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Overruled by [Gantler v. Stephens](#), Del.Supr., January 27, 2009

488 A.2d 858

Supreme Court of Delaware.

Alden SMITH and John W. Gosselin, Plaintiffs

Below, Appellants,

v.

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.

255, 1982

Submitted: June 11, 1984.

Decided: Jan. 29, 1985.

Opinion on Denial of Reargument: March 14, 1985.

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.](#), 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

HORSEY, Justice (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, *864 New T, and Jay A. Pritzker and Robert A. Pritzker, owners of Marmon.¹

Following trial, the former Chancellor granted judgment for the defendant directors by unreported letter opinion dated July 6, 1982.² 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

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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, *865 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 *866 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,⁵ 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 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.

***867** 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;⁶ 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 ***868** 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.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 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.⁸

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.

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 ***869** 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,⁹ 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 ***870** 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 ***871** 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,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 not "reckless or imprudent" is contrary to the record and not the product of a logical and deductive reasoning process.

The plaintiffs contend that the Court of Chancery erred as a matter of law by exonerating the defendant directors under the business judgment rule without first determining whether the rule's threshold condition of "due care and prudence" was satisfied. The plaintiffs assert that the Trial Court found the defendant directors to have reached an informed business judgment on the basis of "extraneous considerations and events that occurred after September 20, 1980." The defendants deny that the Trial Court committed legal error in relying upon post-September 20, 1980 events and the directors' later acquired knowledge. The defendants further submit that their decision to accept \$55 per share was informed because: (1) they were "highly qualified;" (2) they were "well-informed;" and (3) they deliberated over the "proposal" not once but three times. On *872 essentially this evidence and under our standard of review, the defendants assert that affirmance is required. We must disagree.

[1] [2] [3] Under Delaware law, the business judgment rule is the offspring of the fundamental principle, codified in 8 Del.C. § 141(a), that the business and affairs of a Delaware corporation are managed by or under its board of 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.*

[4] 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.*¹²

[5] [6] [7] [8] Under the business judgment rule there is no protection for directors who have made "an unintelligent or unadvised judgment." *Mitchell v. Highland-Western Glass, Del.Ch.*, 167 A. 831, 833 (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. *Lutz v. Boas*, Del.Ch., 171 A.2d 381 (1961). See *Weinberger v. UOP, Inc.*, *supra*; *Guth v. Loft*, *supra*. 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. See *Lutz v. Boas*, *supra*; *Guth v. Loft*, *supra* at 510. Compare *Donovan v. Cunningham*, 5th Cir., 716 F.2d 1455, 1467 (1983); *Doyle v. Union Insurance Company*, Neb.Supr., 277 N.W.2d 36 (1979); *Continental Securities Co. v. Belmont*, N.Y.App., 99 N.E. 138, 141 (1912).

[9] [10] Thus, a director's duty to exercise an informed business judgment is in *873 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.

[11] 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.¹³

[12] [13] [14] In the specific context of a proposed merger of domestic corporations, a director has a duty under 8 Del.C. § 251(b),¹⁴ 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. 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 *874 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 Trial Court in determining whether the Board's judgment was an informed one. We disagree with this *post hoc* approach.

[15] 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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[16] 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.

[17] [18] [19] [20]

...

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* at 712–715. 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, Justice, dissenting:

The majority opinion reads like an advocate's closing address to a hostile jury. And I say that not lightly. Throughout the *894 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, 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 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 *895 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.

The majority of this Court holds that the Board's decision, reached on September 20, 1980, to approve the merger was not the product of an *informed* business judgment, that the Board's subsequent efforts to amend the Merger Agreement and take other curative action were *legally and factually* ineffectual, and 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 disagree.

