Mr. Prickett
Doe

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ALDEN SMITH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 6342
	)	
JAY A. PRITZKER, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF TRANS UNION CORPORATION
IN OPPOSITION TO PLAINTIFF'S
APPLICATION FOR PRELIMINARY INJUNCTION

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PRICKETT, JONES
ELLIOTT & KRISTOL

Robert K. Payson
Michael D. Goldman
Peter M. Sieglaff
Donald J. Wolfe, Jr.
POTTER ANDERSON & CORROON
350 Delaware Trust Building
P. O. Box 951
Wilmington, Delaware 19899
Attorneys for Trans Union Corporation

Of Counsel:

SIDLEY & AUSTIN
Thomas H. Morsch
Shalom L. Kohn
Chicago, Illinois

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I. NATURE AND STAGE OF THE PROCEEDINGS

The complaint in this action seeks, _inter alia_, to enjoin a plan of merger, approved by the directors of Trans Union Corporation ("Trans Union" or the "Company"), but not yet voted upon by Trans Union's shareholders, under which existing Trans Union shareholders would receive $55 a share for their stock as part of a merger between Trans Union and GL Corporation, a Delaware corporation owned and controlled by the Pritzker family of Chicago. The complaint was filed on December 19, 1980. Since that date the corporate defendants have produced voluminous documents, plaintiff has taken the depositions of the ten directors of Trans Union, two members of the Pritzker family, and a representative of Salomon Brothers, an investment banking firm, and defendants have taken the deposition of plaintiff and plaintiff's expert.

As we will show in this memorandum, the merger was approved by Trans Union's directors in the exercise of their honest business judgment, and it will not be consummated unless the shareholders, who have been fully informed of all relevant information, decide for themselves whether the transaction is in their best interests. We will also show that plaintiff cannot meet the burden of proving irreparable injury nor satisfy any other test required for the issuance of a preliminary injunction, that the Special Meeting of Stockholders scheduled for February 10, 1981 should be held, and that if the merger is approved by the shareholders, it should be allowed to be consummated.

II. STATEMENT OF FACTS

Trans Union, a Delaware corporation, is a diversified holding company, the operations of which are conducted entirely through its subsidiaries (PS, p. 23).* As of December 19, 1980, the record date for the Special Meeting at which the shareholders will vote upon the proposed merger, there were 12,512,956 shares of Trans Union common stock issued and outstanding (PS, p. 1). The Company has about 12,900 shareholders (Browder Dep., p. 234), and no person owns 5% or more of its outstanding shares (PS, p. 2). All directors and officers of Trans Union as a group own a total of less than 1.5% of the Company's common stock (PS, p. 28). Trans Union's common stock is traded on the New York Stock Exchange, and it is the only class of stock which has been issued by the Company (PS, p. 29). The closing price of the stock on the New York Stock Exchange on September 19, 1980, the day prior to the announcement of the proposed $55 merger was $37.25 per share (PS, p. 6). During the period of more than five years from January 1, 1975 to the day prior to the announcement of the

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* "PS" refers to Trans Union's Proxy Statement with respect to the subject merger which was mailed to the Company's stockholders on January 21, 1981. Copies of the Proxy Statement, a Notice of Special Meeting of Stockholders, and a transmittal letter are attached to the Affidavit of William B. Moore as Exhibit A. Exhibit B to that affidavit are copies of a letter to Trans Union's shareholders mailed on January 27, 1981, and a Supplement to Proxy Statement ("SPS") mailed with that letter.

proposed merger, the stock has never traded above $39.50 per share (PS, p. 5).

Trans Union's principal activity is the leasing of railway tank cars and other rail cars in the United States, Canada, Mexico, and Great Britain (PS, p. 23). The Company owns the second largest fleet of privately-owned railway tank cars in the world, the total fleet consisting of approximately 51,000 tank cars and 12,000 other rail cars (PS, p. 23). Most of the Company's cars were built in its own plants or by others pursuant to its specifications. Trans Union's other activities include net leasing of vehicles and equipment, chartering oceangoing vessels, rental of construction and electronic equipment, processing and handling of sulphur, storing liquified petroleum gas in underground caverns, water and wastewater treatment, international marketing, manufacture and distribution of fasteners and forged products, real estate development, and information services (PS, pp. 23-24). In 1979, approximately 80% of Trans Union's income before taxes was derived from its leasing operations (PS, p. 3).

The rail car leasing business has, for years, provided substantial potential tax benefits to Trans Union because of accelerated depreciation and investment tax credits available under federal tax laws (Van Gorkom Dep., pp. 21-23). However, Trans Union has not generally had sufficient taxable income to fully utilize the tax benefits available to it (Van Gorkom Dep., p. 22). Under-utilization by Trans Union of the available tax benefits has adversely affected its competitive position in the marketplace because Trans Union, unlike some of its competitors, could not pass on to its customers some of those tax advantages (Chelberg Dep., p. 41). In mid-1980, senior members of Trans Union's management became convinced that proposed federal legislation would be passed that would increase the tax benefits available in the rail car leasing business (Van Gorkom Dep., pp. 23, 68; Chelberg Dep., p. 40; PS, p. 3). Such legislation would, of course, exacerbate the Company's inability to utilize the tax advantages which its primary business activity generates (Van Gorkom Dep., pp. 23, 68).

Trans Union management recognized that a possible solution to the problem of not being able to take advantage of the available tax benefits would be to acquire other companies that had taxable income (Van Gorkom Dep., p. 49). Another solution to the problem was to sell Trans Union to a company which could more fully utilize such benefits (Van Gorkom Dep., p. 55). The disadvantages of solving the problem by acquiring other companies included the fact that such acquisitions would have to be substantial and might well change the character of the Company from its predominant business--rail car leasing (Van Gorkom Dep., p. 67-69). Such acquisitions might also introduce an element of earnings instability and unpredictability (Wallis Dep., pp. 43-44), and the Company would continue to face the problems of its high debt-to-equity ratio and a dilution of its earnings per share (Johnson Dep., pp. 53-55).

Many directors and officers of Trans Union were of the view that the stock market had not fully recognized or appreciated the underlying value of the Company (Van Gorkom Dep., p. 135). For example, although Trans Union's income per share from continuing operations had steadily increased from $3.20 in 1975 to $5.01 in 1979 ($4.87 in 1980), and its dividends had increased from $1.58 per share to $2.24 during the same period, the average price per share of the Company's stock had increased from $31.04 in 1975 to only $32.31 in 1979 ($33.87 for the period January 1, 1980 through September 19, 1980) (PS, p. 3; SPS, p. 5). Publicly-held companies are judged by the stock market almost entirely upon earnings, and, although Trans Union had relatively good earnings, its greatest strength was in its cash flow (Van Gorkom Dep., p. 61).

William B. Browder, who has been a director of Trans Union since 1954, testified that he believed that the market price of the Company's stock in 1980 should have been in the "low $40's" (Browder Dep., p. 154) rather than the range of $32.75 to $38.25 per share at which the stock had actually traded (PS, p. 5). On the other hand, Graham J. Morgan, an outside director of Trans Union, believed that the market provided the best gauge of the value of the stock (Morgan Dep., p. 35). W. A. Wallis, an outside director and economist, believed that the market provided "...the only objective way of evaluating anything" (Wallis Dep., pp. 31, 18).

Van Gorkom concluded in early September, 1980, that the best way for Trans Union shareholders to realize the fair value of their stock would be the acquisition of the Company by another entity (Van Gorkom Dep., p. 69). In particular, Van Gorkom decided to talk with Jay Pritzker, whom Van Gorkom regarded as having one of the best financial minds in the United States, and whose family's interests have made many substantial corporate acquisitions (Van Gorkom Dep., pp. 59, 63, 108). Van Gorkom believed that the Pritzker family, whose companies are privately owned, could afford to pay more for Trans Union than a publicly-owned company because cash flow was more valuable to the Pritzkers than earnings (Van Gorkom Dep., pp. 69, 89, 90), and because public companies are concerned with earnings per share rather than cash flow (Van Gorkom Dep., p. 90) and would be unwilling to have their balance sheets reflect the highly "leveraged" position of Trans Union (J. Pritzker Dep., p. 27). Van Gorkom also believed that Trans Union stock would have the highest value to a buyer like the Pritzkers because they, unlike the general financial community, would recognize the special tax advantages which Trans Union had to offer (Van Gorkom Dep., pp. 69, 92-93). He also knew that the Pritzker family had the financial wherewithal to undertake the acquisition of Trans Union if the parties could reach an understanding (Van Gorkom Dep., p. 89). In addition, if Pritzker declined any interest in an acquisition of Trans Union, Van Gorkom believed that he could gain a valuable insight into the Company's problems and their potential solutions (Van Gorkom Dep., p. 84). Also, if the Pritzkers made an offer to purchase Trans Union, Van Gorkom believed that the Company would be in an advantageous position to obtain a tax-free proposal from another entity (which Van Gorkom, who himself owns more than 60,000 shares (PS, p. 28), would have preferred), because of the interest which a proposal from the Pritzkers would generate (Van Gorkom Dep., pp. 90-93).

On September 13, 1980, Van Gorkom met with Pritzker (Van Gorkom Dep., p. 108). Prior to the meeting Van Gorkom concluded that the maximum price per share which the Company might be able to obtain from Pritzker was $55 (Van Gorkom Dep., p. 101), and he knew that this figure fell within a range of values which had been developed by the Company's Chief Financial Officer prior to the date of the meeting (Van Gorkom Dep., pp. 78-79; Chelberg Dep., p. 70). At the meeting, Van Gorkom learned that the Pritzker-owned companies had taxable income of approximately $200 million which confirmed his belief that an acquisition of Trans Union would be attractive to the Pritzkers (Van Gorkom Dep., pp. 109, 111). Van Gorkom knew that a critical element in Pritzker's analysis of the proposed transaction would be the amount that the Pritzkers would have to borrow to finance their purchase of Trans Union (Van Gorkom Dep., p. 101). Van Gorkom presented figures to Pritzker which showed that the total purchase price would be approximately $690 million, assuming a price of $55 per share (Van Gorkom Dep., pp.

101, 109). Van Gorkom assumed that the Pritzkers would contribute $200 million worth of equity and would borrow the remaining $490 million (Van Gorkom Dep.). Based on Trans Union's projected cash flow, Van Gorkom argued that the Pritzker loan could be substantially repaid in five years (Van Gorkom Dep., p. 103, 109). Van Gorkom then suggested a merger which provided for a cash payment of $55 per share to the stockholders of Trans Union. Pritzker thought the proposed consideration was high (Van Gorkom Dep., pp. 115-116). As Jay Pritzker testified:

> "[Van Gorkom] then proceeded to show me some figures to show me why he felt that we could afford to pay $55 a share for the stock, which sounded to me, from what I had known previously, like a very high price." (J. Pritzker Dep., p. 27).

On September 15 or 16, 1980, Pritzker advised Van Gorkom that he would be interested in a merger at $55 per share if the data presented by Van Gorkom could be confirmed (Van Gorkom Dep., pp. 117, 118). Thereafter, Pritzker's representatives met with Bruce S. Chelberg and Carl W. Peterson, respectively the President and Controller of Trans Union, and Mike Carpenter of the Boston Consulting Group, which had completed a study of the Company earlier in the year (Van Gorkom Dep., p. 119).

During the course of the negotiations, Pritzker advised Van Gorkom that he would not propose a merger unless Trans Union would agree to sell to a Pritzker designee 1,750,000 shares of Trans Union common stock at the market price (J. Pritzker Dep., p. 28). After further negotiations, Pritzker indicated that he was willing to propose a merger of Trans Union and a Pritzker company at **$55 per share cash**, but only if Trans Union would give the right to a Pritzker designee to purchase 1,000,000 shares of the Company's stock at $38 per share, then slightly above the market price (Van Gorkom Dep., p. 167; J. Pritzker Dep., p. 28; Chelberg Dep., p. 99). Pritzker explained that he would not have made the $55 per share merger offer without the acquisition of a substantial number of shares, because:

> "He [Van Gorkom] reemphasized that he had to be free to obtain a better offer. I said to him, 'Well, look, I'm not interested in making a deal and then being a stalking horse for you to go out and find higher bids. First of all, it is costly for me to do this, it ties me up for a long time, but I'm willing to do it provided...the Company will sell me a million and three-quarter shares at the market, at the go-in.'" (J. Pritzker Dep., p. 28).

