To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED
ON _________ 2007
WESTCHESTER
COUNTY CLERK

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF WESTCHESTER**
**COMMERCIAL DIVISION**

**Present: HON. ALAN D. SCHEINKMAN**
**Justice.**

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LEVY INVESTMENTS, LTD., Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

-against-

USI HOLDINGS CORP., DAVID L. ESLICK, RONALD E. FRIEDEN, THOMAS A. HAYES, L. BEN LYTLE, ROBERT A. SPASS, ROBERT F. WRIGHT, WILLIAM L. ATWELL, and COMPASS ACQUISITION HOLDINGS CORP.,

Defendants.

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Index No. 1011/07
Motion Sequence No. 3

Motion Date: 3/26/2007

**DECISION AND ORDER**

Scheinkman, J.:

This is a putative stockholder class action brought against USI Holdings Corp. ("USI" or the "Company") and its directors (the "Individual Defendants"), arising out of the proposed acquisition of USI by Compass Acquisition Holdings Corp. ("Compass"), a company affiliated with Goldman, Sachs & Co. ("Goldman Sachs"). Plaintiff Levy Investments, Ltd. ("Levy" or "Plaintiff") moves the Court for a preliminary injunction, pursuant to CPLR 6301, enjoining a special meeting of the USI stockholders scheduled for March 29, 2007 at which the stockholders are to vote on the approval of the transaction. Levy also seeks an order requiring USI to issue further disclosure statements prior to any stockholder vote or, alternatively, permitting Plaintiff to engage in "expedited discovery".

## RELEVANT BACKGROUND

USI is a publicly traded company. It acts as a distributor of property and casualty insurance, employee health and welfare insurance, financial products and related consulting and administrative services. Since its inception in 1994, it has built a national distribution system through the acquisition, consolidation and integration of nearly 140 insurance brokers and related businesses. It has some 500 sales professionals and product specialists based in 66 offices in 18 states. USI is a

Delaware corporation and has its corporate headquarters in Briarcliff Manor, New York. USI is the ninth largest insurance broker in the United States, as measured by annual revenue. Five large institutional shareholders hold, collectively, 40.8% of USI common stock.

According to its pleading, Levy is a stockholder of USI. The Summons states Levy's address to be 7 King David Street, Jerusalem, Israel.

The saga begins in May, 2006, when David L. Eslick, the Chairman, President and Chief Executive Officer of USI (and one of the Individual Defendants), was approached by a financial sponsor (referred to as Sponsor A) interested in exploring a potential acquisition of USI. This contact was brought to the USI Board of Directors. The outside directors (the Board members less Mr. Eslick and less Robert A. Spass, who is a director of a significant USI shareholder) authorized management to enter into a confidentiality agreement with Sponsor A and to provide it with limited due diligence material. On June 21, 2006, Sponsor A submitted a preliminary indication of interest to acquire USI for $16 to $16.50 per share of common stock.

On June 28, 2006, the Board met and, with Mr. Eslick and Mr. Spass excused, voted to create a Special Committee to consider the proposal from Sponsor A, to consider soliciting proposals from other potential buyers, to negotiate any proposed transaction, and to consider the fairness of any such transaction to USI stockholders and report its recommendations to the Board. The Special Committee consisted of William L. Atwell, Ronald E. Frieden, Thomas A. Hayes, L. Ben Lytle[1], and Robert F. Wright. Mr. Frieden served as the chair of the Special Committee. After interviewing several law firms and several investment banking firms, the Special Committee retained Dewey Ballantine, LLP as its legal advisor and Lazard Frères & Co. ("Lazard") as its financial advisor.

Lazard had the opportunity to undertake some financial analysis, and after a series of meetings, the Special Committee decided to approach other potential acquirers. Lazard reviewed with the Special Committee a list of five financial sponsors (in addition to Sponsor A) that Lazard proposed to contact to solicit their interest. Pursuant to confidentiality agreements, the six prospective buyers were given a presentation by USI management and certain financial information. By October 11, 2006, three potential buyers (including Sponsor A) submitted preliminary indications of interest. Sponsor A bid $16.50 per share, another potential buyer bid $15.00 to $17.00 per share, and the third bid was for $15.50 to $16.50 per share.

At a meeting of the Special Committee on October 19, 2006, it was reported that none of the three bidders would modify their indicated bid range without having the opportunity to conduct further due diligence. A representative of Lazard reported that Goldman Sachs had approached Lazard and expressed an interest in

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[1]Mr. Lytle resigned from the Special Committee in August, 2006 due to personal time constraints.

having certain of its private equity funds explore a potential transaction with USI. The Special Committee decided to invite Goldman Sachs into the process. Goldman Sachs entered into a confidentiality agreement and received due diligence materials.

On October 24, 2006, USI publicly announced its preliminary third quarter results. That announcement included a public announcement that the Special Committee had been formed to review the Company's alternatives. Specifically, USI issued a press release indicating that the Special Committee had been formed to "review an indication of interest from a private equity firm ... and consider all of the Company's options".[2] This public disclosure was an indication to the market that USI was open to expressions of interest from any and all potential bidders. Also on October 24, 2006, Lazard sent letters to the three existing bidders inviting them into a second round of the process and informing them that they would be given access to a "virtual data room" containing additional due diligence materials

Two days later, on October 26, 2006, Lazard reported that, following the public announcement, it had facilitated discussions with three strategic buyers (meaning USI competitors) who were interested in a potential acquisition of USI. The Special Committee decided to invite these three strategic buyers into the process. The virtual data room was opened on that day and USI provided additional data into the data room, throughout the process, in response to requests.

On October 31, 2006, Goldman Sachs submitted a preliminary indication of interest to acquire USI for $17.00 to $19.00 per share.

In early November, one of the three strategic buyers (Strategic Company C) dropped out but another strategic buyer (Strategic Company D) was invited into the process. On November 9, 2006, Strategic Company A submitted a preliminary indication of interest at a range of $16.00 to $18.00 per share, but with 50% payable in cash and 50% in shares of Strategic Company A stock. Strategic Company B decided not to bid.

The situation was reviewed by the Special Committee on November 14, 2006. It was decided to allow Strategic Company A to continue in the process, to schedule a further meeting between Strategic Company A and USI management, and to set December 11, 2006 as a deadline for final bids. The deadline was extended, at the request of various bidders, to December 19, 2006.

Strategic Company D decided not to submit a bid. On December 12, 2006, Strategic Company A withdrew from the process, a decision that was predicated, in part, upon its perceived integration risks associated with the contemplated acquisition of USI.

As a result, as of December 19, 2006, the only remaining bidder was

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[2]While the actual press release is not before the Court, the description provided in the preceding text sentence and the quotation appear in a USI document, "Summary of Process to Date" submitted as an exhibit by Plaintiff.

Goldman Sachs which submitted a final bid of $17.00 per share, subject to Goldman Sachs' exclusive right to negotiate with USI and to further due diligence review. No other bids were received.

On December 21, 2006, the Special Committee directed its attorneys and Lazard to negotiate with Goldman Sachs, including a negotiation of an exclusivity agreement. An exclusivity agreement was entered into on December 26, 2006, with Goldman Sachs having exclusivity until January 15, 2007. During the period from late December, 2006 to mid-January 2007, the representatives of the parties conducted negotiations over the merger agreement and Goldman Sachs continued its due diligence review.

On January 9, 2007, Mr. Eslick met with a representative of Goldman Sachs to discuss the possibility that members of USI management could participate in the merger as well as issues regarding the merger agreement. They also discussed possible compensation and incentive arrangements (including stock ownership) for management, but no agreement was reached.

