

**Smith v. Van Gorkom**  
488 A.2d 858 (Del. 1985)

Before HERRMANN, C.J., and MCNEILLY, HORSEY, MOORE and CHRISTIE, JJ., constituting the Court en banc.

HORSEY, J. (for the majority):

This appeal from the Court of Chancery involves a class action brought by shareholders of the defendant Trans Union Corporation (“Trans Union” or “the Company”), originally seeking rescission of a cash-out merger of Trans Union into the defendant New T Company (“New T”), a wholly-owned subsidiary of the defendant, Marmon Group, Inc. (“Marmon”). Alternate relief in the form of damages is sought against the defendant members of the Board of Directors of Trans Union, New T, and Jay A. Pritzker and Robert A. Pritzker, owners of Marmon.

Following trial, the former Chancellor granted judgment for the defendant directors by unreported letter opinion dated July 6, 1982. Judgment was based on two findings: (1) that the Board of Directors had acted in an informed manner so as to be entitled to protection of the business judgment rule in approving the cash-out merger; and (2) that the shareholder vote approving the merger should not be set aside because 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.*, 457 A.2d 701 (Del. 1983)

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:

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Trans Union was a publicly-traded, diversified holding company, the principal earnings of which were generated by its railcar leasing business. During the period here involved, the Company had a cash flow of hundreds of millions of dollars annually. However, the Company had difficulty in generating sufficient taxable income to offset increasingly large investment tax credits (ITCs). Accelerated depreciation deductions had decreased available taxable income against which to offset accumulating ITCs. The Company took these deductions, despite their

effect on usable ITCs, because the rental price in the railcar leasing market had already impounded the purported tax savings.

In the late 1970's, together with other capital-intensive firms, Trans Union lobbied in Congress to have ITCs refundable in cash to firms which could not fully utilize the credit. During the summer of 1980, defendant Jerome W. Van Gorkom, Trans Union's Chairman and Chief Executive Officer, testified and lobbied in Congress for refundability of ITCs and against further accelerated depreciation. By the end of August, Van Gorkom was convinced that Congress would neither accept the refundability concept nor curtail further accelerated depreciation.

Beginning in the late 1960's, and continuing through the 1970's, Trans Union pursued a program of acquiring small companies in order to increase available taxable income. In 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."

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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.

Donald Romans, Chief Financial Officer of Trans Union, stated that his department had done a "very brief bit of work on the possibility of a leveraged buy-out." This work had been prompted by a media article which Romans had seen regarding a leveraged buy-out by management. The work consisted of a "preliminary study" of the cash which could be generated by the Company if it participated in a leveraged buy-out. As Romans stated, this analysis "was very first and rough cut at seeing whether a cash flow would support what might be considered a high price for this type of transaction."

On September 5, at another Senior Management meeting which Van Gorkom attended, Romans again brought up the idea of a leveraged buy-out as a "possible strategic alternative" to the Company's acquisition program. Romans and Bruce S. Chelberg, President and Chief Operating Officer of Trans Union, had been working on the matter in preparation for the meeting. According to Romans: They did not "come up" with a price for the Company. They merely "ran the numbers" at \$50 a share and at \$60 a share with the "rough form" of their cash figures at the time. Their "figures indicated that \$50 would be very easy to do but \$60 would be very difficult to do under those figures." This work did not purport to establish a fair price for either the Company or 100% of the stock. It was intended to determine the cash flow needed to service the debt that would "probably" be incurred in a leveraged buy-out, based on "rough

calculations” without “any 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 and a financing structure by which to accomplish the sale. Van Gorkom did so without consulting either his Board or any members of Senior Management except one: Carl Peterson, Trans Union’s Controller. Telling Peterson that he wanted no other person on his staff to know what he was doing, but without telling him why, Van Gorkom directed Peterson to calculate the feasibility of a leveraged buy-out at an assumed price per share of \$55. Apart from the Company’s historic stock market price,<sup>5</sup> and Van Gorkom’s long association with Trans Union, the record is devoid of any competent evidence that \$55 represented the per share intrinsic value of the Company.

Having thus chosen the \$55 figure, based solely on the availability of a leveraged buy-out, Van Gorkom multiplied the price per share by the number of shares outstanding to reach a total value of the Company of \$690 million. Van Gorkom told Peterson to use this \$690 million figure and to assume a \$200 million equity contribution by the buyer. Based on these assumptions, Van Gorkom directed Peterson to determine whether the debt portion of the purchase price could be paid off in five years or less if financed by Trans Union’s cash flow as projected in the Five Year Forecast, and by the sale 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

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<sup>5</sup> The common stock of Trans Union was traded on the New York Stock Exchange. Over the five year period from 1975 through 1979, Trans Union’s stock had traded within a range of a high of \$39 1/2 and a low of \$24 1/4 . Its high and low range for 1980 through September 19 (the last trading day before announcement of the merger) was \$38 1/4 - \$29 1/2 .

