR. PAYSON: I think the record permits no

other conclusion.

JUSTICE MOORE: Of equal stature or even greater than Mr. VanGorkom?

MR. PAYSON: Yes, sir, although they probably didn't have the -- except for the insiders -- The outsiders might not have had the absolute detailed information that Mr. VanGorkom possessed just because he was the chief operating officer --

JUSTICE MOORE: I'm speaking in terms of their stature in the business community.

MR. PAYSON: There is no question but that they were at least of the stature of Mr. VanGorkom.

CHIEF JUSTICE HERRMANN: But what did they have on this detail which you are about to address yourself to as compared with VanGorkom and the insiders?

MR. PAYSON: In this --

CHIEF JUSTICE HERRMANN: Is this set out in your brief?

MR. PAYSON: Yes.

CHIEF JUSTICE HERRMANN: All right. Anything that I ask that's set out in the brief you don't need to comment on.

MR. PAYSON: But I think this is helpful, and I think I should respond to this.

In July of 1980, two months before the September meeting, the directors were a week before the July board meeting given the five-year plan. The board meeting minutes show that that plan was discussed among the directors at the meeting I believe on July 20th and in August a very comprehensive study done by the Boston Consulting Group which had been working on its study for about 18 months, presented to the board its study and its conclusions. So that in two months before the decision of September 20th all of the directors had the knowledge imparted by not only the Boston Consulting Group but by management's own five-year plan.

CHIEF JUSTICE HERRMANN: Is this the five-year forecast we are talking about?

MR. PAYSON: Yes.

CHIEF JUSTICE HERRMANN: All right.

MR. PAYSON: In addition, I think Mr. Johnson pointed out that the directors of Trans Union had more detailed information as directors of that company than he had ever experienced as a director of any other company. Mr. VanGorkom not only was a lawyer, but he was also a CPA who had been the company's chief financial officer, and he literally deluged these directors with relevant financial information.

Another critical element: For about five years preceding the September 20th meeting Trans Union had been plagued with an excess of tax deductions. Because of its rail car leasing business it was entitled to investment tax credits and accelerated depreciation. However, it did not have the income to utilize all of its tax advantages. Competitors were coming on the scene which had income which could be offset by these kind of accelerated depreciation investment tax credits, so that they were getting into a better competitive situation than Trans Union with its lack of income.

Mr. VanGorkom had gone to Congress in August of 1980, and had lobbied for a number of changes in the tax law which would have helped Trans Union and other corporations in like situations. He was unsuccessful, or at least he thought he was unsuccessful and he assumed that Congress would pass additional accelerated depreciation legislation which would exacerbate Trans Union's competitive problems which it was already facing, and which were expected to worsen.

So that the directors had not only the Boston Consulting Group study, the five-year plan, but they also had this long history of the problems with

their tax difficulties which VanGorkom reported would be exacerbated he thought in the near future.

The directors thought there were problems in the future. Importantly,they also knew that the Pritzker proposal involved a premium over the market price of this very widely traded stock of about 48 percent or $220,000,000 to the shareholders, and for the first nine months and 19 days of 1980 a premium of 62 percent, or $264,000,000 for all of the shareholders collectively.

JUSTICE MOORE: I understand that, but Mr. Prickett raises a very strong point when he says giv all of that, why did VanGorkom have to go sort of surreptitiously, didn't even disclose this to his own man, Mr. Peterson, when he asked him to run up these little figures on could the deal go for $55 and what-hav you -- doesn't disclose it to its outside or fellow directors, and then summons them to a meeting on Saturday and in essence says we got to do this deal?

Now, how does the business judgment rule protect someone, and for what reasons would a transactio of this magnitude be presented to a board of directors on that basis when there was no emergency? I think it's clear in the record there is no emergency doctrine

like the Bennett vs. Propp situation, is there?

MR. PAYSON: There was not.

JUSTICE MOORE: So what is your explanation for that?

MR. PAYSON: Mr. VanGorkom did not present the proposition to the board.

MR. MOORE: No. To Mr. Pritzker, and then came back and summoned the board.

MR. PAYSON: And Mr. VanGorkom was amazed at the speed with which Mr. Pritzker had proceeded, but he had no control over that. Mr. Pritzker was a third party who looked at the figures, who met with people from the company, who decided he wanted to make a proposal --

JUSTICE MOORE: Why was there such secrecy? He was even keeping it from his fellow directors. What was in the necessity for that?

MR. PAYSON: Mr. VanGorkom explained that he wanted to prevent leaks, and --

JUSTICE MOORE: To his directors?