The Special Committee met again on January 15, 2007. Its lawyers reviewed in detail the terms of the merger agreement and related documents. Lazard provided an oral opinion, later confirmed in writing, that as of that date, the $17.00 per share merger consolidation was fair, from a financial point of view, to the USI's stockholders. After these presentations, the Special Committee unanimously resolved to recommend to the Board that it approve the merger and that it recommend the merger to the stockholders. The entire Board met immediately after the Special Committee meeting and voted (with Mr. Eslick and Mr. Spass abstaining) to approve the merger agreement and recommend that the stockholders adopt it. The parties then executed and entered into the merger agreement.

The next day, January 16, 2006, prior to the opening of trading on NASDAQ, the parties issued a press release publicly announcing the merger agreement.

USI issued a proxy statement dated February 28, 2007 and mailed it to stockholders on or about March 1, 2007 (the "Proxy Statement")[3]. The Proxy Statement contains a Notice of Special Meeting of Stockholders, dated February 27, 2007, setting a special meeting at USI's offices in Briarcliff Manor, New York for March 29, 2007 at 1:30 p.m. to consider and vote on the merger agreement.

Under the merger agreement, USI will become a wholly-owned subsidiary of Compass and will no longer be publicly traded. Compass is an entity controlled by

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[3]The Court was advised on March 21, 2007 that: USI publicly filed a preliminary Proxy Statement with the Securities and Exchange Commission ("SEC") on February 14, 2007; the SEC decided not to formally review the Proxy Statement, and that, therefore, the final Proxy Statement filed on February 28, 2007 is substantively the same as the preliminary version filed two weeks earlier.

private equity funds sponsored by Goldman Sachs.[4] Compass is a Delaware corporation that was formed solely for the purpose of acquiring USI and USI will be the surviving entity and will do business as USI Holdings Corporation.

The Proxy Statement indicates that there were 58,476,786 shares of USI Common Stock issued and outstanding as of February 27, 2007. Under the merger agreement, each stockholder will be paid $17.00 per share in cash, without interest and less applicable withholding taxes. The total amount to be paid to shareholders is approximately $1 billion ($994,105,362). The Proxy Statement indicates that the total amount of funds necessary to consummate the merger and related transactions is approximately $1.4 billion. Of these funds, a maximum of $453 million will be provided by capital contributions from private equity funds sponsored by Goldman Sachs; the balance will come from debt financing provided by, among others, Goldman Sachs Credit Partners, L.P., JPMorgan Chase Bank, N.A., and J.P. Morgan Securities Inc.

The Proxy Statement advises that, pursuant to Delaware law (Section 262 of the Delaware General Corporation Law, a stockholder who dissents from the transaction may deliver a written demand for appraisal of shares prior to the vote. In the event that appraisal rights are pursued, the Delaware Chancery Court will determine the fair value of the shares, exclusive of any element of value arising from the accomplishment of the merger, together with a fair rate of interest, and direct that stockholders be paid accordingly for their stock.

The average closing price of USI Common Stock on NASDAQ for the 30 calendar days prior to the October 24, 2006 announcement of Special Committee formation was $14.14. The $17.00 per share price to be paid under the merger agreement represents a premium of approximately 20.5% to the 30 day average price.

Of moment, the Court notes that Plaintiff alleges in the Amended Complaint that the stock price of USI closed at $14.78 immediately prior to the announcement and that the closing price on the next trading day after the announcement was $15.97. This would suggest that the market responded favorably to the transaction and, perhaps, that an appraisal value that excluded consideration of the merger, would be less than the price offered in the merger.

The Proxy Statement recounts the process by which the merger occurred and sets forth the reasons why the Special Committee and the Board voted to recommend the merger to the stockholders. Among other reasons, the Proxy Statement indicates that the Special Committee believed that the stock was not likely to trade at or above $17 per share in the near future and the cash consideration of $17 per share would allow stockholders to realize a fair value in cash in the near term and provide certainty of value. The Special Committee also considered, as a factor, the

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[4]Another player in the merger is Compass Merger Sub Inc. ("Merger Sub"), a Delaware corporation which is a wholly owned subsidiary of Compass. Merger Sub was formed solely for the purpose of effecting the merger and, upon merger, will merge into USI. Merger Sub is not a party to this action but there is no suggestion that it ought to be. Accordingly, the Court will disregard the existence of Merger Sub for purposes of this decision.

fairness opinion issued by Lazard.

The Lazard fairness opinion was set forth in full as an Annex to the Proxy Statement and a summary was provided in the Proxy Statement itself. Lazard's opinion, based on economic conditions in effect on January 15, 2007, was predicated on a number of different financial analyses. Lazard performed a public market trading analysis which implied a per share equity reference range of $11.75 to $14.25 per share. Lazard undertook a discounted cash flow analysis which resulted in an implied equity range of $15.00 to $18.00 per share. A premiums paid analysis resulted, according to Lazard, in an implied per share equity reference range of $14.10 to $18.53 per share. A leveraged buyout analysis led to Lazard's view that in a leveraged buyout, the implied share price would be $15.00 to $17.50 per share.

The Lazard fairness opinion discloses that a substantial portion of its fee is contingent upon the consummation of the merger. It also discloses that Lazard may have, may currently, and may in the future, be providing investment banking services to private equity funds of Goldman Sachs entities for which Lazard is paid. It further discloses that Lazard and its affiliate entities may trade (and hold, both long and short positions) in securities of USI and of Goldman Sachs' entities.

The Court notes that in October, 2006, three potential buyers who expressed indications of interest submitted bids of: $16.50 per share, $15.00 to $17.00 per share, and $15.50 to $16.50 per share. The Court also observes, at this juncture, that, about one month later, Strategic Company A submitted a preliminary indication of interest at $16.00 to $18.00 per share but with only 50% of the consideration to be paid in cash, the rest in stock. While Goldman Sachs' preliminary indication of interest was at a range of $17.00 to $19.00 per share, and the merger price of $17.00 per share is at the very low end of that range, the Court has been informed by counsel that, since the time that the Compass merger was announced on January 16, 2007, no other offers have been made.[5]

The Proxy Statement advises that USI management has interests that may be different from those of the stockholders. In particular, the Proxy Statement discloses that various directors and officers, including Mr. Eslick, have stock options that could be converted into a cash payment or, alternatively, an agreement could be reached under which Compass would allow an exchange of USI options for Compass stock. The Proxy Statement describes how restricted stock will be treated. It also reviews the employment agreements of various directors and officers, including Mr. Eslick, and discloses the severance payments that could be due them (which, in Mr. Eslick's case, is $3,628,500). The Proxy Statement also reports that, as of its issuance, no member of USI management had made any changes to their employment agreements or had made any agreement with Compass. However, the Proxy Statement warned that there was a "possibility" that members of the USI management team might make new arrangements and, as a result, would have the opportunity to participate in any growth of USI in post-merger future.

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[5]While the merger agreement precludes USI from soliciting or encouraging alternative transaction proposals, USI is not precluded from pursuing or even accepting a superior proposal, provided that Compass is afforded the opportunity to adjust its proposal.

## THE PROCEDURAL HISTORY

This litigation was commenced by the filing of a Summons and Complaint on January 17, 2007, just one day after the public announcement of the merger agreement. The Complaint contained two causes of action. In broad terms, the Complaint asserted that the Individual Defendants breached fiduciary duties owed to USI by allowing USI to engage in a transaction that, as proposed, was not in the best interests of the stockholders, and that the corporate defendants had aided and abetted the fiduciary breaches of the Individual Defendants. Plaintiff professed to be maintaining the action on behalf of similarly situated stockholders and sought to have the Court allow the action to proceed as a class action. As ultimate relief, Plaintiff demanded injunctive relief and counsel and expert fees. No demand for monetary damages was interposed.

Despite moving very quickly to commence the action, Plaintiff did very little with any degree of promptness thereafter. A Request for Judicial Intervention was not filed until February 23, 2007 and, then, not because Plaintiff was seeking any form of judicial relief but because there was stipulation to change the caption [6] and to extend defendants' time to respond to the Complaint. The action was assigned to this Court and, on March 7, 2007, this Court "so ordered" the stipulation of the parties.