Chelberg explained that acquiring the right to buy 1,000,000 shares was simply a variation of the technique of purchasing shares in the open market before advising a target company that you were interested in acquiring it (Chelberg Dep., p. 100). A number of directors testified that they were aware of the use of a similar technique in other acquisitions, including the recent acquisition of Pullman by Wheelabrator-Frye in the late summer of 1980 (<u>E.g.</u>, Chelberg Dep., p. 95).

During the week of September 15, 1980, Van Gorkom discussed his negotiations with only two key members of management (Chelberg and Peterson) because of his concern for "leaks", and the obvious effect such leaks would have on the market for Trans Union stock (Van Gorkom Dep., pp. 126, 137). On September 18 and 19, 1980, the directors of Trans Union were advised that a special meeting of the Company's Board would be held on September 20, 1980 (Van Gorkom Dep., p. 131).

On the morning of the special meeting, Van Gorkom met first with senior management of the Company and advised them about the proposed merger (Van Gorkom Dep., p. 135). Many members of management expressed the view at that meeting that Trans Union should remain a public company and pursue its own programs as an independent company (Bonser Dep., p. 49). Several members of senior management expressed concern about the adequacy of the $55 cash offer, and indicated a belief that a higher price should and could be obtained (SPS, p. 3).

At the special meeting of the Board of Directors held on September 20, 1980, immediately after the meeting of senior management, all directors except O'Boyle, who was in the hospital, were present.* At that meeting, Van Gorkom outlined

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* Trans Union's Board of Directors consists of five of Trans Union's principal officers and five distinguished outside business leaders:

Sidney H. Bonser, Executive Vice President of Trans Union; William B. Browder, Senior Vice President - Law of Trans Union; Bruce S. Chelberg, President and Chief Operating Officer of Trans Union; William B. Johnson, Chairman and Chief Executive Officer of IC Industries, Inc.; Joseph B. Lanterman, Retired Chairman of Amsted Industries Incorporated; Graham J. Morgan, Chairman and Chief Executive Officer of United States Gypsum Company; Thomas P. O'Boyle, Senior Vice President - Administration of Trans Union; Robert W. Reneker, Retired Chairman of Esmark, Inc.; Jerome W. Van Gorkom, Chairman and Chief Executive Officer of Trans Union; and W. Allen Wallis, Chancellor of the University of Rochester and former Dean of the School of Business at the University of Chicago (PS, pp. 27-28).

Pritzker's offer and its genesis, and explained his view that the market had not fully valued the real worth of Trans Union's common stock (Van Gorkom Dep., pp. 131, 145). Van Gorkom advised the Board that it did not have to decide the "absolute correctness" of the $55 per share price, but that in light of the premium being offered over the market price,* the shareholders should be given the opportunity of deciding whether they wanted to accept the offer if the Board thought the offer was reasonable (Van Gorkom Dep., pp. 146, 147, 193, 194).

There was an extended discussion among the directors about the Pritzker offer (Johnson Dep., p. 20). The Board was advised that the merger offer might be withdrawn if the Board did not approve it prior to the opening of the stock market on Monday, September 23, 1980 (Chelberg Dep., p. 123), and that it was a condition of the merger proposal that a Pritzker designee be given the right to purchase 1,000,000 shares at slightly above the market price (Van Gorkom Dep., p. 167). The directors were also advised by Donald B. Romans, Executive Vice President and Chief Financial Officer of Trans Union, that various studies of the value of Trans Union stock had been made, that his initial study indicated a value of between $50 and $60 per share, and that an updated study indicated a value of between

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* The average price per share of Trans Union's common stock for the years 1975 through 1979 was $31.04, $33.17, $36.34, $34.30, and $32.31. During 1980, prior to the public announcement of the proposed merger, the average price per share was $33.88. On September 19, 1980, the last trading date before the announcement of the proposed merger, the stock closed at $37.25.

$55 and $65 per share (Chelberg Dep., pp. 152-54; Bonser Dep., p. 60). Romans also stated that he could not say the $55 price offered by the Pritzkers was unfair (Van Gorkom Dep., p. 147). The consensus among the directors was that the $55 figure was certainly within a reasonable range, and that the shareholders should not be deprived of the opportunity to accept or reject it. As Browder, one of the directors, stated:

> "I felt that based upon what the stock buying public had been paying for Trans Union stock for many, many years, including right up to date, even though it was a little higher than it had been at many times during those recent years, that the spread between that market evaluation, evaluation that the market gives, had been giving our stock, and the price offered by the Pritzkers, was substantial. And I felt that in my own thinking and knowledge of the company operations and its financial results, that while I couldn't say that there is no single dollar price which is the only fair price, this would certainly be a fair price to me.
>
> "It was high enough to satisfy my feelings that this price was one that was -- that should be presented to the shareholders for their determination."

(Browder Dep., p. 156).

The directors also understood that the right of a Pritzker designee to purchase 1,000,000 shares of the Company's common stock at $38 per share was an absolute condition to the proposal, without which the shareholders would not have the opportunity to vote on the $55 per share merger. In fact, it was understood that this was a "take-it or leave-it condition" (Johnson Dep., p. 33).

The Board discussed whether it would be desirable or necessary to have the advice of an investment banker as to the fairness of the proposed transaction (Johnson Dep., p. 43). The directors were advised that a fairness opinion was not legally required (Chelberg Dep., p. 148), and concluded that such advice was not feasible in light of the deadline imposed by the Pritzkers and was not needed as a practical matter because announcement of the Pritzker offer would stimulate additional offers by third parties (Van Gorkom Dep., pp. 151; Chelberg Dep., pp. 165-167; Morgan Dep., pp. 61, 69). As Mr. Wallis, one of the outside directors, testified:

> "Publishing the Pritzker proposal had the effect of notifying everybody that the company was opened to propositions of that sort."

(Wallis Dep., p. 70).

The directors insisted, moreover, that the merger offer be modified to make it more feasible to obtain other bids, and in particular directed that the merger agreement (1) permit the Company to receive offers from other persons, (2) permit the Company to provide any interested persons with the same confidential information which the Pritzkers had received, and (3) release the directors from any obligation to recommend the Pritzker merger if the Company received a more favorable offer (Browder Dep., pp. 108, 109). Pritzker subsequently accepted these conditions (Van Gorkom Dep., p. 161).

In short, the matter was reviewed by the directors thoroughly and in depth:

"Well, there was discussion in which I participated to make sure that the board members collectively were clear on the details of the agreement or offer from Pritzker.

"Specifically, as the meeting went on, those related to the matters of what rights the company had to furnish information to others who may express an interest in the company, and to clarify the language in the draft agreements on that point, and what the situation would be when or if we received an offer which was more favorable.

"We also collectively discussed, and I participated in the discussion, with Mr. Brennan [legal counsel], inquiring of him about the necessity for valuation opinions in spite of the way in which this particular offer was couched.

"We also commented with each other about the necessity to act immediately on this offer.

"We commented with each other about the adequacy of the $55 and the question of how that would be tested.

"We discussed, and I participated in the discussion of the aspects of the transaction regarding the option to purchase a million shares.

"And various other details of the transaction that I can't recall specifically."

(Chelberg Dep., pp. 129-130). Following its discussion the Board voted to approve the transaction.

Following the public announcement of the proposed merger on September 22, 1980, several members of Trans Union's management expressed various concerns about the proposed merger and stated that the $55 offer was not fair in light of the Company's underlying value, and some indicated that they would terminate their employment with the Company if the merger were consummated (SPS, p. 3). Van Gorkom reported to the Pritzkers the apparent disenchantment of certain members of management with the proposed merger, and the Pritzkers indicated that under the circumstances they would be willing to amend the merger documents to permit Trans Union to seek more favorable offers, subject to reasonable time constraints (Van Gorkom Dep., pp. 217-219).

On October 8, 1980, the Board of Trans Union authorized management to amend the merger documents to permit Trans Union to actively seek, through January 31, 1981, other offers for a business combination which might be more favorable to the shareholders than the Pritzker proposal (Van Gorkom Dep., p. 225). Pursuant to that authority, the merger agreements were amended on October 9, 1980 (PS, p. 4). At the October 8 Board meeting, the directors also authorized management to retain an investment banking firm to assist the Company in obtaining more favorable offers. Salomon Brothers was subsequently retained (PS, p. 4). Upon the amendment of the merger documents, most of the members of management who had earlier indicated that they would terminate their employment if the proposed merger were consummated, indicated that they have no intention of resigning whether or not that merger becomes effective (PS, p. 4).

Significantly, Jay Pritzker testified that in his view, the amendments to the agreements allowing solicitation of competing bids made little difference to Trans Union's ability, under the original agreements, to obtain a higher offer (J. Pritzker Dep., pp. 111-112). The original agreement did not expressly permit Trans Union to actively solicit bids, rather than merely receive them, but Pritzker testified that the distinction made little difference in the likelihood another bidder would appear (J. Pritzker Dep., pp. 50-51, 112). This is consistent with the understanding of Trans Union's directors who anticipated from the outset that other offers might well be received (Browder Dep., p. 252; Morgan Dep., pp. 61, 69; Chelberg Dep., pp. 165-167). The principal effect of the amendments, in Pritzker's view, is that it extended the time Pritzker would be at risk under his $688 million offer until February 10, 1981 (J. Pritzker Dep., pp. 52, 112).

Salomon Brothers agreed to assist the Company in soliciting bids from third parties, and pursuant to its engagement, approximately 50 partners and employees of Salomon Brothers went to work on the project (Higgins Dep., p. 13). With the complete cooperation of Trans Union and the Boston Consulting Group, Salomon Brothers prepared an elaborate offering brochure which set forth the Company's financial history, and described its businesses (Higgins Dep., Ex. 2). The brochure also contained five-year operating and financial projections. Salomon Brothers compiled a list of over 150 companies which it believed might be suitable merger partners for Trans Union (Higgins Dep., pp. 76, 109-10; Higgins Dep. Ex. 4). Each of these companies was subsequently contacted by

Salomon Brothers, in person or by telephone, to determine if any interest in an acquisition of Trans Union existed (Higgins Dep., p. 76), and many were given the offering brochure and substantial additional information (Higgins Dep., pp. 77-80). A summary report showing the companies contacted and the response of each is attached hereto as Annex A (Higgins Dep. Ex. 4). Trans Union management personnel subsequently engaged in direct negotiation with several interested companies including General Electric, Kohlberg, Kravis, Roberts & Co. ("KKR"), Borg-Warner, Bendix, and Genstar, Ltd. (Moore Aff., ¶4(bb)).

Of the 150 entities contacted, only four expressed any continuing interest in acquiring Trans Union (Higgins Dep., p. 81) and none had made an offer as of January 26, 1981 (Higgins Dep., pp. 91-92; Moore Aff., ¶4 (bb)). Significantly, even though the proposed issuance of 1,000,000 shares to the Pritzkers was disclosed to each of the 150 prospective merger partners (Higgins Dep., pp. 121-22), it was not cited by any of them as a potential barrier to a merger (Higgins Dep., p. 122). Prior to January 26, 1981, no prospect indicated that there was not enough time to evaluate the situation (Higgins Dep., p. 131; SPS, p. 4).

The most serious expression of interest by a prospective merger partner came from General Electric Credit Corporation, and its parent of General Electric Company ("GE") (SPS, p. 3; Higgins Dep., pp. 93, 98-105). Extensive discussions and negotiations were held with GE involving not only representatives of Salomon Brothers (Higgins Dep., pp. 98-105), but also various representatives of Trans Union. In mid-January, 1981, representatives of GE expressed their interest in acquiring Trans Union in a cash-option merger whereby the shares of Trans Union common stock would be converted to GE common stock on a non-taxable basis at $57 per share, with stockholders having the option of receiving $57 in cash, or in a total-cash merger at $60 per share, all provided the Pritzker merger proposal was withdrawn (SPS, p. 3). Because the Pritzkers declined to withdraw their merger proposal, GE informed Trans Union on January 21, 1981 that it would not make an offer to acquire the Company (SPS, p. 3).

GE representatives explained that in the opinion of three analysts it had consulted, the acquisition of Trans Union would have a negative effect on GE stock, because GE is attempting to position itself as a high-technology organization and Trans Union is not a high-technology company (Van Gorkom Dep., p. 335). Accordingly, GE stated that "We have decided that we will not make any offer because we don't want to get into a bidding contest for a Company of this type." (SPS, p. 3; Van Gorkom Dep., p. 336). The Pritzkers' right to acquire the 1,000,000 Trans Union shares had no effect on GE's action, and GE never objected to that right or indicated that it had any effect whatsoever on their decision not to proceed with a merger offer (Van Gorkom Dep., p. 344).