MR. PAYSON: Yes, because he said that in his experience, if I talk to 10 people, somehow 30 people know it and then all of a sudden 80 people know it, and then we have got rumors in the market. The

stock is going quickly, for example, to 45. People start selling when if they had only waited they could have gotten 55. That was his primary concern, and he so testified.

CHIEF JUSTICE HERRMANN:As I understand it then, until they convened on that Saturday afternoon no one but VanGorkom on that board knew of the Pritzker approach, or the Pritzker deal.

JUSTICE MOORE: One other --

MR. PAYSON: I believe Mr. Browder, who was the general counsel of the company, was informed the night before, because he and his assistant were asked by Mr. VanGorkom to start preparing papers.

CHIEF JUSTICE HERRMANN: Is he a voting director?

MR. PAYSON: Yes. Mr. Browder was.

CHIEF JUSTICE HERRMANN: Those are the only two of the entire board that knew what that meeting was about, or what was going to come forth at that meeting?

MR. PAYSON: There was a management meeting which preceded the directors' meeting, and at that management meeting I believe all of the inside directors were present, but your Honor is correct, that

prior --

CHIEF JUSTICE HERRMANN: The same Saturday morning?

MR. PAYSON: Yes. Prior to that Saturday morning I believe only Mr. Browder -- the only director other than Mr. VanGorkom was Mr. Browder.

CHIEF JUSTICE HERRMANN: If we are going to keep time schedules, you have about five minutes.

MR. PAYSON: I'll close as promptly as I can, your Honor.

Mr. Prickett suggests that the directors did not read the merger agreements at the September 20th meeting. He is correct. But Mr.Brennan, the corporate partner from Sidley & Austin was at the meeting and he explained the documents to the directors, and as a result of his explanation the directors brought specific focus on two changes. Number one, they wanted Trans Uni to have the right to receive bids from others, and they wanted any interested third party to have the right to receive the same information that had been provided to Mr. Pritzker. So that there was specific focus by the directors on the terms of the agreements as had been explained by their outside general counsel.

On October 10th they reconsidered the transaction, and approved certain amendments which

permitted them to go out and actively solicit bids from others with the aid of Salomon Brothers.

JUSTICE MOORE: Now, Mr. Prickett says you held this meeting in January, and that was, if I understand him correctly, just sort of a patch and paste job to cover up what should have been done the first time. What's your response to that in terms of whether they were exercising their business judgment at the first meeting?

MR. PAYSON: One must keep in mind that at the first meeting the directors all assumed that the price of $55 per share in cash would be tested in the marketplace for a period of three or four months. That test in fact occurred, and the stockholders almost received more, General Electric having backed out at the last minute.

In light of the fact that GE had mentioned prices of 57 and 60 whether on a stock-for-stock or part stock and part cash basis, the directors thought it important to meet and reconsider everything which had happened including the October 8th meeting, the September 20th meeting, the interest of GE and others, and specifically the allegations of the plaintiff in this lawsuit. Substantial discovery had been taken.

I believe the depositions of every director with the exception perhaps of two had been taken, and the directors wanted to know from the lawyers what's going on. What have we done wrong? That's reported in an exhibit introduced by Mr. Prickett.

JUSTICE MOORE: So I guess Mr. Sparks is going to talk about why this disclosure in the second go-round --

MR. PAYSON: Yes, Justice Moore.

In light of your admonition, Chief Justice, I think I'll bow to Mr. Sparks unless the Court has any questions of me at this time.

CHIEF JUSTICE HERRMANN: You will rely on your brief for the rest of your argument.

Let me ask a question on the Court's time:

I don't understand the fact -- and I think it's a fact -- that the stockholders voted this merger on February 10, 1981 -- Well, this is more for the next speaker. I will hold it.

Mr. Sparks, before you get started and the clock starts running on you, Mr. Prickett's brief that I am looking at recites that at the special meeting of the stockholders held on February 10th they voted in favor of the merger which was subsequently consummated.

Then there is a footnote:

"The plaintiffs' class consists of ten million five plus shareholders out of a total of 12."

MR. SPARKS: The others opted out, your Honor, and chose not to be members of the class.

CHIEF JUSTICE HERRMANN: The others, you mean the difference between 10 and 12?

MR. SPARKS: Yes, your Honor.

CHIEF JUSTICE HERRMANN: All right. The plaintiffs' class owned twelve million seven hundred some thousand shares out of a total of thirteen million three hundred some shares outstanding. With that many stockholders and that much stock in the plaintiffs' class, and by that time litigation was pending, February 10th, what stockholders voted in favor of the merger? Is that an intelligent question?

MR. SPARKS: I'm sorry. You are saying what stockholders --

CHIEF JUSTICE HERRMANN: What stockholders voted in favor of the merger if that great proportion of numbers of shareholders and that great proportion of stock by February were in the plaintiffs' class?