Rule 7 of the Commercial Division Rules requires that a preliminary conference be held within 45 days of the assignment of the case to a Commercial Division justice. This Court adheres to that Rule and believes in active, and early, judicial supervision of the progress of the cases pending before it. Accordingly, it is the policy of this Court to cause a preliminary conference to be scheduled as soon as the Court learns of the case and to have that conference conducted at as early date as is practicable. In this instance, the Court, having learned of the case on March 7, 2007, issued a directive on March 7, 2007 and transmitted on that date by fax to counsel, establishing a conference for March 16, 2007.

At the outset of the March 16, 2007 conference, the Court noted that, from its review of the filed papers, that the lawsuit concerned an event that was scheduled for March 29 and asked if there was any intention on the part of Plaintiff to seek preliminary injunctive relief. This inquiry was prompted by the Court's reading of the Complaint which sought only injunctive relief and litigation expenses. The Court was advised by Plaintiff's counsel that the parties had been negotiating a settlement, that it was unclear whether the matter would be resolved, and that Plaintiff did intend to seek injunctive relief. It was reported that the negotiations took place over a period of two weeks, but the Court was not informed which two week period was involved, *i.e.,* in January, February or March. Plaintiff's counsel sought to conduct discovery in aid of its preliminary injunction request, with the Court expressing its skepticism as to how the parties would undertake discovery in a two week period and at the same time make an injunction request.

The Court advised counsel that any request for injunctive relief "needs to

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[6] The original caption and complaint named GS Capital Partners, rather than Compass, as a defendant.

be made straight away" so that defendants could have time to respond to it intelligently, the Court would have more than "five seconds" to decide it, and any party aggrieved by the Court's decision would have the opportunity to seek appellate review. For this reason, the Court stated that the time to make an injunction application "is at hand". Further, the Court stated that, while it could not direct Plaintiff to make (or not to make) an application, it would advise that the sooner that Plaintiff made the application the better so that "there is time for reasoned argument and deliberation and a process for obtaining whatever review follows". The conference concluded with the entry of a Preliminary Conference Order, providing, *inter alia*, that an Amended Complaint would be served on or before March 21, discovery demands would be served on or before April 2, and that discovery would be completed by September 14, 2007.

The Court also discussed with counsel the fact that this action is a putative class action. The Preliminary Conference Order provides a briefing schedule for a motion for class certification, which such motion to be made by April 17, 2007.

Plaintiff evidently heeded the Court's admonition that its request for preliminary injunctive relief, if one was to be made, should be pursued with dispatch and proceeded with diligence to prepare such an application. However, at this point, some procedural issues arose, not entirely of Plaintiff's making, which occasioned further delay. Back on February 28, 2007, counsel for the parties entered into a stipulation in which defendants agreed that discovery material would be kept confidential and that any documents provided to the Court would have be submitted *in camera* under seal. While the parties made this agreement on February 28, 2007, they did not then provide it to the Court, though the stipulation contemplated that it would be "so ordered" by the Court.

Defendants provided materials to Plaintiff and, as part of Plaintiff's application for preliminary injunctive relief, Plaintiff wanted to submit some of these materials to the Court. But as the result of the stipulation of February 28, 2007, Plaintiff could not file its motion with the Court as a public document.

Plaintiff ultimately prepared a Notice of Motion, dated March 19, 2007, seeking preliminary injunctive relief. The papers were served upon Defendants "in the early hours" of Tuesday, March 20, 2007, it being the Court's understanding that service was made at 1 o'clock in the morning, an hour at which most people are asleep (excluding, of course, those who work at large Wall Street or Park Avenue law firms, as evidently there were people at the offices of Defendants' counsel to receive the papers when they arrived). While it may have been somewhat disruptive of defense counsel's sleep to discover that a motion was being served them, the process that Plaintiff elected to follow was something of an astonishment to the Court. First, it is, to say the least, somewhat unusual that a party seeking to enjoin a meeting scheduled to be held on March 29 would move by regular notice of motion, as distinguished from seeking an order to show cause. Perhaps even more unusual is that Plaintiff chose as the return date, Wednesday, March 28, 2007 at 9:30 a.m., the very day before the meeting. The Court was surprised, if not slightly offended, by the presumption that it would be asked to decide an application of this importance and given but a day to do so. The Court was also surprised, and more substantially offended, by counsel's decision to select a Wednesday for the return date, when this Court has announced that all motions are to be made returnable on Fridays. Indeed, the Preliminary Conference Order, signed by all counsel, expressly states that: "All motions are shall be made returnable on Fridays. No motion shall, absent the permission of the Court, be made returnable on any other day." Needless to say, the Court was not asked in advance (whether at 1 a.m. or any other time) to allow this motion to be returnable on a Wednesday. Usual procedure would have resulted in the Part Clerk adjusting the return date to Friday, March 30, which would, of course, have pushed the return date past the March 29 stockholder's meeting and would have rendered the motion academic.

In any event, the contretemps over service and the public filing of the motion for preliminary injunction led to another conference, this time on March 21, 2007. The Court reminded counsel that court records may not be sealed absent a judicial finding of "good cause", pursuant to 22 N.Y.C.R.R. §216.1. The Court stated that there was a presumption that court records are open to the public and that the parties appeared to be contemplating sealing everything. However, defense counsel appropriately pointed out that the time to make a superior offer for USI was still open and that public disclosure of internal financial evaluations could cause the maker of a superior bid to cap its bid, *i.e.,* make a less superior offer. This would, of course, be to the disadvantage of the stockholders who all parties profess to protect. Taking the time to parse out what would be sealed and would not be sealed would, though, further delay the filing of the motion. To cut through the Gordian Knot, it was agreed that all the papers would be temporarily sealed so that the motion could be resolved and that promptly thereafter there would be a process to create a public file.

On March 22, 2007, Plaintiff's counsel submitted an Order to Show Cause which provided for the temporary sealing of the motion and the Amended Complaint. The Court signed that Order to Show Cause and, within that, accelerated the return date of the Notice of Motion to Monday, March 27, 2007. (This had been prearranged during the March 21 conference). The Order to Show Cause also provided (also by prearrangement) that Defendants would serve their opposition by Monday, March 26, 2007 and that the Court would hear oral argument on March 26 at 4:00 p.m.

Defendants' papers were delivered to the Court promptly at 9:30 a.m. on March 26. Defendants thus had effectively six full days to prepare their responses. Unfortunately, the Court has had less than three days (parts of which had to be devoted to other judicial business) within which to evaluate the parties' submissions (which include some 70 pages of briefs and detailed factual submissions), a difficulty compounded by the need to apply Delaware law with respect to the substance of the parties' contentions. While the Court appreciates having been afforded "more than five seconds" to come up with a decision, the Court must also conclude that it has not been afforded the opportunity for "reasoned deliberation" that it had hoped for and, further, that the rights of the parties to seek effective appellate review have been compromised. These are considerations that should, and will, be weighed in evaluating the appropriateness of preliminary injunctive relief.

## THE AMENDED COMPLAINT

When Plaintiff filed its motion papers on March 23, 2007, it also filed an Amended Complaint. The Amended Complaint contains more particularized allegations against Defendants. It contains: a First Cause of Action alleging breach of fiduciary duty of due care, loyalty and good faith against the Individual Defendants; a Second

Cause of Action alleging breach of fiduciary duty of candor against the Individual Defendants; and accuses USI and Goldman Sachs of aiding and abetting the breaches of fiduciary duty by the Individual Defendants. The Third Cause of Action is, on its face, asserted against Goldman Sachs, though that entity is not a named defendant. It is unclear whether Plaintiff intended to assert this claim against Compass (which Goldman controls but is a single purpose entity whose sole function is to effectuate the merger) or whether Plaintiff intends to add Goldman Sachs as a party.

