IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MESA PETROLEUM CO., a Delaware corporation, MESA ASSET CO., a Delaware corporation, MESA EASTERN, INC., a Delaware corporation and MESA PARTNERS II, a Texas partnership, Plaintiffs, v. UNOCAL CORPORATION, a Delaware corporation, WILLIAM F. BALLHAUS, CLAUDE S. BRINEGAR, RAY A. BURKE, ROBERT D. CAMPBELL, WILLIAM H. DOHENY, RICHARD K. EAMER, FRED L. HARTLEY, T.C. HENDERSON, DONALD P. JACOBS WILLIAM S. McCONNOR, PETER O'MALLEY, RICHARD J. STEGMEIER and DONN B. TATUM, Defendants.	FILED APR 18 8 39 AM '85 REGISTER IN CHANCERY JOHN D. KELLY III Civil Action No. 7997

REPLY BRIEF OF PLAINTIFFS IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER

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INTRODUCTION

In Aronson v. Lewis, Del. Supr., 473 A.2d 805, 811 (1984), the Supreme Court recognized that the only means available for stockholders to control wrongful acts of directors are through "[t]he machinery of corporate democracy and [litigation]." Here, defendants have sought absolutely to preclude both. With respect to any reasonable opportunity for stockholders to exercise their voting rights, defendants have sought to gag their own stockholders from taking action while reserving to incumbent management the opportunity to manipulate further the corporate machinery, present new proposals and take additional action injurious to Unocal and its stockholders right up until the date of the meeting. As to litigation, defendants urge that this Court should preclude stockholders from seeking any form of redress to vindicate their rights now on ripeness grounds, hoping later to bar any action on mootness.

Plaintiffs submit that Delaware law does not -- and this Court should not -- countenance or permit such an inequitable result. As set forth below, plaintiffs are entitled to immediate injunctive relief to permit Unocal stockholders to exercise their voting rights under Delaware law.

ARGUMENT

I. DEFENDANTS' MANIPULATION OF UNOCAL'S CORPORATE MACHINERY TO CURTAIL STOCKHOLDER VOTING RIGHTS SHOULD BE ENJOINED.

A. The Business Judgment Rule Has No Application In This Case.

Perhaps recognizing that the Notice Bylaws are both illegal and inequitable, defendants seek in vain to find a "safe harbor" in the business judgment rule. That doctrine has no application in this case.

The business judgment rule is relevant only to the personal culpability of directors. Smith v. Van Gorkom, Del. Supr., No. 255, 1982, Horsey, J. (Jan. 29, 1985).* It does not "validate" illegal or inequitable bylaws adopted by directors. Plaza Securities Co. v. Datapoint Corp., Del. Ch., C.A. No. 7932, Brown, C. (Mar. 5, 1985), aff'd, Del. Supr., No. 79, 1985, Horsey, J. (Mar. 8, 1985). As the Court held on the basis of Delaware precedent in Holly Sugar Corp. v. Buchsbaum, [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶98,366 (D. Colo. Oct. 28, 1981):

> Holly management has invoked the business judgment rule to defend its actions, claiming that their purpose was not to entrench themselves in office. That rule does not insulate such acts.

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*Unreported opinions referred to herein and not attached to plaintiffs' opening brief or contained in defendants' appendix are attached hereto in alphabetical order.

¶98,366 at 92,238 (emphasis added). Thus, the business judgment rule cannot be relied upon by defendants to justify the Notice Bylaws or to clothe them with an aura of validity. Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971).

While defendants' attempts to hide behind the business judgment rule have no legal significance,* they nevertheless speak volumes about the motivation of the Unocal board. Defendants devote dozens of pages to describing unsubstantiated, and absolutely incorrect, fears with respect to Mesa (see, e.g., defendant's answering brief ("AB") 2-17, 22-25 and 52-54).** Cumulatively, these recitations establish beyond doubt that the sole and primary purpose of defendants' actions was to entrench themselves in office and to prevent the Partnership -- Unocal's largest stockholder -- from having any voice in Unocal's corporate affairs at any cost. Compare Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255 (2d Cir. 1984). While these damning admissions make clear the true motivation behind the adoption of the Notice Bylaws, the Court need not reach defendants' "issue" with respect to motivation. In Lerman v. Diagnostic Data, Inc., Del. Ch., 421 A.2d 906, 912 (1980), the Court

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*Defendants' unsubstantiated allegations with respect to Mesa are irrelevant. Bachmann v. Ontell, Del. Ch., C.A. No. 7805, Brown, C. (Nov. 7, 1984).

**Even with respect to those matters that they have some basis for, such as the SEC consent order, they tell only half the story. See Tassin Aff., Ex. N at pp. 30-31.

made clear that illegal or inequitable bylaws will be enjoined by this Court regardless of the motivation or intention of the board. Hollow claims of "business judgment" or good intent cannot shield such inequitable provisions.

B. The Notice Bylaws Are An Invalid And Inequitable Manipulation Of The Corporate Machinery of Unocal.

Defendants provide no substantive answer to the fact that the Notice Bylaws operate inequitably to prevent stockholders from exercising their franchise under Delaware law. The fact that no answer exists is only highlighted by the fact that two of the most relevant authorities in this case, Schnell and Lerman, do not appear in defendants' brief until page 37. Nor is it surprising that the Delaware Supreme Court's recent condemnation in Datapoint of a similar attempt to limit stockholder rights appears only briefly in a single footnote. These authorities are dispositive on the invalidity of the manipulations sought to be effected by defendants here.

There can be no doubt that both the purpose and the effect of the Notice Bylaws is to shackle stockholders while leaving management free to frustrate corporate democracy. Otherwise, the Notice Bylaws would not be structured to place an onerous constraint on the stockholders while leaving management free to do whatever it pleases. Management shut the gates on stockholder proposals thirty days before the meeting, but carefully refrained from commencing its defensive tender offer until the stockholders were restrained from acting. See Nolen Aff. Ex. A. Under defendants' interpretation of their new bylaws, Unocal stockholders are absolutely precluded from taking any action at the Annual Meeting to complain of or to stop the defensive tender or any other management action. Thus they would preclude, by way of example, the kind of solicitation effort begun by Howard Keck, former President and Chief Executive Officer of Superior Oil Co., after Superior adopted a poison pill, which forced management to reverse itself. Second Carter Aff. ¶4. Of course, defendants have given themselves the right -- even in the midst of the meeting itself -- to propose and seek stockholder approval of actions which support its interests.

The few paragraphs of defendants' brief devoted to Lerman completely fail to distinguish it. The bylaw in Lerman, as the Notice Bylaws here, operated to prevent stockholders from acting on an equal footing with incumbent management by imposing an advance notice requirement. That inequitable effect, intentional or unintended, is enjoinable.

The sole opportunity for Unocal stockholders to take any action is at an annual meeting. The adoption of the Notice Bylaws has effectively limited the right and ability of stockholders to act at the Annual Meeting. Management has denied them their right and ability without their consent, and in a way that operates to perpetuate management.

Defendants' attempts to distinguish Schnell are equally unavailing. While defendants suggest that they have not "advanced" the meeting date (AB 37-38), they have adopted bylaws even more egregious than the devices condemned in Schnell. The Notice Bylaws' prohibition against stockholder action not proposed thirty days in advance, combined with the flexibility reserved to (and freely exercised by) management, turn the sole opportunity for stockholders to exercise their voting rights meaningfully into a hollow proceeding totally controlled by management.

Defendants' utter failure to explain why Schnell and Lerman do not mandate invalidation of the Notice Bylaws is in fact only highlighted by the authorities they cite. For example, in In Re Flushing Hospital and Dispensary, N.Y. App., 288 N.Y. 125, 41 N.E.2d 917, modified, 43 N.E.2d 356 (1942) (AB 28), the Court invalidated bylaws which sought to place unreasonable constraints on the nomination of directors. Indeed, the Court held:

> The method used in the adoption or amendment of a bylaw may be legal, but the courts are not constrained to sanction an unlawful result though achieved by legal means....Changes in by-laws calculated to give to a group an unreasonable or unfair advantage, which are not adapted to the purposes of the corporation, are void.

* * *

> Measured by such standards the challenged amendments to the by-laws are patently invalid. That is true though the group which by amendment to the by-laws sought to control the election and thereafter to control the affairs of the corporation may have acted with unselfish motives and in the belief that the new directors would promote the best interests of the corporation and the community.

288 N.Y.2d at 132. Similarly, in <u>In re Farrell</u>, N.Y. App. Div., 200 N.Y.S. 95, <u>aff'd</u>, 142 N.E. 301 (1923), cited in <u>In re O'Shea</u>, N.Y. App. Div., 269 N.Y.S. 840 (1934), upon which defendants rely (AB 28), the Court stated:

> If the by-law was intended to mean that no member should be eligible for the office of director unless nominated as prescribed in Section 40, such a regulation would be unreasonable. A shareholder would no longer be free to vote for whom he pleased, but would be obligated to confine his choice to a prescribed list of nominees. This is necessarily a serious impairment of the stockholders right of free voting, and is therefore invalid.

200 N.Y.S. at 96.

Similarly, in <u>Valle v. North Jersey Automobile Club</u>, N.J. Super., 310 A.2d 518 (1973), the Court questioned <u>In re Hamilton</u>, N.J. Supr., 137 A. 843 (1927) cited by defendants, and stated:

> [T]he by-laws provisions relating to independent nominations of board members in actuality do not afford "the demo-cractic process of election" that should be required in such a corporation. Since 5% of the total membership is now over 5,000, the requirement that the number of members file a written

> certificate of such nominations would appear to be so burdensome as realistically to preclude independent nominations from being made.

310 A.2d at 526.*

Here, as in Lerman, Schnell, Datapoint and Holly Sugar -- and corroborated by defendants' own authorities --

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*In re Hamilton, N.J. Supr., 137 A. 843 (1927), from which defendants quote extensively, has been criticized by a court of its own state. (Valle v. North Jersey Automobile Club, N.J. Super., 310 A.2d 518, 525 n.7 (1973) (suggesting Hamilton is not good law)) and has been specifically rejected by the Pennsylvania Supreme Court. Commonwealth v. Markey, Pa. Supr., 190 A. 892, 893 (1937) ("we think the reasoning [of Hamilton] does not compel us to follow it"). In re O'Shea, N.Y. App. Div., 269 N.Y.S. 840 (1934) and In re Flushing Hospital and Dispensary, N.Y.Ct. App., 288 N.Y. 125, 41 N.E.2d 917, modified, 43 N.E.2d 356(1942), both involve membership corporations whose elections differ radically from large publicly held corporations. 280 N.Y. at 130. Stuberfield v. The Long Island City Savings & Loan Association, N.Y. Supr., 37 Misc.2d 811, 235 N.Y.S.2d 908 (1962) is inapposite since it involved a New York savings and loan association which the Court distinguished from a stock corporation:

> The Legislature itself recognized the difference between savings and loan associations and stock corporations and it is not contemplated that members will exercise control over management in the Banking Law. The law vests in the Superintendent of Banks and the Banking Board the power to remove directors and officers of an association (Banking Law, §41). The Superintendent of Banks has approved the by-law attacked by plaintiff. This approval, even if not determinative, carries the greatest weight, and means that the regulating body having principal responsibility has concluded that said by-law is not contrary to public policy or the legitimate interests of the members of the association.

37 Misc.2d at 820. Defendants have not seen fit to mention these rather significant deficiencies in the authority they have cited to the Court.

inequitable bylaws have been adopted which illegally discriminate against stockholders and in favor of management with respect to their only opportunity to exercise their voting rights. The Notice Bylaws are inequitable and their enforcement should be enjoined.

