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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ALDEN SMITH, Plaintiff, v. JAY A. PRITZKER, ROBERT A. PRITZKER, JEROME W. VAN GORKOM, BRUCE S. CHELBERG, WILLIAM B. JOHNSON, JOSEPH B. LANTERMAN, GRAHAM J. MORGAN, THOMAS P. O'BOYLE, ROBERT W. RENEKER, 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.	)	Civil Action No. 6342

PLAINTIFF'S POST-HEARING MEMORANDUM
IN SUPPORT OF HIS MOTION FOR A
PRELIMINARY INJUNCTION

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FACTUAL HIGHLIGHTS

On July 17, 1980, TU's Senior Vice President - Controller, Carl W. Peterson, submitted to the TU Board of Directors the TU Five-Year Forecast for the years 1981-1985 (the "Forecast"). A copy of the Forecast is attached hereto as Exhibit "A". The Forecast projects steadily increasing net income from 1981 to 1985, culminating in projected net income in 1985 of $153,000,000 (the Forecast, p. 2).

In addition, the Forecast projects cash flow of $963,100,000 after dividends and debt repayment, of which $712,800,000 would be available for operations and with the remaining $250,300,000 available as unused cash. The Forecast concludes that there are four ways to utilize the unused cash: (a) repurchase stock from stockholders; (b) increase dividends to stockholders; (c) undertake a major acquisition program; or (d) pursue some combination of the above.

At the end of the Forecast, the TU Board of Directors is told that TU remains "an engine of cash", that there is every reason to expect "rapid income growth as well as a cash surplus with which to grow even more rapidly or to increase returns to our stockholders" and that TU appears to have the financial capacity to better serve our stockholders than we did in the 1970's".

Through pretrial discovery, plaintiff obtained the preliminary proxy materials which had been submitted by the TU Board to the Securities and Exchange Commission ("SEC") but

which had not yet been mailed to stockholders (marked for identification as G-001089 through G-001192). These preliminary proxy materials gave as the principal reason for the Pritzker merger the "substantial premium" that the stockholders would obtain for their shares, because the market price had consistently failed to reflect the growth in TU's earnings and dividends.

As plaintiff pursued discovery, TU rewrote various portions of its proxy materials, and the January 19, 1981 Proxy Statement (the "Proxy Statement") mailed to TU stockholders was amended and supplemented to disclose that the Forecast contains projections which indicate that TU's net income might increase to approximately $153,000,000 in 1985. Stockholders were _not_ told of the most important projection: that TU would generate the enormous cash flow figures set out above. Stockholders were not told of corporate strategies available to expand TU and increase returns to stockholders. The only cash flow information contained in the Proxy Statement is the _historical_ source and use of funds statement found at page 39.

On or about January 27, 1981, TU amended and supplemented the Proxy Statement (the "Supplement"), candidly recognizing that plaintiff's counsel in this litigation adduced many of the events related in the Supplement. But the Supplement failed to disclose to stockholders the spectacular cash flow figures projected in the Forecast. The Supplement neglected to inform stockholders of the benefit

to TU and its stockholders which could be realized from utilization of the $250,000,000 surplus cash which TU would generate.

The Supplement did not merely update events occurring after the Proxy Statement was mailed to TU stockholders on or about January 20, 1981. The Supplement amended the Proxy Statement to disclose, for the first time, material events which had occurred prior to January 20, 1981. The occurrence of these events were either not disclosed or were presented in a misleading light in the Proxy Statement. A few examples:

Proxy Statement	Supplement
Advised stockholders that in September 1980 TU and a Pritzker entity entered into serious discussions with respect to the proposed merger.	Discloses that Mr. Van Gorkom approached a Pritzker entity to investigate Pritzker interest in the proposed merger.
Disclosed only that the Pritzker entity had agreed to enter into a $55 per share cash merger subject to financing.	Disclosed that Mr. Van Gorkom suggested the $55 per share price in part on the basis that in addition to an equity contribution the Pritzker entity could obtain financing (to be repaid out of TU's cash flow) which would justify the payment of the $55 price.
Silent.	Discloses that prior to the September 20, 1980 meeting of the TU Board of Directors, Mr. Van Gorkom met with senior management of TU to advise them of the Pritzker merger proposal, and that at that meeting, several members of senior management, including Mr. Donald Romans, Executive Vice-President and Chief Financial Officer, indicated concern as to whether the $55 price was in the best interest of stockholders.