On January 26, 1981, the Trans Union Board of Directors again considered the proposed merger in light of the termination of the GE negotiations and the other events which had transpired since September 20, 1980 (see generally, Moore Aff.). In addition to the directors, the meeting was attended by Trans Union's Chief Financial Officer, Donald B. Romans, as well as Trans Union's counsel in this litigation (Moore Aff., ¶3). The Board was again advised of all the relevant details of the merger proposal and how it arose, and of every other fact of substance relating to the merger as reflected in the extensive discovery in this case (Moore Aff., ¶4). These facts, which the Board considered and discussed at length, included: the fact that Van Gorkom had initially proposed the $55 price; that Trans Union had not had the opportunity to seek an opinion from an investment banker as to fairness because of the time constraints imposed by the Pritzkers' offer; that a number of members of senior management and other employees had expressed the opinion that the merger price of $55 was too low; that General Electric had indicated that it would make a merger offer on a non-taxable basis at $57 a share, or at $60 a share on a taxable basis, if the Pritzkers withdrew, and the Pritzkers' refusal to do so; that some of Romans' studies indicated that the Company had a value of between $55 and $65 a share; and that Romans feels that a so-called "leveraged buyout" at $60 a share could still be accomplished within the next three months (Moore Aff. ¶4). Without further burdening this memorandum, we respectfully urge the Court to review the Moore Affidavit which recounts, in detail, the matters and events considered by the Board at the January 26, 1981 meeting.

The Board concluded after discussion that a number of these additional facts should be disclosed to the shareholders, and accordingly directed the preparation and dissemination of a Supplement to Proxy Statement and letter to stockholders (Moore Aff., ¶5 and Ex. B). After considering all these facts, and after being advised by counsel that the Board could take any position it chose, or abstain from taking a position, with respect to recommending the merger to shareholders, the Board concluded unanimously that it would continue to recommend the merger offer (Moore Aff. ¶6).*

It is, of course, still unclear whether an offer more favorable than the Pritzker transaction will be received by Trans Union before the shareholders meeting on February 10, 1981. For the purpose of the present motion, this Court should assume that an offer more favorable than the Pritzker proposal will not be received.**

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* Significantly, O'Boyle, who was not present at the September 20, 1980 directors' meeting and who stated that he probably would have voted against the merger at that time, voted at the January 26, 1981 meeting in favor of the merger proposal (Moore Aff. ¶6). Bonser, who remained silent at the September 20, 1980 meeting (Moore Aff., ¶4(i)), also voted in favor of recommending the merger proposal (Moore Aff. ¶6).

** If such an offer is received, presumably the shareholders will vote in favor of it rather than the Pritzker proposal (or reject both), and the present motion which seeks to enjoin the Pritzker merger will have become moot.

III. SUMMARY OF ARGUMENT

Plaintiff seeks to enjoin this merger because of his own unique financial situation and is not a proper representative of Trans Union shareholders generally. Even if he were, he is unable to show that the shareholders will suffer irreparable injury or that their remedies under the appraisal statute, 8 Del.C. §262, and for money damages are inadequate. Nor has he shown that the alleged injury he will suffer if the merger proceeds outweighs the injury the shareholders will suffer if the transaction is enjoined and their shares drop from $55 to the pre-announcement market price of $37.25 (a total of more than $222 million).

Moreover, plaintiff has fallen far short of showing that he is likely to prevail on the merits. This is not a case in which an interested majority imposed its will on the minority. On the contrary, the Trans Union Board, in the exercise of its honest business judgment and based upon all of the relevent circumstances, has done nothing more than recommend the $55 cash offer to the shareholders. It is the shareholders--not the defendants in this case--who will finally pass upon the adequacy of the offer. The shareholders are in possession of all the facts they need to make an informed decision, and this Court should permit them to do so by denying plaintiff's motion for preliminary injunction.

IV. ARGUMENT

A. Alden Smith Is Not A Suitable Plaintiff To Maintain This Action.

Plaintiff's deposition reveals that he stands in a unique position compared with other Trans Union shareholders and, thus, is not an appropriate representative of the investors on whose behalf this action was purportedly instituted. Plaintiff obtained his Trans Union shares in December, 1959, when his company was merged with Trans Union (Smith Dep., p. 15). The cost basis of his Trans Union Stock, for tax purposes, is less than 50¢ per share (Smith Dep., p. 18). In the early 1960's, plaintiff made a "short sale" of the equivalent of 50,000 Trans Union shares (Smith Dep., pp. 81, 96). As collateral for this short sale, plaintiff put up a portion of the stock he received in the merger. By this transaction, plaintiff ensured that with respect to those shares, which represented most of his holdings, he would not incur any further gain or loss by reason of any change in Trans Union's price. By engaging in this transaction, however, plaintiff obtained a total of $767,392 from the short sale and this amount was not subject to any tax because it was a hedging transaction (Smith Dep., pp. 106-111).

The effect of the proposed merger would be to frustrate plaintiff's effort to continue to defer his tax liability on his short sale. If the merger proceeds, plaintiff's long and short positions would each be liquidated (Smith Dep., p. 93), and plaintiff would incur a tax liability of $214,800 (Smith Dep., p. 112). Thus, it is apparent that plaintiff's objection to the merger is based on his desire to avoid tax liability with respect to his short sales. It is extremely unlikely that other shareholders face a similar tax problem.* This helps explain why plaintiff is opposing a merger which gives shareholders a 47% premium over the market price. He faces personal financial problems as a result of his hedging machinations, which are utterly unrelated to the fundamental fairness of the transaction.

Moreover, the announced merger frustrates yet another tax scheme that plaintiff has concocted. Plaintiff testified that he had planned to "cover" his short sales--i.e., to purchase Trans Union's stock and exchange it for the shares sold short (Smith Dep., p. 102). The reason for this, plaintiff testified, is that he obtained a substantial capital gain in connection with the sale of an orange grove, and by covering his short sales he would have a tax loss that would offset the capital gain and preclude the need for him paying capital gain taxes (Smith Dep., p. 103). Plaintiff also testified, however, that if the merger were cancelled, Trans Union's stock price

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* Plaintiff testified that his former partner, Compere Loveless, who also obtained Trans Union stock as part of the 1959 merger with Trans Union, was in a similar position with respect to having "substantial" short sales (Smith Dep., p. 116). But plaintiff was unable to say that any shareholder other than Loveless and himself was in such a position (Id.).

would drop back to $45 or $46,* instead of the current market price of about $55. The lower the stock price, of course, the less expensive it would be for plaintiff to cover his short sales (Smith Dep., p. 102).** Again, plaintiff is in a unique position compared with other stockholders. While other Trans Union shareholders would prefer to see the <u>highest</u> possible price for their shares, plaintiff desires the <u>lowest</u> possible price, at least in the near future, so that he could minimize his losses on covering the short sales.*** For this reason, too, plaintiff's objections to the merger are not based on the fairness of the transaction.

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* This testimony was, of course, utter speculation on plaintiff's part since Trans Union stock never traded, prior to the announcement of the subject merger, above $39.50 in the last six years, and the recently announced earnings per share from continuing operations for 1980 ($4.87) are less than such earnings for 1979 ($5.01) (SPS, p. 5). If the merger is not consummated, and the stock returns to its more recent price/earnings ratio, the market price is more likely to be about $36 per share.

** Plaintiff testified that his loss on covering the short sale was $1,982,608 at the market price of $55.22 on the date of his deposition.

*** Plaintiff testified that the amount he would have to pay to cover the short sale was irrelevant, since he had an offsetting capital gain (Smith Dep., pp. 102-03). This statement is ludicrous. Plaintiff's losses in covering his short sales would offset his capital gain. Thus, each additional $1 plaintiff pays in covering the short sales would offset a $1 of gain, and plaintiff would save 28¢ in taxes. The additional cost to plaintiff would be the difference between the $1 additional cost on covering the short sale and the 28¢ savings, or 72¢. Thus, the amount plaintiff pays to cover the short sale does make a material difference to him, and accordingly, plaintiff's objective is to see that Trans Union's stock price is as low as possible.

Under these circumstances, it is apparent that plaintiff cannot represent Trans Union shareholders generally because plaintiff's objective is to depress the price of Trans Union's stock rather than increase it as other shareholders would undoubtedly want. Although Delaware state law on class action cases is sparse, cases decided under the Federal Rules of Civil Procedure are legion that an individual may not serve as a class representative when he has a conflict of interest with the remaining putative class members.* *See*, *e.g.*, *Schy v. Susquehanna Corp.*, 419 F.2d 1112, 1117 (7th Cir. 1970), *cert. denied*, 400 U.S. 826 (1971); *Sanders v. John Nuveen & Co.*, 463 F.2d 1075, 1081-83 (7th Cir. 1972), *cert. denied*, 409 U.S. 1009 (1973); *Pomierski v. W.R. Grace & Co.*, 282 F.Supp. 385 (N.D. Ill. 1967); *Lavin v. Chicago Board of Education*, 73 F.R.D. 438, 441 (N.D. Ill. 1977) ("Rule 23 requires an active, interested, participating named representative *whose interests are coextensive with the class interests* to protect the class rights.") (Emphasis supplied).

The reason for this requirement that the named representative be "similarly situated" to the class is

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* Plaintiff also has a conflict of interest by reason of his purchase of 100 shares of Marmon preferred stock (Smith Dep., p. 57). Since Marmon is an affiliate of the parent of the Pritzker entity which will acquire Trans Union, it will be benefited to the extent that the $55 being offered is less than a fair price, as plaintiff claims. By reason of his stock ownership in Marmon, therefore, plaintiff will also gain to that extent. Accordingly, plaintiff is on both sides of the merger transaction and cannot fairly represent Trans Union shareholders purportedly opposed to the merger.

obvious. As the court put it in Robinson v. Leahy, 73 F.R.D. 109, 111 (N.D. Ill. 1977), the requirement

> "...insures the vigorous prosecution of the case necessary to protect the interests of the unnamed class members who will be equally bound by a favorable or adverse decision in the named plaintiff's action."

Because plaintiff is not similarly situated to the other shareholders, and indeed has the conflicting interest of desiring to depress the stock price, it is hard to see how plaintiff's attorneys can purport to represent both plaintiff and the class. As the court said in Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43, 51 (D.Del. 1974):

> "...how a single set of attorneys, despite their ability and integrity, could adequately balance this conflict among the class members is beyond imagination."

See also, Harriss v. Pan American World Airways, Inc., 74 F.R.D. 24, 42-43 and n.15 (N.D.Cal., 1977), where the court, relying upon the Code of Professional Responsibility and citing Mandujano v. Basic Vegetable Pdcts., Inc., 541 F.2d 832, 835 (9th Cir. 1976), noted:

> "'[T]he class is not the client. The class attorney...(has) responsibilities to each individual member of the class...' There is accordingly an overriding professional obligation which imposes a strict standard of congruence of interest upon the proposed class." (Emphasis supplied).

It is plain that the "strict standard of congruence of interest" has not been satisfied. Plaintiff's opposition to a merger providing a 47% premium over market is prompted by nothing more than his personal and idiosyncratic tax considerations. Plaintiff cannot adequately and fairly represent other shareholders, and the relief he seeks--which would disadvantage other shareholders by depriving them of a right to vote on a favorable merger--should be denied.

B. <u>Even If Plaintiff Were A Proper Representative Of Trans Union Shareholders Generally, He Is Not Entitled To Injunctive Relief.</u>

As indicated above, the instant action is based upon plaintiff's displeasure with the price he will receive if the proposed merger is approved. Thus, through his pending application for interlocutory injunctive relief, plaintiff would have this Court substitute its judgment as to the desirability of the merger proposal (which involves a 47% cash premium over the pre-announcement price of Trans Union shares on the New York Stock Exchange) for that of the wholly disinterested Board of Directors of Trans Union and, more important, for that of the Trans Union shareholders who have yet to speak. Before turning to a detailed discussion of the principles of Delaware law which disdain judicial interference in the corporate process and which relegate resolution of such complaints to the corporate ballot box, it is instructive to note that this action does not involve those factors which would ordinarily warrant an exception to the general rule of judicial restraint.

First, this is not a case in which a majority stockholder, in violation of the fiduciary duties which attend that status, is acting to impose its will upon the corporate minority. On the contrary, no stockholder or group of stockholders of Trans Union is in a position to dictate or control the outcome of the scheduled vote of stockholders. The burden of proof, accordingly, falls squarely on plaintiff to prove his case. E.g., Weinberger v. UOP, Inc., Del.Ch., 409 A.2d 1262 (1979).