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 Monday, September 15, Pritzker advised Van Gorkom that he was interested in the \$55 cash-out merger proposal and requested more information on Trans Union. Van Gorkom agreed to meet privately with Pritzker, accompanied by Peterson, Chelberg, and Michael Carpenter, Trans Union’s consultant from the Boston Consulting Group. The meetings took place on September 16 and 17. Van Gorkom was “astounded that events were moving with such amazing rapidity.”

On Thursday, September 18, Van Gorkom met again with Pritzker. At that time, Van Gorkom knew that Pritzker intended to make a cash-out merger offer at Van Gorkom’s proposed \$55 per share. Pritzker instructed his attorney, a merger and acquisition specialist, to begin drafting merger documents. There was no further discussion of the \$55 price. However, the number of shares of Trans Union’s treasury stock to be offered to Pritzker was negotiated down to one million shares; the price was set at \$38--75 cents above the per share price at the close of the market on September 19. At this point, Pritzker insisted that the Trans Union Board act on his merger proposal within the next three days, stating to Van Gorkom: “We have to have a decision by no later than Sunday [evening, September 21] before the opening of the English stock exchange on Monday morning.” Pritzker’s lawyer was then instructed to draft the merger documents, to be reviewed by Van Gorkom’s lawyer, “sometimes with discussion and sometimes not, in the haste to get it finished.”

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.

Senior Management’s reaction to the Pritzker proposal was completely negative. No member of Management, except Chelberg and Peterson, supported the proposal. Romans

objected to the price as being too low;<sup>6</sup> he was critical of the timing and suggested that consideration should be given to the adverse tax consequences of an all-cash deal for low-basis shareholders; and he took the position that the agreement to sell Pritzker one million newly-issued shares at market price would inhibit other offers, as would the prohibitions against soliciting bids and furnishing inside information to other bidders. Romans argued that the Pritzker proposal was a “lock up” and amounted to “an agreed merger as opposed to an offer.” Nevertheless, Van Gorkom proceeded to the Board meeting as scheduled without further delay.

Ten directors served on the Trans Union Board, five inside (defendants Bonser, O’Boyle, Browder, Chelberg, and Van Gorkom) and five outside (defendants Wallis, Johnson, Lanterman, Morgan and Reneker). All directors were present at the meeting, except O’Boyle who was ill. Of the outside directors, four were corporate chief executive officers and one was the former Dean of the University of Chicago Business School. None was an investment banker or trained financial analyst. All members of the Board were well informed about the 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. 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 period of 90 days, Trans Union could receive, but could not actively solicit, competing offers; the offer had to be acted on by the next evening, Sunday, September 21; Trans Union could only furnish to competing bidders published information, and not proprietary information; the offer was subject to Pritzker obtaining the necessary financing by October 10, 1980; if the financing contingency were met or waived by Pritzker, Trans Union was required to sell to Pritzker one million newly-issued shares of Trans Union at \$38 per share.

Van Gorkom took the position that putting Trans Union “up for auction” through a 90-day market test would validate a decision by the Board that \$55 was a fair price. He told the Board that the “free market will have an opportunity to judge whether \$55 is a fair price.” Van Gorkom framed the decision before the Board not as whether \$55 per share was the highest price that could be obtained, but as whether the \$55 price was a fair price that the stockholders should be given the opportunity to accept or reject.

Attorney Brennan advised the members of the Board that they might be sued if they failed to accept the offer and that a fairness opinion was not required as a matter of law.

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<sup>6</sup> Van Gorkom asked Romans to express his opinion as to the \$55 price. Romans stated that he “thought the price was too low in relation to what he could derive for the company in a cash sale, particularly one which enabled us to realize the values of certain subsidiaries and independent entities.”

Romans attended the meeting as chief financial officer of the Company. He told the Board that he had not been involved in the negotiations with Pritzker and knew nothing about the 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.”

The Board meeting of September 20 lasted about two hours. Based solely upon Van Gorkom’s oral presentation, Chelberg’s supporting representations, Romans’ oral statement, Brennan’s legal advice, and their knowledge of the market history of the Company’s stock, the directors approved the proposed Merger Agreement. However, the Board later claimed to have attached two conditions to its acceptance: (1) that Trans Union reserved the right to accept any better offer that was made during the market test period; and (2) that Trans Union could share its proprietary information with any other potential bidders. While the Board now claims to have reserved the right to accept any better offer received after the announcement of the Pritzker agreement (even though the minutes of the meeting do not reflect this), it is undisputed that the Board did not reserve the right to actively solicit alternate offers.

The Merger Agreement was executed by Van Gorkom during the evening of September 20 at a formal social event that he hosted for the opening of the Chicago Lyric Opera. 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 if a more favorable offer were not received before February 1, 1981, Trans Union’s shareholders would thereafter meet to vote on the Pritzker proposal.