In terms of substance, the Amended Complaint asserts that material information was omitted from the Proxy Statement, arguing that the Proxy Statement does not inform stockholders of how Goldman Sachs entered the bidding process for USI. It asserts that the Proxy Statement does not disclose that Goldman Sachs final offer indicates that an agreement with USI management on equity participation was contemplated. Plaintiff claims that the Proxy Statement does not give details regarding the nature of the confidentiality restrictions placed on the due diligence materials to the four strategic buyers nor the criteria that Lazard used to select the strategic or financial buyers that it contacted. Plaintiff charges that USI's directors and officers will reap benefits from the buy-out that are not shared by non-insider stockholders and that the Individual Defendants and others had conflicts arising from business and personal relationships which were not disclosed. Plaintiff also contends that the $17.00 per share price is grossly inadequate. Based upon Plaintiff's review of internal USI documents, Plaintiff argues that the per share value could be in a range from $17.50 per share to $20.50 per share and alleges that USI could be worth more than $21.50 per share to Goldman Sachs. Plaintiff charges that Lazard has conflicting interests and that the termination fee that would have to be paid to Goldman Sachs if the merger does not occur (under certain conditions) is geared towards compelling stockholders to vote in favor of the merger.

The Amended Complaint seeks injunctive relief and litigation expenses, though it also seeks the imposition of a constructive trust upon any benefits that the Defendants receive, including any "change in control" benefits. A "change in control" could trigger USI's obligation to pay certain substantial severance benefits to senior managers.

On the same day that Plaintiff filed its Amended Complaint, USI filed a Form 8-K with the SEC, a report of unscheduled material events or corporate changes. The only information disclosed in the 8-K Form is the service of the Amended Complaint. While the Proxy Statement disclosed the existence of this action, it did not particularize Plaintiff's allegations, stating only that the Plaintiff contended that the pending acquisition was unfair to the stockholders and that Plaintiff was asserting claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty. The Proxy Statement also recited the relief Plaintiff was seeking. While the Form 8-K likewise contains a brief, summary description of the action and the Amended Complaint, the Form 8-K has appended to it the complete text of the Amended Complaint, including all of its allegations, its prayer for relief, and the names, addresses, and telephone numbers of Plaintiff's counsel.

Plaintiff's counsel notes, appropriately, that the public disclosure of the Amended Complaint was at a variance with Defendants' concern that the confidentiality of internal financial analyses be preserved, since the Amended Complaint does disclose the contents of some of those analyses. As a result, the Court does surely question whether all of the materials filed under temporary seal are deserving of any confidentiality[7]. But Defendants' larger point is that public disclosure of Plaintiff's claims as to what was omitted from the Proxy Statement effectively informs USI shareholders of the information that Plaintiff asserts stockholders should have in order to make an informed vote. Defendants point out that the Form 8-K, in addition to be obtainable from the SEC, is accessible on USI's website and has been "picked up" by financial sites such as Yahoo! Finance.

## THE STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

Plaintiff asserts that Delaware law applies to the underlying legal requirements of establishing entitlement to injunctive relief but that New York procedural law governs the standard under which the Court may grant such relief. Defendants do not dispute this assertion. The Court perceives the line, if such there be, between the requirements of establishing entitlement to injunctive relief, on the one hand, and the standard for granting such relief, on the other, is, at best, rather thin. However, there seems to be no reason (and little present time) to parse any distinction. At least in broad terms, it seems that the standards for measuring an application for preliminary injunctive relief applied in Delaware are substantially the same as those followed in New York.

In New York, it is well settled that a preliminary injunction is a drastic remedy which should be issued cautiously. The movant must show: (a) probability of success on the merits; (b) danger of irreparable harm in the absence of an injunction; and (c) that the balance of the equities weigh in its favor. While the existence of an issue of fact will not defeat a motion for injunctive relief which demonstrates the required elements, [CPLR 6312(c)], the movant must show a clear right to relief which is plain from the undisputed facts. *Matter of Related Properties, Inc. v. Town Board of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *Stockley v. Gorelik*, 24 A.D.3d 535 (2d Dept. 2005).

The Delaware Supreme Court has stated that, to obtain a preliminary injunction, the plaintiff must show a "reasonable probability of success on the merits", that irreparable harm will occur without the injunction, and that the harm that plaintiff would suffer without an injunction outweighs the harm to the defendant if the relief is granted. *Allen v. Prime Computer, Inc.*, 540 A.2d 417, 419 (Del. Sup. Ct. 1988); *see* also *Emerald Partners v. Berlin,* 726 A.2d 1215, 1227 n. 18. (Del. Sup. Ct. 1999).

The Delaware Court of Chancery has stated the principles in some greater detail. The remedy of a preliminary injunction is granted only sparingly and only on a persuasive showing that it is urgently necessary, that it will result in comparatively less harm to the adverse party, and that, in the end, it is unlikely to be shown to have been issued improvidently. Three elements must be met: (1) a reasonable probability of success on the merits; (2) "imminent, irreparable harm" will result if an injunction is

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[7]Defendants state that the version of the Amended Complaint that was publicly filed was redacted to omit a table of confidential projections but is otherwise complete.

not granted; and (3) the damage to plaintiff if the injunction does not issue will exceed the damage to the defendants if the injunction does issue. *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998); *accord, Abrons v. Marée,* 911 A.2d 805, 810 (Del. Ch. 2006). Of interest, the elements are not necessarily weighed equally; a strong showing on one element may overcome a weak showing on another. But a failure of proof on one element will defeat the application. *Abrons v. Marée, supra; Cantor Fitzgerald, L.P. v. Cantor, supra.*

It has been wryly noted, with justifiable local pride, that the Court of Chancery "did not become the nation's premier business trial court by issuing preliminary injunctions 'on flimsy grounds". *Emerald Partners v. Berlin, supra*, 726 A.2d at 1227 n.18. Of moment here, the Court of Chancery has cautioned that the plaintiff is required to make a particularly strong showing on the merits to enjoin a premium transaction where there is no competing offer, given the risk of significant injury to the stockholders. *Abrons v. Marée, supra*, 911 A.2d at 810-811; see also *In Re MONY Group Inc. Shareholder Litigation*, 852 A.2d 9, 19 (Del. Ch. 2004). On the other hand, some Delaware authority suggests that the standard of reasonable probability of success is more flexible there than it is in New York. Where there are critical issues of fact, Delaware requires only that the court be convinced that it is "reasonably likely" that, at the final hearing, plaintiff will establish the necessary facts by a preponderance of the evidence. *Cantor Fitzgerald, L.P. v. Cantor*, supra, 724 A.2d 571 at 580. But this same authority instructs that irreparable injury means "immediate, discernible harm for which there is no adequate remedy at law". 724 A.2d at 586. The injury to plaintiff must be more than speculative and the damages must be difficult or impossible to quantify. No injunction may issue if the injury can be fully compensated, after a trial on the merits, either by an award of damages or by any other form of equitable relief. 724 A.2d at 586.

Because of the compression of the time within which to deliberate upon Plaintiff's application, a circumstance that is attributable to Plaintiff's delay in making the application, the Court is concerned that its ability to weigh the contentions of the parties on the merits, and evaluate them in detail, has been significantly compromised. That said, for the reasons which will follow, the Court has not been persuaded that Plaintiff has shown that it is likely to succeed on the merits. But the Court is convinced that Plaintiff will not be irreparably injured if an injunction is denied and, further, is convinced that the harm to USI and its stockholders that could result from an injunction is greater than the harm that Plaintiff will sustain if an injunction is denied. The Court also finds that the balance of the equities weighs heavily in Defendants' favor. Since the lack of irreparable injury, the greater harm to Defendants, and the equities in Defendants' favor compel the denial of Plaintiff's motion, the Court will address those matters prior to its discussion of the merits of Plaintiff's claim.