Second, although plaintiff's unverified complaint suggests that the purchase by the Pritzker group of 1,000,000 Trans Union shares at a price in excess of the pre-announcement market price was designed to influence the outcome of the stockholder's vote (Compl., ¶¶22(f), 24(c), 26(c)), the record subsequently developed establishes that this contention is simply wrong. The record date for the upcoming stockholders meeting is December 19, 1980, well in advance of the issuance of such shares (J. Pritzker Dep., pp. 72-7). Thus, it is clear that such shares cannot be voted at the meeting and cannot influence its outcome with respect to the proposed merger.

Third, there is not a scrap of evidence that Trans Union's directors or management have engaged in self-dealing or are otherwise personally or improperly interested in the consummation of the proposed merger. There is absolutely no evidence that any director or officer of Trans Union has any understanding or commitment with Mr. Pritzker or any entity controlled by the Pritzker family with respect to future compensation or otherwise if the proposed merger is approved.

In fact, Jay Pritzker testified that the subject was never discussed with any member of senior management prior to the approval of the proposal and the execution of the merger documents (J. Pritzker Dep., pp. 58-60). Nor is there any merit to plaintiff's allegation that the merger was approved in order to permit the officers and directors of Trans Union to accelerate the exercise of stock options held by various members of Trans Union management. The issue was not even raised until after the Board meeting of September 20, 1980, approving the merger (Browder Dep., p. 316). More important, however, the acceleration of these options was not a term sought or requested by Trans Union management. As the record establishes, it was the Pritzker group which decided to have the outstanding options eliminated prior to the effective date of any merger (Browder Dep., p. 318), so that, upon consummation of the merger, the Pritzkers would own all of the common stock of Trans Union.

Nor is this a case where relevant information is being concealed from the shareholders. The Proxy Statement and the Supplement to Proxy Statement disclose all germane facts with respect to the proposed merger. In light of such disclosure and the fact that there is no majority or controlling stockholder, the shareholders of Trans Union, and not plaintiff or this Court, should decide whether the proposal transaction should be consummated.

In short, plaintiff seeks in this action to override the considered judgment of a strong and experienced board of directors and to prevent the Trans Union shareholders from voicing their interest in a proposal that offers a cash premium of 47% over market. Plaintiff himself guessed that if the merger were to be blocked, the stock price would drop back to $45 or $46 a share (Smith Dep., pp. 291-293). The market price of $37.25 which existed prior to the announcement of the merger seems even more probable. We do not challenge plaintiff's right to express his disaffection with the offered price, but rather his attempt to augment his influence beyond that warranted by his investment by seeking judicial intervention. The proper forum is the scheduled stockholders meeting, and plaintiff remains free to voice his objections to the other shareholders through the proxy machinery. Only if his view is shared by a majority of his fellow stockholders can such an objection be sustained.

C. Plaintiff Must Sustain An Onerous Burden Of Proof Before Preliminary Injunctive Relief Will Issue.

The issuance of a preliminary injunction is an extraordinary form of equitable relief which requires an extraordinary showing by the applicant of "urgent necessity". State v. Delaware State Education Ass'n., Del.Ch., 326 A.2d 868, 872 (1974). It has thus long been settled that the power to enjoin challenged conduct in advance of a thorough examination of the merits of the matter upon full evidentiary hearing will not be casually or routinely invoked. Petty v. Penntech Papers, Inc., Del.Ch., 347 A.2d 140 (1975). On the contrary, plaintiff must satisfy several rigorous prerequisites before such relief properly may be granted.

Initially, plaintiff must demonstrate that, in the absence of interlocutory relief, some otherwise inevitable and irreparable injury is imminent. American Vulcanized Fibre Co. v. Taylor, Del.Ch., 87 A. 1025 (1913). The fear of some future injury on the part of plaintiff, standing alone, will not suffice. Capital Educators Ass'n v. Camper, Del.Ch., 320 A.2d 782 (1974); Bayard v. Martin, Del.Supr., 101 A.2d 329 (1953), cert. den., 347 U.S. 944 (1954); Sandler v. Schenley Industries, Inc., Del.Ch., 79 A.2d 606 (1951). As stated by then-Chancellor Quillen, preliminary injunctive relief

> "...will not be granted merely to allay the fears or apprehension of the plaintiff where there is no showing or reasonable ground for believing that the defendant is about to commit the wrongs complained of or where he is without the opportunity or the intention of so doing."

State v. Delaware State Educational Ass'n., supra.

Additionally, even when a plaintiff is able to establish the imminent threat of irreparable injury, the probability of such injury, absent injunction, must be weighed against the probability of resulting harm to the defendant and others if the requested relief is granted. Weinberger v. United Financial Corp. of Calif., Del.Ch., 405 A.2d 134 (1979); Eastern Shore Natural Gas Co. v. Stauffer Chemical Co., Del.Supr., 298 A.2d 322 (1972); Gimbel v. Signal Companies, Inc., Del.Ch., 316 A.2d 599 (1974), aff'd., Del.Supr., 316 A.2d 619 (1974). It is plaintiff's burden also to tip the balance of relative inconvenience. Gimbel v. Signal Companies, Inc., supra.

Finally, but of at least equal importance, plaintiff bears the burden of demonstrating at least a reasonable probability of ultimate success on the merits of the matter in issue. Gropper v. North Texas Oil Co., Del.Ch., 114 A.2d 231 (1955); Holladay v. General Motors Corp., Del.Ch., 43 A.2d 844 (1945), aff'd. sub nom., Wilmington Trust Co. v. General Motors Corp., Del.Supr., 51 A.2d 584 (1945); Porges v. Vadsco Sales Corp., Del.Ch., 32 A.2d 148 (1953); Allied Chemical & Dye Corp. v. Steel & Tube Co., Del.Ch., 122 A.142 (1923).

Each of these factors must be affirmatively demonstrated on the record on the strength of plaintiff's own proof. Craven v. Fifth Ward Republican Club, Del.Ch., 146 A.2d 400 (1958). However, in considering the probability of plaintiff's ultimate success on the merits, it is proper to examine the proof offered by defendants as well. Bayard v. Martin, supra.

As will be demonstrated, plaintiff has failed to establish on the record the elements essential to the special burden with which he is charged. Accordingly, the motion for equitable interlocutory relief must fail.

D. Plaintiff Cannot Show That Irreparable Injury Is Imminent.

As noted above, the Delaware decisions establish that an injunction will never be granted except in a clear case of irreparable injury and with full conviction on the part of the

Court of its urgent necessity. State of Delaware v. Delaware State Education Ass'n., supra.

Preliminarily, it is manifest that consummation of the challenged merger proposal remains subject to several conditions as yet unfulfilled, not the least of which is approval by a majority of the Trans Union shareholders at the special meeting to be held on February 10, 1981. Due to the absence of a controlling shareholder, that approval is by no means a foregone conclusion. In addition, the proxy materials make clear the existence of additional conditions to the effectuation of the merger, including the absence of litigation with respect to the merger (a condition threatened by the instant procceding), and the exercise of dissenter's appraisal rights representing no more than 5% of the outstanding Trans Union common stock. In light of this, it would appear that plaintiff's prayer for preliminary relief is based primarily upon anxiety over unpredictable future contingencies. Inasmuch as plaintiff's anticipated injury is not presently exigent, this Court should refrain from interfering preliminarily in the corporate process. Hartford Accident & Indemnity Co. v. W. S. Dickey Mfg. Co., Del.Supr., 24 A.2d 315 (1942); E. L. Bruce Co. v. State, Del.Supr., 144 A.2d 533 (1958); A.S.G. Industries, Inc. v. MLZ, Inc., Del.Ch., C.A. No. 161 (1978); (unreported decision, a copy of which is attached hereto as Annex B); Cascella v. GDV, Inc., et al., Del.Ch., C.A. No. 5899 (June 20, 1979) (unreported decision, a copy of which is attached hereto as Annex C).

In addition, the relief plaintiff presently seeks is an injunction against the meeting at which the shareholders will vote on the merger. Such a prayer seeks to substitute plaintiff's judgment for that of the other stockholders, would deprive other stockholders of the opportunity to decide if they want the 47% premium the merger represents, and would contravene the important policy of this state against enjoining shareholder meetings. See, e.g., American Hardware Corp. v. Savage, Del. Supr., 136 A.2d 690 (1957); Lenahan v. National Computer Analysts Corp., Del.Ch., 310 A.2d 661 (1973); Bell v. Lavino, 3 Del.J.Corp. L. 572 (1977); Cascella v. GDV, Inc., supra.

Moreover, the nature of the injury anticipated by plaintiff is plainly not irreparable and therefore does not warrant the extraordinary relief he seeks. While he has sought to express it in a variety of ways, plaintiff's principal complaint is based upon the alleged inadequacy of price to Trans Union shareholders. (Compl., ¶¶24(b), 24(e), 26(d), 30, 40). Even if this were a valid contention, plaintiff clearly has an adequate remedy through resort to appraisal authorized by 8 Del.C. §262. While appraisal rights have been declared insufficient to compensate minority stockholders who are cashed-out of the corporation by an abusive stockholder whose majority position foreordains approval of the freeze-out, no such facts are present here. Indeed, the appraisal remedy was expressly designed by legislative mandate to function as an alternative for stockholders dissatisfied with the value deemed acceptable by a majority of their fellow investors. That is precisely the case presented here. In Stauffer v. Standard Brands, Inc., Del.Ch., 178 A.2d 331 (1962), aff'd., Del.Supr., 187 A.2d 78 (1962), plaintiffs brought an action to set aside a merger, alleging that the merger price was so low as to constitute fraud on the minority shareholders. The Court of Chancery concluded that because the sole dispute related to the fairness of the merger price, plaintiff's sole remedy was an appraisal proceeding. On appeal, the Delaware Supreme Court affirmed, Chief Justice Southerland holding:

> "...it is plain that the relief sought is the recovery of the monetary value of plaintiff's shares--relief for which the statutory appraisal provisions provided an adequate remedy. The Vice Chancellor held that in the circumstances of this case that the remedy was exclusive. His analysis of the facts and the law was thorough and well-considered and we agree with it."

187 A.2d at 80.

Insofar as it is applied to a merger between unaffiliated corporate entities negotiated at arm's length, as is the case here, the reasoning employed by the Stauffer decision remains sound. As previously noted, the appraisal remedy has since been declared inadequate to compensate minority stockholders who are frozen out by the majority stockholder solely for the purpose of eliminating them from the corporate enterprise. Singer v. Magnavox Co., Del.Supr., 380 A.2d 969 (1967) ("But none of these decisions [including Stauffer] involved a merger in which the minority was totally expelled via a straight 'cash for stock conversion' in which the only purpose of the merger, was as alleged here, to eliminate the minority."); Roland International Corp. v. Najjar, Del.Supr., 407 A.2d 1032 (1979) ("The unmistakable focus in Singer was on the law of fiduciary duty.... It may not be circumvented by full compliance with the procedures permitted under and required by the corporate statutes, nor is it discharged by remitting minority shareholders to a statutory appraisal remedy...."). The basis for distinguishing Stauffer in Singer and Roland was the presence of a fiduciary duty arising from the relationship between the minority and a majority stockholder standing on both sides of the transaction. No such relationship is present here. As a result, the appraisal remedy provides plaintiff in this action with a remedy which is entirely adequate to assuage his disaffection with the proffered merger price. In Roland, Justice Quillen, who dissented on the grounds that on occasion appraisal might well constitute an adequate remedy even in a majority-minority setting, observed:

> "At oral argument counsel in broad terms noted the one statutory limitation, 8 Del.C. §262(f), on valuation ["fair value exclusive of any element of value arising from the accomplishment on expectation of the merger"] and recited generally evidence difficulties as to post merger earnings, the possibility of a premium payment and the extension of the fairness doctrine beyond price. None of these items are persuasive grounds for the inadequacy of the remedy in the current context. Tri-Continental Corp. v. Battye, Del.Supr., 74 A.2d 71, 72 (1950). There appears here to be no desirable reason to create an unnecessary damage forum, particularly now in light of recent efforts

> to promote the adequacy of the statutory remedy. See 60 Del. Laws, Ch. 371 (1976) and Raab v. Villager Indus. Inc., Del. Supr., 355 A.2d 888 (1976), cert.den. 429 U.S. 853, 97 S.Ct. 147, 50 L.Ed.2d 129 (1976). See also Berkowitz, Delaware Chills Freeze-Outs: A Critical Brief of Singer v. The Magnavox Company and Tanzer v. International General Industries, Inc., 31 Del.J. Corp.Law, 426, 427 (1978). Certainly this Court should not foster an unnecessary damage forum because of any judicial limitation placed on the statutory appraisal procedure. Rather, we should encourage this legislatively established valuation process to be open to generally accepted techniques of evaluation used in other areas of business and law."