MR. SPARKS: Your Honor, first --

CHIEF JUSTICE HERRMANN: Is it just the difference between those -- I'm puzzled by this.

MR. SPARKS: Your Honor, first the class action determination took place after the merger had taken place.

CHIEF JUSTICE HERRMANN: So they were not involved in the litigation that commenced in December?

MR. SPARKS: Well, they were named in the complaint. Mr. Prickett pled that it was a class action The merger went forward through the preliminary injunction stage. The merger was consummated, and after the merger was consummated then notice went out to the class and they had an opportunity to opt out. As you know, that class action --

CHIEF JUSTICE HERRMANN: Oh, I see.

MR. SPARKS: -- proceeding they were in until they opted out. The figures on the vote were that a total of 8,708,131 shares representing 69.6 perce of the outstanding shares entitled to vote voted in favor of the merger. 970,000 shares equal to 7.25 percen of the shares voted against the merger, and 99,107 of the proxies were voted that were submitted that abstained on the merger vote, and thus 89 percent of the votes cast with respect to the merger were voted in

favor of the merger proposal.

CHIEF JUSTICE HEFLMANN: All right. Thank you.

JUSTICE MOORE: Further on the Court's time, with respect to Mr. Prickett's arguments that you needed the January meeting to patch up the disclosures that you should have made the first go-round, why did you need litigation to disclose what Mr. Prickett says is the obvious?

MR. SPARKS: Well, first we don't believe it's the obvious. We have never, contrary to what Mr. Prickett says,conceded that there was anything deficient in the 104-page proxy statement.

JUSTICE MOORE: Why did you have to issue the second one then?

MR. SPARKS: Because on or about January 20th or 21st or 22nd the GE deal which at the time of -- Let me pull this out. I think it's helpful to go back to the record and to the proxy statements themselves.

In the letter to stockholders that was sent by Mr. VanGorkom on the front of this 104-page proxy statement sent out on January 19th, it was disclosed that, "Discussions have been held with some

companies that express serious interest, but as of the date of this letter, January 19, no firm proposal has been received. However, General Electric Credit Corporation has stated that it is considering whether to make a firm offer to acquire Trans Union, and will communicate its decision to management before the end of January. You will be notified promptly if a firm offer is made, and the response of your board of directors with respect to such offer."

A couple days later they said we are not going to do it, and the board met to consider that, and the six-page supplement to the proxy statement was put out with the primary purpose of discussing the fact that GE had come in, had made these proposals, had decided not to make an offer.

JUSTICE MOORE: Aside from the GE proposal that you are disclosing, were there any other disclosures that you made concerning facts that were known to you or your company at the time of the first proxy statement?

MR. SPARKS: I believe there are facts in the supplement to the proxy statement, elaboration of facts that was not laid out as completely in the first proxy statement.

JUSTICE MOORE: Why is that?

MR. SPARKS: Simply because the company did not believe on January 19th that this elaboration was necessary material, and frankly --

JUSTICE MOORE: What changed its mind?

MR. SPARKS: Nothing really changed its mind. The company still didn't believe that the information was material, but they were putting out a supplement to the proxy statement and they decided that in light of the claims made by Mr. Prickett it would be prudent to lay out everything before the stockholders. And 15 days before the meeting -- and that's even longer than you have to send out a formal notice of meeting for a meeting, for example, to elect directors under Delaware law -- 15 days before the meeting they sent out the supplement, and it expanded on things that they had already said in the original proxy statement, none of which Mr. Prickett has picked out as being material. He hasn't pointed out what is in here that is material that wasn't in the first proxy material.

What has been done here is in light of Mr. Prickett's claims, is to say -- Well, if some stockholder says there are also some things that we should have disclosed, the company out of prudence says we will expand it. They put in what I think frankly is a lot

of information that stockholders probably didn't really need, but it's all there --

CHIEF JUSTICE HEERMANN: I'm going to start the clock now.

MR. SPARKS: -- day by day. What happened on September 20th, what happened on October 10, what happened on December 2, what happened on January 26, and the company put it all into the supplement. So there can be no question that if anybody thought these t were important they had them before them.

But the real motivation for the supplement proxy material was the changed status of the General Electric transaction.

I want to just touch on a couple of quick things, and then get right to the cash flow disclosure point that Mr. Prickett made. One, the Chief Justice asked what the plaintiffs' position, or talked about the plaintiffs' position with respect to possible self-dealin here.

In the summary of argument at the very beginning of Mr. Prickett's reply brief he cites defendants' summary which was -- this is a case in which plaintiffs challenge 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. I think that issue is not one under those circumstances that the Court need be concerned with, or can consider in light of that concession.