## PLAINTIFF WILL NOT SUSTAIN IRREPARABLE INJURY

In moving for a preliminary injunction, no affidavit was submitted by any one from Levy. While it may be true that a client affidavit is not strictly required in order to obtain preliminary injunctive relief, such an affidavit would have been most helpful in evaluating Levy's interest in this action and its ability to respond in damages should an injunction issue, a consideration all the more important given that the only address stated for Levy is in another country.

Of moment, the papers submitted on Levy's behalf do not disclose how many shares of USI stock Levy holds. Because much stock is held in street name, USI has not been able to inform the Court of that information either.[8] At oral argument on March 26, 2007, counsel for Levy represented, in response to a question from the Court, that Levy held approximately 3,000 shares.

A review of Levy's Amended Complaint, and the affidavit of Matthew Morris, indicates that, even assuming that all of the allegations to be true and correct, the highest possible value suggested by Plaintiff for USI shares is $21.50 per share (the reported value that the stock has to Goldman Sachs). The difference between that highest reported value of $21.50 and the $17.00 merger price is $4.50. Thus, even assuming that Plaintiff can prove everything that it alleges, it would seem that its maximum damages are only $13,500, a quantified sum. Plaintiff's damages simply cannot be viewed as difficult to quantify or as being speculative in nature. If USI has been undervalued in the merger deal, it would seem that the amount of the undervaluation can be readily ascertained and Plaintiff made entirely whole.

Plaintiff, of course, asserts that this is an action that it seeks to maintain on behalf of a class of similarly situated stockholders whose damage claims would be aggregated. But this Court may not blithely assume that a class, if certified, would include all holders of the 58,476,786 shares of USI stock outstanding as of February 27,2007 or that Plaintiff is the proper and sole representative of all of those stockholders. See CPLR 901(a)(2), (3) (4). The claims and defenses may be different, for example, with respect to the five large institutional holders of 40.8% of USI stock. There may be stockholders who have opted to elect their appraisal rights under Delaware law; there may be stockholders who acquired their stock after, and perhaps because of, the merger announcement.

Additionally, while the criteria for class certification are to be broadly construed, see *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 91-92 (2d Dept. 1980), the Court may lack personal jurisdiction over non-New York stockholders. Accordingly, it is possible, if not probable, that the Court would have to adopt an opt-in procedure for non-New York residents and an opt-out procedure for New York residents. *See Katz v. NVF Company*, 100 A.D.2d 470 (1st Dept. 1984); *see also Brandon v. Chefetz*, 106 A.D.2d 162 (1st Dept. 1985). The Court has not been informed as the number of New York resident stockholders and, of course, there is no present means of predicting how many New York residents would opt-out nor how many non-New York residents would opt in. The Court also notes that there is no indication that Levy is a New York resident and it may be debatable as to whether a non-New York resident is a proper representa-

[8]While not raised by Defendants, the Court notes that Levy has not provided any information as to when it acquired its USI stock, alleging only that Levy "is and at all times relevant hereto has been," a USI stockholder. If Levy acquired its shares after the merger announcement, then it would not be in a position to complain about the terms of the merger. *See Louisiana Municipal Employees' Retirement System v. Crawford*, 2007 WL 582510 at *6-*7 (Del. Ch. 2007). For purposes of this decision, the Court will view Plaintiff's allegation as encompassing a claim that Levy held its shares prior to the merger announcement.

tive of a class consisting of New York residents.[9]

But, most important, given all of these variables, the Court is not able to conclude that, even if pursued as a class action, monetary damages would not be an adequate remedy.

The parties have a significant disagreement on what Delaware law instructs as to irreparable injury in the present context. Plaintiff urges that the potential loss of its interest in USI as a result of the merger is, by itself, regarded as an irreparable injury. Defendants argue that the appraisal right, available to a dissenting stockholder under Delaware statute, is an adequate legal remedy, the existence of which should foreclose a finding of irreparable injury. The parties rely, in the main, upon Chancery Court decisions.

The Court will start its analysis with the Delaware Supreme Court's decision in *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983), which Defendants read as supporting the view that, absent fraud, appraisal is the shareholder's usual and basic remedy in a fundamental corporate change. The Court believes that Defendant's reading is too broad. *Weinberger* involved the merger of a subsidiary into a majority owner, with the minority shareholders receiving cash. The Supreme Court of Delaware found that the merger did not meet the test of fairness, where two directors (of both the parent and the subsidiary) had reported that a greater price would have been a good investment by the parent, an opinion not disclosed to the outside directors. Since the merger had occurred, the Court addressed the appropriate remedy in view of the lack of an informed vote by the minority. While the Court did observe that ordinarily a plaintiff's monetary remedy should be confined to the appraisal proceeding, it also stressed that it did not intend to limit any of the Chancellor's historic powers to grant other relief. It specifically pointed out that appraisal may not be an appropriate remedy where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets and palpable overreaching are concerned. If the transaction is not capable of being unwound, the Court said, the award should be in the form of monetary damages based on fairness standards. 457 A.2d at 714. While *Weinberg* does not support the view that the appraisal right is always an adequate legal remedy, it does stand for the proposition that monetary damages are available to make a minority stockholder whole in the event that a merger is found to be flawed due to a failure to make a material disclosure.

In the same vein is *Porter v. Texas Commerce Bancshares*, 1989 WL 120358 (Del. Ch. 1989), where stockholders sought to rescind a merger that had already taken place. Defendants moved to dismiss, arguing that appraisal was the exclusive remedy. The Court concluded that a claim that a proxy statement is false or misleading in a material way is not a claim for which appraisal provides an exclusive remedy. Indeed, the Court observed that it would be anomalous to hold that a non-dissenting shareholder, who relied upon a reasonable assumption that the deal was done in good faith and with care, would be foreclosed, based upon an appraisal remedy that would not be available to a non-dissenting shareholder, from suing directors for

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[9]This may not be significant since, by commencing this action, Levy has submitted to the jurisdiction of the Court, just as non-New York residents might chose to do via an opt-in procedure.

breach of duty. *Id.* at **1129.

Defendants also rely upon *Louisiana Municipal Employees' Retirement System v. Crawford*, 2007 WL 582510 (Del. Ch. 2007). But that case, too, is distinguishable in the sense that one of the very things not disclosed was the entitlement to appraisal. The Court held that the shareholder vote could not take place until after there was proper disclosure of the appraisal right and the structure of bankers fee. However, the Chancery Court did observe that, once this disclosure was made, the existence of the appraisal right weakened plaintiff's argument for an injunction barring the vote from taking place at all. While there were "serious questions" concerning the merger negotiations, the Court put "great trust in the decisions of informed, disinterested shareholders". *Id.* at *13. The Court stated: " So long as appraisal rights remain available, shareholders fully apprised of all relevant facts may protect themselves" without judicial assistance. *Id.* But this language has an important caveat: that there have been full disclosure of all relevant facts, something Plaintiff disputes here.

Plaintiff relies upon *In Re MONY Group Inc. Shareholder Litigation*, 852 A.2d 9, 19 (Del. Ch. 2004), where the Chancery Court found that a preliminary injunction should issue to block a shareholder vote on a merger where the proxy statement was misleading. There, the board had rejected an original offer because of outsized change in control payments. After the deal was amended, the proxy statement reported the efforts that the board made to lower the payments, which created the strong impression that the revised payments were in line with those in comparable transactions. However, the board had before it an analysis of comparable transactions which showed that even the reduced change in control payments were still higher than indicated by the comparables. While the board may not have required to disclose the comparative analysis in the first place, by having stressed the reduction in the payments and the correlation between that reduction and the negotiated per share price, the proxy statement misleadingly implied that the change in control payments were consistent with current market practices. 852 A.2d at 26-27. On the other hand, the *MONY* court specifically rejected plaintiffs' claim that their criticisms of the methodology used by the company's financial advisor gave rise to a disclosure issue – a point that would seem contrary to Plaintiff's challenge to Lazard's methodology here. Indeed, *MONY* points out that the applicable standard, as to the merit of the underlying transaction, is not whether the directors came to a perfect decision, but whether they came to a reasonable one. *Id.* at 19-20.