Silent.	Discloses that at the September 20, 1980 meeting of the Board of Directors of TU, Mr. Romans could not say that $55 per share was unfair, and that he had prepared a preliminary report which reflected the value of TU in the range of $55 to $65 per share.
Informed stockholders that the TU Board of Directors unanimously recommended the Pritzker proposal.	After the September 20, 1980 meeting of the TU Board of Directors, Mr. Bonser, Director and Executive Vice-President of TU, stated that he did not vote with respect to the merger.
Silent.	Discloses that Thomas P. O'Boyle, Director and Senior Vice-President - Administration of TU, did not attend the September 20, 1980 meeting.
Silent.	Discloses that following the execution of the Pritzker agreement, Kohlberg, Kravis, Roberts & Co. proposed to acquire TU for $60 per share.
Silent.	Discloses that in mid-January 1981, General Electric Company ("GE") indicated to TU that its subsidiary, General Electric Credit Corporation ("GECC") was interested in acquiring TU in a transaction which would allow stockholders to choose between receiving $57.50 per share for their stock or exchanging their TU stock for GE stock on a nontaxable basis. The GECC proposal was conditioned upon termination of the Pritzker proposal. The Pritzkers rejected a request that their offer be terminated. The GECC offer will not be made because, in part, of GECC's "unwillingness to become involved in a bidding contest for TU."

The foregoing is only a partial list of the material events which occurred prior to the mailing of the Proxy Statement on January 20, 1981 but which were not disclosed until the Supplement was mailed to TU stockholders on or about January 27, 1981.

ARGUMENT

TU stockholders have a right to expect TU's officers and directors to fulfill their duty of complete fairness and candor required by Delaware law. At a minimum, this duty requires full disclosure of both economic projections contained in the Forecast. TU's Board of Directors has before it two critically important measurements of projected economic performance for TU. Stockholders are entitled to the benefit of both measurements in order to cast an informed vote on the Pritzker proposal. TU's directors have not satisfied their duty of complete fairness and candor by merely picking projected net income and concealing projected cash flow, particularly when TU's senior executives have consistently recognized that the real economic strength of TU lies in its ability to generate enormous cash flow.

It is ludicrous for defendants to suggest that stockholders will be "confused" by being told that their company can serve them better in the 1980's than it could in the 1970's because of the availability of cash flow which can be utilized for their benefit. This Court must not allow TU's Board of Directors to cavalierly disregard their fiduciary obligations to stockholders.

Defendants' reliance upon SEC Release No. 5377 (the "Release") is completely misplaced and only clouds the real issues before this Court. The Release merely insists that historical cash flow is not a substitute for a presentation of historical net income. Plaintiff has never asserted anything remotely contradictory to that statement of accounting principles. The Release, however, fully recognizes that meaningful disclosure of the economic performance of a company may necessitate supplemental financial data when income measurement does not accurately reflect the economic performance of the company, and when a presentation of cash flow is a useful measure of a company's ability to accept new investment opportunities, to acquire and maintain its assets and to make distributions to stockholders as a result of liquid or near-liquid resources. Both of these reasons are particularly applicable in the case of TU, the "engine of cash".

A portion of the Release deals with a presentation of cash flow on a per-share basis. Plaintiff also has never asserted that the projected cash flow of TU should be so presented and, in fact, no such presentation is contained in the Forecast which should be disclosed to stockholders.

Plaintiff requests that the Pritzker merger be preliminarily enjoined in view of the improvident and unnecessarily hasty manner in which it was conceived and in view of the onerous conditions accepted by the TU Board of Directors which cripple the opportunity for a better offer.

At a minimum, the February 10, 1981 Special Meeting of Stockholders should be postponed until complete and accurate disclosure of all material facts has been made to TU and they have had, as required by Delaware law, at least 20 days to digest all material information and to come to an intelligent decision as to how to vote on the Pritzker deal. The policy behind 8 Del.C. §251(c) can be no other than to require that stockholders have ample time -- at least 20 days -- in which to analyze (or have analyzed by their investment advisors) the single most important vote which these stockholders have ever faced. Counsel for the Pritzker defendants has represented to this Court that the Pritzker financing is committed until March 31, 1981. Thus, defendants recognize that there is sufficient time for this Court to exercise its equity jurisdiction to postpone the meeting for the benefit of stockholders in order that they may have all the information they need about the glorious future of TU before they cast their votes.

Another benefit of major significance to TU stockholders will be that additional time will be made available for a resurrection of the KKR $60 per share bid. The Supplement discloses that Mr. Romans advised the TU Board of Directors that in his opinion a $60 per share leveraged buyout -- the type of proposal submitted by KKR -- could probably be consummated within a reasonable period of time. Moreover, time will be allowed for discussions to continue with another potential acquiror of TU which is mentioned in the TU Board's covering letter to the Supplement, but the name of which is withheld from stockholders.