CHIEF JUSTICE HERRMANN: Very well.

MR. SPARKS: Second, in the question about who knew about the Trans Union negotiations with the Pritzkers on the Trans Union board, the Court asked, and Mr. Payson responded that Mr. VanGorkom and Mr. Browder were the only ones that knew. I believe he has forgotten that as the record clearly shows Mr. Chelberg, the president and the number two man at Trans Union was involved in the negotiations throughout the week before that meeting. He also knew about the transaction. So there were three insiders that knew about the transaction before Saturday, and of course the deadline that was imposed that the matter be addressed by the end of the day Sunday was one imposed by Mr. Pritzker, not by Mr. VanGorkom.

JUSTICE MOORE: But how can these outside directors be expected to be adequately informed and to bring their business judgment to bear when they are kept in the dark and they are summoned to a meeting and it's

only then and there that it's disclosed, and they are expected to make an informed judgment within a two-hour period involving the complete sale of their company?

MR. SPARKS: Your Honor, these directors in the months of July and August had extensive exposure to the prospects of the company in reviewing the five-ye plan with respect to possible alternatives in the future that the company might follow, with respect to the Bosto Consulting Group study. One was presented in July, the other in August. They were familiar, generally familiar with the market history. These are directors that had been on the company I believe the shortest term was something like seven or eight years. These people had been directors for years and years and years. They were familiar with the problem -- the tax pass through problem They were completely familiar with the prospects of the company if it continued to operate as a going concern.

What was then brought to them was a proposa not unlike somebody coming in with a tender offer, and also --

JUSTICE MOORE: It was a little different because they could have turned this down, whereas with a tender offer they are at the tender offeror's mercy.

MR. SPARKS: They could have turned it

down, that is correct, your Honor. They came in and they came in with a price of $55 a share in the face of historic market price in the 35-37 range which had never moved. Just wasn't moving. Faced with that they saw a premium in the 50 to 60 percent range for a company they knew had some problems in the future, and these directors -- In effect what Mr. Prickett has been arguing as I hear it is if a decision the directors believe is sound on its face is brought to them and they also know that they have the chance to have people shoot at the company for three or four months, if it happens that they happen to be wrong, that they are not allowed to do in two hours because they feel it's not a difficult decision -- they felt this was fair. They knew what the company was. They knew what the offer was. They were experienced people in the financial and business community, and they said this is a fair deal. This is a good offer, which is what the testimony says. Mr. Johnson's testimony. This was a good offer.

And the argument that's being made is that faced with that nonetheless, you have to meet -- because there are 36 hours available you have to meet all 36 hours, or you have to go out and get some investment banker who won't know the company as well as you do to

come in and try to do some hurried investment banking view, and you are faced with an offeror that says this is on the table until the end of the day on Sunday, and it's not going to be there afterwards.

JUSTICE MOORE: Isn't that an unusual ultimatum?

MR. SPARKS: Not necessarily.

CHIEF JUSTICE HERRMANN: To give to the board of directors of this magnitude of a deal.

MR. SPARKS: Well, I'm not sure it is. I think it may be just good business on the part of the offeror in this case, the Pritzkers.

CHIEF JUSTICE HERRMANN: You are saying in the business world that's not unusual?

MR. SPARKS: That's not unusual. I mean in the business world we get tender offers for numbers this large and even larger that come completely out of the blue with a half hour's notice, and companies are expected to respond. It's part of the business world, and I believe that modern business executives like these executives are able to gear up and deal with these things

If there were doubt in these directors' minds that this was a fair deal, as I think it's been the test of the market has shown that it was, they

could have turned it down. They didn't believe it was an unfair deal. They thought it was a fair deal. Yet they also knew that if they were wrong, somebody else co come in and prove them wrong with money by making a tender offer or another merger proposal. It didn't happen. It vindicated what in fact they did in the first place. But the record shows these were informed people, they thought about it, they knew what the terms of the merger proposal were. They made detailed changes and it's really just second guessing.

If this KKR offer had materialized, if this GE offer had materialized, I suppose there would be no attack here. It didn't happen to happen that way. But it could have happened, and as it was the price was fair.

CHIEF JUSTICE HERRMANN: As of that Saturday afternoon, was the posture such as far as Pritzker was concerned, and he was the other contracting party --

MR. SPARKS: Yes, and he was my client before he was dismissed by plaintiffs voluntarily on the ground that they had made no case against him.

JUSTICE MOORE: It's terrible to lose one's client in the midst of a case.