407 A.2d at 1040, fn. 12.

While the members of the Supreme Court in Roland disagreed as to the adequacy of the appraisal in a Singer setting, the decisions in Singer and Roland provide no basis on which to conclude that the appraisal remedy is inadequate to satisfy fully a shareholder who dissents from the price offered by a merger proposal in which a majority or controlling stockholder is not involved. Indeed, to so hold would effectively vitiate the very purpose for the appraisal.

Even apart from the available appraisal remedy, there is no threat of irreparable injury here because plaintiff can be compensated fully for any losses he may sustain through money damages. If, as alleged, the merger price is inadequate, plaintiff can obtain from any and all of the defendants (assuming, of course, he can prove some theory of liability--an element not required in an appraisal proceeding) money damages representing the difference between the alleged fair value and the merger price of $55 per share. Kahn v. Household Acquisition Corp. et al., Del.Ch., C.A. No. 6293 (December 10, 1980) (unreported decision, a copy of which is attached hereto as Annex D). Such damages could also fully eliminate any detriment resulting from the fact that the merger does not involve a tax-free exchange, assuming that such a claim is legally cognizable. In any event, plaintiff's only basis for attacking the proposed merger is price, and for such an alleged injury he has a fully adequate remedy. State of Delaware v. Delaware State Educ. Ass'n., supra, 326 A.2d at 875; see also, Reeves v. Transport Data Comm., Del.Ch., 318 A.2d 147, 149 (1974); High on Injunctions, §28.*

Similarly, plaintiff cannot persuasively allege the threat of irreparable injury with respect to the proposed purchase by a Pritzker designee of 1,000,000 shares of Trans Union common stock. First, as noted above, these shares were

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* The foregoing discussion has proceeded on the assumption that plaintiff does not here seek to enjoin the shareholders meeting. If he did, his assertion of irreparable injury would be even less persuasive. Any claim that plaintiff would be irreparably injured by an act of shareholder democracy is preposterous. Furthermore, any injunction based on such a claim would contravene the policy of this State against enjoining shareholder meetings. See, e.g., American Hardware Corp. v. Savage, Del.Supr., 136 A.2d 690 (1957); Lenahan v. National Computer Analysts Corp., Del.Ch., 310 A.2d 661 (1973); Bell v. Lavino, 3 Del.J.Corp.L. 572 (1977); Cascella v. GDV Inc., et al., supra. Obviously, if a majority of the stockholders do not vote in favor of the transaction, this action will be moot.

not purchased until after the record date, and thus cannot be voted in favor of the merger. No irreparable injury or influence can therefore result in respect to the shareholders' meeting by reason of the issuance of these shares. Nor will any irreparable injury result from any other aspect of such issuance. In the event that the proposed merger is consummated these shares will, in effect, simply disappear. One Pritzker entity will pay Trans Union $38 million for the shares, and another Pritzker entity will receive $55 million for those shares, subsuming in the process the $38 million paid to Trans Union for the shares in the first instance. Effectuation of the merger will thus result in the transfer of $17 million from one Pritzker entity to another, a matter entirely irrelevant to any Trans Union shareholder. Plaintiff's "expert", in fact, conceded that "If the Pritzker merger is in fact carried out, the one million share provision obviously becomes moot." (Meigs Aff.. p. 26 n.). With respect to the 1,000,000 shares, the merger can have no effect on any other Trans Union shareholder, each of whom would in any event receive $55 per share in the merger, and, contrary to the unsupported allegations of the Complaint, will not discriminate among those stockholders. Thus plaintiff's complaints regarding the issuance of common stock to a Pritzker designee at a price in excess of the prevailing market price are entirely meritless and do not provide a basis for injunctive relief.*

Finally, even if this Court should ultimately find the issuance of the 1,000,000 shares to have been improper, there is no basis for an injunction because the transaction can readily be rescinded. The shares can be cancelled, the $38 million purchase price can be returned by Trans Union, and the Pritzker group can be required to disgorge whatever financial benefit it may obtain by virtue of the proposed merger. There is simply no basis on the record now before this Court that warrants the issuance of the extraordinary remedy of a preliminary injunction.

E. The Balance Of Hardships Tips Decidedly In Favor Of Defendants And The Trans Union Shareholders.

As discussed above, if preliminary injunctive relief is denied, plaintiff still retains an adequate remedy by which to seek money damages. The only resulting hardships faced by

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* Neither is there any basis for the issuance of an injunction because of the effect of the 1,000,000 shares in impeding a higher bid from another entity. There is absolutely no evidence that this aspect of the transaction has had such an effect; in fact, the testimony is to the contrary. (Higgins Dep., pp. 121-22, Van Gorkom Dep., p. 344). Nor may it be suggested that the bid of a competing offeror would be diminished because of the dilution implicit in the issuance of the million shares at $38, then slightly above the market price. A prospective bidder would pay only so much as would enable him to exceed the $55 per share price offered by the Pritzkers. Thus, the bidder who wanted to buy Trans Union would pay the same amount--some amount slightly above the $55 bid--whether or not the additional shares were issued. And in any event, there is not a shred of evidence that the 1,000,000 shares was a material consideration to General Electric, Borg-Warner, Bendix, KKR, or any other prospective offeror.

plaintiff in the event that interlocutory relief is denied is that he will be required to prove his entitlement to money damages on the merits (or elect appraisal where liability is not an issue). As observed by Vice Chancellor Brown in Kahn v. Household Acquisition Corp., supra:

> "If the merger is approved, the... shareholders will be entitled to receive $6.00 per share to have and invest as they see fit, while the case is proceeding. If plaintiff prevails under her theories, the defendants can be required to pay such additional amount to each...shareholder as may be found necessary to constitute a fair price."

Annex D, p. 9.

The risk of the issuance of preliminary relief to the shareholders of the corporation is compelling in comparison. As Jay Pritzker has testified, his financing commitments for a $450 million line of credit at a fixed interest rate of 14%, on which the challenged proposal is based, expire on March 31, 1981 (J. Pritzker Dep., p. 113). The Court can take judicial notice that this favorable rate of interest is no longer available in the financial community and, as Pritzker's testimony establishes, the loss of access to this huge line of credit at such a rate would severely threaten the feasibility of a transaction of this magnitude (J. Pritzker Dep., p. 113). Thus, if the merger is preliminarily enjoined, Trans Union shareholders may well be denied the opportunity to receive cash for their shares at a 47% premium over market price. If the market returns to its pre-announcement level, the shareholders as a group will have lost more than $222 million.

F. Plaintiff Cannot Demonstrate A Reasonable Probability Of Success On The Merits.

1. The Applicable Standard Is The Business Judgment Rule.

In addition to the special burden he must shoulder in seeking preliminary injunctive relief, plaintiff must carry an equally heavy burden in presenting the merits of his complaint by reason of the business judgment rule. Application of this standard is mandated by plaintiff's failure to present any evidence whatsoever of self-dealing on the part of Trans Union's directors. Thus, plaintiff is charged with the difficult task of persuading this Court that he will prevail on his claim that an arm's length offer by GL Corporation to pay every shareholder of Trans Union a price in cash equal to approximately 147% of the prevailing market price is so grossly inadequate as to constitute a fraud on the stockholders even if after full disclosure they decide to vote in favor of the proposal.

The Delaware law ordinarily vests the judgment of the directors of the corporation with a heavy presumption that they have acted in good faith. As stated by Chief Justice Wolcott in the leading case of Sinclair Oil Corp. v. Levien, Del.Supr., 280 A.2d 717, 720 (1971):

> "A board of directors enjoys a presumption of sound business judgment, and its decisions will not be disturbed if they can be attributed to any rational business purpose. A court under such circumstances will not substitute its own notions of what is or is not sound business judgment."

This rule is particularly apt where, as here, the primary allegation is that the proferred price is inadequate. When such a question is raised, the business judgment rule requires that room be afforded for honest differences of opinion. Allied Chemical & Dye Corp. v. Steel & Tube Co. of America, Del.Ch., 120 A. 486, 494 (1923). Thus, "a wide discretion in the matter of valuation, as in other matters, is confided to directors." Cole v. National Cash Credit Ass'n., Del.Ch., 156 A. 183, 188 (1931). Consequently, "a mere inadequacy of price will not suffice to condemn the transaction as fraudulent, unless the inadequacy is so gross as to display itself as a badge of fraud". Mitchell v. Highland Western Glass Co., Del.Ch., 167 A. 831, 833 (1933).

As more recently enunciated by Vice Chancellor Brown under facts similar to those presented here:

> "It is well established that in order to enjoin a proposed merger on the theory of constructive fraud based on a claimed undervaluation or overvaluation of corporate assets, it must be plainly demonstrated that the overvaluation or undervaluation, as the case may be, is such as to show a conscious abuse of discretion before a case of fraud in law can be made out. Cole v. National Cash Credit Ass'n., Del.Ch., 156 A. 183 (1931).
>
> "Mere inadequacy of price will not reveal fraud, but rather the disparity must be so gross as to lead the court to conclude that it was not due to an honest error of judgment, but rather to bad faith, or to reckless indifference to the rights of others interested. Wide discretion in the matter of valuation is confided to directors, and as long as they appear to act in good faith,

> with honest motives, and for honest ends, the exercise of their discretion will not be interfered with."

Muschel v. Western Union Corp., Del.Ch., 310 A.2d 904, 908 (1973).

Equally clear is the inapplicability of the exception to this rule first enunciated in Singer v. Magnavox Co., supra. Because the Singer analysis is rooted in the fiduciary relationship that arises between a majority stockholder and those holding the minority interest, it has no application here. Where, as here, a corporate acquisition is not controlled by one stockholder standing on both sides of the transaction, the judicial inquiry contemplated by Singer is simply inapposite. As the Singer opinion recognizes:

> "To state the obvious, under §251 two (or more) Delaware corporations "may merge into a single corporation". Generally speaking, whether such a transaction is good or bad, enlightened or ill-advised, selfish or generous--these considerations are beside the point."

380 A.2d at 973.

Indeed, the presumption afforded the untainted judgment of directors is bolstered in this case by the fact that, even though their shareholdings represent only a small percentage of the outstanding shares, several members of the Trans Union Board would themselves suffer substantial personal detriment from too low a merger price by virtue of their own stock interests in Trans Union. The officers and directors as a group hold 161,401 shares, exclusive of stock options (PS, p. 28), and Van Gorkom himself, who holds more than 60,000 shares, testified to his willingness to sell them at the $55 price (Van Gorkom Dep., p. 314). If the stock is in fact worth more than the $55 price that has been offered, the directors and officers who own Trans Union shares stand to lose significantly on their own investment interests. As this Court observed in Gropper v. North Central Texas Oil Co., Del.Ch., 114 A.2d 231, 235 (1955):

> "There has been no showing of any plausible motive which would cause such officers and principal stockholders to commit acts of self-injury."

In this case, there has been no showing of any such motive, much less a plausible one. As previously noted, there is simply no evidence in this case from which it can be reasonably concluded that the members of the Trans Union Board would have had any reason to act other than independently and on the basis of their own evaluations. On the other hand, there is ample evidence that plaintiff's opposition to the merger is based on his unique position as a result of his personal tax considerations. See Section IV.A., supra.

Further, subsequent Delaware decisions have recognized that the special burdens envisioned by Singer and its progeny have no application in circumstance which do not involve a controlling interest standing on both sides of the transaction. See, e.g., Weinberger v. United Financial Corp., supra. Indeed, the courts have expressly held that, even when the offeror is in a position to control the outcome of the vote on a merger, Singer will not be applied where the transaction is structured to neutralize that control by conditioning the approval of the proposal upon an affirmative vote of a majority of the minority shareholders. See, Weinberger v. UOP, Inc., Del.Ch., 409 A.2d 1262 (1979); Wayne v. Utilities & Industries Corp., Del.Ch., C.A. No. 5744 (July 19, 1979) (unreported decision, a copy of which is attached hereto as Exhibit E), aff'd. in part sub nom., Fins v. Perlman, Del.Supr., No. 233, 1979; Harman v. Masoneilan Int'l. Inc., Del.Ch., 418 A.2d 1004 (1980).