Defendants' discussion of Moran v. Household International, Inc., Del. Ch., C.A. No. 7730, Walsh, V.C. (Jan. 29, 1985), appeal pending, Del. Supr., No. 47, 1985, as supposed authority for their position reveals the bankruptcy of that position. Vice Chancellor Walsh did not uphold bylaw amendments regulating the nature of the business to be conducted at stockholders' meetings. In fact, plaintiff there had voted for the bylaws and did not challenge them in his complaint; the parties did not address them either at trial or in briefing; and the Court did not consider their validity. Indeed, one of the bylaws plaintiff suggests Vice Chancellor Walsh "upheld" was identical to the consent bylaw invalidated in Datapoint.

As plaintiffs demonstrated in their opening brief, the Notice Bylaws and defendants' interpretation of them constitute manipulation of the rankest sort. Whether their inequitable effect is intentional or not, they are invalid and their enforcement must be enjoined.

II. THE NOTICE BYLAWS BOTH CONFLICT WITH AND ARE INCONSISTENT WITH 8 DEL.C. §211.

In their opening brief plaintiffs demonstrated that the Notice Bylaws conflict with 8 Del.C. §211(b) and are thus void. As plaintiffs showed, Section 211(b) provides on its face that at an annual meeting of stockholders the stockholders may conduct any proper business regardless of whether any notice of it has been provided. They further showed that the statute, unlike many other provisions of the General Corporation Law, does not permit even the certificate of incorporation, much less the bylaws, to provide otherwise. This is made clear not only by the plain language of the statute, its legislative history, and the interrelationship of Sections 211 and 222, but also by the fact that it is the only reading of the statute which comports with the broad policy of the General Corporation Law that annual meetings be held to enable stockholders to express their will.

Defendants present only one response, and devote only three pages of their brief, to this critical point. Both the brevity of that response and the paucity of authority defendants can muster are telling. Defendants argue, without any authority to support it, that Section 211(b) regulates only the "type" of business which may be conducted at annual meetings, and leaves to the bylaws the regulation of the "timing or procedure" by which those types of business might be conducted. Their contention finds no support in either law or policy.

Virtually the same arguments were made to this Court and to the Supreme Court in Datapoint, and they were soundly rejected. There, the Datapoint board adopted a bylaw "designed to establish a procedure to govern any attempt to take corporate action on Datapoint's behalf by written shareholder consent." (Slip op. at 6) (emphasis added). Against plaintiffs' arguments that the bylaw was invalid because it conflicted with the statutory grant of power to stockholders to conduct business by written consent, defendants contended that a "procedure is required so as to insure that both sides have sufficient time and opportunity to put their positions before the shareholders" (slip op. at 10), and that "the bylaw does not prohibit [stockholders] from taking action by written consent, but only fills in where the statute is silent by setting a procedure for the exercise of that right which is fair and protective to all Datapoint shareholders" (slip op. at 11).

Chancellor Brown could find no room in the statute to accommodate these regulations of the timing or procedure of the stockholders' statutory power to take the action permitted by the statute. Although recognizing that the bylaw did not limit the type of action -- written consent -- which might be taken by the stockholders, but only the timing and procedures by which that type of action might be taken, he found that "the bylaw is totally at odds with the statutory right given to shareholders by §228 no matter how laudable its objective might be." (Slip op. at 14).

Defendants' argument that the Notice Bylaws are valid because they regulate only the "timing or procedure" of nominations, elections and action at annual meetings and do not deprive the stockholders of the power to engage in "types" of business at annual meetings can rise no further than the arguments flatly rejected by this Court -- and three days later, from the bench, by the Supreme Court -- in Datapoint.

Defendants' only effort to distinguish Datapoint, mentioned in their brief for the first and only time in a footnote on page 33, is disingenuous. Section 228 does not address the timing or procedure by which action by consent may be taken any more than Section 211 addresses the timing or procedure by which action may be taken by stockholders at an annual meeting, and this Court did not purport to find that it did.* It simply found that

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*Section 228(a) provides as follows:

> (a) Unless otherwise provided in the certificate of incorporation, any action required by this chapter to be taken at any annual or special meeting of stockholders of a corporation, or any action which may be taken at any annual or special meeting of such

[Footnote continued on next page]

under the statute the stockholders had the right to take action by written consent and that bylaw regulation governing that action, "no matter how laudable its objective might be" (slip op. at 14), even if it purported to regulate only the "timing or procedure" of the action and not the "type" of action, was inconsistent with that statutory grant of authority to the stockholders.

Indeed, the defendants' arguments are even less availing here than in Datapoint. Under the General Corporation Law, stockholders may take action by three means: at annual meetings, at special meetings, and by written

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[Footnote continued from previous page]

> stockholders, may be taken without a meeting, without prior notice and without a vote, if a consent in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted.

Compare the provisions of Section 211(b):

> (b) An annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided in the bylaws. Any other proper business may be transacted at the annual meeting.

Defendants' suggestion that timing and procedure "were the very subject of 8 Del.C. §228" but that timing and procedure are not the subject of Section 211(b) is not readily understandable from this comparison.

consent. Their power to take action at special meetings without board approval may be curtailed either in the bylaws or in the certificate of incorporation by the simple expedient, which Unocal has utilized, of providing as permitted by Section 211(d) that only the board may call special meetings of stockholders.* Stockholders' power to take action by written consent may be curtailed by providing in the certificate of incorporation (although not in the bylaws) either regulations governing the exercise of that power or, as Unocal has done, an outright abrogation of that power. But the statute makes no provision whatsoever which would permit a limitation upon the exercise by the stockholders of their statutory right to transact any proper business at an annual meeting.** Certainly, if the board may not impose by bylaw even laudable regulations upon the exercise by the stockholders of a defeasible right, such as the right to take action by written consent, regulations governing the exercise by the stockholders of

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*Section 211(d) provides as follows:

> (d) Special meetings of the stockholders may be called by the board of directors or by such person or persons as may be authorized by the certificate of incorporation or by the bylaws.

**Indeed, the right of stockholders to voice their opinions and take stockholder action at annual meetings is so fundamental and so important that even majority-owned corporations must conduct annual meetings, though the outcome may be preordained.

a flatly indefeasible right cannot stand no matter how laudable the board may think them to be.*

Moreover, the regulations which the defendants have purported to impose here are manifestly unreasonable and would be invalid even if regulation in general were, though it is not, legal. Defendants piously claim that they are not regulating the "types of business" that may be brought before annual meetings, but they have in fact done just that. Under the Notice Bylaws, the stockholders cannot transact any business whatsoever other than that presented to them by the board (either before or after the thirty-day cutoff date imposed by the board) or by stockholders (so long as notice of that business was given to Unocal at least thirty days before the meeting). Thus, they cannot transact any type of business, unless the board in the exercise of the unilateral power it has given itself asks them to, relating to matters occurring within thirty days of the meeting.

Such a limitation on the types of business the stockholders may consider is particularly egregious given

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*Indeed, as the Court held in Loew's Theatres, Inc. v. Commercial Credit Co., Del. Ch., 243 A.2d 78, 80-81 (1968), even a provision adopted by stockholders and set forth in the certificate of incorporation "which seeks to waive a statutory right or requirement is unenforceable." There, the Court held void a provision in a certificate of incorporation limiting inspection of the corporation's stocklist and books and records to 25% stockholders. If a stockholder-adopted limitation on inspection rights is void, surely a board-adopted limitation on the most fundamental of the stockholders' rights is void.

the facts of this very case, and those facts demonstrate particularly well the invalidity and unreasonableness of the Notice Bylaws. Defendants have purported to freeze the types of business that the stockholders may consider, and thus the types of business they can conduct, according to the circumstances existing on March 29. Yet those circumstances have changed and are continuing to change dramatically. On March 29, the Partnership and Mesa Eastern had not announced their Offer. On March 29, defendants had not revealed their interpretation of the Notice Bylaws as restricting the stockholders' ability to conduct business at a reconvened meeting to proposals conveyed to Unocal prior to March 29. And on March 29, Unocal had not made its conditional and defensive offer to buy in 50 percent of its shares.

Under defendants' Notice Bylaws, the stockholders cannot conduct any business relating to these events other than business presented to them by the board. But defendants can neither stop time nor freeze the kaleidoscope of events which is rapidly unfolding. Defendants' effort to limit the types of business the shareholders may conduct to that relating to circumstances existing on March 29 and conveyed to Unocal (unless the business is proposed by the board), even if the meeting is adjourned to a later date, is invalid and cannot stand.

That the interpretation defendants have placed on the Notice Bylaws is contrary to the statute is also plain.* Defendants' claim that a reconvened meeting is merely part of the adjourned meeting is, in the circumstances presented here, not only incorrect but directly contrary to the General Corporation Law.

Under Section 222(c), if a meeting is adjourned for more than thirty days (as the Partnership has asked the stockholders to do) or if a new record date is set

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*Contrary to defendants' suggestion, which forms the basis for part of their argument under this head, plaintiffs do not concede that the regulation in Article III, Section 6 of nominations for election as director and the invalidation of stockholder votes for persons not nominated in accordance with the requirements of that provision is valid. To the contrary, it is patently invalid and plaintiffs have so alleged and continue so to contend. Among other things, the bylaw seriously restricts the ability of opponents of the board to wage a proxy fight by tilting the balance of information and opportunity on this matter of ultimate stockholder decision toward the board. More fundamentally, however, it purports absolutely to negate the stockholders' right to vote for any persons they choose as director. Delaware law establishes no requirement that a person be nominated for election as director and grants no authority for the corporation or the inspectors of election to reject ballots cast for persons not nominated. To the contrary, votes may be cast for any person, whether on management's card, an opposition card or a write-in, and those votes must be counted just as any other. As the Court held in Commonwealth v. Markey, Pa. Supr., 190 A. 892 (1937), which expressly rejected the rationale of In re Hamilton, N.J. Supr., 137 A. 843 (1927), a case cited by defendants, "without nominations having been made at all, an election could be carried through. We do not see how it can be maintained, as a general proposition, that nomination is a prerequisite to election...." See also In re Farrell, N.Y. App., 200 N.Y.S. 95 (1923), aff'd, 142 N.E.2d 301, discussed above at p. 7.

(as the Partnership has asked the board to do), new notice must be given to the stockholders.* Under such circumstances the quorum present at the adjourned meeting could not conceivably be deemed to continue and to be effective at the reconvened meeting, because the stockholders of record entitled to vote at the reconvened meeting will not be the same stockholders who were entitled to vote at the adjourned meeting. This is of course particularly the case where, as here, great trading activity is occurring on a daily basis. Thus, defendants' contention that the reconvened meeting must be viewed as a mere continuation of the adjourned meeting simply fails, and with it defendants' purported justification for limiting the business at the reconvened meeting to that for which notice was given prior to the original, but adjourned, meeting.

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*Section 222(c) provides as follows:

> (c) When a meeting is adjourned to another time or place, unless the by-laws otherwise require, notice need not be given of the adjourned meeting if the time and place thereof are announced at the meeting at which the adjournment is taken. At the adjournment meeting the corporation may transact any business which might have been transacted at the original meeting. If the adjournment is for more than thirty days, or if after the adjournment a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting.

Defendants' new bylaws conflict with Section 211(b) and are invalid and void on their face. Their enforcement must be enjoined. Plaza Securities Co. v. Datapoint Corp.