CHIEF JUSTICE HERRMANN: Was the Rubicon crossed that Saturday afternoon? Were these doors still all open as you have outlined?

MR. SPARKS: They were, your Honor. There was no contractual --

CHIEF JUSTICE HERRMANN: Why was the ultimatum issued then by midnight, or before the London market opened if the doors were still open for Pritzker to be overruled?

MR. SPARKS: The Rubicon was not crossed. The Rubicon was crossed in terms of the fact that the offer was still available because the directors said it was fair and they would go forward and let it be tested in the market. The very reason Mr. Pritzker insisted on the million share option was because he believed it was going to be tested in the market.

CHIEF JUSTICE HERRMANN: Well, I thought part of his motivation and part of his personality was that he didn't want the world to know that he was going to be turned down, or that his offer was going to be turned down, and that was the reason for the deadline. Now, if this market was still open for weeks and months later for a turn down of the Pritzker deal, what's this element of I've got to know for the point of view of my

read will show that this is Mr. Pritzker's way of dealing. He likes to move to a matter, and either he likes to see that it's going to go forward or he likes to move on to something else with his money.

CHIEF JUSTICE HERRMANN: My questions are addressed to how open this deal was after the Saturday meeting.

MR. SPARKS: After the Saturday meeting it was the understanding of both Mr. Pritzker and the board of directors that the board had the right to receive other bids and to give the same information that it had given to the Pritzkers to any other bidder that came along. That understanding was embodied in the sentence that's quoted in the Chancellor's opinion. It was later expanded on October 10th to lay it out in much greater detail including making it clear that there was an unconditional and -- there was an unconditional right of the company to solicit other bids and to recommend any better offer, any offer that they thought was better subject only to the requirement that by February 10 they put the Pritzker proposal to the stockholders, which was Mr. Pritzker's way of being sure that they didn't string him along in this solicitation thing forever. There were four months to go out and look for other bids.

MR. SPARKS: If there had been a higher GE deal and the board had recommended it, they had every right to do that under the agreement.

CHIEF JUSTICE HERRMANN: No liability to Pritzker on the contract?

MR. SPARKS: Pritzker would have had no breach of contract claim against them. All the Pritzkers would have had the right to do was have their deal put to the stockholders on February 10, and if there had been a $57 cash offer, or $60 cash offer by GE and recommendation of the board as they were entitled to do, that that was a better offer, nobody in their right mind would have voted for a $55 offer. It just won't happen. So that they were really unfettered contrary to really what have been repeated assertions to the contrary. The Chancellor saw through it. He read the contract. It's in the record. We didn't invite the court to read it. It just didn't put any strait jacket on Trans Union.

Your Honor, I really haven't gotten to the disclosure questions, and let me get to them quickly.

The main disclosure argument that I have heard is that there should have been a disclosure of Trans Union's cash flow. First, I think the Court

ought to be aware of what was disclosed. This will answer one of the Court's questions which Mr. Prickett was unable to answer.

At Page 3 of the proxy materials, the main proxy materials, after setting forth historical information, the proxy materials go on and state:

> "The board of directors believes that assuming reasonably favorable economic and financial conditions, the company's prospects for future earnings growth are excellent. The company's business plan --" That's the five-year projection -- "prepared in July 1980 contains projections which were furnished to GE and by Salomon Brothers to other potential business combination entities as referred to below, and would indicate that its net income might increase to $153,000,000 in 1985."

Then it goes on and discusses that further and the tax effect, tax and interest effects on the company.

The largest income number in that, the 153,000,000 which was three times what the company made for the year ended 1979 was furnished to the

stockholders. Now, it's against that background and the concept of total mix that Mr. Prickett argues that there should be or should have been some additional disclosure about cash flow. And in arguing that he relies on what he says in his reply brief is a reversal of the SEC's position with respect to the disclosure of cash flow. And while I normally don't hand things up in oral argument, I am going to hand up with the Court's permission, the SEC release which he quotes in his brief, which I'm afraid the Court may not have since it's in the CCH Service.

CHIEF JUSTICE HERRMANN: That's part of your appendix?

MR. SPARKS: No, it is not. It was cited for the first time in Mr. Prickett's reply brief.

CHIEF JUSTICE HERRMANN: You are now offering it as part of your appendix?

MR. SPARKS: I'll offer it as part of my appendix. I would like to do that. It's something that was cited.

CHIEF JUSTICE HERRMANN: Any objection, Mr. Prickett?

MR. PRICKETT: No, your Honor. I would like to see it.

MR. SPARKS: Certainly.

MR. PRICKETT: And I'll comment on it in my reply argument.

CHIEF JUSTICE HERRMANN: You may hand it to the clerk.

(Brief pause.)