It is thus clear that the decision of the directors to provide the stockholders the opportunity to consider the merger proposal is entitled to a presumption of good faith and propriety. With this standard in mind, we will examine below the specific allegations raised by plaintiff.

2. The Alleged Breach of Duty.

Plaintiff asserts in his complaint that the directors have breached their fiduciary obligations to the stockholders of the Company in two respects: 1) by failing to undertake "an adequate effort to determine the availability of other potential merger partners for TUC who could offer terms more beneficial to TUC and the public stockholders" (Compl., ¶24(b), and 2) by having failed "to obtain the requisite information pertinent to the proposed transaction and failed to weigh and consider carefully the proposed transaction" (Compl., ¶24(d)). Neither contention finds support in the record.

The contention that the Board failed to seek offers from other suitors is simply wrong. The directors took affirmative action in connection with the original Pritzker proposal to permit Trans Union to receive additional offers which might prove more favorable to the Trans Union shareholders. Thereafter, at the October 8, 1980 Board meeting, the directors instructed management actively to solicit bids from third-parties and to retain an investment banker to aid the Company in such solicitations. Upon its retention, Salomon Brothers prepared a detailed offering brochure evaluating the financial history and prospects of Trans Union. Salomon Brothers subsequently contacted 150 potential suitors on Trans Union's behalf (see Annex A), three or four of which expressed serious interest, but none of which has ventured a competing offer.

Indeed, one of the very purposes for initially approaching the Pritzker group was to establish a reasonable range for future offers. It was believed by the directors that an offer from the Pritzker group, whose financial expertise is widely respected, would excite interest in Trans Union among other suitors and would encourage additional offers (Chelberg Dep., pp. 162-166). In fact, Salomon Brothers so opined (Chelberg Dep., p. 167). Plaintiff's allegations that the Board failed to seek out alternative proposals is utterly meritless.

Equally without basis is plaintiff's lame attempt to suggest that the Trans Union directors failed to bring their business judgment to bear in evaluating the subject proposal. See, Kaplan v. Centex, Del.Ch., 284 A.2d 119, 124 (1971), in which then-Chancellor Duffy observed that application of the business judgment rule is contingent upon a showing that informed directors brought their judgment to bear on the transactions. The facts of record reveal that the directors had long been aware of Trans Union's inability fully to utilize the tax benefits available to it, its inability to pass along to its customers many of those tax advantages, proposed legislation that would increase the available tax benefits, the failure of the market to recognize the company's cash-flow strength, and the advantages that would attend the acquisition of Trans Union by a privately-owned company in light of these factors (See, e.g., Johnson Dep., p. 83). In addition, of course, the directors received current operating results, financial reports, projections and related information on a regular basis (Morgan Dep., pp. 28-29, 31).

Wholly aside from this background information to which each of the Trans Union directors was privy, and their consideration of these matters in view of the Pritzker proposal at the September 20 and October 8 special meetings and at the December 2 regular meeting at which all prior actions of the Board were unanimously ratified and confirmed, the Board has recently met yet a fourth time to consider again the desirability of the proposed merger. On January 26, 1981, the Trans Union Board met and considered at length the very facts which plaintiff apparently contends that the Board has failed to consider (Moore Aff., ¶¶3, 4). Advised by counsel that they were free to alter or revoke their prior recommendation to the stockholders with regard to the proferred price, the Board nonetheless unanimously voted in favor of the proposed merger. Indeed, O'Boyle, who had been absent from the September 20 meeting, and who indicated that he probably would have voted against the proposal if he had been in attendance at that time, stated that in light of the ensuing events he now favored its approval (Moore Aff., ¶6).

It is noteworthy that this Court specifically considered and approved such a procedure in Muschel v. Western Union Corp., supra, in which Vice Chancellor Brown considered an application to preliminarily enjoin a merger and held:

> "...I must note that as of this date Western Union has submitted an affidavit to the effect that such a meeting was held yesterday, August 9, 1973, and all matters, heretofore raised by Plaintiffs were considered, including their amended complaint, trial brief and a transcript of the August 3rd hearings in this Court. It is therein recited that after full review, discussion and consideration, it was the unanimous vote of the directors present to approve the merger with NSC. Thus, Plaintiffs now are in the position of asking the Court to enjoin the merger until such time as the Western Union board does what, according to its affidavit, it did yesterday."

310 A.2d at 909.

Afforded the opportunity to consider for a fourth time the advisibility of the proposed merger with the benefit of hindsight informed both because of ensuing events and by plaintiff's allegations and the extensive discovery had in this proceeding, the Board has unanimously reaffirmed its recommendation that the stockholders vote in favor of the transaction. Confronted with these facts plaintiff's naked allegation that the Board did not render an informed judgment is wholly without substance.

3. The $55 Per Share Is Fair Under Traditional Delaware Legal Standards.

As noted above, because Trans Union solicited bids from some 150 entities, none of which elected to top the $55 offer made by the Pritzker, the free market, the only objective testing ground, has already established the fairness of the $55 price, and no further analysis is required. But to the extent any further inquiry into fairness is appropriate, it only confirms the point.

In Poole v. N.V. Deli Maatschappij, Del.Supr., 243 A.2d 67 (1968), certain former minority shareholders in a tobacco company sued the defendant majority stockholder, Deli, and others, alleging that plaintiffs had been fraudulently induced to sell their shares to Deli in response to an allegedly false and misleading tender offer. This Court rendered judgment for the defendants, holding that plaintiffs had failed to establish that the "true value" of the stock exceeded the price paid by Deli. See 224 A.2d at 262. On appeal, the Delaware Supreme Court rejected plaintiffs' argument that the stock should have been valued on a liquidation basis rather than on a "going concern" basis, which the Chancery Court had used, and affirmed:

"...that the actual or true value of the stock is to be determined by considering the various factors of value including earnings, dividends, market price, assets, and the other factors deemed relevant in a stock evaluation problem arising under the Delaware Corporation Merger Statute, 8 Del.C. §262."

Id., at p. 69. Thus, we submit that, at the least, the "value" of the Trans Union minority shares for purposes of testing the fairness of the $55 per share merger price is the same as if this were an appraisal case under 8 Del.C. § 262. Accordingly, we will review those elements which the Delaware courts have considered in determining the "fair value" of stock in appraisal proceedings.

The most frequently cited description of value for appraisal purposes is contained in the Delaware Supreme Court's opinion in Tri-Continental Corp. v. Battye, Del.Supr., 74 A.2d 71, 72 (1950):

"The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern. By value of the stockholder's proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock which has been taken by the merger. In determining what figure represents this true or intrinsic value, the appraiser and the courts must take into consideration all factors and elements which reasonably might enter into the fixing of value. Thus, market value, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of merger and which throw any light on future prospects of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholders' interest, but must be considered by the agency fixing the value."

In practice, three factors are usually taken into account in appraisal cases: (1) earnings value; (2) market value; and (3) net asset value. Sometimes a fourth factor, dividend value, is separately considered.

i. Earnings Value

As accurately summarized in a recent unreported appraisal decision by this Court:

> "The law in Delaware regarding the procedure to be followed to reach an earnings evaluation is well settled. The earnings for appraisal proposes are to be determined by averaging the corporation's earnings over a reasonable period of time. This determination is based upon historical earnings rather than prospective earnings, and the customary period of time over which to compute such average is ordinarily fixed at the five-year period immediately preceding the merger, Francis I. duPont & Co. v. Universal City Studios, Inc., Del.Ch., 312 A.2d 344 (1973), aff'd, Universal City Studios, Inc. v. Francis I. duPont & Co., Del.Supr., 334 A.2d 216 91975). The number of years over which the average is taken, however, may be shortened or expanded when appropriate but only in the most unusual situation, Adams v. R. C. Williams & Company, Del.Ch., 158 A.2d 797 (1960)." Tannetics, Inc. v. A.J. Industries, Inc., Del.Ch., C.A. No. 5306, pp. 11-12 (July 17, 1979)(Annex F).

It is absolutely clear that historical rather than prospective earnings must be used in determining the earnings value for appraisal purposes. Estimating earnings principally on the basis of long-range projections is "a technique which has not met with approval in Delaware in proceedings having to do with the determination of present value of assets." Levin v. Midland-Ross Corp., Del.Ch., 194 A.2d 50, 57 (1963).

A five year historical earnings history is used in virtually all of the cases.* One of the reasons a five year average is used is "to balance extraordinary profits and/or losses which might distort the earnings data if a period of only one or two years was used." Francis I. duPont & Co., v. Universal City Studios, Inc., Del.Ch. 312 A.2d 344, 349 (1973), aff'd., Del.Supr., 334 A.2d 216 (1975). Thus, a shorter period of earnings history is generally not permitted (id.), even where there has been an upward trend in earnings. Id., Sporborg v. City Specialty Stores, Del.Ch., 123 A.2d 121, 125 (1956):

> "[T]he upward trend of this Corporation in the last fiscal year may suggest that future earnings may be even greater than those of preceding years. But this does not justify the use of only a single year's earnings."

This Court recently rejected the argument of dissenting stockholders that only the year prior to the merger should be considered as opposed to the traditional five year earnings history. Bell v. Kirby Lumber Corp., Del.Ch., 395 A.2d 730 (1978), aff'd. in part and rev'd. on other grounds in part, Del.Supr., 413 A.2d 137 (1980). There, the dissenting shareholders argued unsuccessfully that the completion, just prior to the merger, of major new operating facilities and the corporation's projections of "phenomenal" increases in future earnings warranted use of only the prior year's results.

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* See, e.g., Application of Delaware Racing Association, Del. Supr., 213 A.2d 203 (1965); Bell v. Kirby Lumber Corp., Del. Ch., 395 A.2d 730 (1978); Gibbons v. Schenley Industries, Inc., Del.Ch., 339 A.2d 460 (1975); In re Olivetti Underwood Corp., Del.Ch., 246 A.2d 800 (1968).

Just as a period of less than five years is not favored, years of unusual profit or loss generally may not be excluded in an appraisal case, nor may the historical period be extended so as to minimize their impact. Francis I. duPont & Co. v. Universal City Studios, Inc., Del.Ch., 312 A.2d 344, 349 (1973), aff'd., Del.Supr., 334 A.2d 216 (1975). Indeed, in one case where the five year historical period included a loss year attributable to a drought, then-Chancellor Seitz rejected arguments by the dissenting shareholders that the loss year should be excluded in arriving at an earnings value. Felder v. Anderson, Clayton & Co., Del.Ch., 159 A.2d 278, 284 (1960).

Once an average earnings figures is derived, that figure is capitalized by use of an earnings multiplier. In appraisal proceedings, "the application of a multiplier to average earnings in order to capitalize them lies within the realm of judgment. There is no hard and fast rule to govern the selection." Application of Delaware Racing Association, supra, 213 A.2d at 213. Accord, Bell v. Kirby Lumber Corp., supra, 395 A.2d at 740. Addressing general considerations to be applied in a choosing an appropriate multiplier, the Delaware Supreme Court has stated:

> "It is well settled that in an appraisal proceeding under 8 Del.C. §262, the shares must be valued on a going concern basis. Sporborg v. City Specialty Stores, 35 Del.Ch. 160, 123 A.2d 121, 123 (1956). This approach necessitates not only the Court's examination of historical earnings but also a perusal of the corporation's stability and future prospects as of the date of merger. The prospective financial condition of the subject corporation and

> the risk factor inherent in the corporation and the industry within which it operates are vital factors to be considered in arriving at a realistic present earnings value. These considerations are manifested in the valuation process through the choice of a capitalization factor, or multiplier. The multiplier will be low if the financial outlook for a corporation is poor, or high if prospects are encouraging." Universal City Studios, Inc. v. Francis I. duPont & Co., Inc., supra, 334 A.2d at 218.

There appears to be no Delaware appraisal case involving the determination of an appropriate multiplier for a company closely analogous to Trans Union in terms of its business and history. However, several Delaware appraisal decisions have relied upon Dewing, Financial Policy of Corporations (5th Ed. 1953),* which ascribes multipliers to various generic classes of companies. One such class, to which Dewing ascribes a multiplier of eight times earnings, might be said to describe Trans Union:

> "2. Businesses, well established, but requiring considerable managerial care. To this category would belong the great number of old, successful industrial businesses, large and small...." Dewing, supra at 390.