It was not until the following day, October 10, that the actual amendments to the Merger Agreement were prepared by Pritzker and delivered to Van Gorkom for execution. As will be seen, the amendments were considerably at variance with Van Gorkom’s representations of the amendments to the Board on October 8; and the amendments placed serious constraints on Trans Union’s ability to negotiate a better deal and withdraw from the Pritzker agreement. Nevertheless, Van Gorkom proceeded to execute what became the October 10 amendments to the Merger Agreement without conferring further with the Board members and apparently without comprehending the actual implications of the amendments.

Salomon Brothers’ efforts over a three-month period from October 21 to January 21 produced only one serious suitor for Trans Union--General Electric Credit Corporation (“GE Credit”), a subsidiary of the General Electric Company. However, GE Credit was unwilling to make an offer for Trans Union unless Trans Union first rescinded its Merger Agreement with Pritzker. When Pritzker refused, GE Credit terminated further discussions with Trans Union in early January.

In the meantime, in early December, the investment firm of Kohlberg, Kravis, Roberts & Co. (“KKR”), the only 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 proposal fell within the protection of the business judgment rule. The Court found that the Board had given sufficient time and attention to the transaction, since the directors had considered the Pritzker proposal on three different occasions, on September 20, and on October 8, 1980 and finally on January 26, 1981. On that basis, the Court reasoned that the Board had acquired, over the four-month period, sufficient information to reach an informed business judgment on the cash-out merger proposal. The Court ruled:

... 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 in determining on a course of action which they believed to be in the best interest of the stockholders of Trans Union.

The Court of Chancery made but one finding; i.e., that the Board's conduct over the entire period from September 20 through January 26, 1981 was not reckless or improvident, but informed. This ultimate conclusion was premised upon three subordinate findings, one explicit and two implied. The Court's explicit finding was that Trans Union's Board was "free to turn down the Pritzker proposal" not only on September 20 but also on October 8, 1980 and on January 26, 1981. The Court's implied, subordinate findings were: (1) that no legally binding agreement was reached by the parties until January 26; and (2) that if a higher offer were to be forthcoming, the market test would have produced it, 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.

Under Delaware law, the business judgment rule is the offspring of the fundamental principle, codified in §141(a), that the business and affairs of a Delaware corporation are managed by or under its board of directors. In carrying out their managerial roles, directors are charged with an unyielding fiduciary duty to the corporation and its shareholders. The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors. 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 v. Lewis*, 473 A.2d 805 (Del. 1984)] 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 themselves "prior to making a business decision, of all material information reasonably available to them." *Id.*

Under the business judgment rule there is no protection for directors who have made "an unintelligent or unadvised judgment." *Mitchell v. Highland-Western Glass*, 167 A. 831, 833 (Del. Ch. 1933). A director's duty to inform himself in preparation for a decision derives from the fiduciary capacity in which he serves the corporation and its stockholders. Since a director is vested with the responsibility for the management of the affairs of the corporation, he must execute that duty with the recognition that he acts on behalf of others. Such obligation does not tolerate faithlessness or self-dealing. But fulfillment of the fiduciary function requires more than the mere absence of bad faith or fraud. Representation of the financial interests of others imposes on a director an affirmative duty to protect those interests and to proceed with a critical eye in assessing information of the type and under the circumstances present here.

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, 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 directors was an informed one.

In the specific context of a proposed merger of domestic corporations, a director has a duty under §251(b), along with his fellow directors, to act in an informed and deliberate manner in determining whether to approve an agreement of merger before submitting the proposal to the stockholders. Certainly in the merger context, a director may not abdicate that duty by leaving to the shareholders alone the decision to approve or disapprove the agreement. Only an agreement of merger satisfying the requirements of §251(b) may be submitted to the shareholders under §251(c).

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 issue of whether the directors reached an informed decision to “sell” the Company on September 20, 1980 must be determined only upon the basis of the information then reasonably available to the directors and relevant to their decision to accept the Pritzker merger proposal. This is not to say that the directors were precluded from altering their original plan of action, had they done so in an informed manner. What we do say is that the question of whether the directors reached an informed business judgment in agreeing to sell the Company, pursuant to the terms of the September 20 Agreement presents, in reality, two questions: (A) whether the directors reached an informed business judgment on September 20, 1980; and (B) if they did not, whether the directors’ actions taken subsequent to September 20 were adequate to cure any infirmity in their action taken on September 20. We first consider the directors’ September 20 action in terms of their reaching an informed business judgment.

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On the record before us, we must conclude that the Board of Directors did not reach an informed business judgment on September 20, 1980 in voting to “sell” the Company for \$55 per share pursuant to the Pritzker cash-out merger proposal. Our reasons, in summary, are as follows:

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 Van Gorkom's statement of his understanding of the substance of an agreement which he admittedly had never read, nor which any member of the Board had ever seen.