MR. SPARKS: Your Honor, in arguing that cash flow should have been disclosed in the reply brief, and I believe by distinction in the oral argument this morning, plaintiffs have twice, and I believe egregiously miscited the document that I have just handed up to the Court.

First, at Pages 27 and 28 of their reply brief there is an argument that the SEC has reversed its position on the appropriateness of disclosing cash flow information. That is incorrect. At the first page of No. 62021 of what I am handing up to the Court in the summary at the very beginning it states:

> "The Commission is announcing the publication of a codification of existing accounting series releases. The material included in the codification represents only those portions of these ASR's that are relevant today. This publication is part

of the Commission's continuing efforts to review its rules, regulations and releases and to delete requirements that are no longer necessary, and to simplify the remainder."

Then under the heading "Date: No new accounting or auditing policies are established in the codification. Therefore, the content is already effective."

What is then contained on the next page starting at Page 62688 and to the end of what I have handed up to the Court, beginning in the lower right hand column is the accounting series release No. 142, and it is unchanged from the uncodified form which is set forth at Pages 61 and 62 of defendants' brief. Indeed what the SEC has done as this release makes clear, is reemphasize its longstanding position that cash flow data should not be broken out for disclosure purposes.

That's the first error. The second is even worse, because plaintiffs have lifted a single sentence from the release itself and quoted it out of context at Page 28 of their brief to suggest that the release says exactly the opposite of what it in fact

states, and I would direct the Court's attention to Page 62681 in the left hand column under the heading 202.02.

"The sentence quoted in plaintiff's reply brief is the following." They quoted the first sentence. "One of the principal reasons given for presenting cash flow is that the income measurement model currently prescribed by generally accepted accounting principles does not accurately reflect the income performance of certain types of companies, typically those with substantial assets which arguably do not depreciate or require replacement."

At that point in the brief there are three dots and that's all that's quoted. The rest of the paragraph, indeed the rest of the column is what the SEC's position is.

"While the Commission recognizes that there are problems of income measurement for some industries, the unilateral development and presentation on an unaudited basis of various measures of performance by different companies which constitute departures from the generally understood accounting model has led to conflicting results and

confusion for investors. Additionally, it is not clear that the simple omission of depreciation and other non-cash charges deducted in the computation of net income provides an appropriate alternative measure of performance for any industry either in theory or practice."

They go on to say that this has been recognized by the Accounting Principles Board, and then in the next paragraph they say:

"If accounting net income computed in conformity with generally accepted accounting principles is not an accurate reflection of income performance of a company or industry, it is not an appropriate solution to have each company independently decide what the best measure of its performance should be and present that figure to its shareholders as Truth. This would result in many different concepts and numbers which could not be used meaningfully by investors to compare different candidates for their investment dollars."

It is that guideline that Trans Union

followed. It avoided the confusion that the suggestions of plaintiffs here is urging. In short, your Honor --

By the way, it is also interesting and important to focus on the fact that what plaintiffs are urging is a disclosure not of historic cash flows, but sort of a double whammy. They want you to put in projected cash flows which have the speculative element in addition to this confusion element,and the fact that you are comparing apples and oranges and confusing investors.

CHIEF JUSTICE HERRMANN: You have about three minutes left.

MR. SPARKS: Okay.

The historic cash flow information incidentally for someone who is interested, as plaintiffs' own expert has testified at trial could be broken out from the data included in Trans Union's proxy materials which did at Page 18, for example, set forth the timing differences between tax depreciation and book depreciation, and did include at Page 61 a source and application of funds. Just not material and it's not the basis upon which investors evaluate these types of transactions.

JUSTICE MOORE: Do you think it would have been material to a stockholder to know that its company was referred to as an engine of cash?

MR. SPARKS: I don't know what that means, your Honor. I don't think that provides any basis for comparison. They knew that the company was involved in the leasing business. The proxy materials clearly disclose that depreciation and interest factors and tax factors are important.

JUSTICE MOORE: You may not know what it means, but your client certainly knew what it meant.

MR. SPARKS: No. We are talking about whether -- In the first place, where investors are going to get their return is from net income. That I think is really the bottom line.

And second, what they are trying to do in making an investment decision is compare this company to other companies. And to say that it's a cash cow or an engine of cash, really it doesn't add anything to anything. Even if those words had been used, I don't believe that would add anything to investor perception. And the SEC has clearly said that to put these other numbers in is not appropriate, because it confuses investors and it doesn't allow any basis for comparison.

and that's really the function in what they are trying to do, is compare the performance of this company to some other alternative investment that they might make with their money.

CHIEF JUSTICE HERRMANN: Your time is up.

Mr. Prickett.