At the time of the September 20, 1980 meeting the Board was acutely aware of Trans Union and its prospects. The problems created by accumulated investment tax credits and accelerated depreciation were discussed repeatedly at Board meetings, and all of the directors understood the problem thoroughly. Moreover, at the July, 1980 Board meeting the directors had reviewed Trans Union's newly prepared five-year forecast, and at the August, 1980 meeting Van Gorkom presented the results of a comprehensive study of Trans Union made by The Boston Consulting Group. This study was prepared over an 18 month period and consisted of a detailed analysis of all Trans Union subsidiaries, including competitiveness, profitability, cash throw-off, cash consumption, technical competence and future prospects for contribution to Trans Union's combined net income.

At the September 20 meeting Van Gorkom reviewed all aspects of the proposed transaction and repeated the explanation of the Pritzker offer he had earlier given to senior management. Having heard Van Gorkom's explanation of the Pritzker's offer, and Brennan's explanation of the merger documents the directors discussed the matter. Out of this discussion arose an insistence on the part of the directors that two modifications to the offer be made. First, they required that any potential competing bidder be given access to the same information concerning Trans Union that had been provided to the Pritzkers. Second, the merger documents were to be modified to reflect the fact that the directors could accept a better offer and would not be required to recommend the Pritzker offer if a better offer was made. The following language was inserted into the agreement:

“Within 30 days after the execution of this Agreement, TU shall call a meeting of its stockholders (the ‘Stockholder's Meeting’) for the purpose of approving and adopting the Merger Agreement. The Board of Directors shall recommend to the stockholders of TU that they approve and adopt the Merger Agreement (the ‘Stockholders' Approval’) and shall use its best efforts to obtain the requisite vote therefor; *provided, however, that GL and NTC acknowledge that the Board of Directors of TU may have a competing fiduciary obligation to the Stockholders under certain circumstances.*” (Emphasis added)

While the language is not artfully drawn, the evidence is clear that the intention underlying that language was to make specific the right that the directors assumed they had, that is, to accept any offer that they thought was better, and not to recommend the Pritzker offer in the face of a better one. At the conclusion of the meeting, the proposed merger was approved.

At a subsequent meeting on October 8, 1981 the directors, with the consent of the Pritzkers, amended the Merger Agreement so as to establish the right of Trans Union to solicit as well as to receive higher bids, *896 although the Pritzkers insisted that their merger proposal be presented to the stockholders at the same time that the proposal of any third party was presented. A second amendment, which became effective on October 10, 1981, further provided that Trans Union might unilaterally terminate the proposed merger with the Pritzker company in the event that prior to February 10, 1981 there existed a definitive agreement with a third party for a merger, consolidation, sale of assets, or purchase or exchange of Trans Union stock which was more favorable for the stockholders of Trans Union than the Pritzker offer and which was conditioned upon receipt of stockholder approval and the absence of an injunction against its consummation.

Following the October 8 board meeting of Trans Union, the investment banking firm of Salomon Brothers was retained by the corporation to search for better offers than that of the Pritzkers, Salomon Brothers being charged with the responsibility of doing “whatever possible to see if there is a superior bid in the marketplace over a bid that is on the table for Trans Union”. In undertaking such project, it was agreed that Salomon Brothers would be paid the amount of \$500,000 to cover its expenses as well as a fee equal to 3/8ths of 1% of the aggregate fair market value of the consideration to be received by the company in the case of a merger or the

like, which meant that in the event Salomon Brothers should find a buyer willing to pay a price of \$56.00 a share instead 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 shareholders of Trans Union advising them of a February 10, 1981 meeting in which the merger would be voted. On January 26, 1981 the directors held their regular meeting. At this meeting the Board discussed the instant merger as well as all events, including this litigation, surrounding it. At the conclusion of the meeting the Board unanimously voted to recommend to the stockholders that they approve the merger. Additionally, the directors reviewed and approved a Supplemental Proxy Statement which, among other things, advised the stockholders of what had occurred at the instant meeting and of the fact that General Electric had decided not to make an offer. On February 10, 1981 *897 the stockholders of Trans Union met pursuant to notice and voted overwhelmingly in favor of the Pritzker merger, 89% of the votes cast being in favor of it.

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.