III. PLAINTIFFS ARE ENTITLED TO INTERIM INJUNCTIVE RELIEF.

Plaintiffs have no quarrel with defendants' suggestion that "imminent irreparable injury" must be shown (AB 45). It is present here, and it is caused by defendants' announcement in Mr. Hartley's letter dated April 7, 1985, first received by the public on April 11, 1985, that plaintiffs cannot bring <u>anything</u> up at an adjournment of the Annual Meeting. As the letter said, it is defendants' position that:

> "...no further nominations or proposals could be submitted for shareholder action even if the meeting were adjourned."

Tassin Aff. ¶12; Complaint, Ex. A. The specific irreparable injury is to plaintiffs' efforts to solicit proxies in favor of the Adjournment Proposals. It is simple common sense that a proposal to adjourn a meeting in order to hold a meeting at which <u>nothing</u> can be brought up, as declared by defendants, will not appeal to stockholders. The Court could so hold without anything in the record on the matter. However, in this case, common sense is supported by expert opinion:

> 7. Based on the foregoing, it is my opinion that the position of Unocal as stated in the April 7 letter that under its bylaws no further proposals or nominations may be submitted by stockholders for stockholder action at the Meeting, even if the Meeting is adjourned, will have a significant chilling effect on the Partnership's proxy solicitation since stockholders

> who might otherwise vote in favor of adjournment will not do so because Unocal has told them it will be a futile act.

(Carter Aff. ¶4). Mr. Gavin's opinion to the contrary is noteworthy, but not credible in the least. As the Second Carter Affidavit makes clear, the Gavin Affidavit is demonstrably false. On this critical point, his naked assertion to the contrary is unsupported by extrinsic evidence and flies in the face of common sense.

Defendants next set up a straw man, and proceed to demolish it. They argue that "plaintiffs' alleged inability to present hypothetical proposals does not constitute specific, imminent irreparable harm." Of course, this argument totally ignores the current, ongoing irreparable harm plaintiffs are suffering in their solicitation of proxies. A gag rule imposed on the conduct of the Annual Meeting creates _per se_ irreparable harm to the stockholders and to the opposition of management. Under the defendants' rules, even though there have been extraordinary developments since the imposition of management's one-sided, _ipse dixit_, thirty day gag rule on March 28 (such as the April 8 Offer being made by the Partnership and Mesa Eastern, defendants' new interpretation of the Notice Bylaws, and management's Exchange Offer first announced on April 17) no stockholder can take any of these events into consideration in making proposals at the Annual Meeting. Thus, not only are plaintiffs now purportedly foreclosed from formulating any new proposals in the light of these events, but so are all other stockholders. This in itself, and by definition, causes irreparable injury by depriving the stockholders of important aspects of their corporate franchise. According to defendants, the stockholders now can consider at the meeting only management proposals, not stockholder proposals. To state such a proposition is to demonstrate its absurdity and the irreparable injury such a manipulation engenders.

Under this section of their answering argument defendants also assert that with respect to the question of what proposals might be presented at a reconvened meeting the matter is not yet ripe since, they argue, if the Adjournment Proposals do not pass, the matter would become moot. They thus repeat an argument that defendants' counsel made at the scheduling conference before the Court in opposition even to scheduling plaintiffs' application for a temporary restraining order. Defendants' argument reveals rather than hides the irreparable harm plaintiffs are suffering and will continue to suffer unless defendants' conduct is restrained. If the Adjournment Proposals do not pass because of defendants' April 7 statement that a vote for adjournment will be a futile act, plaintiffs will never have a day in court. It is apparent that defendants will then argue that the matter is moot. Plaintiffs would have been not only irreparably harmed but the matter would be beyond the power of this Court to remedy in any way.

Ironically, defendants unwittingly concede the existence of irreparable harm here. By making their mootness argument, premised on the failure of the Adjournment Proposals, defendants have shown their hand. They hope to skew the proxy solicitation (and prevent plaintiffs from obtaining relief by trumpeting that the harm, if any, has yet to arrive), and then unabashedly to argue that the issue is moot because they have won the unfair contest.

Defendants also rely on _Edelman v. Phillips Petroleum Co._, Del. Supr., No. 55, 1985 (Feb. 16, 1985) (Order), an order by only two Justices -- not a full panel -- on a question of certification. There, had the challenged reclassification been turned down and the matter rendered moot, plaintiffs would have in effect prevailed; and there could be no argument, as here, that failure to approve the reclassification was caused by the defendants' wrongful conduct. By contrast, if the Adjournment Proposals were to fail here, we would contend that the wrongful position taken by defendants' on April 7 caused it. According to defendants, our claim would be barred as moot.

Defendants next argue that this Court has the power to order a new meeting if it later determines this to be necessary. We agree with this proposition. However, defendants do not say they will abandon their mootness argument if the Adjournment Proposals fail. Moreover, defendants do not contend that the matter has not been fully and completely presented. The facts here are largely undisputed. The legal issues are clear and concise. The inequitable effect of defendants' actions has been demonstrated. Why should the Court not act now to prevent irreparable harm rather than allow it to occur and attempt to undo it? No reason is suggested. None, and there is no reason why the Court should not act now. Events here are moving very swiftly. Enormous transactions are being proposed. As the Offer of the Partnership and Mesa Eastern reveals, they have incurred some $45 million in commitment and related fees. Millions of dollars are being spent on the proxy solicitation by both sides. Similar sums are being spent by Unocal on its defenses, including its just-announced exchange offer.

The meeting should be conducted fairly and in accordance with Delaware law the first time. Plaintiffs are being irreparably harmed now in two ways: current injury to them in their ability to solicit proxies, and current injury to them and all other stockholders by defendants' gag rule. It comes with ill grace for defendants to complain that no further stockholder proposals have been made when defendants have announced that they will not recognize them. The harm can only be avoided by the prompt exercise of the Court's injunctive powers.

Defendants' final argument is that plaintiffs should be barred from any remedy by their laches. Defendants argue that since plaintiffs knew of defendants' initial bylaw amendments on March 10, plaintiffs are barred by the one-month delay. None of the cases they cite would support such a draconian rule. Of course, defendants have ignored the fact, undisputed on the record, that plaintiffs filed suit the day after they learned of defendants' April 7 letter; and that letter brought with it the current and immediate impact on the Partnership's proxy solicitation and thus on the success or failure of the Adjournment Proposals.

Until then, plaintiffs were content to see if they prevailed on the Adjournment Proposals and wait to see what position Unocal would take with respect to the adjourned meeting agenda. Unocal has now taken its position. No matter what the stockholders want, defendants have announced that there is to be no adjourned meeting in any meaningful sense. Plaintiffs anticipated before the April 7 position was declared by Unocal that if they sued, defendants would argue that they had taken no position as yet, the matter was not ripe, there was no current harmful effect because the Adjournment Proposal was to be submitted and so on. While plaintiffs reserved all their rights in submitting the Adjournment Proposal to management thirty days before April 29, they believed that as long as it would be fairly presented and considered they would have a chance to bring up any proposals at the adjourned meeting. On

April 11 plaintiffs learned for the first time that, in defendants' view, plaintiffs could not bring up anything at the adjourned meeting; and they took that position in such a way as to impair plaintiffs' chance to present fairly their Adjournment Proposals. In effect, defendants said that never in 1985 would the Unocal shareholders have a chance to consider plaintiffs' proposals or any other stockholders' proposals. Compare Holly Sugar Corp. v. Buchsbaum. That was new; that was concrete; and that plaintiffs could not live with. Plaintiffs sued immediately. There can be no laches in such a situation.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that their application for a temporary restraining order, in the form submitted herewith, be granted.

Charles F. Richards, Jr.
Samuel A. Nolen
Jesse A. Finkelstein
Thomas A. Beck
C. Stephen Bigler
Daniel J. Kaufman
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Wilmington, DE 19899
Attorneys for Plaintiff

DATED: April 18, 1985

EXHIBIT A

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

GROVER C. BROWN
CHANCELLOR

COURT HOUSE
WILMINGTON, DELAWARE

November 7, 1984

Henry N. Herndon, Jr., Esquire
Morris, James, Hitchens & Williams
P.O. Box 2306
Wilmington, Delaware 19899

A. Gilchrist Sparks, III, Esquire
Morris, Nichols, Arsht & Tunnell
P.O. Box 1347
Wilmington, Delaware 19899

Re: Bachmann v. Ontell
Civil Action No. 7805
Submitted: November 5, 1984

Gentlemen:

I have decided that the motion of the plaintiffs to strike the affirmative defense of the defendants is well taken. In this action brought pursuant to 8 Del.C. §225 to determine the legal composition of the board of directors of the corporation, the defendants have asserted as an affirmative defense that the plaintiffs, if they are all declared to be in office so as to thereby constitute a majority of the board, intend to liquidate the corporation in a manner designed to further their own pecuniary interests in disregard of the interests of the public shareholders. For this reason, the defendants presumably take the position that the Court should not declare them to be directors even if it is otherwise established by the evidence that they have been properly elected and remain in office.

Having reflected upon the matter, I do not view this to be a proper defense to assert in this action brought pursuant to §225. That statute comtemplates a summary proceeding, if necessary, to determine the validity of a corporate election or to determine the right of a person to hold a corporate office in the event that such office is claimed by more than one person. As such the statute is directed at the corporate election process. The affirmative defense asserted by the defendants here is not addressed to the election process, but rather it would have the Court bar the plaintiffs, or some of them, from holding office because of fiduciary improprieties that the defendants fear they are likely to commit in the event that their collective authority to serve and act as directors is established.

Such a defense is directed to the wisdom of permitting persons to act as directors of the corporation as opposed to their right, if lawfully elected under the particular corporate structure, to serve in that capacity. As such, I feel that such an affirmative defense attempts to inject into the proceeding a collateral matter which is not within the contemplation of the statute under which the summary proceeding has been brought.

I think that the case of In re Arthur Treacher's Fish & Chips, Del. Ch., 386 A.2d 1162 (1978) is distinguishable since that was an action brought under 8 Del.C. §273, a statute designed specifically to afford a swift procedure for seeking a dissolution of a joint venture corporation having only two shareholders. In a proceeding under §273, dissolution of the corporate venture is the purpose of the action and thus an alleged inequitable plan or motivation in bringing the action might well constitute a matter of defense.

Here, however, dissolution or liquidation of the corporation is not related to the purpose of the statute. Therefore, I do not feel that the decision in Arthur Treacher's Fish & Chips provides any authority for offering such an affirmative defense by the defendants in this action.

At the trial I reserved ruling on the plaintiffs' motion and, for purposes of expediency, permitted defendants to offer evidence in support of their affirmative defense subject to whatever ruling I might later make. However, since I have now decided to grant the motion, I offer this ruling in advance of any post-trial submissions so as to alert counsel that the matter of the alleged intent of the plaintiffs to liquidate the corporation to the detriment of the public shareholders is no longer in the case. Thus, there will be no need for counsel to deal with that issue in any post-trial memoranda.

The motion of the plaintiffs to strike the affirmative defense of the defendants is granted. IT IS SO ORDERED.

Very truly yours,

GCB/vll

cc: Register in Chancery

EXHIBIT B

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALBERT I. EDELMAN, Plaintiff, v. PHILLIPS PETROLEUM COMPANY, a Delaware corporation, MESA PETROLEUM COMPANY, a Delaware corporation, MESA PARTNERS, a Texas partnership, MESA ASSET CO., a Delaware corporation, MESA SOUTHERN CO., a Delaware corporation, GEORGE B. BEITZEL, MICHAEL N. CHETKOVICH, GLENN A. COX, WILLIAM C. DOUCE, JAMES B. EDWARDS, ROBERT F. FROEHLKE, E. DOUGLAS KENNA, C. M. KITTREL, MELVIN R. LAIRD, CAROL A. LAISE, DAVID B. MEEKER, C. J. SILAS, R. G. WALLACE, W. CLARKE WESCOE, DELORES D. WHARTON and FRANCIS M. WHEAT, Defendants.	§	No. 55, 1985

Submitted: February 15, 1985
Decided: February 16, 1985

Before McNEILLY and MOORE, Justices (constituting the available members of the Court).