CONCLUSION

TU's enormous projected cash flow has been furnished to the Pritzkers. Through Salomon Brothers, the same projected cash flow has been furnished to potential suitors (the complete Forecast was included in the materials furnished by Salomon Brothers to the companies it contacted). There is no justification for the TU Board's withholding from TU's owners the very same and critically important financial information. The duty of complete fairness and candor demands that the TU Board account to TU stockholders for all forecasts available in order that stockholders can intelligently evaluate the recommendation of their fiduciaries that the Pritzker merger be approved.

This Court should exercise its equitable jurisdiction to preliminarily enjoin consummation of the proposed Pritzker merger or, alternatively, to postpone for a reasonable time the TU stockholders' meeting in order that full disclosure can be made to stockholders and discussions can be completed with the entities interested in providing a more attractive alternative to stockholders.

Respectfully submitted,

PRICKETT, JONES, ELLIOTT & KRISTOL

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lists and standard product catalogs, and reports to stockholders should also not be considered advertising costs for purposes of this rule.

It is recognized that the distinction between advertising costs and other selling expenses is frequently not clear cut. Where the guidance set forth herein is not sufficient to enable the registrant to determine the appropriateness of including or excluding certain classifications of significant costs, disclosure of the type of costs included or excluded from the caption will be a satisfactory solution.

Under Item 8, Research and development costs, all costs charged to expense as incurred in the current period for the benefit of the company in these account classifications should be reported. These would include company sponsored projects of pure and practical research as well as the development of new products or services or new or better production machinery and equipment and for the improvement of existing products and services. The amortization of deferred research and development costs should not be included herein since this amount is described in Item 3 of the schedule.[1]

(The text of the amendments of Rules 1-02, 3-15, 5-02-23, 5-03-17, 5-04, 9-05, 12-02, 12-04, 12-06, 12-13, 12-16, 12-42 and 12-43 of Regulation S-X is omitted.)

The amendments to Regulation S-X are adopted pursuant to authority conferred on the Securities and Exchange Commission by the Securities Act of 1933, particularly Sections 6, 7, 8, 10 and 19(a) thereof; the Securities Exchange Act of 1934, particularly Sections 12, 13, 15(d) and 23(a) thereof; the Public Utility Holding Company Act of 1935, particularly Sections 5(b), 14 and 20(a) thereof; and the Investment Company Act of 1940, particularly Sections 8, 30, 31(c) and 38(a) thereof.

By the Commission.

— Footnote —

*The effective date of the requirement for compensating balance disclosure was deferred to cover periods beginning on or after December 30, 1972 (Accounting Series Release No. 136).

[1 This paragraph was rescinded in Accounting Series Release No. 178, October 9, 1975.—CCH.]

PART B—CORRECTIONS, CLARIFICATIONS AND EDITORIAL CHANGES

[¶ 72,164]

RELEASE NO. 142

March 15, 1973, 38 *F.R.* 9159; *Securities Act Release No.* 5377, *Exchange Act Release No.* 10041.

Reporting Cash Flow and Other Related Data.

Introduction

The Commission has recently received preliminary registration statements which include "cash flow per share" data in the narrative section of the prospectus. Use of such data has also been noted in annual reports to shareholders, particularly in the "Financial Highlights" or "President's Letter" section. These and other means of presenting financial data appear designed to decrease the credibility of conventional financial statements as a measure of business activity.

The variation in form and purposes of such data creates confusion. The term "Cash Flow" and similar formulations such as "Earnings Before Non-Cash Charges," "Adjusted Net Income," "Net Operating Income" and "Operating Funds Generated" do not have precise definitions and may mean different things to different people. In addition to this definitional problem, there are different purposes for presenting these data. One is to present an apparent alternative to net income as a measure of performance. A second is to present information about liquid or near-liquid assets provided by operations which may be available for reinvestment or distribution to shareholders.

While differing definitions and purposes are basic sources of the confusion investors and registrants are experiencing with "cash flow" data, the presentation of such data on a per share basis compounds this confusion.

Numerous questions have been received in regard to the Commission's policy in these matters. This release is being issued to outline the Commission's views.

