COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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CHANCELLOR

February 3, 1981

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Re: Smith v. Pritzker, C.A. 6342
Submitted: January 30, 1981

Plaintiff, the holder of 54,061 shares of common stock of the defendant Trans Union Corporation, suing for himself and members of his class under Rule 23 in this action, which was filed on December 19, 1980, seeks the granting by this Court of a preliminary injunction against the effectuation of the proposed merger of the defendant Trans Union Corporation into the defendant New T Co., a wholly-owned subsidiary of the defendant GL Corporation, which proposed merger has been recommended to their stockholders by the board of directors of Trans Union Corporation. A vote on such proposed merger is scheduled to be taken by the stockholders of such corporation at a special meeting of stockholders to be held at 111 West Jackson Boulevard, Chicago, Illinois on Tuesday, February 10, 1981 at 9:30 a.m.

The defendant Trans Union Corporation, whose operations currently generate cash in the amount of $162,000,000 a year, has issued and outstanding 13,518,956 shares of common stock, 1,000,000 of such shares having recently been issued to the defendant New T Co. as a prelude to and part and parcel of the proposed merger under attack.

However, the proponents of such proposed merger receiving such additional shares, for which $38 per share has been paid, have expressed their intention not to vote said shares for the proposed merger.

On September 12, 1980, Jerome W. Van Gorkom, the chief executive officer of Trans Union Corporation, a company principally concerned with the rental of railroad tank cars, having evidently become concerned about the modest market price of his company's stock viewed in light of its ability to generate a large cash flow as well as to produce satisfactory earnings, approached Jay A. Pritzker, one of the owners of the defendant GL Corporation and its affiliates with the proposal that Trans Union Corporation be acquired by the Pritzker interests by means of a cash merger, a price of $55 per share being suggested as an appropriate merger price.

Having shortly thereafter received approval of such proposal from Jay A. Pritzker, Mr. Van Gorkom,[1] after disclosing the proposed merger plan to several financial experts in the management of Trans Union, called a special meeting of directors of the corporation for Saturday, September 20, at 12 noon, at which meeting he disclosed the details of the proposed merger to the board, leading to some opposition, particularly from those directors with management positions who feared that the proposed take-over by the Pritzker interests would pose a threat to the security of their positions. But in the end, all of the board members, except Mr. Bonser, who claims to have abstained (although he later approved the minutes of the meeting) agreed that the question

[1] Plaintiffs question Mr. Van Gorkom's motives in seeking a buyer in light of a recent optimistic five year forecast of Trans Union prospects but have failed in my opinion to establish fraud or bad faith on his part or on the part of other board members in advancing the merger in question.

of whether or not to approve the proposed merger should be submitted to the stockholders for their approval or rejection, with the proviso that confidential information concerning Trans Union, which had been furnished to Mr. Pritzker, should be made available to other possible bidders. Furthermore, in order to assuage any lingering opposition to the proposed merger, the basic agreement was modified so as to permit Trans Union actively to solicit other bids through the services of an investment banker and to postpone the submission of the proposed Pritzker merger to the Trans Union stockholders until February, 1981 in order to give more time for the obtaining of higher bids.

Next, on October 8, 1980, the board of directors of Trans Union approved the retention of Salomon Brothers to conduct a search for better offers, but decided against the obtaining of an expert opinion as to the overall fairness of the merger price of $55 per share. Salomon Brothers having been authorized to do whatever might be necessary to obtain a bid superior to the arrangement made with the Pritzker interests, was assured compensation of $500,000, including expenses, for its efforts regardless of success as well as a fee of 3/8% of 1% of the amount of a bid per share greater than that agreed on with the Pritzkers, which meant that in the event of a $56 bid for the shares in question the Salomon fee would be $2,650,000. In the course of its efforts Salomon Brothers interviewed some 125 to 150 potential offerers but has failed to date to produce a binding offer greater than the price agreed to by the Pritzkers. In fact, as a result of the efforts of Salomon Brothers as well as those of personnel of Trans Union the only tentative offers which have been made to Trans Union since last fall were these of Kohlberg, Kravis, Roberts and Company, which involved a so-called leveraged buy-out in which manage-

mentof Trans Union was to participate and that of a subsidiary of General Electric Company, neither of which tentative offers came to fruition.[2] However, if a more attractive proposal from either of such companies or from a third party were to be submitted to Trans Union prior to the special meeting of stockholders scheduled for February 10, 1981, such action would constitute a valid reason for submitting such superior proposal to the Trans Union stockholders.

Next, on Monday, January 26, 1981, the board of directors of Trans Union, gathered at a regular meeting, re-examined the pending Pritzker proposal and voted unanimously to recommend such proposal for favorable consideration at the special stockholders' meeting to be held on Tuesday, February 10, 1981. The matters discussed at such meeting were thereafter reported to the stockholders in a supplementary proxy letter of the same date.

While plaintiff with considerable skill makes much of the apparently casual manner in which the merger here in issue was developed and agreed on, nonetheless the price of Trans Union common stock, which has historically been traded on the New York Stock Exchange, closed at the end of business on September 19, 1980, at $37.25 a share prior to announcement of the proposed merger. Thus, the merger here in issue offers stockholders of Trans Union a premium of $17.75 per share or an aggregate premium for such corporation's 12,512,956 stockholders of $222,000,000, or more than 47% over the last closing price before the announcement of the proposed merger. Further-

[2] The tentative G E proposal was based on alternatives of $57 in cash and stock and $60 in cash.

more, the $55 per share price represents a premium of $21.12 or more than 62% over the high and low prices at which shares of Trans Union traded in 1980 before the merger proposal under attack was announced.