ORDER DENYING INTERLOCUTORY APPEAL

This 16th day of February, 1985, it appearing that:

(1) The plaintiff, a stockholder of Phillips Petroleum Co. (Phillips) has filed this derivative and class action against Phillips, its directors, and Mesa Petroleum Co. (Mesa), both Delaware corporations, and other defendants affiliated with Mesa, to prevent Phillips and Mesa from

consummating an agreement settling prior litigation which includes a proposed recapitalization of Phillips.

(2) The Phillips stockholders are due to meet on February 22, 1985 to vote on the Recapitalization Plan.

(3) The plaintiff sought, and was denied by the Court of Chancery, a preliminary injunction to prevent submission of the Recapitalization Plan to the Phillips stockholders.

(4) By an unreported opinion dated February 12, 1985 the Court of Chancery carefully analyzed the various contentions of the plaintiff and found that they did not warrant the relief sought in the nature of a preliminary injunction.

(5) Pursuant to Supreme Court Rule 41 the plaintiff sought certification to this Court of certain questions of law. Concurrently, the plaintiff also sought the certification of an interlocutory appeal of the same questions under Supreme Court Rule 42. By an oral ruling, and subsequent written Order, on February 15, 1985 the Court of Chancery denied certification of the matters under both Rules 41 and 42 of this Court.

(6) Basically, the questions which the plaintiff sought certification under Rules 41 and 42 are:

> (a) Is the standard of 'complete candor' <u>Lynch v. Vickers Energy Corp</u>., Del.Supr., 383 A.2d 278 (1978) met by mailing (a) a 288-page Prospectus-Proxy Statement (the "Proxy Statement") only twenty-one days before a special meeting, and (b) a 39-page Supplementary Proxy Statement (the "Supplement") only thirteen days before the meeting, which substantially alters the

already complicated series of financial, tax and corporate transactions presented to shareholders in the Proxy Statement on a single "take it or leave it" basis?

(b) Does not Delaware Law prohibit the forced redemption of common stock through an illusory reclassification of common stock into redeemable preferred stock?

(c) Does not the duty of complete candor mandate disclosure to stockholders of investment bankers' opinions known to the Board of Directors which are contrary to opinions of investment bankers retained by the corporation?

(7) In his oral ruling denying certification the Vice Chancellor found that the issues relating to the first question respecting the proxy statement were highly factual and the record is limited. While the trial court was inclined to certify the second question involving the reclassification issue as a matter of first impression, it noted that the stockholders had yet to vote on the subject, and if rejected by them, then the issue is moot. Under the circumstances the Court of Chancery concluded that if the stockholders approved the transaction the issue would be one of remedy rather than the establishment of a legal right. Respecting the third question, the Vice Chancellor concluded that it, too, was so highly factual that the issue decided did not meet the criteria of Rule 42.

(8) In denying certification of questions of law under Supreme Court Rule 41 the trial court reasoned that this procedure involved the resolution of legal issues before their determination in the Court of Chancery. Accordingly,

the Vice Chancellor considered that remedy unavailable to the plaintiff in this case.

(9) Upon consideration of the foregoing we must agree that the certification of questions of law pursuant to Rule 41 is not an appropriate procedure where, in cases like this, the trial court has already addressed and decided the legal issues for which certification is sought.

(10) In connection with the interlocutory appeal under Rule 42, we are satisfied that as to the first and third questions presented by the plaintiff, material facts relating to those issues are in dispute. Therefore, they do not meet the criteria of Rule 42(b)(i). As for the second question, involving reclassification of Phillips common stock, the issue may be rendered moot by the stockholder vote on February 22, 1985. Under such circumstances this Court would be rendering an impermissible advisory opinion. Sannini v. Casscells, Del. Supr., 401 A 2d 927, 930 (1979). Should the stockholders approve the reclassification, the plaintiff is not without an adequate remedy. While the question may be one of first instance in this State, and without expressing any ultimate views on the merits, we are satisfied that on the present record there do not exist important and urgent reasons for an immediate determination by this Court of that matter.

NOW, THEREFORE, IT IS ORDERED that the interlocutory appeal of the plaintiff be, and the same hereby is, REFUSED.

BY THE COURT:

A. G. Moore II

Justice

EXHIBIT C

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALDEN SMITH and JOHN W. GOSSELIN, Plaintiffs Below, Appellants,	§	
v.	§	No. 255, 1982
JEROME W. VAN GORKOM, BRUCE S. CHELBERG, WILLIAM B. JOHNSON, JOSEPH B. LANTERMAN, GRAHAM J. MORGAN, THOMAS P. O'BOYLE, W. ALLEN WALLIS, SIDNEY H. BONSER, WILLIAM D. BROWDER, TRANS UNION CORPORATION, a Delaware corporation, MARMON GROUP, INC., a Delaware corporation, GL CORPORATION, a Delaware corporation, and NEW T. CO., a Delaware corporation, Defendants Below, Appellees.	§	

Submitted: June 11, 1984
Decided: January 29, 1985

Before HERRMANN, Chief Justice, McNEILLY, HORSEY, MOORE and CHRISTIE, constituting the Court en banc.

Upon appeal from the Court of Chancery. Reversed and Remanded.

William Prickett (argued) and James P. Dalle Pazze, of Prickett, Jones, Elliott, Kristol & Schnee, Wilmington, and Ivan Irwin, Jr. and Brett A. Ringle, of Shank, Irwin, Conant & Williamson, of Dallas, Texas, of counsel, for plaintiffs below, appellants.

Robert K. Payson (argued) and Peter M. Sieglaff of Potter, Anderson & Corroon, Wilmington, for individual defendants below, appellees.

Lewis S. Black, Jr., A. Gilchrist Sparks, III (argued) and Richard D. Allen, of Morris, Nichols, Arsht & Tunnell, Wilmington, for Trans Union Corporation, Marmon Group, Inc., GL Corporation and New T. Co., defendants below, appellees.

HORSEY, Justice: (for the majority):

the stockholders had been "fairly informed" by the Board of Directors before voting thereon. The plaintiffs appeal.

Speaking for the majority of the Court, we conclude that both rulings of the Court of Chancery are clearly erroneous. Therefore, we reverse and direct that judgment be entered in favor of the plaintiffs and against the defendant directors for the fair value of the plaintiffs' stockholdings in Trans Union, in accordance with Weinberger v. UOP, Inc., Del. Supr., 457 A.2d 701 (1983).[3]

We hold: (1) that the Board's decision, reached September 20, 1980, to approve the proposed cash-out merger was not the product of an informed business judgment; (2) that the Board's subsequent efforts to amend the Merger Agreement and take other curative action were ineffectual, both legally and factually; and (3) that the Board did not deal with complete candor with the stockholders by failing to disclose all material facts, which they knew or should have known, before securing the stockholders' approval of the merger.

I.

The nature of this case requires a detailed factual statement. The following facts are essentially uncontradicted:[4]

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[3]It has been stipulated that plaintiffs sue on behalf of a class consisting of 10,537 shareholders (out of a total of 12,844) and that the class owned 12,734,404 out of 13,357,758 shares of Trans Union outstanding.

[4]More detailed statements of facts, consistent with this factual outline, appear in related portions of this Opinion.

July 1980, Trans Union Management prepared the annual revision of the Company's Five Year Forecast. This report was presented to the Board of Directors at its July, 1980 meeting. The report projected an annual income growth of about 20%. The report also concluded that Trans Union would have about $195 million in spare cash between 1980 and 1985, "with the surplus growing rapidly from 1982 onward." The report referred to the ITC situation as a "nagging problem" and, given that problem, the leasing company "would still appear to be constrained to a tax breakeven." The report then listed four alternative uses of the projected 1982-1985 equity surplus: (1) stock repurchase; (2) dividend increases; (3) a major acquisition program; and (4) combinations of the above. The sale of Trans Union was not among the alternatives. The report emphasized that, despite the overall surplus, the operation of the Company would consume all available equity for the next several years, and concluded: "As a result, we have sufficient time to fully develop our course of action."

-B-

On August 27, 1980, Van Gorkom met with Senior Management of Trans Union. Van Gorkom reported on his lobbying efforts in Washington and his desire to find a solution to the tax credit problem more permanent than a continued program of acquisitions. Various alternatives were suggested and discussed preliminarily, including the sale of Trans Union to a company with a large amount of taxable income.

benefit of experts to identify what the limits were to that, and so forth." These computations were not considered extensive and no conclusion was reached.

At this meeting, Van Gorkom stated that he would be willing to take $55 per share for his own 75,000 shares. He vetoed the suggestion of a leveraged buy-out by Management, however, as involving a potential conflict of interest for Management. Van Gorkom, a certified public accountant and lawyer, had been an officer of Trans Union for 24 years, its Chief Executive Officer for more than 17 years, and Chairman of its Board for 2 years. It is noteworthy in this connection that he was then approaching 65 years of age and mandatory retirement.

For several days following the September 5 meeting, Van Gorkom pondered the idea of a sale. He had participated in many acquisitions as a manager and director of Trans Union and as a director of other companies. He was familiar with acquisition procedures, valuation methods, and negotiations; and he privately considered the pros and cons of whether Trans Union should seek a privately or publicly-held purchaser.

Van Gorkom decided to meet with Jay A. Pritzker, a well-known corporate takeover specialist and a social acquaintance. However, rather than approaching Pritzker simply to determine his interest in acquiring Trans Union, Van Gorkom assembled a proposed per share price for sale of the Company of certain weaker divisions identified in a study done for Trans Union by the Boston Consulting Group ("BCG study"). Peterson reported that, of the purchase price, approximately $50-80 million would remain outstanding after five years. Van Gorkom was disappointed, but decided to meet with Pritzker nevertheless.

Van Gorkom arranged a meeting with Pritzker at the latter's home on Saturday, September 13, 1980. Van Gorkom prefaced his presentation by stating to Pritzker: "Now as far as you are concerned, I can, I think, show how you can pay a substantial premium over the present stock price and pay off most of the loan in the first five years. * * * If you could pay $55 for this Company, here is a way in which I think it can be financed."

Van Gorkom then reviewed with Pritzker his calculations based upon his proposed price of $55 per share. Although Pritzker mentioned $50 as a more attractive figure, no other price was mentioned. However, Van Gorkom stated that to be sure that $55 was the best price obtainable, Trans Union should be free to accept any better offer. Pritzker demurred, stating that his organization would serve as a "stalking horse" for an "auction contest" only if Trans Union would permit Pritzker to buy 1,750,000 shares of Trans Union stock at market price which Pritzker could then sell to any higher bidder. After further discussion on this point, Pritzker told Van Gorkom that he would give him a more definite reaction soon.

On Friday, September 19, Van Gorkom, Chelberg, and Pritzker consulted with Trans Union's lead bank regarding the financing of Pritzker's purchase of Trans Union. The bank indicated that it could form a syndicate of banks that would finance the transaction. On the same day, Van Gorkom retained James Brennan, Esquire, to advise Trans Union on the legal aspects of the merger. Van Gorkom did not consult with William Browder, a Vice-President and director of Trans Union and former head of its legal department, or with William Moore, then the head of Trans Union's legal staff.

On Friday, September 19, Van Gorkom called a special meeting of the Trans Union Board for noon the following day. He also called a meeting of the Company's Senior Management to convene at 11:00 a.m., prior to the meeting of the Board. No one, except Chelberg and Peterson, was told the purpose of the meetings. Van Gorkom did not invite Trans Union's investment banker, Salomon Brothers or its Chicago-based partner, to attend.