This multiplier is confirmed by Trans Union's pre-announcement stock price of $37.25 which was 7.43 times the 1979 earnings per share from continuing operations of $5.01. The average stock price of about $33 per share for 1980 prior to the announcement of the merger was also 7.43 times the income per share for the first six months of 1980 on an annualized basis.

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* See, e.g., Levin v. Midland-Ross Corp., Del.Ch., 194 A.2d 50 (1963); Sporborg v. City Specialty Stores, Del.Ch., 123 A.2d 121 (1956).

For the years 1976 through 1980, Trans Union's average earnings from continuing operations, were $4.32 per share (PS, p. 3; SPS, p. 5). Using the multiplier of eight time earnings, the earnings value of Trans Union stock is $34.56 a share. Even using a multiplier of ten times earnings--the highest indicated by Dewing for any enterprise, Dewing, supra at 390--the resulting figure is $43.20 per share.

ii. Market Value

Although it has long been held that value for appraisal purposes is not synonymous with "market value" (Chicago Corp. v. Munds, Del. Ch., 172 A.452 (1934)), market value is recognized as a factor "worthy of high weight" in an appraisal proceeding. In re Olivetti, supra, 246 A.2d at 809; accord, Gibbons v Schenley Industries Inc., supra, 339 A.2d at 467. In the instant case, it is undisputed that the trading in Trans Union stock on the New York Stock Exchange was sufficient to establish a reliable market value.

As for the appropriate date to use, the market price for appraisal purposes is "that which existed immediately prior to the formal announcement of an intention to merge." Tannetics, Inc. v. A.J. Industries, Inc., supra at 14; accord, Gibbon v. Schenley Industries, Inc., supra, 339 A.2d at 468. The closing price on the day preceeding the announcement of the proposed merger may be used (see Tannetics, Inc. v. A.J. Industries, Inc., supra, at 14) or the average of trading prices on such day may be used (see Levin v. Midland-Ross Corp., supra, 194 A.2d at 53-54). The closing price of Trans Union stock on September 19, 1980, the last trading day prior to the announcement of the merger, was $37.25 (PS, p. 2).

iii. Assets

The third factor usually considered in appraisal cases is the net asset value of the corporation. This has been equated to "a mathmatical figure representing the total value of [the corporation] less the prior claims" and the "theoretical liquidating value to which the shares would be entitled upon the company going out of business." Tri-Continental v. Battye, supra, 74 A.2d at 74. It is now settled, notwithstanding some contrary authority in the earlier cases, that net asset value should be determined by assessing the "fair market value" of the assets upon theoretical liquidation rather than by determining the "going concern" value of those assets. Poole, supra, 243 A.2d at 67 70-72 (1968).* Fair market value for purposes of valuing assets in appraisal proceedings has been defined as

> "...the price which would be agreed upon by a willing seller and a willing buyer under usual and ordinary circumstances, after

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* As the Delaware Supreme Court held:

> "Any allowance for earning power of the assets or value of the business, deemed necessary under the circumstances of a given case, is best left to the court's consideration of earnings as an independent element of stock value and to the court's exercise of the weighting function." Poole, supra, 243 A.2d at 72.

> consideration of all available uses and purposes, without any compulsion upon the seller to sell or upon the buyer to buy." Id. at 70 n. 1.

Appraisal cases often rely on physical appraisals of corporate assets made by experts to determine the fair market value of those assets for purposes of deriving an asset value. See, e.g. Bell v. Kirby Lumber Corp., supra, 395 A.2d 730; Tannetics, Inc. v. A.J. Industries, supra at 7; Adams v. R. C. Williams & Co., Del.Ch., 158 A.2d 797, 802 (1960); In re General Realty & Utilities Corp., Del. Ch., 52 A.2d 6, 11 (1947). Obviously, it would have been physically and economically impossible to have fair market appraisals of Trans Union's assets, particularly given the expedited schedule of the preliminary injunction hearing, and Trans Union's extensive operations throughout the world (PS, pp. 23-27). Because Trans Union is an ongoing industrial concern with no plans to liquidate, and because the great majority of its assets are used to generate earnings (as opposed to being held for appreciation), defendants submit that it would be appropriate for this Court to ignore or, at best, give only minimal weight to, Trans Union's asset value in determining the fair value of Trans Union's shares. See, e.g., Gibbons v. Schenley Industries, Inc., Del.Ch., 339 A.2d 460 (1975). As stated in Graham, Dodd, Cottle and Tatham, Security Analysis (4th Ed. 1962) at p. 217:

> "There is good reason for not taking the asset-value factor seriously. The average market price of a common stock over the years depends chiefly on the earning power and the dividend payments. These, in turn,

> usually do not bear any close or reasonably consistent relation to the asset value. (While such a relation may possibly be traced for corporations as a whole, the range in the case of individual companies is virtually unlimited.) Investors and speculators have found that the asset value is typically no guide at all to earning-power value or average market price. Hence they have gradually come to give the asset-value factor practically no weight."

In any event, it is apparent that the proposed merger price exceeds the likely asset value. The book value of Trans Union stock is $28 a share (PS, p. i). Thus, even a doubling of the book value would essentially approximate the $55 a share now being offered.

iv. Weighting

Once the values for the various factors have been assigned, each must be weighted relative to the others so that a weighted average value can be derived. There is no fixed formula for this process:

> "The question of what weight to give the various elements of value lies always within the realm of judgment. There is no precise criterion to apply to determine the question. It is a matter of discretion with the valuator." Application of Delaware Racing Association, supra, 213 A.2d at 214.

Because of the extensive trading market in Trans Union common stock, defendants submit that market value should be given the most weight. In re Olivetti, supra at 246 A.2d 809. This Court has stated, in a case where an injunction against a merger was sought, that:

> "[M]arket price, when it can be established by free trading in an open forum, is, in my opinion, the most significant element to be taken into consideration in reaching a judgment on the overall fairness of a corporate merger." David J. Greene & Co. v. Schenley Industries, Inc., Del. Ch., 281 A.2d 30 (1971).

Because Trans Union is an ongoing industrial concern using substantially all of its assets in the generation of earnings, Trans Union's average earnings should be given relatively high weight. See Sporborg v. City Specialty Stores, supra, 123 A.2d 127. For the same reason, and because there was no prospect of a liquidation of Trans Union's assets, its asset value should be given little, if any, weight.

It is plain, however, that whatever weights are afforded to the various elements of the formula, the result will be much less than $55 a share. For example, indulging in every presumption in plaintiff's favor--including use of an earnings multiplier of 10 and doubling the book as asset value--the following is indicated:

Market Price	$37.25
Earnings (x 10)	43.20
Asset Value (book x 2)	56.00

Weighing market at 55% and earnings at 45% as was done in Gibbons v. Schehley Industries, Inc., Del.Ch., 339 A.2d 460 (1975) (asset value not weighted because not determinable), results in a "value" of $39.93 per share. Weighing market at 50%, earnings at 25%, and assets at 25% as in In re Olivetti Corp., Del.Ch., 246 A.2d 800 (1968), results in a "value" of

$43.43 per share. In fact, since both market price and the average historical earnings (times a multiplier of 10) are considerably below $55, and since "asset value" approximates the $55 bid only on the extreme assumption that the Company's book value should be doubled, it is apparent that <u>any</u> reasonable weighting supports the fairness of the $55 price under established Delaware standards. Once again, plaintiff has failed to meet his burden.

4. <u>The Assumption Of Debt By The Surviving Corporation And The Purported Appropriation Of Corporate Opportunity.</u>

Woven throughout plaintiff's Complaint is the contention that the pending merger proposal is inequitable because the surviving corporation will assume a substantial amount of debt now carried by the merging corporation after the merger. This is perceived by plaintiff as a wrong against the present Trans Union shareholders in that the surviving corporation will receive no additional assets following the merger in compensation for the assumption of the debt. It is thus alleged that the merger will result in a waste of the assets of the surviving corporation (Compl., ¶¶26(d), 28(d)). What plaintiff fails to explain is the source of his standing to complain as to the effect of the transaction upon a surviving corporation in which he will have no interest. The fact that the surviving corporation may become obligated on certain debts <u>after</u> the merger in no way operates unfairly or works to the detriment of its <u>former</u> stockholders. As stated by then-Chancellor Quillen in <u>Tanzer v. International General Industries, Inc.</u>, Del.Ch., C.A. No. 4945 (unreported decision, a copy of which is attached hereto as Annex G), <u>rev'd. on other grounds</u>, Del.Supr., 379 A.2d 1121 (1977), on remand, Del.Ch., 402 A.2d 382 (1979):

> "The fact the Kliklok will pay the interest on a loan used to purchase the minority shares when IGI is the sole owner does not inject a detriment to its corporate purpose."

On remand from the Supreme Court's decision in <u>Tanzer</u>, Vice Chancellor Hartnett again examined the issue in the context of a fairness inquiry and significantly expanded this holding, concluding:

> "Chancellor Quillen's language [quoted above] could well be expanded to read: "The fact that Kliklok will pay the interest on a loan used to purchase minority shares when I.G.I. is the sole owner does not infect a detriment to its corporate purpose, nor indicate unfairness to the minority stockholders."

402 A.2d at 393.

It is thus clear that the nature of the obligations undertaken by the surviving corporation do not provide a cognizable basis for complaint by present Trans Union stockholders who will have no interest of any kind in the Company following consummation of the merger.

In a related context, plaintiff asserts that defendants have appropriated a corporate opportunity by employing the credit of Trans Union to offset the debt of the merging corporation rather than to benefit Trans Union stockholders (Compl., ¶36). This assertion is fatally defective in at least two respects.

First, the right to use the credit and related tax advantages available to Trans Union to offset the debt of the merging company is precisely what the latter corporation is offering to purchase by way of its proposal. Presumably, whatever value this right may have to the merging company is reflected in the consideration it is offered. To this extent, plaintiff's assertion begs the very question which the Trans Union Board has determined should be put before the stockholders: is the offered price sufficient to compensate for the sale of these under-utilized tax benefits? Should the stockholders declare by majority vote that a 47% cash premium is sufficient, it can hardly be maintained that the purchaser has misappropriated a corporate opportunity to the detriment of Trans Union. Yet that is the conclusion which plaintiff would have this Court reach.

This points up a second defect in plaintiff's claim: it assumes that one or more individuals who are in a position to act on behalf of the corporation stand to benefit personally at the corporation's expense by usurping the right of the corporation to sell its intrinsic tax advantages. The record reveals no such facts. The Pritzker group is merely an arm's length offeror having no influence over the Trans Union Board or stockholders aside from its ability to offer an attractive price.

The directors and officers of the Company stand to gain no personal benefit from the approval of the merger beyond that sum offered on an equal basis to each of the stockholders. Simply stated, the only corporate opportunity presented by this transaction is that available equally to each of the Trans Union stockholders to sell their shares at approximately 147% of the prevailing market price in exchange for divesting themselves of any further investment interest in Trans Union. Plaintiff's allegation is entirely without legal or factual foundation.

G. The Proxy Material Made Complete Disclosure Of All Relevant Facts Upon Which A Reasonable Shareholder Could Make An Informed Judgment Concerning The Proposed Merger.

In Lynch v. Vickers Energy Corp., Del.Supr., 383 A.2d 278 (1977), a case involving a tender offer by a majority shareholder of a Delaware corporation for all outstanding shares of such corporation, the Supreme Court outlined the test for disclosure owed by a majority stockholder to the minority stockholders as follows:

> "...whether defendants had disclosed all information in their possession germane to the transaction in issue. And by 'germane' we mean, for present purposes, information such as a reasonable shareholder would consider important in deciding to sell or retain stock. Compare TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 96 S.Ct. 2126, 2133, 48 L.Ed.2d 757 (1976)."

Id. at p. 281.

Thus, the Delaware Supreme Court adopted the same disclosure requirements which are applicable under the federal securities laws, i.e., whether a reasonable shareholder would consider a fact important in deciding how to vote. TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

In Kaplan v. Goldsamt, Del.Ch., 380 A.2d 556, 565-566 (1977), this Court held:

> "To summarize this point, while a corporation must adequately inform shareholders as to matters under consideration, the requirement of full disclosure does not mean that a proxy statement must satisfy unreasonable or absolute standards. Many people may disagree as to what should or should not be in such a statement to shareholders, and as to alleged omissions the simplest test (sometimes difficult of application) is whether the omitted fact is material. Kaufman v. Shoenberg, 33 Del.Ch. 211, 91 A.2d 786 (1952). There is obviously no requirement to include insignificant information. Compare Baron v. Pressed Metals of America, Del.Supr., 35 Del.Ch. 581, 123 A.2d 848 (1956); American Hardware Corporation v. Savage Arms Corporation, 37 Del.Ch. 10, 135 A.2d 725 (1957). Provided that the proxy statement viewed in its entirety sufficiently discloses the matter to be voted upon, the omission or inclusion of a particular item is within the area of management judgment. Schiff v. RKO Pictures Corp., 34 Del.Ch. 329, 104 A.2d 267 (1954).
>
> "This long standing view of the Delaware courts comports with the recent expression of the United States Supreme Court in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976) wherein it was stated that in order for an omission to be material,
>
> '...there must be a substantial likelihood that the disclosure of the fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.' Id., 96 S.Ct. at 2133."