In any event, the *MONY* Court granted the injunction, holding that Delaware courts "recognize the irreversible harm which would occur by permitting a stockholder vote on a merger to proceed without all material information necessary to make an informed decision". *Id.* at 32. However, the Court also observed that the supplemental decision it required could be accomplished quickly and that any delay would be short.

The Court believes that Plaintiff, here, reads, *MONY* to broadly. It does not appear to stand for the proposition that, standing alone, the mere prospect that the merger will require stockholders to cash out gives rise to irreparable injury. Rather, it seems to stand for the principle that, if the court is convinced that a proxy statement is materially misleading, it should not allow the stockholder vote until proper disclosure is made. This view of *MONY* would be consistent with the general Delaware principle that a strong showing on one injunction element (likelihood of success) can bolster a weaker showing on another (injury and harm). More important, in *MONY*, the Court made a determination the proxy statement was misleading – not just an indication that plaintiffs might succeed at a later date in proving that it was so. It would, of course, be surprising for a court not to enjoin a meeting that was being conducted on the basis of a proxy statement found to be misleading. This Court's reading of *MONY* is informed by *In Re IXC Communications, Inc.*, 1999 WL 1009174 (Del. Ch. 1999), one of the cases relied upon by *MONY*. In *IXC*, the Court found that while plaintiffs' challenge to the proposed merger was, to some extent, "colorable", an injunction would not issue to block the shareholder vote. "The mere prospect of perceived inequities which may result after a fully informed shareholder vote may be the subject of ex-post claims for relief but will not support the extraordinary measure of preliminary injunctive relief." *Id.* at *10.

Additionally, the Court believes that the filing of the 8-K form is a supplemental public disclosure that substantially mitigate any real risk of irreparable injury. *See State of Wisconsin Investment Board v. Bartlett*, 2000 WL 238026 (Del. Ch. 2000) at *10. The point is that material proxy deficiencies must be remedied before a vote. *See Ortsman v. Green*, 2007 WL 702475 (Del. Ch. 2007) at *2.

Here, the stockholders have been given not just notice of, but virtually all of the substance of, Plaintiff's claims. Stockholders have access not only to the nature of Plaintiff's claims but to the reasoning that lies behind them. Stockholders also have the names, addresses and telephone number of Plaintiff's counsel so that stockholders may contact them if they choose. Of some significance, while the 8-K was filed on March 23, this Court has not been advised that any additional stockholders wish to directly participate in the action. The filing of the 8-K makes it impossible for the Court to conclude that the shareholders lack all material information necessary to make an informed decision.

## THE BALANCE OF THE EQUITIES AND OF THE RELATIVE HARMS FAVORS DENIAL OF PRELIMINARY INJUNCTIVE RELIEF

Delaware law requires that, in determining the issue of preliminary injunction, the court should weigh the harm that plaintiff would sustain without one and the harm that defendant would incur by reason of one. This assessment militates against the grant of injunctive relief here.

As noted above, the harm that Plaintiff would incur without an injunction is the loss of perhaps $4.50 per share, aggregating, on the basis of 3,000 shares, to $13,500. On the side, the proposed merger (which is the only available offer) has a nine month outside date and could be terminated sooner if there is a failure of a condition or representation that results in a material adverse change. As a result, any delay creates consummation risk in and of itself.

Apart from the interests of the immediate parties, there are persons not before the Court who could be adversely impacted. If the Court were to enjoin the transaction, it is not inconceivable that the stock price could decline to its pre-merger level. A stockholder who had to sell the stock to raise cash and who could not await the determination of the action might sustain an irreparable loss. Those who held on to their stock would lose the time value of their funds.

If the Court were to grant preliminary injunctive relief, the giving of an undertaking would be mandatory. See CPLR 6312; *Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604 (2d Dept. 2004); *Livas v. Mitzner*, 303 A.D.2d 381 (2d Dept. 2003). *Schwartz v. Gruber*, 261 A.D.2d 526 (2d Dept. 1999); *Carter v. Konstantatos*, 156 A.D.2d 632 (2d Dept. 1989); *Litwa v. Litwa*, 89 A.D.2d 581 (2d Dept. 1982). The purpose of an undertaking is to provide a "ready source from which the defendant may recover for damages" sustained by reason of a preliminary injunction that is later found to have been improperly granted. *Margolies v. Encounter*, Inc., 42 N.Y.2d 475, 479 (1977). This consideration is all the more important here since Plaintiff is resident in a foreign country and its ability to respond in damages is not known. The Court would have to condition any relief upon an undertaking of millions of dollars as it could not relegate USI and the other Defendants to chase a foreign entity, with no known New York contacts and whose financial responsibility has not been made known.

To be considered as well, in assessing the equities of the situation, is Plaintiff's lack of diligence in pursuing this application. Delay, or laches, in presenting an application for injunctive relief, is surely a factor under New York law. *See Sportschannel America Associates v. National Hockey League*, 186 A.D.2d 417 (1st Dept. 1992); *Schulwolf v. Cerro Corp.*, 86 Misc.2d 292 (Sup. Ct. N.Y. County 1976). It seems to be a consideration under Delaware law as well. See *Ortsman v. Green*, 2007 WL 702475 (Del. Ch. 2007); *see also In re Sungard Data Systems, Inc. Shareholders Litigation*, 2005 WL 1653975 (Del. Ch. 2005).

This action was filed on January 17, 2007 and this application was not served until March 20, 2007, with the meeting then just nine days away. Even with that, the motion was not made returnable (in the first instance) until March 28, 2007. Plaintiff has known of the March 29 meeting date since at least the filing of Proxy Statement on March 1. While it is certainly commendable and appropriate for counsel to participate in settlement negotiations, counsel must be cognizant of the relevant time frames. Counsel should have inquired as to whether Defendants would consent to an adjournment of the March 29 meeting and, if informed that such consent would not be given, Plaintiffs would have been on notice of their obligation to seek judicial relief with dispatch.

In *Ortsman v. Green, supra,* the Court found plaintiff's request to seek an injunction timely where plaintiff moved quickly once the company made clear the proposed schedule for the stockholder meeting. In that case, the meeting was scheduled for March 28, 2007; the Court decided on February 28, 2007 to allow expedited discovery and scheduled a hearing for March 23, with a reply brief to be filed by March 21. In other words, plaintiff was in court, and the process for resolving the preliminary injunction application was underway, more than one month before the meeting date.

Additionally, the Court is not persuaded that Plaintiff has established a likelihood or probability of success on the merits, yet a further factor in the Court's assessment that the equities of this matter are with Defendants and not with Plaintiff.

## ASSESSMENT OF THE MERITS

Plaintiff asserts that it has shown a reasonable likelihood of success on the merits of its claims that (1) USI and the Individual Defendants violated their duty of care in approving the proposed merger; and (2) the Individual Defendants violated their duty of disclosure to the shareholders. The Court will deal with each of Plaintiff's claims, in turn. In approaching this assessment of the merits, the Court is mindful that Plaintiff has not yet had an opportunity to obtain complete discovery of documents and has not had the opportunity to obtain deposition testimony. This is significant in that there may well be evidentiary materials that could either inculpate, or exculpate, Defendants which are within Defendants' exclusive knowledge or control. Thus, the Court prefaces its assessment with the observation that the assessment is based upon the current record before the Court.