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 Board's "inside" and "outside" directors;<sup>17</sup> and (4) their reliance on Brennan's legal advice that the directors might be sued if they rejected the Pritzker proposal. We discuss each of these grounds *seriatim*:

(1)

A substantial premium may provide one reason to recommend a merger, but in the absence of other sound valuation information, the fact of a premium alone does not provide an adequate basis upon which to assess the fairness of an offering price. Here, the judgment reached as to the adequacy of the premium was based on a comparison between the historically depressed Trans Union market price and the amount of the Pritzker offer. Using market price as a basis for concluding that the premium adequately reflected the true value of the Company was a clearly faulty, indeed fallacious, premise, as the defendants' own evidence demonstrates.

The record is clear that before September 20, Van Gorkom and other members of Trans Union's Board knew that the market had consistently undervalued the worth of Trans Union's stock, despite steady increases in the Company's operating income in the seven years preceding the merger. The Board related this occurrence in large part to Trans Union's inability to use its ITCs as previously noted. Van Gorkom testified that he did not believe the market price accurately reflected Trans Union's true worth; and several of the directors testified that, as a general rule, most chief executives think that the market undervalues their companies' stock. Yet, on September 20, Trans Union's Board 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.

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.

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<sup>17</sup> We reserve for discussion under Part III hereof, the defendants' contention that their judgment, reached on September 20, if not then informed became informed by virtue of their "review" of the Agreement on October 8 and January 26.

Indeed, as of September 20, the Board had no other information on which to base a determination of the intrinsic value of Trans Union as a going concern. As of September 20, the Board had made no evaluation of the Company designed to value the entire enterprise, nor had the Board ever previously considered selling the Company or consenting to a buy-out merger. Thus, the adequacy of a premium is indeterminate unless it is assessed in terms of other competent and sound valuation information that reflects the value of the particular business.

Despite the foregoing facts and circumstances, there was no call by the Board, either on September 20 or thereafter, for any valuation study or documentation of the \$55 price per share as a measure of the fair value of the Company in a cash-out context. It is undisputed that the major asset of Trans Union was its cash flow. Yet, at no time did the Board call for a valuation study taking into account that highly significant element of the Company's assets.

We do not imply that an outside valuation study is essential to support an informed business judgment; nor do we state that fairness opinions by independent investment bankers are required as a matter of law. Often insiders familiar with the business of a going concern are in a better position than are outsiders to gather relevant information; and under appropriate circumstances, such directors may be fully protected in relying in good faith upon the valuation reports of their management.

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 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.

The record also establishes that the Board accepted without scrutiny Van Gorkom's representation as to the fairness of the \$55 price per share for sale of the Company--a subject that the Board had never previously considered. The Board thereby failed to discover that Van Gorkom had suggested the \$55 price to Pritzker and, most crucially, that Van Gorkom had arrived at the \$55 figure based on calculations designed solely to determine the feasibility of a leveraged buy-out.<sup>19</sup> No questions were raised either as to the tax implications of a cash-out merger or how the price for the one million share option granted Pritzker was calculated.

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<sup>19</sup> As of September 20 the directors did not know: that Van Gorkom had arrived at the \$55 figure alone, and subjectively, as the figure to be used by Controller Peterson in creating a feasible structure for a leveraged buy-out by a prospective purchaser; that Van Gorkom had not sought advice, information or assistance from either inside or outside Trans Union directors as to the value of the Company as an entity or the fair price per share for 100% of its stock; that Van Gorkom had not consulted with the Company's investment bankers or other financial analysts; that Van Gorkom had not consulted with or confided in any officer or director of the Company except Chelberg;

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.

(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 accept his offer, they cannot be found to have acted impulsively or in an uninformed manner on September 20; and (b) that the adequacy of the \$17 premium for sale of the Company was conclusively established over the following 90 to 120 days by the most reliable evidence available--the marketplace. Thus, the defendants impliedly contend that the "market test" eliminated the need for the Board to perform any other form of fairness test either on September 20, or thereafter.

Again, the facts of record do not support the defendants' argument. There is no evidence: (a) that the Merger Agreement was effectively amended to give the Board freedom to put Trans Union up for auction sale to the highest bidder; or (b) that a public auction was in fact permitted to occur. The minutes of the Board meeting make no reference to any of this. Indeed, the record compels the conclusion that the directors had no rational basis for expecting that a market test was attainable, given the terms of the Agreement as executed during the evening of September 20.

[N]otwithstanding what several of the outside directors later claimed to have "thought" occurred at the meeting, the record compels the conclusion that Trans Union's Board had no rational basis to conclude on September 20 or in the days immediately following, that the Board's acceptance of Pritzker's offer was conditioned on (1) a "market test" of the offer; and (2) the Board's right to withdraw from the Pritzker Agreement and accept any higher offer received before the shareholder meeting.