MR. PRICKETT: Your Honor, I will reply seriatim to some of the arguments advanced by the bifurca argument presented on behalf of the defendants.

First of all, the Court has asked question as to whether if the $55 price was good for VanGorkom he being a big stockholder and he being a person who is knowledgeable of the company, isn't that a pretty good measure that it was a pretty good price for everybody? The answer is no. And I'm going to speak plainly because the time is short.

VanGorkom sold his shares for $55. If he makes that investment decision for himself, all well and good. But just because he's a fool and sells for $55 does not mean he discharges his responsibilities which are corporate to his stockholders. If he wants to go out and sell for $55, and he's leaving on the table 10 or $15 to Mr. Pritzker, that's no justification for what he did to us. What we are entitled to was

an informed decision, not his seat of the pants thing.

What he did was to sell his own shares for a lot less than what they would have commanded since he was selling the whole company, and he never knew that, and it was only when he got sued that he realized that he had been snookered by Pritzker. I can't sue Pritzker. I have no claim against him. He really just walked in and took it away from VanGorkom, and the board went along with it. I can't fault him, and I dismissed the claim against him. It was there for the picking. It's beautiful to watch how he moves up on these guys though. He tells them he's interested in 55. He wants secrecy and he wants speed. Why? Because unless he gets a definitive agreement everybody knows in the investment world that this is an engine of cash, and that he is stealing it, so he wraps it up. That doesn't make a claim against him, but that doesn't justify what Mr. VanGorkom did.

CHIEF JUSTICE HERRMANN: Did he wrap it up, Mr. Prickett, as of that Saturday? It's been said that he didn't wrap it up.

MR. PRICKETT: Well, he did about as good a job as you could do. That is, he got them to sign the deal at the opera that night, and what he had then

was what was defined by them as a definitive merger agreement.

CHIEF JUSTICE HERRMANN: What night was that?

MR. PRICKETT: Saturday night.

CHIEF JUSTICE HERRMANN: Saturday night.

JUSTICE MOORE: It wasn't at the opera. It was at the offices of the company.

MR. PRICKETT: Sorry. It was not at the opera. It was at a party before the opera, and VanGorkom in a black tie signed the agreement without reading the thing. And then there was a press release issued to the world saying that there was a definitive merger agreement. Nothing to indicate that this company could be retrieved, could be bought by somebody else. The world is told there is a definitive merger agreement, and indeed it was. They had signed a deal that they could not back out of.

Now, perhaps somebody else could come along and make a better offer, but they could not back out of it. They had gotten in. Pritzker had gotten about as good a deal as he could have gotten.

The board insisted that they put two conditions on it. Where is the evidence of that?

There is none. There is absolutely no evidence of that. But in any case, from Pritzker's point of view he had sewed it up. Sure he had two dangers. Somebody could come along and make a better offer, but under that original agreement I don't think they could back out for the better offer. Maybe in October they could when it was opened up, but before that nobody could do it.

Now let's talk about the tender offer: Anybody could make a tender offer for those shares, even in spite of the Pritzker agreement. But let me point out the difference between a tender offer and what Pritzker got.

Pritzker got a deal for a hundred percent of the company. He would never have to worry about a minority stockholder again because he's getting a hundred percent. If you make a tender offer, you are making an individual offer to each stockholder, and he decides whether he is going to do it. And you may get 70, 80 percent, but you don't get them all, and what Pritzker got was a hundred percent, and that was the difference.

Secondly, Pritzker got a collateral deal for a million shares, and sure, it was --

JUSTICE MOORE: Let me just ask you one other thing about that, Mr. Prickett:

True, the tender offer proposal would not have resulted in the full 100 percent of the shares being sold, but nonetheless, the deal was being tested in the marketplace, and a deal like the Pritzkers could have come along too, couldn't it?

MR. PRICKETT: Well, first of all, the difference between getting a hundred percent and 90 percent is very significant.

JUSTICE MOORE: I realize that, but what would have prevented, say, like the GE Credit transactio or somebody else from coming in and saying this is a goo deal, and 60 would be a tremendous deal for us. Let's make Pritzker's offer, but for $60.

MR. PRICKETT: That's exactly what GE did do. The price -- They recognized the price was a steal, and they offered in draft 57 and 60. It wasn't the price that was inhibiting them. But there were conditions that were put on the right of any subsequent offer. He could only have two conditions in his offer. One, stockholder approval, and no injunction.

Now, what were all the other conditions that Pritzker had in his offer? The right to check

inventory, the right to check finances. All the standard things that any offer was. They couldn't be in any offer. Secondly, it had to be completed before the Pritzker deal took place.