Of those present at the Senior Management meeting on September 20, only Chelberg and Peterson had prior knowledge of Pritzker's offer. Van Gorkom disclosed the offer and described its terms, but he furnished no copies of the proposed Merger Agreement. Romans announced that his department had done a second study which showed that, for a leveraged buy-out, the price range for Trans Union stock was between $55 and $65 per share. Van Gorkom neither saw the study nor asked Romans to make it available for the Board meeting.

Company and its operations as a going concern. They were familiar with the current financial condition of the Company, as well as operating and earnings projections reported in the recent Five Year Forecast. The Board generally received regular and detailed reports and was kept abreast of the accumulated investment tax credit and accelerated depreciation problem.

Van Gorkom began the Special Meeting of the Board with a twenty-minute oral presentation. Copies of the proposed Merger Agreement were delivered too late for study before or during the meeting.[7] He reviewed the Company's ITC and depreciation problems and the efforts theretofore made to solve them. He discussed his initial meeting with Pritzker and his motivation in arranging that meeting. Van Gorkom did not disclose to the Board, however, the methodology by which he alone had arrived at the $55 figure, or the fact that he first proposed the $55 price in his negotiations with Pritzker.

Van Gorkom outlined the terms of the Pritzker offer as follows: Pritzker would pay $55 in cash for all outstanding shares of Trans Union stock upon completion of which Trans Union would be merged into New T Company, a subsidiary wholly-owned by Pritzker and formed to implement the merger; for a

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[7]The record is not clear as to the terms of the Merger Agreement. The Agreement, as originally presented to the Board on September 20, was never produced by defendants despite demands by the plaintiffs. Nor is it clear that the directors were given an opportunity to study the Merger Agreement before voting on it. All that can be said is that Brennan had the Agreement before him during the meeting.

merger proposal until the morning of the meeting; that his studies did not indicate either a fair price for the stock or a valuation of the Company; that he did not see his role as directly addressing the fairness issue; and that he and his people "were trying to search for ways to justify a price in connection with such a [leveraged buy-out] transaction, rather than to say what the shares are worth." Romans testified:

> I told the Board that the study ran the numbers at 50 and 60, and then the subsequent study at 55 and 65, and that was not the same thing as saying that I have a valuation of the company at X dollars. But it was a way - a first step towards reaching that conclusion.

Romans told the Board that, in his opinion, $55 was "in the range of a fair price," but "at the beginning of the range."

Chelberg, Trans Union's President, supported Van Gorkom's presentation and representations. He testified that he "participated to make sure that the Board members collectively were clear on the details of the agreement or offer from Pritzker;" that he "participated in the discussion with Mr. Brennan, inquiring of him about the necessity for valuation opinions in spite of the way in which this particular offer was couched;" and that he was otherwise actively involved in supporting the positions being taken by Van Gorkom before the Board about "the necessity to act immediately on this offer," and about "the adequacy of the $55 and the question of how that would be tested."

Neither he nor any other director read the agreement prior to its signing and delivery to Pritzker.

* * *

On Monday, September 22, the Company issued a press release announcing that Trans Union had entered into a "definitive" Merger Agreement with an affiliate of the Marmon Group, Inc., a Pritzker holding company. Within 10 days of the public announcement, dissent among Senior Management over the merger had become widespread. Faced with threatened resignations of key officers, Van Gorkom met with Pritzker who agreed to several modifications of the Agreement. Pritzker was willing to do so provided that Van Gorkom could persuade the dissidents to remain on the Company payroll for at least six months after consummation of the merger.

Van Gorkom reconvened the Board on October 8 and secured the directors' approval of the proposed amendments — sight unseen. The Board also authorized the employment of Salomon Brothers, its investment banker, to solicit other offers for Trans Union during the proposed "market test" period.

The next day, October 9, Trans Union issued a press release announcing: (1) that Pritzker had obtained "the financing commitments necessary to consummate" the merger with Trans Union; (2) that Pritzker had acquired one million shares of Trans Union common stock at $38 per share; (3) that Trans Union was now permitted to actively seek other offers and had retained Salomon Brothers for that purpose; and (4) that other concern to make a firm offer for Trans Union, withdrew its offer under circumstances hereinafter detailed.

On December 19, this litigation was commenced and, within four weeks, the plaintiffs had deposed eight of the ten directors of Trans Union, including Van Gorkom, Chelberg and Romans, its Chief Financial Officer. On January 21, Management's Proxy Statement for the February 10 shareholder meeting was mailed to Trans Union's stockholders. On January 26, Trans Union's Board met and, after a lengthy meeting, voted to proceed with the Pritzker merger. The Board also approved for mailing, "on or about January 27," a Supplement to its Proxy Statement. The Supplement purportedly set forth all information relevant to the Pritzker Merger Agreement, which had not been divulged in the first Proxy Statement.

* * *

On February 10, the stockholders of Trans Union approved the Pritzker merger proposal. Of the outstanding shares, 69.9% were voted in favor of the merger; 7.25% were voted against the merger; and 22.85% were not voted.

II.

We turn to the issue of the application of the business judgment rule to the September 20 meeting of the Board.

The Court of Chancery concluded from the evidence that the Board of Directors' approval of the Pritzker merger coming, the market test would have produced it,[10] and Trans Union would have been contractually free to accept such higher offer. However, the Court offered no factual basis or legal support for any of these findings; and the record compels contrary conclusions.

This Court's standard of review of the findings of fact reached by the Trial Court following full evidentiary hearing is as stated in Levitt v. Bouvier, Del. Supr., 287 A.2d 671, 673 (1972):

> [In an appeal of this nature] this court has the authority to review the entire record and to make its own findings of fact in a proper case. In exercising our power of review, we have the duty to review the sufficiency of the evidence and to test the propriety of the findings below. We do not, however, ignore the findings made by the trial judge. If they are sufficiently supported by the record and are the product of an orderly and logical deductive process, in the exercise of judicial restraint we accept them, even though independently we might have reached opposite conclusions. It is only when the findings below are clearly wrong and the doing of justice requires their overturn that we are free to make contradictory findings of fact.

Applying that standard and governing principles of law to the record and the decision of the Trial Court, we conclude that the Court's ultimate finding that the Board's conduct was

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[10] We refer to the underlined portion of the Court's ultimate conclusion (previously stated): "that given the market value of Trans Union's stock, the business acumen of the members of the board of Trans Union, the substantial premium over market offered by the Pritzkers and the ultimate effect on the merger price provided by the prospect of other bids for the stock in question, that the board of directors of Trans Union did not act recklessly or improvidently . . . ."

directors.[11] Pogostin v. Rice, Del. Supr., 480 A.2d 619, 624 (1984); Aronson v. Lewis, Del. Supr., 473 A.2d 805, 811 (1984); Zapata Corp. v. Maldonado, Del. Supr., 430 A.2d 779, 782 (1981). In carrying out their managerial roles, directors are charged with an unyielding fiduciary duty to the corporation and its shareholders. Loft, Inc. v. Guth, Del. Ch., 2 A.2d 225 (1938), aff'd, Del. Supr., 5 A.2d 503 (1939). The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors. Zapata Corp. v. Maldonado, supra at 782. The rule itself "is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson, supra at 812. Thus, the party attacking a board decision as uninformed must rebut the presumption that its business judgment was an informed one. Id.

The determination of whether a business judgment is an informed one turns on whether the directors have informed

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[11] 8 Del.C. § 141 provides, in pertinent part:

> (a) The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.

those interests and to proceed with a critical eye in assessing information of the type and under the circumstances present here. See Lutz v. Boas, supra; Guth v. Loft, supra at 510. Compare Donovan v. Cunningham, 5th Cir., 616 F.2d 1455, 1467 (1982); Doyle v. Union Insurance Company, Neb. Supr., 277 N.W.2d 36 (1979); Continental Securities Co. v. Belmont, N.Y. App., 99 N.E.2d 138, 141 (1912).

Thus, a director's duty to exercise an informed business judgment is in the nature of a duty of care, as distinguished from a duty of loyalty. Here, there were no allegations of fraud, bad faith, or self-dealing, or proof thereof. Hence, it is presumed that the directors reached their business judgment in good faith, Allaun v. Consolidated Oil Co., Del. Ch., 147 A. 257 (1929), and considerations of motive are irrelevant to the issue before us.

The standard of care applicable to a director's duty of care has also been recently restated by this Court. In Aronson, supra, we stated:

> While the Delaware cases use a variety of terms to describe the applicable standard of care, our analysis satisfies us that under the business judgment rule director liability is predicated upon concepts of gross negligence. (footnote omitted)

473 A.2d at 812.

We again confirm that view. We think the concept of gross negligence is also the proper standard for determining whether a business judgment reached by a board of director may not abdicate that duty by leaving to the shareholders alone the decision to approve or disapprove the agreement. See Beard v. Elster, Del. Supr., 160 A.2d 731, 737 (1960). Only an agreement of merger satisfying the requirements of 8 Del.C. § 251 (b) may be submitted to the shareholders under § 251 (c). See generally Aronson v. Lewis, supra at 811-13; see also Pogostin v. Rice, supra.

It is against those standards that the conduct of the directors of Trans Union must be tested, as a matter of law and as a matter of fact, regarding their exercise of an informed business judgment in voting to approve the Pritzker merger proposal.

III.

The defendants argue that the determination of whether their decision to accept $55 per share for Trans Union represented an informed business judgment requires consideration, not only of that which they knew and learned on September 20, but also of that which they subsequently learned and did over the following four-month period before the shareholders met to vote on the proposal in February, 1981. The defendants thereby seek to reduce the significance of their action on September 20 and to widen the time frame for determining whether their decision to accept the Pritzker proposal was an informed one. Thus, the defendants contend that what the directors did and learned subsequent to September 20 and through January 26, 1981, was properly taken into account by

The directors (1) did not adequately inform themselves as to Van Gorkom's role in forcing the "sale" of the Company and in establishing the per share purchase price; (2) were uninformed as to the intrinsic value of the Company; and (3) given these circumstances, at a minimum, were grossly negligent in approving the "sale" of the Company upon two hours' consideration, without prior notice, and without the exigency of a crisis or emergency.

As has been noted, the Board based its September 20 decision to approve the cash-out merger primarily on Van Gorkom's representations. None of the directors, other than Van Gorkom and Chelberg, had any prior knowledge that the purpose of the meeting was to propose a cash-out merger of Trans Union. No members of Senior Management were present, other than Chelberg, Romans and Peterson; and the latter two had only learned of the proposed sale an hour earlier. Both general counsel Moore and former general counsel Browder attended the meeting, but were equally uninformed as to the purpose of the meeting and the documents to be acted upon.

Without any documents before them concerning the proposed transaction, the members of the Board were required to rely entirely upon Van Gorkom's 20-minute oral presentation of the proposal. No written summary of the terms of the merger was presented; the directors were given no documentation to support the adequacy of $55 price per share for sale of the Company; and the Board had before it nothing more than and Romans' brief oral statement of his preliminary study regarding the feasibility of a leveraged buy-out of Trans Union do not qualify as § 141 (e) "reports" for these reasons: The former lacked substance because Van Gorkom was basically uninformed as to the essential provisions of the very document about which he was talking. Romans' statement was irrelevant to the issues before the Board since it did not purport to be a valuation study. At a minimum for a report to enjoy the status conferred by § 141 (e), it must be pertinent to the subject matter upon which a board is called to act, and otherwise be entitled to good faith, not blind, reliance. Considering all of the surrounding circumstances -- hastily calling the meeting without prior notice of its subject matter, the proposed sale of the Company without any prior consideration of the issue or necessity therefor, the urgent time constraints imposed by Pritzker, and the total absence of any documentation whatsoever -- the directors were duty bound to make reasonable inquiry of Van Gorkom and Romans, and if they had done so, the inadequacy of that upon which they now claim to have relied would have been apparent.