### A. Duty of Care

Plaintiff claims that instead of attempting to maximize shareholder value in connection with the proposed merger, the Individual Defendants breached their duty of care by conducting a flawed sales process that resulted in their acceptance of an inferior offer from Goldman Sachs and breached their duty of loyalty by accepting Goldman Sachs' offer in order to secure substantial benefits for themselves.

It is well settled that "... in making business decisions, directors must consider all material information reasonably available ..." and "that the directors' process is actionable only if grossly negligent." *Brehm v. Eisner,* 746 A.2d 244, 259 (Del. 2000). Under the well-known business judgment rule, there 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. *Id.; see also, Hanson Trust PLC v. ML SCM Acquisition, Inc.,* 781 F.2d 264, 273 (2d Cir. 1986). Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption. *See Puma v. Marriott,* 283 A.2d 693, 695 (Del. Ch. 1971). Accordingly, Plaintiffs bear the burden to show that the defendant directors failed to act in good faith, or in the honest belief that the proposed merger was in the best interest of the corporation, or on an informed basis. *In re Compucom Systems, Inc. Shareholders Litigation.,* 2005 WL 2481325, *5 (Del. Ch. 2005).

"The consequences of a sale of control impose special obligations on the directors of a corporation. In particular, they have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the shareholders." *Paramount Communications Inc. v. Q.C. Network, Inc.,* 637 A.2d 34, 43 (Del. 1994); *see also, Mills Acquisition Co. v. Macmillan, Inc.,* 559 A.2d 1261, 1285 (Del. 1989) (board's efforts must be designed to enhance interests of stockholders); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,* 506 A.2d 173, 182 (Del. 1986) (board charged with obligation to obtain best price for shareholders in sale). In this context, the directors are still entitled to the presumption that they satisfied their fiduciary duties in accordance with the business judgment rule. *See, e.g., In re Compucom Systems, Inc. Shareholders Litigation.,supra* 2005 WL 2481325, at *5. As such, "... courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness." *In re Toys 'R' Us, Inc. Shareholder Litigation,* 877 A.2d 975, 1001 (Del. Ch. 2005); *see also Paramount Communications, Inc. v. Q.C. Network, Inc., supra,* 637 A.2d at 45.

The Delaware Supreme Court has emphasized that "there are many business and financial considerations implicated in investigating and selecting the best value reasonably available" which are within the expertise of the board of directors. *Paramount Communications, Inc. v. Q.C. Network, Inc., supra,* 637 A.2d at 45. As such, "there is no single blueprint that a board must follow" in fulfilling its fiduciary duties in the context of a sale of a company. *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989); *McMillan v. Intercargo Corp.,* 768 A.2d 492, 502 (Del. Ch. 2000). It has further been held that:

> ... a court applying enhanced judicial scrutiny should be deciding whether the directors made a reasonable decision, not a perfect decision. If a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination. *Paramount Communications Inc. v. Q.C. Network, Inc., supra,* 637 A.2d at 45.

Here, the present record fails to establish that the sales process was flawed. It is apparent that the USI Board engaged in a process reasonably designed to achieve the best available price for the company, in that the Board, when informed of a potential buyer (Sponsor A) formed a Special Committee of independent directors having business acumen which, in turn, retained its own experienced financial and legal advisors; (b) publicly announced the formation of the Special Committee and its mandate, putting interested bidders on notice that the Company was for sale and effectively inviting them to make an offer, and (c) followed the recommendation of the Special Committee and its independent financial advisor with respect to which transaction to pursue and at what price.

Plaintiff's criticisms of the process appear to be without merit. First, Plaintiff suggests the process was flawed because the USI restricted strategic buyers' access to due diligence materials, while "granting unfettered access to Goldman and the other financial buyers." While Plaintiff asserts that this action ostensibly deprived these strategic buyers (*i.e.*, competitors) of the means adequately to analyze whether integrating USI into to their operations could be accomplished in an efficient manner, it is obvious that, unless and until a purportedly interested party demonstrated its credentials as a serious bidder, there could well be substantially more risk than reward in providing a competitor with access to detailed and competitively sensitive data. *See, In re the MONY Group Inc. Shareholder Litigation, supra* 852 A.2d 9, 21 (Del. Ch. 2004) (where court held it to be reasonable to fail to pursue public auction, *inter alia*, as a result of the concern that competitors might use the process to obtain due diligence from the company and gain access to the company's career agents). Plaintiff's submissions fall far short of demonstrating that strategic buyers were deprived of information reasonably necessary to evaluate the proposed transaction and that the board acted unreasonably in protecting sensitive information. Further, while its apparent that the somewhat interested strategic bidders cited integration, synergy or cost cutting concerns in declining to continue in the process, there is no reason to believe, at this point, that this was because of a lack of information as distinguished from their evaluation of the information they did have.

Plaintiff criticizes the sales process by suggesting that the Special Committee was dominated by Mr. Eslick, who participated in meetings with potential buyers, with Lazard, and with the Special Committee. This criticism appears to be meritless. Indeed, it seems to the Court logical, reasonable, and prudent for the Special Committee, and its financial adviser, to obtain input from the Chief Executive. Information from Mr. Eslick would appear likely to result in a better-informed Special Committee. Likewise, it would difficult to fathom a circumstance in which a potential acquirer would not want to meet with the seller's Chief Executive Officer, if for no other reason, its own due diligence. In any event, it is clear from a review of the Proxy Statement that (a) the Special Committee and Lazard (as opposed to Mr. Eslick) identified the potential bidders to be contacted before the process was made public, and (b) that Mr. Eslick participated in Special Committee meetings as a conduit of information and was excused from those meetings when it came time for deliberation and the taking of decisions. Perhaps Plaintiff can develop more information through discovery and depositions but certainly a probability of success on this theory has not been shown.

Plaintiff contends that the USI board erred to the detriment of the shareholders when it relied upon the financial analysis performed by Lazard, and asserts that the resulting sales price is unfair. To that end, Plaintiff submits an affidavit by Matthew Morris, the Managing Director of Fin Econ Partners, a financial advisory firm. Upon a review of data provided to him by Plaintiff, Mr. Morris opines: (a) that Lazard applied unreasonably low pricing multiples for the public companies it considered in calculating a value of USI's stock; (b) that Lazard erred in excluding values based on Cash EPS multiples in the final Fairness Presentation; (c) that Lazard failed to make the proper valuation adjustments necessary to account for USI's control (or takeout) value; (d) that in its discounted cash flow analysis, Lazard failed to consider the value of the Company's approximately $37 million in available cash and equivalents as of December 31, 2006; and (e) that EBITDA exit multiples used by Lazard in its Discounted Cash Flow Analysis failed to account for the control value that would be reflected in a future sale of USI.

Defendants object to the Court's consideration of the Morris submission on several grounds.

Defendants assert Mr. Morris has no relevant experience, as his Curriculum Vitae does not demonstrate he ever has (I) provided investment banking advice to a board of directors or special committee of a public company exploring strategic alternatives; (ii) rendered a fairness opinion to a board of directors or special committee of a public company with respect to a proposed strategic transaction; or (iii) drafted a proxy statement.

Defendants object to the Morris submission on the ground that it is devoid of competent foundational data. They assert the affidavit is based exclusively on selective information provided to Morris by Plaintiff from three of the seven presentations Lazard made during the course of its engagement for the Special

Committee.

Further, Defendants assert Mr. Morris failed to undertake an independent valuation analysis of his own, was not privy to Lazard's oral presentations or discussions with the Special Committee concerning valuation, has never spoken with USI management, never reviewed any deposition testimony from members of the Special Committee or Lazard concerning the presentations at issue, and conducted no due diligence on USI.