(3)

The directors' unfounded reliance on both the premium and the market test as the basis for accepting the Pritzker proposal undermines the defendants' remaining contention that the Board's collective experience and sophistication was a sufficient basis for finding that it reached its September 20 decision with informed, reasonable deliberation.<sup>21</sup>

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and that Van Gorkom had deliberately chosen to ignore the advice and opinion of the members of his Senior Management group regarding the adequacy of the \$55 price.

<sup>21</sup> Trans Union's five "inside" directors had backgrounds in law and accounting, 116 years of collective employment by the Company and 68 years of combined experience on its Board. 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

(4)

Part of the defense is based on a claim that the directors relied on legal advice rendered at the September 20 meeting by James Brennan, Esquire, who was present at Van Gorkom's request. Unfortunately, Brennan did not appear and testify at trial even though his firm participated in the defense of this action. There is no contemporaneous evidence of the advice given by Brennan on September 20, only the later deposition and trial testimony of certain directors as to their recollections or understanding of what was said at the meeting. Since counsel did not testify, and the advice attributed to Brennan is hearsay received by the Trial Court over the plaintiffs' objections, we consider it only in the context of the directors' present claims. In fairness to counsel, we make no findings that the advice attributed to him was in fact given. We focus solely on the efficacy of the defendants' claims, made months and years later, in an effort to extricate themselves from liability.

Several defendants testified that Brennan advised them that Delaware law did not require a fairness opinion or an outside valuation of the Company before the Board could act on the Pritzker proposal. If given, the advice was correct. However, that did not end the matter. Unless the directors had before them adequate 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.

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. Thus, we cannot conclude that the mere threat of litigation, acknowledged by counsel, constitutes either legal advice or any valid basis upon which to pursue an uninformed course.

Since we conclude that Brennan's purported advice is of no consequence to the defense of this case, it is unnecessary for us to invoke the adverse inferences which may be attributable to one failing to appear at trial and testify.

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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.

-B-

We now examine the Board's post-September 20 conduct for the purpose of determining ... whether it was informed and not grossly negligent.

(1)

First, as to the Board meeting of October 8: Its purpose arose in the aftermath of the September 20 meeting: (1) the September 22 press release announcing that Trans Union "had entered into definitive agreements to merge with an affiliate of Marmon Group, Inc.;" and (2) Senior Management's ensuing revolt.

Trans Union's press release stated:

FOR IMMEDIATE RELEASE:

CHICAGO, IL--Trans Union Corporation announced today that it had entered into definitive agreements to merge with an affiliate of The Marmon Group, Inc. in a transaction whereby Trans Union stockholders would receive \$55 per share in cash for each Trans Union share held. The Marmon Group, Inc. is controlled by the Pritzker family of Chicago.

The merger is subject to approval by the stockholders of Trans Union at a special meeting expected to be held sometime during December or early January.

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 the Agreement be amended to permit Trans Union to solicit, as well as receive, higher offers; and (2) that the shareholder meeting be postponed from early January to February 10, 1981. In return, Pritzker asked Van Gorkom to obtain a commitment from Senior Management to remain at Trans Union for at least six months after the merger was consummated.

Van Gorkom then advised Senior Management that the Agreement would be amended to give Trans Union the right to solicit competing offers through January, 1981, if they would

agree to remain with Trans Union. Senior Management was temporarily mollified; and Van Gorkom then called a special meeting of Trans Union's Board for October 8.

Thus, the primary purpose of the October 8 Board meeting was to amend the Merger Agreement, in a manner agreeable to Pritzker, to permit Trans Union to conduct a "market test." Van Gorkom understood that the proposed amendments were intended to give the Company an unfettered "right to openly solicit offers down through January 31." Van Gorkom presumably so 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.

Thus, the Court of Chancery's finding that the October 8 Board meeting was convened to *reconsider* the Pritzker "proposal" is clearly erroneous.

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 arrangements for Pritzker's acquisition of Trans Union had been completed; and (2) Pritzker's purchase of one million shares of Trans Union's treasury stock at \$38 per share.

The next day, October 10, Pritzker delivered to Trans Union the proposed amendments to the September 20 Merger Agreement. Van Gorkom promptly proceeded to countersign all the instruments on behalf of Trans Union without reviewing the instruments to determine if they were consistent with the authority previously granted him by the Board. The amending documents were apparently not approved by Trans Union's Board until a much later date, December 2. The record does not affirmatively establish that Trans Union's directors ever read the October 10 amendments.

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" under §141(e) on which the directors could reasonably have relied. Further, the amended Merger Agreement imposed on Trans Union's acceptance of a third party offer conditions more onerous than those imposed on Trans Union's acceptance of Pritzker's offer on September 20. After October 10, Trans Union could accept from a third party a better offer only if it were incorporated in a definitive agreement between the parties, and not conditioned on financing or on any other contingency.