"Cash Flow" as a Proxy for Income Measurement

One of the principal reasons given for presenting "cash flow" is that the income measurement model currently prescribed by generally accepted accounting principles does not accurately reflect the economic performance of certain types of companies, typically those with substantial assets which arguably do not depreciate or require replacement. While the Commission recognizes that there are problems of income measurement for some industries, the unilateral development and presentation on an unaudited basis of various measures of performance by different companies which constitute departures from the generally understood accounting model has led to conflicting results and confusion for investors. Additionally, it is not clear that the simple omission of depreciation and other non-cash charges deducted in the computation of net income provides an appropriate alternative measure of performance for any industry either in theory or in practice. This problem was recognized by the Accounting Principles Board in Opinion No. 19 where it was noted that "the amount of working capital or cash provided from operations is not a substitute for or an improvement upon properly determined net income as a measure of results of operations...."

If accounting net income computed in conformity with generally accepted accounting principles is not an accurate reflection of economic performance for a company or an industry, it is not an appropriate solution to have each company independently decide what the best measure of its performance should be and present that figure to its shareholders as Truth. This would result in many different concepts and numbers which could not be used meaningfully by investors to compare different candidates for their investment dollars.

Where the measurement of economic performance is an industry-wide problem, representatives of the industry and the accounting profession should present the problem and suggested solutions to the Financial Accounting Standards Board which is the body charged with responsibility for researching and defining principles of financial measurement. Until new and uniform measurement principles are developed and approved for an industry, the presentation of measures of performance other than net income should be approached with extreme caution. Such measures should not be presented in a manner which gives them greater authority or prominence than conventionally computed earnings.

Where management believes that the existing conventional income model does not present the results of operations realistically or fully, an explanation of the reasons and a description of possible alternatives which might be used to measure results may be presented to shareholders and potential investors to supplement conventional financial data. The presentation of additional data in tabular form is also acceptable. Such tables should be accompanied by a careful explanation of the data presented. The adding together of figures derived by different measurement techniques (such as net income and cash flow) should be avoided as should per share data relating to measures other than net income (see discussion below). In addition, when various measurement models are used for different lines of business, there should be a consistent application of such models to all similar segments of the firm's operations. Also, results for all segments included in consolidated statements of net income should be included in any tabular or summary presentation.

Annual reports to shareholders as well as filings with the Commission should include explanations and data as discussed above whenever measurement models other than conventionally computed income are used. Such additional information and data would typically be presented in the "Financial Highlights," the "President's Letter," or the text of the report and should not be presented without also presenting net income. Terms such as "Net Operating Income" which leave the impression that a figure other than net income is really income should not be used.

In cases where a measurement problem exists for an individual company rather than in an entire industry, a solution already exists in the procedures of the accounting profession. Under the newly adopted Code of Ethics of the American Institute of CPA's, an auditor is permitted to render an opinion approving statements prepared even though they deviate from the principles adopted by the Accounting Principles Board (or its successor body) if he believes and can support the assertion that due to unusual circumstances the financial

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statements would otherwise be misleading. Under such circumstances, full disclosure must be made by both company and auditor, and the basic statements must be prepared in accordance with the principles determined to present operating results most meaningfully. In such cases, the staff of the Commission will naturally consider the circumstances which gave rise to the situation, but it will normally give great weight to the judgment of the registrants and their independent accountants.

The above discussion is designed to assist companies which believe the conventional income measurement model is unsatisfactory in providing disclosure which is useful and not misleading. This discussion is not intended to support or reject any particular new measurement model and the Commission strongly urges the accounting profession and other interested parties to consider the development of new techniques for the measurement of results in industries where the current model seems deficient.

"Cash Flow" as a Measurement of Funds Generated from Operations

A second basic reason for highlighting cash or funds generated from operations data in financial summaries is to show the liquid or near-liquid resources generated from operations which may be available for the discretionary use of management. Analysts have suggested that this is a useful measure of the ability of the entity to accept new investment opportunities, to maintain its current productive capacity by replacement of fixed assets and to make distributions to shareholders without drawing on new external sources of capital.

While presentation of "funds generated from operations" is useful, these data should be considered in the framework of a source and application of funds statement which reflects management's decisions as to the use of these funds and the external sources of capital used. The implication of a presentation which shows only the funds generated from operations portion of a funds statement is that the use of such funds is entirely at the discretion of management. In fact certain obligations (e.g., mortgage payments) may exist even if replacement of non-depreciating assets is considered unnecessary. Therefore presentation of one part of a funds statement should be avoided.