The defendants rely on the following factors to sustain the Trial Court's finding that the Board's decision was an informed one: (1) the magnitude of the premium or spread between the $55 Pritzker offering price and Trans Union's current market price of $38 per share; (2) the amendment of the Agreement as submitted on September 20 to permit the Board to accept any better offer during the "market test" period; (3) the collective experience and expertise of the apparently believed that the market stock price accurately reflected the value of the Company for the purpose of determining the adequacy of the premium for its sale.

In the Proxy Statement, however, the directors reversed their position. There, they stated that, although the earnings prospects for Trans Union were "excellent," they found no basis for believing that this would be reflected in future stock prices. With regard to past trading, the Board stated that the prices at which the Company's common stock had traded in recent years did not reflect the "inherent" value of the Company. But having referred to the "inherent" value of Trans Union, the directors ascribed no number to it. Moreover, nowhere did they disclose that they had no basis on which to fix "inherent" worth beyond an impressionistic reaction to the premium over market and an unsubstantiated belief that the value of the assets was "significantly greater" than book value. By their own admission they could not rely on the stock price as an accurate measure of value. Yet, also by their own admission, the Board members assumed that Trans Union's market price was adequate to serve as a basis upon which to assess the adequacy of the premium for purposes of the September 20 meeting.

The parties do not dispute that a publicly-traded stock price is solely a measure of the value of a minority position and, thus, market price represents only the value of a single share. Nevertheless, on September 20, the Board assessed the adequacy of the premium over market, offered by Pritzker, solely by comparing it with Trans Union's current and historical stock price. (_See_ _supra_ note 5 at _____.)

Here, the record establishes that the Board did not request its Chief Financial Officer, Romans, to make any valuation study or review of the proposal to determine the adequacy of $55 per share for sale of the Company. On the record before us: The Board rested on Romans' elicited response that the $55 figure was within a "fair price range" within the context of a leveraged buy-out. No director sought any further information from Romans. No director asked him why he put $55 at the bottom of his range. No director asked Romans for any details as to his study, the reason why it had been undertaken or its depth. No director asked to see the study; and no director asked Romans whether Trans Union's finance department could do a fairness study within the remaining 36-hour[18] period available under the Pritzker offer.

Had the Board, or any member, made an inquiry of Romans, he presumably would have responded as he testified: that his calculations were rough and preliminary; and, that the study was not designed to determine the fair value of the Company, but rather to assess the feasibility of a leveraged buy-out financed by the Company's projected cash flow, making certain assumptions as to the purchaser's borrowing needs. Romans would have presumably also informed the Board of his view, and the widespread view of Senior Management, that the timing of the offer was wrong and the offer inadequate.

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[18] Romans' department study was not made available to the Board until circulation of Trans Union's Supplementary Proxy Statement and the Board's meeting of January 26, 1981, on the eve of the shareholder meeting; and, as has been noted, the study has never been produced for inclusion in the record in this case.

available to them. Had they done so, they would have learned of the source and derivation of the $55 price and could not reasonably have relied thereupon in good faith.

None of the directors, Management or outside, were investment bankers or financial analysts. Yet the Board did not consider recessing the meeting until a later hour that day (or requesting an extension of Pritzker's Sunday evening deadline) to give it time to elicit more information as to the sufficiency of the offer, either from inside Management (in particular Romans) or from Trans Union's own investment banker, Salomon Brothers, whose Chicago specialist in merger and acquisitions was known to the Board and familiar with Trans Union's affairs.

Thus, the record compels the conclusion that on September 20 the Board lacked valuation information adequate to reach an informed business judgment as to the fairness of $55 per share for sale of the Company.[20]

(2)

This brings us to the post-September 20 "market test" upon which the defendants ultimately rely to confirm the reasonableness of their September 20 decision to accept the Pritzker proposal. In this connection, the directors present a two-part argument: (a) that by making a "market test" of Pritzker's $55 per share offer a condition of their September 20 decision to

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[20] For a far more careful and reasoned approach taken by another board of directors faced with the pressures of a hostile tender offer, see Pogostin v. Rice, supra at 623-627.

counsel have made the affirmative representation that this critical document has been produced. Thus, the Court is deprived of the best evidence on which to judge the merits of the defendants' position as to the care and attention which they gave to the terms of the Agreement on September 20.

Van Gorkom states that the Agreement as submitted incorporat the ingredients for a market test by authorizing Trans Union to receive competing offers over the next 90-day period. However, he concedes that the Agreement barred Trans Union from actively soliciting such offers and from furnishing to interested parties any information about the Company other than that already in the public domain. Whether the original Agreement of September 20 went so far as to authorize Trans Union to receive competitive proposals is arguable. The defendants' unexplained failure to produce and identify the original Merger Agreement permits the logical inference that the instrument would not support their assertions in this regard. Wilmington Trust Co. v. General Motors Corp., Del. Supr., 51 A.2d 584, 593 (1974); II Wigmore on Evidence § 291 (3d ed. 1940). It is a well established principle that the production of weak evidence when strong is, or should have been, available can lead only to the conclusion that the strong would have been adverse. Interstate Circuit v. United States, 306 U.S. 208, 226 (1939); Deberry v. State, Del.Supr., 457 A.2d 744, 754 (1983). Van Gorkom, conceding that he never read the Agreement, stated that he was relying upon his understanding that, under corporate law, directors always have an inherent right, as well as a fiduciary duty, to accept a better offer notwithstanding an existing contractual commitment by the Board. (See the discussion infra, part III B (3) at p. 55.)

either the right to accept a better offer or the right to distribute proprietary information to third parties. The logical witness for the defendants to call to confirm their construction of this clause of the Agreement would have been Trans Union's outside attorney, James Brennan. The defendants' failure, without explanation, to call this witness again permits the logical inference that his testimony would not have been helpful to them. The further fact that the directors adjourned, rather than recessed, the meeting without incorporating in the Agreement these important "conditions" further weakens the defendants' position. As has been noted, nothing in the Board's Minutes supports these claims. No reference to either of the so-called "conditions" or of Trans Union's reserved right to test the market appears in any notes of the Board meeting or in the Board Resolution accepting the Pritzker offer or in the Minutes of the meeting itself. That evening, in the midst of a formal party which he hosted for the opening of the Chicago Lyric Opera, Van Gorkom executed the Merger Agreement without he or any other member of the Board having read the instruments.

The defendants attempt to downplay the significance of the prohibition against Trans Union's actively soliciting competing offers by arguing that the directors "understood that the entire financial community would know that Trans Union was for sale upon the announcement of the Pritzker offer, and anyone desiring to make a better offer was free to do so." Yet, the

Gimbel v. Signal Companies, Inc., Del. Ch., 316 A.2d 599 (1974), aff'd per curiam, Del. Supr., 316 A.2d 619 (1974). There, the Court of Chancery preliminarily enjoined a board's sale of stock of its wholly-owned subsidiary for an alleged grossly inadequate price. It did so based on a finding that the business judgment rule had been pierced for failure of management to give its board "the opportunity to make a reasonable and reasoned decision." 316 A.2d at 615. The Court there reached this result notwithstanding the board's sophistication and experience; the company's need of immediate cash; and the board's need to act promptly due to the impact of an energy crisis on the value of the underlying assets being sold — all of its subsidiary's oil and gas interests. The Court found those factors denoting competence to be outweighed by evidence of gross negligence; that management in effect sprang the deal on the board by negotiating the asset sale without informing the board; that the buyer intended to "force a quick decision" by the board; that the board meeting was called on only one-and-a-half days' notice; that its outside directors were not notified of the

(continued)
Trans Union's five "outside" directors included four chief executives of major corporations and an economist who was a former dean of a major school of business and chancellor of a university. The "outside" directors had 78 years of combined experience as chief executive officers of major corporations and 50 years of cumulative experience as directors of Trans Union. Thus, defendants argue that the Board was eminently qualified to reach an informed judgment on the proposed "sale" of Trans Union notwithstanding their lack of any advance notice of the proposal, the shortness of their deliberation, and their determination not to consult with their investment banker or to obtain a fairness opinion.

information regarding the intrinsic value of the Company, upon which a proper exercise of business judgment could be made, mere advice of this type is meaningless; and, given this record of the defendants' failures, it constitutes no defense here.[22]

* * *

We conclude that Trans Union's Board was grossly negligent in that it failed to act with informed reasonable deliberation in agreeing to the Pritzker merger proposal on September 20; and we further conclude that the Trial Court erred as a matter of law in failing to address that question before determining whether the directors' later conduct was sufficient to cure its initial error.

A second claim is that counsel advised the Board it would be subject to lawsuits if it rejected the $55 per share offer. It is, of course, a fact of corporate life that today when faced with difficult or sensitive issues, directors often are subject to suit, irrespective of the decisions they make. However, counsel's mere acknowledgement of this circumstance cannot be rationally translated into a justification for a board permitting itself to be stampeded into a patently unadvised act. While suit might result from the rejection of a merger or tender offer, Delaware law makes clear that a board acting within the ambit of the business judgment rule faces no ultimate liability. Pogostin v. Rice, supra. Thus, we cannot conclude that the mere

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[22]Nonetheless, we are satisfied that in an appropriate factual context a proper exercise of business judgment may include, as one of its aspects, reasonable reliance upon the advice of counsel. This is wholly outside the statutory protections of 8 Del.C. § 141 (e) involving reliance upon reports of officers, certain experts and books and records of the company.

> Until October 10, 1980, the purchaser has the right to terminate the merger if financing that is satisfactory to the purchaser has not been obtained, but after that date there is no such right.
>
> In a related transaction, Trans Union has agreed to sell to a designee of the purchaser one million newly-issued shares of Trans Union common stock at a cash price of $38 per share. Such shares will be issued only if the merger financing has been committed for no later than October 10, 1980, or if the purchaser elects to waive the merger financing condition. In addition, the New York Stock Exchange will be asked to approve the listing of the new shares pursuant to a listing application which Trans Union intends to file shortly.
>
> Completing of the transaction is also subject to the preparation of a definitive proxy statement and making various filings and obtaining the approvals or consents of government agencies.

The press release made no reference to provisions allegedly reserving to the Board the rights to perform a "market test" and to withdraw from the Pritzker Agreement if Trans Union received a better offer before the shareholder meeting. The defendants also concede that Trans Union never made a subsequent public announcement stating that it had in fact reserved the right to accept alternate offers, the Agreement notwithstanding.

The public announcement of the Pritzker merger resulted in an "en masse" revolt of Trans Union's Senior Management. The head of Trans Union's tank car operations (its most profitable division) informed Van Gorkom that unless the merger were called off, fifteen key personnel would resign.

Instead of reconvening the Board, Van Gorkom again privately met with Pritzker, informed him of the developments, and sought his advice. Pritzker then made the following suggestions for overcoming Management's dissatisfaction: (1) that represented the amendments to Trans Union's Board members on October 8. In a brief session, the directors approved Van Gorkom's oral presentation of the substance of the proposed amendments, the terms of which were not reduced to writing until October 10. But rather than waiting to review the amendments, the Board again approved them sight unseen and adjourned, giving Van Gorkom authority to execute the papers when he received them.[25]

Thus, the Court of Chancery's finding that the October 8 Board meeting was convened to reconsider the Pritzker "proposal" is clearly erroneous. Further, the consequence of the Board's faulty conduct on October 8, in approving amendments to the Agreement which had not even been drafted, will become apparent when the actual amendments to the Agreement are hereafter examined.