The October 9 press release, coupled with the October 10 amendments, had the clear effect of locking Trans Union's Board into the Pritzker Agreement. Pritzker had thereby foreclosed Trans Union's Board from negotiating any better "definitive" agreement over the remaining eight weeks before Trans Union was required to clear the Proxy Statement submitting the Pritzker proposal to its shareholders.

(2)

Next, as to the "curative" effects of the Board's post-September 20 conduct, we review in more detail the reaction of Van Gorkom to the KKR proposal and the results of the Board-sponsored "market test."

The KKR proposal was the first and only offer received subsequent to the Pritzker Merger Agreement. The offer resulted primarily from the efforts of Romans and other senior officers to propose an alternative to Pritzker's acquisition of Trans Union. In late September, Romans' group contacted KKR about the possibility 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.

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 Pritzker's offer had not only been similarly conditioned, but accepted on an expedited basis. Van Gorkom refused Kravis' request that Trans Union issue a press release announcing KKR's offer, on the ground that it might "chill" any other offer. Romans and Kravis left with the understanding that their proposal would be presented to Trans Union's Board that afternoon.

Within a matter of hours and shortly before the scheduled Board meeting, Kravis withdrew his letter-offer. He gave as his reason a sudden decision by the Chief Officer of Trans Union's rail car leasing operation to withdraw from the KKR purchasing group. Van Gorkom had spoken to that officer about his participation in the KKR proposal immediately after his meeting with Romans and Kravis. However, Van Gorkom denied any responsibility for the officer's change of mind.

At the Board meeting later that afternoon, Van Gorkom did not inform the directors of the KKR proposal because he considered it "dead." Van Gorkom did not contact KKR again until January 20, when faced with the realities of this lawsuit, he then attempted to reopen negotiations. KKR declined due to the imminence of the February 10 stockholder meeting.

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 refute the contention that they did not reach an informed business judgment in approving the Pritzker merger. The defendants contend that the Trial Court correctly concluded that Trans Union's directors were, in effect, as "free to turn down the Pritzker proposal" on January 26, as they were on September 20.

The Board's January 26 meeting was the first meeting following the filing of the plaintiffs' suit in mid-December and the last meeting before the previously-noticed shareholder meeting of February 10. All ten members of the Board and three outside 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 both concern that the \$55 per share price was inadequate and a belief that a higher price should and could be obtained;

(e) The fact that Romans had advised the Board at its meeting on September 20, that he and his department had prepared a study which indicated that the Company had a value in the range of \$55 to \$65 per share, and that he could not advise the Board that the \$55 per share offer made by Pritzker was unfair.

[T]he defendants argue that whatever information the Board lacked to make a deliberate and informed judgment on September 20, or on October 8, was fully divulged to the entire Board on January 26. Hence, the argument goes, the Board's vote on January 26 to again "approve" the Pritzker merger must be found to have been an informed and deliberate judgment.

On the basis of this evidence, the defendants assert: (1) that the Trial Court was legally correct in widening the time frame for determining whether the defendants' approval of the Pritzker merger represented an informed business judgment to include the entire four-month period during which the Board considered the matter from September 20 through January 26; and (2) that, given this extensive evidence of the Board's further review and deliberations on January 26, this Court must affirm the Trial Court's conclusion that the Board's action was not reckless or improvident.

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.

[T]estimony 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 §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 its stockholders that the proposed shareholder meeting was cancelled. There is no evidence that the Board gave any consideration to these, its only legally viable alternative courses of action.

But the second course of action would have clearly involved a substantial risk--that the Board would be faced with suit by Pritzker for breach of contract based on its September 20 agreement as amended October 10. As previously noted, under the terms of the October 10 amendment, the Board's only ground for release from its agreement with Pritzker was its entry into a more favorable definitive agreement to sell the Company to a third party. Thus, in reality, the Board was not "free to turn down the Pritzker proposal" as the Trial Court found. Indeed, short of negotiating a better agreement with a third party, the Board's only basis for release from the Pritzker Agreement without liability would have been to establish fundamental wrongdoing by Pritzker. Clearly, the Board was not "free" to withdraw from its agreement with Pritzker on January 26 by simply relying on its self-induced failure to have reached an informed business judgment at the time of its original agreement.

Therefore, the Trial Court's conclusion that the Board reached an informed business judgment on January 26 in determining whether to turn down the Pritzker "proposal" on that day cannot be sustained. 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 §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 of §141(e) by evidence of a reasonable, good faith reliance on "reports," including legal advice, rendered the Board by certain inside directors and the Board's special counsel, Brennan.