When plaintiff's allegations, evidence and arguments are tested against these standards, we submit that he has utterly failed to meet his burden of proof in this case.

Apparently concerned with the obvious weakness of his arguments with respect to the directors' exercise of their honest business judgement and the inherent fairness of the $55 offering price, plaintiff has belatedly directed the Court's attention to alleged defects in Trans Union's proxy material. In an amended complaint served upon defendants' counsel late on the day on Wednesday, January 28, 1981--only thirty-six hours before the hearing on plaintiff's motion for preliminary injunction--plaintiff points to scores of alleged misstatements or omissions in the Proxy Statement mailed to the shareholders earlier in the month. There are at least four flaws in plaintiffs' approach.

First, this is an obvious shotgun approach intended to delay the shareholders meeting on February 10, 1981, by raising so many questions regarding the 76-page Proxy Statement (with additional pages of appendix) that they cannot all be addressed in this memorandum or at the hearing on plaintiff's motion for injunctive relief.* It is axiomatic, of course, that the

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* Plaintiff argues, for example, that somewhere in the proxy material there is a reference to a shareholders' meeting on February 10, 1980 instead of February 10, 1981, notwithstanding the fact that the letter to Stockholders and Notice of Special Meeting of Stockholders clearly and conspicuously disclose that the meeting is on February 10, 1981, not 1980.

function of a court of equity is to do equity. We respectfully urge the Court to cut through plaintiff's trial tactics in the interests of protecting the rights of all the litigants and most importantly, the shareholders of Trans Union.

Second, plaintiff makes no reference whatsoever to the Supplement to Proxy Statement mailed to the shareholders of Trans Union on January 27, 1981. This document clearly and forthrightly addresses many of the matters allegedly omitted or not fully disclosed in the original Proxy Statement.

Third, plaintiff fails to address the fact that all of the matters set forth in his Amended Complaint and allegedly omitted from the original Proxy Statement were discussed fully by the Trans Union Board of Directors at its meeting on January 26, 1981, that the Board voted unanimously to continue to recommend the Pritzker merger to the shareholders, and that all of these actions have been disclosed fully to the shareholders. See generally, Moore Aff.

Fourth, and most important, the matters allegedly misstated or omitted have not in fact been misstated or omitted. While it is not possible in the time available to address all of plaintiffs allegations in complete detail, there is clearly no merit to those which might be considered material. For example, Trans Union's "cash flow" (Amend. Compl. ¶41(a)) is fully disclosed in the Financial Statements appearing in the Proxy Statement (pp. 37-76) which have been prepared in accordance with generally accepted accounting principles. See also Proxy Statement, p. 39 showing historical cash flow analyses. In addition, it should be pointed out that the Securities and Exchange Commission has expressly questioned the use of cash flow analyses in communications to shareholders on the ground that such analyses are confusing and of questionable relevance. See Accounting Release No. 142, CCH Fed.Sec.L.R. ¶72, 164, a copy of which is attached hereto as Annex H. For Trans Union to have set forth cash flow projections in the proxy material would only have compounded the confusion which concerns the SEC.

The "value" of the Company's stock and the alternatives for realizing such value (Amend Compl. ¶41(b)) are commented upon in the Proxy Statement at pp. i and 2-6, and there is no merit whatsoever to the claim that the disclosure is inadequate. The steps leading up to the "formation" of the merger proposal (Amend Compl. ¶41(c)) were explained in the Proxy Statement at pp. 2-5 and are referred to in even greater detail in the Supplement to Proxy Statement. The conditions under which another offer which the Board might consider more favorable may be submitted in competition with the Pritzker interests (Amend. Compl. ¶41(d)), and the various alternatives available to the Board depending on the circumstances of such other offer, are explained in detail in the Proxy Statement (p. 10) and are described fully in Appendix I to the Proxy Statement. See also the extended discussion of the negotiations with General Electric and Kohlberg, Kravis, Roberts & Co. in the

Supplement to Proxy Statement at p. 3-4. The tax advantages allegedly being secured by GL Corporation (Amend. Compl. ¶41(h)) are discussed at page 12 of the Proxy Statement and further discussed at page 2 of the Supplement to Proxy Statement.

The allegations regarding the failure to disclose the specific tax treatment which may be applicable to the offshore Pritzker trust's 1,000,000 shares under various circumstances (Amend. Compl. ¶41(f) and (g)) are totally without merit since this is patently not relevant to the tax treatment of the other present shareholders. The proposed merger is taxable in the sense that it does not qualify as a nontaxable reorganization under the provisions of the U.S. Internal Revenue Code. The extent to which shareholders, including the Pritzker interests, are required to pay taxes, and the amount thereof depends on a great variety of circumstances unique to each shareholder (e.g., whether such shareholder is subject to U.S. tax laws or to foreign taxation, whether there are offsetting losses or other offsets or credits available, whether such shareholder is a charity or other institution exempt from taxation, or is an arbitrageur). At page 7 of the Proxy Statement, shareholders are urged to consult their personal tax advisor with respect to the effect of the proposed merger on them. Each shareholder's vote on the merger will, presumably, reflect such shareholder's view on the tax effect of the merger as it applies to him and not as it applies to any other shareholder, including the Pritzker designee which owns the 1,000,000 shares. If the merger is not approved and the shares held by the Pritzker interests are later sold in some other transaction, the tax effects of such sale by the Pritzker interests will have absolutely no effect on the Company or its shareholders.

The allegations regarding the continuing efforts of Salomon Brothers (Amend. Compl. ¶41(i)) are contrary to all of the evidence: The fact is that Salomon Brothers has aggressively sought a suitable acquisition candidate for Trans Union and no firm offer, other than the present proposal, has been forthcoming (see Johnson Dep. pp. 80-83; Annex A). Plaintiff has been unable to adduce any credible evidence to the contrary. The alleged failure to disclose the Pritzker's registration rights in the event the merger is not consummated (Amend. Compl. ¶41(j)) is ridiculous inasmuch as the granting of registration rights is a normal adjunct of any private sale of stock of any size and the cost to the Company in effecting registration would be de minimis. The failure to distinguish between GL Corporation and the Pritzker Trusts (Amend Compl. ¶41(k)) is totally immaterial. Moreover, the facts are set forth correctly in the Proxy Statement. The alleged misrepresentation with respect to stock options (Amend. Compl. ¶41(l)) is not a misrepresentation at all. In fact, all options held by Company employees and the treatment to be accorded options in connection with the merger are disclosed at pages 7 and 28-29 of the original Proxy Statement and Appendix I thereto. The bid allegedly made by Kohlberg, Kravis, Roberts & Co. (Amend. Compl. ¶41(m)) was not in reality a bid at all and it was withdrawn within about three hours of its receipt. In any event it is fully disclosed at p. 4 of the Supplement to Proxy Statement as are the subsequent negotiations with KKR. Actions to be taken by the Pritzker interests to repay loans following consummation of the transaction (Amend. Compl. ¶41(n)) are fully disclosed in the Proxy Statement at pp. 11-12 and in the agreements reproduced verbatim in the Appendix. Moreover, these are totally immaterial to the shareholders of Trans Union if the merger is consummated (as are many of plaintiff's other objections to the proxy material). The alleged lack of benefit to Trans Union shareholders (Amend. Compl. ¶41(o)) is argumentative and not a factual ommission. The amendments to the merger agreement of which plaintiff complains (Amend. Compl. ¶41(p)) are once again argumentative, are not material to the shareholders of Trans Union, and in any event are fairly disclosed in the Proxy Statement and Supplement to Proxy Statement.

Under the circumstances, plaintiff's belated attempt to turn this into a "disclosure" case should be rejected, and the shareholders, having been fully and conscientiously advised of all the material facts, should be permitted to determine whether they want to approve the $55 per share cash merger.

V. CONCLUSION

On January 26, 1981--more than four months after they had first voted upon the Pritzker proposal--the directors of Trans Union had an opportunity to consider whether they should continue to recommend the Pritzker proposal to the shareholders. Following a full discussion of all that had happened in the intervening period of time, the directors unanimously decided to continue their earlier recommendation (see generally, Moore Aff.).

At their depositions several of the outside directors had an opportunity to explain their current positions. For example, on January 22, 1981, Robert W. Reneker, the retired Chairman of the Board of Esmark, Inc., a diversified New York Stock Exchange company, was asked his view of the proposal:

> "Q As you sit here today, Mr. Reneker, and know the facts that you testified about, including the original arrangement and the amendment of that arrangement and the retention of Salomon Brothers and the unhappiness, I think was the word you used, on the part of senior management people, do you feel that this $55 cash offer is fair or unfair to the shareholders of Trans Union?
>
> A Well, as I just indicated, I felt it was a reasonable offer at the time it was made, and I feel today even more encouraged that it was a good offer, because it has been tested in the marketplace and Salomon has gone out, and there have been a number of people who have looked at this, and identified the possibilities of this company.
>
> It seems to me that the real test and the worth of $55 has kind of been exhibited agressively over what I think has been an

> adequate period of time, if we talk from the second of October until, indeed, today.
>
> So that I guess that is a long answer to a question, yes, I am comfortable with it."

(Reneker Dep., p. 131).

William B. Johnson, Chairman of IC Industries and a former president of Railway Express Agency and Assistant General Counsel of the Pennsylvania Railroad, testified in response to a similar inquiry:

> "Well today [January 26, 1981] I voted again for the Pritzker deal because it is immediate money, it is sure money, it is not speculating, it is not off at some point in the future with very high interest rates. The loans have been made at rates which are below the current interest rates, and the shareholders are within reach of about a 50 percent premium over what the stock market will give them, and it is virtually in their hands. An 11 multiple is a high multiple in my opinion for Trans Union and I don't believe the market is going to give it to them. I don't believe acquisitions are going to give it to them. I don't think refundability [i.e., proposed federal legislation providing for reimbursement of capital expenditures] is going to give it to them. And I don't know any better way to assure the shareholders of a good deal than the Pritzker deal today. If a better deal without all the uncertainties and delays and all that, and costs were available, I sure would be for it. But as of right now on the 26th of January, it isn't available."

(Johnson Dep., pp. 83-84).

It is worth noting once again that the directors of Trans Union are an unusually experienced, able and independent group. In addition to Messrs. Reneker and Johnson, the other outside directors are Graham J. Morgan, Chairman and Chief

Executive Officer of United States Gypsum Company, Joseph Lanterman, for many years the Chairman and Chief Executive Officer of Amsted Industries, Inc., and W. A. Wallis, Chancellor of the University of Rochester, former dean of the School of Business at the University of Chicago, and a member of the boards of directors of companies such as Eastman Kodak, Metropolitan Life Insurance Co., Standard Oil (Ohio), and Bausch & Lomb. To suggest, as counsel for plaintiff did during the course of their depositions, that these individuals are mere rubber-stamps who did not exercise their own independent judgment with respect to the proposed merger simply ignores reality.

Because there is no majority or controlling stockholder involved in the subject merger, Singer and its progeny have no relevance to these proceedings. The directors, in the exercise of good faith business judgment, have approved the proposed merger and have recommended it to Trans Union's shareholders. The shareholders have been given all germane information with respect to the proposed merger, and if they approve the transaction at their meeting on February 10, 1981, it should be consummated.

Accordingly plaintiff's motion for preliminary injunction should be denied.

Respectfully submitted,

POTTER ANDERSON & CORROON

By Robert K Payson

Robert K. Payson
Michael D. Goldman
Peter M. Sieglaff
Donald J. Wolfe, Jr.
350 Delaware Trust Building
P.O. Box 951
Wilmington, DE 19899

Attorneys for Trans Union Corporation

OF COUNSEL:

Thomas H. Morsch
Shalom L. Kohn
Sidley & Austin
Chicago, Illinois

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