In paragraph 30 of his complaint as well as in his amended complaint plaintiff leaves a clue as to why he is so bitterly opposed to the merger in issue, therein stating in part:

> "30. Many of the Public Stockholders of TUC common stock acquired their shares in connection with tax free acquisitions by TUC. Therefore many of the Public Stockholders, including plaintiff Smith, have a low basis for their stock for tax purposes. Consummation of the merger could be a taxable event. Therefore, many Public Stockholders would face substantial tax liability.

Plaintiff contrasts this situation with the tax advantages which the Pritzker interests will stand to gain in the event of a sale of their 1,000,000 shares of Trans Union to a higher bidder because of the Pritzker Bahamian trusts which are not subject to United States' income taxes.

However, the point is that in the event of the consummation of the proposed cash merger of Trans Union into the Pritzker designee, New T Co., capital gain taxes which Mr. Smith has been able to defer for many years by hedging on his acquisition of Trans Union stock as a result of the sale to Trans Union of his own company, Smith & Laveless, Inc. in 1959, will become due and payable in the amount of $214,800. And while other stockholders of Trans Union have no doubt received their stock in so-called tax-free exchanges, I consider it significant that no other stockholder of Trans Union has sought to intervene in this proceeding in opposition to the merger in issue.

Next, while it is clear that the prescribed function of Salomon Brothers was to find a better prospect for a merger and not to give an

opinion on the overall fairness of the proposed merger with the Pritzker designee, plaintiff's expert, Duff & Phelps, after a careful study concluded that the fair price of Trans Union stock prior to September 20, 1980, ranged between $65 and $75 in light of the encouraging five year prospects of the corporation and that there was no economic justification for selling 1,000,000 shares of Trans Union stock to the Pritzker interests at $38 per share. However, I conclude that as with most hired professional evaluations, such analysis is obviously one of an advocate and not that of a neutral observer.

Next, despite the fact that the merger in issue, if approved, will call for the paying off of stock options now held by certain of the individual defendants at a cost of some $2,000,000, I am satisfied that a ruling restraining the effectuation of the basic plan under attack, namely the paying of a premium of $17 per share to the holders of shares of Trans Union, if the stockholders of such corporation approve, should not be issued now. In other words, the elimination of such options as a part of the proposed merger is not such a factor, which considered alone, would merit a ruling that the merger is so unfair as not to be entitled to be submitted to the stockholders for their approval or rejection.

I am also satisfied that the proxy material furnished to the Trans Union stockholders complied with the requirements of 8 Del. C. §251(c) and that it fairly presented the question to be voted on at the February 10, 1981 meeting.

Plaintiff argues, however, that the granting of a preliminary injunction against the consummation of the proposed merger with the designee of the Pritzker interests allegedly finds support in the case of Gimbel v. Signal Companies, Inc., Del. Ch., 316 A.2d 599 (1974),

aff'd, Del. Supr., 316 A.2d 619 (1974), a case in which a proposed sale of corporate assets was preliminarily enjoined because of the basic showing that no real effort had been made by the board of the defendant corporation to determine whether or not other companies would offer a higher price for the assets in question and that the proposed sale must be enjoined not because the board of directors of the would-be seller had failed to adopt an intelligent and an advised judgment but that the evidence of value of the assets in question was of such magnitude that it would appear that a basic mistake in valuation had been made by defendant's board of directors. See contra Weinberger v. United Financial Corporation, Del. Ch., 405 A.2d 134 (1979), in which there was as here no evidence of a firm offer of a greater amount, and in which this Court noted that in such a situation the rights of stockholders who wish to take advantage of the cash offered in the merger under attack must be taken into account. Furthermore, this is not a situation analogous to that found in Thomas v. Kempner, Del. Ch., C.A. 4138 (1973), in which the board of directors of the defendant corporation refused to consider a pending higher offer for valuable real estate of the corporation than that made by the firm of White and Hill, a refusal which persuaded this Court to grant injunctive relief against the consummation of a sale of such lands to White and Hill and ordered that offers for bids be put out for the lands in question, the result being that the lands were eventually sold to a third party for a substantially higher price than that offered by White and Hill.

The provisions of 8 Del. C. §141 place the management of a Delaware corporation under the direction of a board of directors and where there is no indication of fraud or ultra vires conduct, this Court will not

interfere with questions of policy and business management, there being a presumption that directors form their judgments in good faith, Allaun v. Consolidated Oil Co., Del. Ch., 147 A. 257 (1929). And when the transaction complained of is the result of independent business judgment the test applicable to the transaction in the absence of fraud is business judgment, Puma v. Marriott, Del. Ch. 283 A.2d 693 (1971).

Finally, it must be noted that inasmuch as this is not a case of a dominating majority imposing its will on a minority, the rule of Sterling v. Mayflower Hotel, Del. Ch. 89 A.2d 862 (1952) aff'd, Del. Supr., 93 A.2d 909 (1952) and Singer v. Magnavox, Del. Supr. 380 A.2d 909 (1977) does not apply, the Pritzker interests holding only 111,000 shares of Trans Union prior to the proposed merger.

I conclude that plaintiff has not demonstrated that probability of ultimate success on final hearing which would entitle him to the granting of a preliminary injunction. If the proposed merger is not in the best interests of the stockholders of Trans Union Corporation, it is their prerogative so to decide at the vote to be taken on February 10, 1981 at the special meeting to be held in Chicago. In my opinion, the granting of a preliminary injunction would result in substantial harm to the stockholders of Trans Union which would not be offset by the benefit which would thereby be gained by plaintiff.

Plaintiff's motion for the granting of a preliminary injunction, as prayed for, is denied, and it is

SO ORDERED this 3rd day of February, 1981.

William Marvel
Chancellor

WM/ch
c: Register in Chancery