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; and (2) that considerations of good faith, including the presumption that the directors acted in good faith, are irrelevant in determining the threshold issue of whether the directors as a Board exercised an informed business judgment. For the same reason, we must reject defense counsel's *ad hominem* argument for

affirmance: that reversal may result in a multi-million dollar class award against the defendants for having made an allegedly uninformed business judgment in a transaction not involving any personal gain, self-dealing or claim of bad faith.

## 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 of the Board's action, if its approval by majority vote of the shareholders is found to have been based on an informed electorate.

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*, 139 A.2d 591, 593 (Del.Ch. 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.

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 would consider important in deciding whether to sell or retain stock." *Id.* at 281.

Applying this standard to the record before us, we find that Trans Union's stockholders were not fully informed of all facts material to their vote on the Pritzker Merger and that the Trial Court's ruling to the contrary is clearly erroneous. We list the material deficiencies in the proxy materials:

(1) The fact that the Board had no reasonably adequate information indicative of the intrinsic value of the Company, other than a concededly depressed market price, was without question material to the shareholders voting on the merger.

Accordingly, the Board's lack of valuation information should have been disclosed. Instead, the directors cloaked the absence of such information in both the Proxy Statement and the Supplemental Proxy Statement. Through artful drafting, noticeably absent at the September 20 meeting, both documents create the impression that the Board knew the intrinsic worth 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.

Nowhere does the Board disclose that Romans stated to the Board that his calculations were made in a “search for ways to justify a price in connection with” a leveraged buy-out transaction, “rather than to say what the shares are worth,” and that he stated to the Board that his conclusion thus arrived at “was not the same thing as saying that I have a valuation of the Company at X dollars.” Such information would have been material to a reasonable shareholder because it tended to invalidate the fairness of the merger price of \$55. Furthermore, defendants again failed to disclose the absence of valuation information, but still made repeated reference to the “substantial premium.”

(3) We find misleading the Board’s references to the “substantial” premium offered. The Board gave as their primary reason in support of the merger the “substantial premium” shareholders would receive. But the Board did not disclose its failure to assess the premium offered in terms of other relevant valuation techniques, thereby rendering questionable its determination as to the substantiality of the premium over an admittedly depressed stock market price.

(4) We find the Board’s recital in the Supplemental Proxy of certain events preceding the September 20 meeting to be incomplete and misleading. It is beyond dispute that a reasonable stockholder would have considered material the fact that Van Gorkom not only suggested the \$55 price to Pritzker, but also that he chose the figure because it made feasible a leveraged buy-out. The directors disclosed that Van Gorkom suggested the \$55 price to Pritzker.

Although by January 26, the directors knew the basis of the \$55 figure, they did not disclose that Van Gorkom chose the \$55 price because that figure would enable Pritzker to both finance the purchase of Trans Union through a leveraged buy-out and, within five years, substantially repay the loan out of the cash flow generated by the Company’s operations.

(5) The Board’s Supplemental Proxy Statement, mailed on or after January 27, added significant new matter, material to the proposal to be voted on February 10, which was not contained in the Original Proxy Statement. Some of this new matter was information which had only been disclosed to the Board on January 26; much was information known or reasonably available before January 21 but not revealed in the Original Proxy Statement. Yet, the stockholders were not informed of these facts. Included in the “new” matter first disclosed in the Supplemental Proxy Statement were the following:

(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 sale 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 Romans and several members of Senior Management had indicated concern at the September 20 Senior Management meeting that the \$55 per share price was inadequate and had stated that a higher price should and could be obtained; and

(e) The fact that Romans had advised the Board at its meeting on September 20 that he and his department had prepared a study which indicated that the Company had a value in the range of \$55 to \$65 per share, and that he could not advise the Board that the \$55 per share offer which Pritzker made was unfair.

In this case, the Board’s ultimate disclosure as contained in the Supplemental Proxy Statement related either to information readily accessible to all of the directors if they had asked the right questions, or was information already at their disposal. In short, the

information disclosed by the Supplemental Proxy Statement was information which the defendant directors knew or should have known at the time the first Proxy Statement was issued. The defendants simply failed in their original duty of knowing, sharing, and disclosing information that was material and reasonably available for their discovery. They compounded that failure by their continued lack of candor in the Supplemental Proxy Statement. While we need not decide the issue here, we are satisfied that, in an appropriate case, a completely candid but belated disclosure of information long known or readily available to a board could raise serious issues of inequitable conduct.

The burden must fall on defendants who claim ratification based on shareholder vote to establish that the shareholder approval resulted from a fully informed electorate. On the record before us, it is clear that the Board failed to meet that burden.

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. Thereafter, an award of damages may be entered to the extent that the fair value of Trans Union exceeds \$55 per share.

REVERSED and REMANDED for proceedings consistent herewith.

MCNEILLY, J., 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.