The Commission has also noted situations where investors were misled by cash distributions which were in excess of net income and were not accompanied by disclosure indicating clearly that part of the distribution represented a return of capital. To highlight this fact in cases where funds distributed exceed net income, the Commission developed the "Funds Generated and Funds Disbursed" statement in Form 7-Q which begins with the caption "Income (Loss) Before Realized Gain or Loss on Investments." From that amount the first deduction is "Cash Distributed to Shareholders." The statement then provides for adding non-cash charges and deducting debt repayments to arrive at the "Excess (Deficiency) of Funds Generated Over Distributions." This indicates whether operations generated the cash to make distributions or whether distributions are made from borrowing or other sources.

Cash flow presentations designed to reflect the liquid assets or working capital generated by the firm should be consistent with the principles outlined in this section.

Per Share Information

Many of the problems outlined above are accentuated when "cash flow" data is presented on a per share basis. Most importantly, such a presentation emphasizes the implication that cash flow is more meaningful than net income as a measure of performance, particularly when a per share figure is included in the "Financial Highlights" section of a report.

The first major problem in the presentation of cash flow per share data is that of investor understanding. Investors over many years have grown accustomed to seeing operating per share data computed only in the case of net income. Accounting authorities have considered and largely settled the measurement problems associated with the presentation of net income on a per share basis. If other data are presented in this way, there is a danger that the investor will think that what he is seeing is the conventional accounting measure of earning power when in fact this is not the case. In a number of reports, cash flow per share data have been presented in such a manner as to lead to this inference despite the strong recommendation of the Accounting Principles Board in Opinion No. 19 that "isolated statistics of working capital or cash provided from operations, especially per share amounts, not be presented in annual reports to shareholders." Such presentations run a high risk of materially misleading investors and companies are urged to avoid this type of disclosure.

Beyond the problem of understandability is the question of relevance. The investment

community generally recognizes the relevance of "earnings per share" as a measure of the historically achieved earning power of an economic entity in terms of a unit which is being bought, sold and quoted in the market place, the share of common stock. The earning power represented by that share has generally been considered a significant element in the determination of its worth. Net income, as a measure of ultimate result, may reasonably be interpreted on a per share basis since no significant claims stand between it and the common stock owner. Where there are senior equity claims, these are deducted before computing the per share figure. Dividends are similarly logically presented in terms of the individual share, as are net assets.

Significant questions as to relevance arise, however, when other data are presented on a per share basis. Sales, current assets, funds flow, total assets, cash and other similar figures cannot logically be related to the common shareholder without adjustment. These are aggregate data which are of great importance to analysts and management alike in understanding the operations of the total economic entity, but they are not items which accrue directly to the benefit of the owner of a part of the common equity. Charges and claims must be considered before the owner is benefited. To reflect such items on a per share basis may mislead the unsophisticated, since there is an implication that the shareholder is directly affected. In fact, such data are only meaningful from an operating viewpoint and not from that of an external investment unit.

Accordingly, per share data other than that relating to net income, net assets and dividends should be avoided in reporting financial results.

Conclusion

In this release, the Commission has reiterated and explained its view as expressed to individual registrants for many years that certain approaches to "cash flow" reporting may be misleading to investors. All registrants are urged to examine their reporting practices in light of the problems and guidance set forth in this release and to amend them where appropriate.

The Commission recognizes that reporting financial results cannot be a static phenomenon, and it continues to examine its views and policies to determine in what respects change is desirable. In this connection, it welcomes comments and suggestions regarding its policies from registrants and other knowledgeable parties. If any parties have comments on the views and policies set forth in this release, they should be addressed to the Chief Accountant of the Commission.

By the Commission.

[¶ 72,165]

RELEASE NO. 143

March 20, 1973.

Findings and Order Imposing Remedial Sanction *In the Matter of Robert Lynn Burroughs.*

In these proceedings pursuant to Rule 2(e) of the Commission's Rules of Practice to determine whether Robert Lynn Burroughs, an accountant, should be temporarily or permanently denied the privilege of appearing or practicing before the Commission,[1] he submitted an offer of settlement.

Under the terms of the offer, respondent, solely for the purpose of these proceedings and without admitting or denying the allegations of the order for proceedings, consented to findings in accordance with the allegations in that order and to the entry of an order censuring him.

After due consideration of the offer of settlement and upon the recommendation of its staff, the Commission determined to accept such offer.

On the basis of the order for proceedings and the offer of settlement, it is found that:[2]

1. Respondent, an employee of a public accounting firm, participated, under the supervision of a partner in the firm, in the audit of the records of a registered broker-dealer.

2. In connection with such audit and the certification of the broker-dealer's financial statement as of September 30, 1971, which was filed with the Commission on Form X-17a-5 pursuant to Rule 17a-5 under the Securities Exchange Act of 1934, respondent failed to comply with generally accepted

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