The next day, October 9, and before the Agreement was amended, Pritzker moved swiftly to off-set the proposed market test amendment. First, Pritzker informed Trans Union that he had completed arrangements for financing its acquisition and that the parties were thereby mutually bound to a firm purchase and sale arrangement. Second, Pritzker announced the exercise of his option to purchase one million shares of Trans Union's treasury stock at $38 per share — 75 cents above the current market price. Trans Union's Management responded the same day by issuing a press release announcing: (1) that all financing

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[25] We do not suggest that a board must read in haec verba every contract or legal document which it approves, but if it is to successfully absolve itself from charges of the type made here, there must be some credible contemporary evidence demonstrating that the directors knew what they were doing, and ensured that their purported action was given effect. That is the consistent failure which cast this Board upon its unredeemable course.

(or sale of assets) with a third party or had entered into a "definitive" merger agreement more favorable than Pritzker's and for a greater consideration — subject only to stockholder approval. Further, the "extension" of the market test period to February 10, 1981 was circumscribed by other amendments which required Trans Union to file its preliminary proxy statement on the Pritzker merger proposal by December 5, 1980 and use its best efforts to mail the statement to its shareholders by January 5, 1981. Thus, the market test period was effectively reduced, not extended. (See infra note 29 at _____.)

In our view, the record compels the conclusion that the directors' conduct on October 8 exhibited the same deficiencies as did their conduct on September 20. The Board permitted its Merger Agreement with Pritzker to be amended in a manner it had neither authorized nor intended. The Court of Chancery, in its decision, overlooked the significance of the October 8-10 events and their relevance to the sufficiency of the directors' conduct. The Trial Court's letter opinion ignores: the October 10 amendments; the manner of their adoption; the effect of the October 9 press release and the October 10 amendments on the feasibility of a market test; and the ultimate question as to the reasonableness of the directors' reliance on a market test in recommending that the shareholders approve the Pritzker merger.

We conclude that the Board acted in a grossly negligent manner on October 8; and that Van Gorkom's representations on which the Board based its actions do not constitute "reports" of a leveraged buy-out by all members of Management, except Van Gorkom. By early October, Henry R. Kravis of KKR gave Romans written notice of KKR's "interest in making an offer to purchase 100%" of Trans Union's common stock.

Thereafter, and until early December, Romans' group worked with KKR to develop a proposal. It did so with Van Gorkom's knowledge and apparently grudging consent. On December 2, Kravis and Romans hand-delivered to Van Gorkom a formal letter-offer to purchase all of Trans Union's assets and to assume all of its liabilities for an aggregate cash consideration equivalent to $60 per share. The offer was contingent upon completing equity and bank financing of $650 million, which Kravis represented as 80% complete. The KKR letter made reference to discussions with major banks regarding the loan portion of the buy-out cost and stated that KKR was "confident that commitments for the bank financing * * * can be obtained within two or three weeks." The purchasing group was to include certain named key members of Trans Union's Senior Management, excluding Van Gorkom, and a major Canadian company. Kravis stated that they were willing to enter into a "definitive agreement" under terms and conditions "substantially the same" as those contained in Trans Union's agreement with Pritzker. The offer was addressed to Trans Union's Board of Directors and a meeting with the Board, scheduled for that afternoon, was requested.

Van Gorkom's reaction to the KKR proposal was completely negative; he did not view the offer as being firm because of its financing condition. It was pointed out, to no avail, that mid-January. Even then, its proposal was not in the form of an offer. Had there been time to do so, GE Credit was prepared to offer between $2 and $5 per share above the $55 per share price which Pritzker offered. But GE Credit needed an additional 60 to 90 days; and it was unwilling to make a formal offer without a concession from Pritzker extending the February 10 "deadline" for Trans Union's stockholder meeting. As previously stated, Pritzker refused to grant such extension; and on January 21, GE Credit terminated further negotiations with Trans Union. Its stated reasons, among others, were its "unwillingness to become involved in a bidding contest with Pritzker in the absence of the willingness of [the Pritzker interests] to terminate the proposed $55 cash merger."

* * *

In the absence of any explicit finding by the Trial Court as to the reasonableness of Trans Union's directors' reliance on a market test and its feasibility, we may make our own findings based on the record. Our review of the record compels a finding that confirmation of the appropriateness of the Pritzker offer by an unfettered or free market test was virtually meaningless in the face of the terms and time limitations of Trans Union's Merger Agreement with Pritzker as amended October 10, 1980.

(3)

Finally, we turn to the Board's meeting of January 26, 1981. The defendant directors rely upon the action there taken to attorneys attended the meeting. At that meeting the following facts, among other aspects of the Merger Agreement, were discussed:

(a) The fact that prior to September 20, 1980, no Board member or member of Senior Management, except Chelberg and Peterson, knew that Van Gorkom had discussed a possible merger with Pritzker;

(b) The fact that the price of $55 per share had been suggested initially to Pritzker by Van Gorkom;

(c) The fact that the Board had not sought an independent fairness opinion;

(d) The fact that, at the September 20 Senior Management meeting, Romans and several members of Senior Management indicated

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January 10 and was later postponed to February 10 under the October 8-10 amendments. We refer to the document titled "Amendment to Supplemental Agreement" executed by the parties "as of" October 10, 1980. Under new Section 2.03 (a) of Article A VI of the "Supplemental Agreement," the parties agreed, in part, as follows:

> "The solicitation of such offers or proposals [i.e., 'other offers that Trans Union might accept in lieu of the Merger Agreement'] by TU . . . shall not be deemed to constitute a breach of this Supplemental Agreement or the Merger Agreement provided that . . . . [Trans Union] shall not (1) delay promptly seeking all consents and approvals required hereunder . . . [and] shall be deemed [in compliance] if it files its Preliminary Proxy Statement by December 5, 1980, uses its best efforts to mail its Proxy Statement by January 5, 1981 and holds a special meeting of its Stockholders on or prior to February 10, 1981 . . .
>
> * * *
>
> It is the present intention of the Board of Directors of TU to recommend the approval of the Merger Agreement to the Stockholders unless another offer or proposal is made which in their opinion is more favorable to the Stockholders than the Merger Agreement."

of several of the Board members at trial as confirming the Minutes.[31] On the basis of this evidence, the defendants

(continued)

RESOLVED, that the Secretary of the Company be and he hereby is authorized and directed to mail to the stockholders a Supplement to Proxy Statement, substantially in the form of the proposed Supplement to Proxy Statement submitted to the Board at this meeting, with such changes therein and modifications thereof as he shall, with the advice and assistance of counsel, approve as being necessary, desirable, or appropriate.

The Board then reviewed and discussed at great length the entire sequence of events pertaining to the proposed $55 cash merger with a subsidiary of GE Corporation, beginning with the first discussion on September 13, 1980, between the Chairman and Mr. Jay Pritzker relative to a possible merger. Each of the Directors was involved in this discussion as well as counsel who had earlier joined the meeting. Following this review and discussion, such counsel advised the Directors that in light of their discussions, they could (a) continue to recommend to the stockholders that the latter vote in favor of the proposed merger, (b) recommend that the stockholders vote against the merger, or (c) take no position with respect to recommending the proposed merger and simply leave the decision to stockholders. After further discussion, it was moved, seconded, and unanimously voted that the Board of Directors continue to recommend that the stockholders vote in favor of the proposed merger, each Director being individually polled with respect to his vote.

[31] In particular, the defendants rely on the testimony of director Johnson on direct examination:

Q. Was there a regular meeting of the board of Trans Union on January 26, 1981?

A. Yes.

Q. And what was discussed at that meeting?

A. Everything relevant to this transaction.

You see, since the proxy statement of the 19th had been mailed, see, General Electric had advised that they weren't going to make a bid. It was concluded to suggest that the shareholders be advised of that, and that required a supplemental proxy statement, and that required authorization of the board,

(cont'd)

We cannot agree. We find the Trial Court to have erred, both as a matter of fact and as a matter of law, in relying on the action on January 26 to bring the defendants' conduct within the protection of the business judgment rule.

Johnson's testimony and the Board Minutes of January 26 are remarkably consistent. Both clearly indicate recognition that the question of the alternative courses of action, available to the Board on January 26 with respect to the Pritzker merger, was a legal question, presenting to the Board (after its review of the full record developed through pre-trial discovery) three options: (1) to "continue to recommend" the Pritzker merger; (2) to "recommend that the stockholders vote against" the Pritzker merger; or (3) to take a noncommittal position on the merger and "simply leave the decision to [the] shareholders."

We must conclude from the foregoing that the Board was mistaken as a matter of law regarding its available courses of action on January 26, 1981. Options (2) and (3) were not viable or legally available to the Board under 8 Del.C. § 251 (b). The Board could not remain committed to the Pritzker merger and yet recommend that its stockholders vote it down; nor could it take a neutral position and delegate to the stockholders the unadvised decision as to whether to accept or reject the merger. Under § 251 (b), the Board had but two options: (1) to proceed with the merger and the stockholder meeting, with the Board's recommendation of approval; or (2) to rescind its agreement with Pritzker, withdraw its approval of the merger, and notify that day cannot be sustained.[32] The Court's conclusion is not supported by the record; it is contrary to the provisions of § 251 (b) and basic principles of contract law; and it is not the product of a logical and deductive reasoning process.

* * *

Upon the basis of the foregoing, we hold that the defendants' post-September conduct did not cure the deficiencies of their September 20 conduct; and that, accordingly, the Trial Court erred in according to the defendants the benefits of the business judgment rule.

IV.

Whether the directors of Trans Union should be treated as one or individually in terms of invoking the protection of the business judgment rule and the applicability of 8 Del.C. § 141 (c) are questions which were not originally addressed by the parties in their briefing of this case. This resulted in a supplemental briefing and a second rehearing en banc on two basic questions: (a) whether one or more of the directors were deprived of the protection of the business judgment rule by evidence of an absence of good faith; and (b) whether one or more of the outside directors were entitled to invoke the protection

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[32] To the extent the Trial Court's ultimate conclusion to invoke the business judgment rule is based on other explicit criteria and supporting evidence (i.e., market value of Trans Union's stock, the business acumen of the Board members, the substantial premium over market and the availability of the market test to confirm the adequacy of the premium), we have previously discussed the insufficiency of such evidence.

> wide discretion in the matter of valuation and affords room for honest differences of opinion. In order to prevail, plaintiffs had the heavy burden of proving that the merger price was so grossly inadequate as to display itself as a badge of fraud. That is a burden which plaintiffs have not met.

However, plaintiffs have not claimed, nor did the Trial Court decide, that $55 was a grossly inadequate price per share for sale of the Company. That being so, the presumption that a board's judgment as to adequacy of price represents an honest exercise of business judgment (absent proof that the sale price was grossly inadequate) is irrelevant to the threshold question of whether an informed judgment was reached. Compare Sinclair Oil Corp. v. Levien, Del. Supr., 280 A.2d 717 (1971); Kelly v. Bell, Del. Supr., 266 A.2d 878, 879 (1970); Cole v. National Cash Credit Association, Del. Ch., 156 A. 183 (1931); Allaun v. Consolidated Oil Co., supra; Allen Chemical & Dye Corp. v. Steel & Tube Co. of America, Del. Ch., 120 A. 486 (1923).

V.

The defendants ultimately rely on the stockholder vote of February 10 for exoneration. The defendants contend that the stockholders' "overwhelming" vote approving the Pritzker Merger Agreement had the legal effect of curing any failure of the Board to reach an informed business judgment in its approval of the merger.