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, Senior Vice-President-Administration. At the time the merger was proposed the inside five directors had collectively been employed by the Company for 116 years and had 68 years of

combined experience as directors. The “outside” directors were A.W. Wallis, William B. Johnson, Joseph B. Lanterman, Graham J. Morgan and Robert W. Reneker. With the exception of Wallis, these were all chief executive officers of Chicago based corporations that were at least as large as Trans Union. The five “outside” directors had 78 years of combined experience as chief executive officers, and 53 years cumulative service as Trans Union directors.

The inside directors wear their badge of expertise in the corporate affairs of Trans Union on their sleeves. But what about the outsiders? Dr. Wallis is or was an economist and math statistician, a professor of economics at Yale University, dean of the graduate school of business at the University of Chicago, and Chancellor of the University of Rochester. Dr. Wallis had been on the Board of Trans Union since 1962. He also was on the Board of Bausch & Lomb, Kodak, Metropolitan Life Insurance Company, Standard Oil and others.

William B. Johnson is a University of Pennsylvania law graduate, President of Railway Express until 1966, Chairman and Chief Executive of I.C. Industries Holding Company, and member of Trans Union’s Board since 1968.

Joseph Lanterman, a Certified Public Accountant, is or was President and Chief Executive of American Steel, on the Board of International Harvester, Peoples Energy, Illinois Bell Telephone, Harris Bank and Trust Company, Kemper Insurance Company and a director of Trans Union for four years.

Graham Morgan is a chemist, was Chairman and Chief Executive Officer of U.S. Gypsum, and in the 17 and 18 years prior to the Trans Union transaction had been involved in 31 or 32 corporate takeovers.

Robert Reneker attended University of Chicago and Harvard Business Schools. He was President and Chief Executive of Swift and Company, director of Trans Union since 1971, and member of the Boards of seven other corporations including U.S. Gypsum and the Chicago Tribune.

Directors of this caliber are not ordinarily taken in by a “fast shuffle”. I submit they were not taken into this multi-million dollar corporate transaction without being fully informed and aware of the state of the art as it pertained to the entire corporate panorama of Trans Union. True, even directors such as these, with their business acumen, interest and expertise, can go astray. I do not believe that to be the case here. These men knew Trans Union like the back of their hands and were more than well qualified to make on the spot informed business judgments concerning the affairs of Trans Union including a 100% sale of the corporation. Lest we forget, the corporate world of then and now operates on what is so aptly referred to as “the fast track”. These men were at the time an integral part of that world, all professional business men, not intellectual figureheads.

I have no quarrel with the majority’s analysis of the business judgment rule. It is the application of that rule to these facts which is wrong. An overview of the entire record, rather than the limited view of bits and pieces which the majority has exploded like popcorn, convinces me that the directors made an informed business judgment which was buttressed by their test of the market.

At the time of the September 20 meeting the 10 members of Trans Union’s Board of Directors were highly qualified and well informed about the affairs and prospects of Trans Union. These directors were acutely aware of the historical problems facing Trans Union which were caused by the tax laws. They had discussed these problems *ad nauseam*. In fact, within two months of the September 20 meeting the board had reviewed and discussed an outside study of the company done by The Boston Consulting Group and an internal five year forecast

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.*, 383 A.2d 278 (Del. 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 reported by Trans Union as its net income for December 31, 1979 confirmed the statement in the proxy materials that the "Board of Directors believes that, assuming reasonably favorable economic and financial conditions, the Company's prospects for future earnings growth are excellent." This material was certainly sufficient to place the Company's stockholders on notice that there was a reasonable basis to believe that the prospects for future earnings growth were excellent, and that the value of their stock was more than the stock market value of their shares reflected.

Overall, my review of the record leads me to conclude that the proxy materials adequately complied with Delaware law in informing the shareholders about the proposed transaction and the events surrounding it.

## ON MOTIONS FOR REARGUMENT

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.

The Court, through its majority, finds no merit to either motion and concludes that both motions should be denied. We are not persuaded that any errors of law or fact have been made that merit reargument.

However, defendant O'Boyle's motion requires comment. Although O'Boyle continues to adopt his fellow directors' arguments, O'Boyle now asserts in the alternative that he has standing to take a position different from that of his fellow directors and that legal grounds exist for finding him not liable for the acts or omissions of his fellow directors. Specifically, O'Boyle makes a two-part argument: (1) that his undisputed absence due to illness from both the September 20 and the October 8 meetings of the directors of Trans Union entitles him to be relieved from personal liability for the failure of the other directors to exercise due care at

*those* meetings; and (2) that his attendance and participation in the January 26, 1981 Board meeting does not alter this result given this Court's precise findings of error committed at that meeting.

We reject defendant O'Boyle's new argument as to standing because not timely asserted. Our reasons are several. *One*, in connection with the supplemental briefing of this case in March, 1984, a special opportunity was afforded the individual defendants, including O'Boyle, to present any factual or legal reasons why each or any of them should be individually treated. Thereafter, at argument before the Court on June 11, 1984, the 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--

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.