GE comes along. It has the money, but it can't comply. It can't clear Hart-Scott-Rodino. It just can't comply with that. It's got the Canadian problem. I mean, TU has Canadian operations. They got to clear with Canada. None of that can be done, and of course Pritzker knows that. He's way ahead. He's cleared that. So, you know, it's tested in the marketplace ostensibly, but Pritzker who is the guy that suggests this, he knows it didn't really make any difference because he's so far ahead contractually and temporally and financially that he knows nobody can touch him.

JUSTICE MOORE: So what you are saying is that -- the stockholder about being tested in the marketplace is a chimera. There is no way to test it in the marketplace, is that right?

MR. PRICKETT: Absolutely none. Absolutely no way. And when GE really got serious and put 57 and 60 in -- but they said we don't have time. Go to Pritzker and get him to stand aside. After all he's

making his little collateral deal. Mr. Pritzker says no way. No way at all. So it didn't happen.

There was no test in the marketplace.

Now let's talk about Salomon Brothers briefly. That is pure window dressing. Salomon Brothers was never consulted at the time the deal was made, and then because of the crabbing of management, Pritzker says why don't you get Salomon Brothers. But who is Salomon Brothers? They are his bankers. Who is going to end up with TU? Pritzker.

So thirty-five hundred thousand dollars is what he allows as the fee, and ostensibly they can make a fee if they can find somebody else. Did they ever participate in GE? There is not a word to indicate that Salomon Brothers got into the GE deal. They just don't do it, and they don't get into KKR. Salomon Brothers knew which side the corporate bread was buttered on, and that was pure cosmetics. And if there is any question about it, why was it that Salomon Brother never gave an opinion for the 500,000 bucks of TU money that they took on this deal? They didn't do it.

Why didn't they get an independent banker? The woods are full of them who would love to work for that money and who really would have done a job. He

didn't do it. They went to get Salomon Brothers, Pritzker's own banker with his approval, and he set the fee. And is it surprising that they didn't turn anything up?

Now, the defense on the business judgment is that there was a five-year forecast and the Boston study provided to the board. I agree they were provided, but the five-year forecast when you come to l at it says we got two to three years, and we got a lot of alternatives that could work well for the stockholders. Not one of the alternatives suggested selling the company. It said we ought to decide carefully on these things. The board never decided that. They got this study that suggests these alternatives, and then a month later they are summoned on a Saturday, and it said we got a take it or leave it proposition that we g to answer by the opening of the market. And they never considered the alternatives. They just decided that which had never even been presented to them in this study as alternative that was in the interests of the stockholders.

Now --

CHIEF JUSTICE HERRMANN: You should close now, Mr. Prickett.

MR. PRICKETT: Yes, sir. Let me just say secrecy. The only justification is that his very own chosen board is going to leak this, and so he decides th he is not going to consult with anybody on the board, his executive committee, the management or anybody else. He going to do it single-handed. He's going to sell out without telling anybody. What he says is I don't trust the guys that I have elected to the board. They are going to leak it for their private benefit.

That's not right. What he did was try to pull off a coup single-handed and he got caught because he was dealing with a master who skinned him alive. I don't care about him, but he skinned all the stockholders.

CHIEF JUSTICE HERRMANN: Very well.

MR. PRICKETT: So that, your Honor, I think that the Court has been gracious to me in giving me additional time to reply, but I don't think I should trespass further, though I have had necessarily to omit some of the responses that I would have made not only to Mr. Payson but to Mr. Sparks. Thank you, your Honors.

CHIEF JUSTICE HERRMANN: Very well, gentlemen. We have this case under advisement.

Let me say something about the timing

that we have all had here this morning.

A case of this magnitude and difficulty is squeezed into -- was scheduled to be squeezed into 30 minutes at a side. Because there was no application for enlargement of the usual 30 minutes of a side time the Court has scheduled four more cases today. We are behind schedule, and counsel and others have been waiting beyond the time that they should have had to wait.

Furthermore, counsel, you gentlemen have been obliged to talk at top rate and top speed regardless of dryness of lip or dryness of tongue. This is not right.

For future references, when a case of this kind comes before the Court and you know and you feel, and I think you did know, that you are not going to be able to say all the things you wanted to say in 30 minutes, make applications to the Court for extension of time so that we will not have this situation confronting you and confronting the Court.

The Court will now take a short recess.

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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 herein and that the foregoing pages numbered 1 to 78 inclusive constitute a full, true and correct record of the proceedings heard before the Supreme Court of the State of Delaware on the date herein indicated.

IN WITNESS WHEREOF I have signed my name this _____ day of April, A.D., 1983.

_____
Official Court Reporter

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Transcribed by:
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