The parties tacitly agree that a discovered failure of the Board to reach an informed business judgment in approving the merger constitutes a voidable, rather than a void, act. Hence, the merger can be sustained, notwithstanding the infirmity disclosure, the defendants state that there was no dispute at trial over the standard of disclosure required of the Board; but the defendants concede that the Board was required to disclose "all germane facts" which a reasonable shareholder would have considered important in deciding whether to approve the merger. Thus, the defendants argue that when the Trial Court speaks of finding the Company's shareholders to have been "fairly informed" by Management's proxy materials, the Court is speaking in terms of "complete candor" as required under Lynch v. Vickers Energy Corp., Del. Supr., 383 A.2d 278 (1978).

The settled rule in Delaware is that "where a majority of fully informed stockholders ratify action of even interested directors, an attack on the ratified transaction normally must fail." Gerlach v. Gillam, Del. Ch., 139 A.2d 591, 593 (1958). The question of whether shareholders have been fully informed such that their vote can be said to ratify director action, "turns on the fairness and completeness of the proxy materials submitted by the management to the . . . shareholders." Michelson v. Duncan, supra at 220. As this Court stated in Gottlieb v. Heyden Chemical Corp., Del. Supr., 91 A.2d 57, 59 (1952):

> [T]he entire atmosphere is freshened and a new set of rules invoked where a formal approval has been given by a majority of independent, fully informed stockholders. . . .

In Lynch v. Vickers Energy Corp., supra, this Court held that corporate directors owe to their stockholders a fiduciary duty to disclose all facts germane to the transaction at issue in an atmosphere of complete candor. We defined "germane" in the tender offer context as all "information such as a reasonable stockholder

> [a]lthough the Board of Directors regards the intrinsic value of the Company's assets to be significantly greater than their book valué . . ., systematic liquidation of such a large and complex entity as Trans Union is simply not regarded as a feasible method of realizing its inherent value. Therefore, a business combination such as the merger would seem to be the only practicable way in which the stockholders could realize the value of the Company.

The Proxy stated further that "[i]n the view of the Board of Directors . . ., the prices at which the Company's common stock has traded in recent years have not reflected the inherent value of the Company." What the Board failed to disclose to its stockholders was that the Board had not made any study of the intrinsic or inherent worth of the Company; nor had the Board even discussed the inherent value of the Company prior to approving the merger on September 20, or at either of the subsequent meetings on October 8 or January 26. Neither in its Original Proxy Statement nor in its Supplemental Proxy did the Board disclose that it had no information before it, beyond the premium-over-market and the price/earnings ratio, on which to determine the fair value of the Company as a whole.

(2) We find false and misleading the Board's characterization of the Romans report in the Supplemental Proxy Statement. The Supplemental Proxy stated:

> At the September 20, 1980 meeting of the Board of Directors of Trans Union, Mr. Romans indicated that while he could not say that $55,00 per share was an unfair price, he had prepared a preliminary report which reflected that the value of the Company was in the range of $55.00 to $65.00 per share.

before us, it is clear that the Board failed to meet that burden. Weinberger v. UOP, Inc., supra at 703; Michelson v. Duncan, supra.

* * *

For the foregoing reasons, we conclude that the director defendants breached their fiduciary duty of candor by their failure to make true and correct disclosures of all information they had, or should have had, material to the transaction submitted for stockholder approval.

VI.

To summarize: we hold that the directors of Trans Union breached their fiduciary duty to their stockholders (1) by their failure to inform themselves of all information reasonably available to them and relevant to their decision to recommend the Pritzker merger; and (2) by their failure to disclose all material information such as a reasonable stockholder would consider important in deciding whether to approve the Pritzker offer.

We hold, therefore, that the Trial Court committed reversible error in applying the business judgment rule in favor of the director defendants in this case.

On remand, the Court of Chancery shall conduct an evidentiary hearing to determine the fair value of the shares represented by the plaintiffs' class, based on the intrinsic value of Trans Union on September 20, 1980. Such valuation shall be made in accordance with Weinberger v. UOP, Inc., supra

McNEILLY, Justice, dissenting:

The majority opinion reads like an advocate's closing address to a hostile jury. And I say that not lightly. Throughout the opinion great emphasis is directed only to the negative, with nothing more than lip service granted the positive aspects of this case. In my opinion Chancellor Marvel (retired) should have been affirmed. The Chancellor's opinion was the product of well reasoned conclusions, based upon a sound deductive process, clearly supported by the evidence and entitled to deference in this appeal. Because of my diametrical opposition to all evidentiary conclusions of the majority, I respectfully dissent.

It would serve no useful purpose, particularly at this late date, for me to dissent at great length. I restrain myself from doing so, but feel compelled to at least point out what I consider to be the most glaring deficiencies in the majority opinion. The majority has spoken and has effectively said that Trans Union's Directors have been the victims of a "fast shuffle" by Van Gorkom and Pritzker. That is the beginning of the majority's comedy of errors. The first and most important error made is the majority's assessment of the directors' knowledge of the affairs of Trans Union and their combined ability to act in this situation under the protection of the business judgment rule.

Trans Union's Board of Directors consisted of ten men, five of whom were "inside" directors and five of whom were "outside" directors. The "inside" directors were Van Gorkom, Chelberg, Bonser, William B. Browder, Senior Vice-President-Law, and Thomas P. O'Boyle, of $55.00, such firm would receive a fee of roughly $2,650,000 plus disbursements.

As the first step in proceeding to carry out its commitment, Salomon Brothers had a brochure prepared, which set forth Trans Union's financial history, described the company's business in detail and set forth Trans Union's operating and financial projections. Salomon Brothers also prepared a list of over 150 companies which it believed might be suitable merger partners, and while four of such companies, namely, General Electric, Borg-Warner, Bendix, and Genstar, Ltd. showed some interest in such a merger, none made a firm proposal to Trans Union and only General Electric showed a sustained interest.[1] As matters transpired, no firm offer which bettered the Pritzker offer of $55 per share was ever made.

On January 21, 1981 a proxy statement was sent to the share-

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1. Shortly after the announcement of the proposed merger in September senior members of Trans Union's management got in touch with KKR to discuss their possible participation in a leverage buyout scheme. On December 2, 1980 KKR through Henry Kravis actually made a bid of $60.00 per share for Trans Union stock on December 2, 1980 but the offer was withdrawn three hours after it was made because of complications arising out of negotiations with the Reichman family, extremely wealthy Canadians and a change of attitude toward the leveraged buyout scheme, by Jack Kruzenga, the member of senior management of Trans Union who most likely would have been President and Chief Operating Officer of the new company. Kruzenga was the President and Chief Operating Officer of the seven subsidiaries of Trans Union which constituted the backbone of Trans Union as shown through exhaustive studies and analysis of Trans Union's intrinsic value on the market place by the respected investment banking firm of Morgan Stanley. It is interesting to note that at no time during the market test period did any of the 150 corporations contacted by Salomon Brothers complain of the time frame or availability of corporate records in order to make an independent judgment of market value of 100% of Trans Union.

cast prepared by management. At the September 20 meeting Van Gorkom presented the Pritzker offer, and the board then heard from James Brennan, the company's counsel in this matter, who discussed the legal documents. Following this, the Board directed that certain changes be made in the merger documents. These changes made it clear that the Board was free to accept a better offer than Pritzker's if one was made. The above facts reveal that the Board did not act in a grossly negligent manner in informing themselves of the relevant and available facts before passing on the merger. To the contrary, this record reveals that the directors acted with the utmost care in informing themselves of the relevant and available facts before passing on the merger.

The majority finds that Trans Union stockholders were not fully informed and that the directors breached their fiduciary duty of complete candor to the stockholders required by Lynch v. Vickers Energy Corp., Del. Supr. 383 A.2d 278 (1978) [Lynch I], in that the proxy materials were deficient in five areas.

Here again is exploitation of the negative by the majority without giving credit to the positive. To respond to the conclusions of the majority would merely be unnecessary prolonged argument. But briefly what did the proxy materials disclose? The proxy material informed the shareholders that projections were furnished to potential purchasers and such projections indicated that Trans Union's net income might increase to approximately $153 million in 1985. That projection, what is almost three times the net income of $58,248,000 purpose of the meeting be given at least 20 days prior to the meeting. This was accomplished by the proxy statement mailed January 19, 1981. Nothing in § 251(c) prevents the supplementation of proxy materials within 20 days of the meeting. Indeed when additional information, which a reasonable shareholder would consider important in deciding how to vote, comes to light that information must be disclosed to stockholders in sufficient time for the stockholders to consider it. But nothing in § 251(c) requires this additional information to be disclosed at least 20 days prior to the meeting. To reach a contrary result would ignore the current practice and would discourage the supplementation of proxy materials in order to disclose the occurrence of intervening events. In my opinion, fifteen days in the instant case was a sufficient amount of time for the stockholders to receive and consider the information in the supplemental proxy statement.

CHRISTIE, Justice, dissenting:

I respectfully dissent.

Considering the standard and scope of our review under Levitt v. Bouvier, Del. Supr., 287 A.2d 671, 673 (1972), I believe that the record taken as a whole supports a conclusion that the actions of the defendants are protected by the business judgment rule. Aronson v. Lewis, Del. Supr., 473 A.2d 805, 812 (1984); Pogostin v. Rice, Del. Supr., 480 A.2d 619, 627 (1984). I also am satisfied that the record supports a conclusion that the defendants acted with the complete candor required by Lynch v. Vickers Energy Corp., Del. Supr., 383 A.2d 278 (1978). Under the circumstances I would affirm the judgment of the Court of Chancery.

ON MOTIONS FOR REARGUMENT

Submitted: March 4, 1985
Decided: March 14, 1985

Following this Court's decision, Thomas P. O'Boyle, one of the director defendants, sought, and was granted, leave for change of counsel. Thereafter, the individual director defendants, other than O'Boyle, filed a motion for reargument and director O'Boyle, through newly-appearing counsel, then filed a separate motion for reargument. Plaintiffs have responded to the several motions and this matter has now been duly considered.

following colloquy took place between this Court and counsel for the individual defendants at the outset of counsel's argument:

> COUNSEL: I'll make the argument on behalf of the nine individual defendants against whom the plaintiffs seek more than $100,000,000 in damages. That is the ultimate issue in this case, whether or not nine honest, experienced businessmen should be subject to damages in a case where --
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> JUSTICE MOORE: Is there a distinction between Chelberg and Van Gorkom vis-a-vis the other defendants?
>
> COUNSEL: No, sir.
>
> JUSTICE MOORE: None whatsoever?
>
> COUNSEL: I think not.

Two, in this Court's Opinion dated January 29, 1985, the Court relied on the individual defendants as having presented a unified defense. We stated:

> The parties' response, including reargument, has led the majority of the Court to conclude: (1) that since all of the defendant directors, outside as well as inside, take a unified position, we are required to treat all of the directors as one as to whether they are entitled to the protection of the business judgment rule. . . .

Three, previously O'Boyle took the position that the Board's action taken January 26, 1981 -- in which he fully participated -- was determinative of virtually all issues. Now O'Boyle seeks to attribute no significance to his participation in the January 26 meeting. Nor does O'Boyle seek to explain his having given before the directors' meeting of October 8, 1980 his "consent to the transaction of such business as may come before the meeting." It is the view of the majority of the Court that O'Boyle's change of position following this Court's decision on the merits comes too late to be considered. He has clearly waived that right.

The Motions for Reargument of all defendants are denied.

McNEILLY and CHRISTIE, Justices, dissenting:

We do not disagree with the ruling as to the defendant O'Boyle, but we would have granted reargument on the other issues raised.