Defendants also submit an affidavit from Stephen Campbell, a Managing Director at Lazard with many years of experience in investment banking which, according to Defendants, refutes Mr. Morris' assertions.

As a result of the submission of this application for preliminary injunctive relief just four days prior to the scheduled shareholder's vote, the Court has had an unusually compressed time in which to evaluate the complex financial analyses and arguments tendered. Even assuming, however, that the Court were to decide that Mr. Morris is an expert qualified to render an opinion on the valuation performed by Lazard, the Court is left with significant factual disputes as to the appropriate methodology for conducting the valuation, which prevent the Court from finding that Plaintiff has met its burden on this issue. See, e.g., *Faberge International. v. DiPino,* 109 A.D.2d 235, 240 (1st Dept. 1985). Further, even if the positions asserted by Mr. Morris are reasonable, it has not been shown that the Special Committee breached its duties by not foreseeing these criticisms or by relying on the Lazard opinion, which was just one of many factors leading it to recommend the deal. There are a number of other external factors (such as the lack of any other serious bidders, the then current market price, the historic market price, etc.) that would support the deal, apart from the Lazard opinion.

Plaintiffs further allege that the Defendants breached their duty of loyalty by skewing the sales process and the buyout to favor their interests as well as those of the Company's executive management over those of the stockholders. Plaintiffs assert that longstanding business and personal ties between the Individual Defendants, including the members of the Special Committee, posed conflicts of interest that infected the sales process and ultimately, their acceptance of Goldman Sachs' offer.

In evaluating Plaintiff's claims, the Court notes that the proposed merger was approved by a Special Committee comprising independent, outside directors who constitute a majority of the USI Board. Under Delaware law, absent a showing that a majority of a board that approved the transaction in dispute was interested and/or lacked independence, the courts respect the business judgment of the board. See *Orman v. Cullman*, 794 A.2d 5, 23 (Del. Ch. 2002); Under Delaware law, a director is "independent" if he "neither appear[s] on both sides of a transaction nor expects to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally." *See Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 174, n. 140 (Del. Ch. 2005) (internal citations omitted). That standard has been met here or, at least, Plaintiff has not shown that its challenge on this basis is probable of success.

**B. <u>Duty of Disclosure</u>**

Plaintiffs contend that the USI and the Individual Defendants failed in their disclosure obligations in the Proxy Statement by, *inter alia*: failing to disclose charts of revenue or earnings projections that were relied upon by Lazard in its fairness opinion; failing to disclose the manner in which Goldman Sachs entered the sales process; setting forth the specifics of any of the proposals by other bidders; failing to disclose that the Goldman Sachs deal contemplates potential equity participation by USI management; and failing to disclose conflicts of interest.

Plaintiffs' arguments, in the main, seem precluded by *Skeen v. Jo-Ann Stores, Inc.,* 750 A.2d 1170 (Del. 2000). There, the Delaware Supreme Court held that it is duty of directors to "disclose fully and fairly all material information within the board's control...." 750 A.2d at 1172. Omitted facts are considered material "if there is a reasonable likelihood that a reasonable stockholder would consider [them] important in deciding how to vote." *Id.* There must be "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable stockholder as having significantly altered the 'total mix' of information made available." *Id.* In *Skeen*, the Delaware Supreme Court distinguished between facts which might be helpful and those which are material. In particular, at least on the facts of that case, the Court ruled that management projections fall into the "helpful" but not "material" category, at least in the absence of a showing that "the undisclosed information is inconsistent with, or otherwise significantly differs from, the disclosed information." *Id.* at 1174.

Contrary to Plaintiff's assertion, the Proxy Statement does disclose the manner in which Goldman Sachs entered the sales process – it states that Goldman Sachs contacted Lazard. The Court was somewhat intrigued by the fact that this contact occurred prior to the time that Lazard's role had been publically disclosed, thus raising the question as to how Goldman Sachs learned of Lazard's involvement. While Plaintiff sees the possibility of nefarious behavior, the Court cannot draw an inference of skullduggery based on this as-of-now unaccounted for situation. As discussed during oral argument, the possibility exists that this was a coincidence or, more likely, Lazard's role was reported by one of the existing bidders to someone in the financial community. But the Court cannot say that a definitive explanation of this curiosity would have significantly altered the total mix of information available or that a reasonable stockholder would have considered this information material.

Plaintiffs contend that the Proxy Statement failed to disclose that the final offer from Goldman Sachs contemplated an agreement with USI management on equity participation before signing. Yet, Plaintiffs concede that the Proxy Statement warns that there is a possibility that management members may participate in equity after the buy-out and that such matters were subject to negotiation and no agreement has been made. No information has been developed, at least as of yet, to indicate that any USI management members, in fact, had an undisclosed agreement for equity participation at the time of the Proxy Statement. While the final Goldman Sachs offer summary submitted to this Court apparently relates to the final offer made on December 19, 2006, it is of significance that no agreement as to management equity had apparently been made as of March 1, 2007 when the Proxy Statement was filed. In any event, the Court finds it difficult to accept the idea that a reasonable stockholder would not be aware that, in general, senior management seek equity participation, or at least equity reward, in the form of options or grants, as a form of compensation. Indeed, this issue has been front and center in the financial community in the past few years. It could hardly be a surprise to a reasonable stockholder that USI senior management might want to negotiate a benefits package, inclusive of equity participation, in order to stay on after the merger. Further, the Proxy informs that certain directors and officers already had significant options on USI stock. Accordingly, the Court cannot conclude that Plaintiff's argument concerning further disclosure of equity participation possibilities is likely to succeed.

Likewise, the Court cannot credit Plaintiff's claim that further disclosure of conflicts of interests was required. The Proxy Statement, as it is, sets forth significant information regarding potential conflicts and it is difficult to see how the information cited by Plaintiff would truly add to the total mix of information already disclosed. In particular, the Court notes that Lazard disclosed that its fee would in large part be contingent, that it had provided services to Goldman Sachs entities, and that it had traded in Goldman Sachs securities. Plaintiff points out that a Goldman Sachs entity owns almost $56 million of stock in a Lazard affiliate. But, as Compass points out, that holding is but a pebble in the Goldman Sachs ocean. While the Court would certainly not dispute that $56 million is a lot of money, as in all things, money is relative.

In any event, as previously discussed, the 8-K filing has put all of Plaintiff's claims of non-disclosure, and its entire Amended Complaint (except for one chart) before the public. That filing, which occurred on March 23, 2007 (some six days before the vote), by itself, alerts stockholders to the issues which Plaintiff alleges constitute omissions or misstatements.

For these reasons, the Court does not find that Plaintiff has established a reasonable likelihood of success.

## **DISCOVERY**

The Court does not see any good cause to alter the discovery provisions of the existing Preliminary Conference Order.

## **CONCLUSION**

The Court concludes that Plaintiff's motion should be denied in all respects.

Because there may yet be documents with the Court that should remain under temporary seal, the Court will sign the decision herewith but will not file it nor the materials considered until Friday, March 30, 2007. For present purposes, the Court is providing this Decision and Order to counsel only. Counsel shall appear in this Court on Friday, March 30, 2007 at 11:00 a.m. to address the issues relating to public access to this Decision and Order and the motion materials, unless the Court receives prior to 5 p.m. on Thursday, March 29, 2007 a stipulation from counsel indicating that **all** material filed with the Court and listed hereinafter may be publicly filed together with a complete copy of this Decision and Order.

The Court has considered the following papers, noting that, in the interests of expedition, it has overlooked all defects in form, including but not limited to defects in the form of affidavits and declaration and the submission of oversized briefs:

a) Notice of Motion, dated March 19, 2007; Affidavit of David A. Rosenfeld, Esq., dated March 19, 2007 and the exhibits annexed thereto; Affidavit of Matthew Morris, dated March 19, 2007 and the exhibits annexed thereto;

b) Order to Show Cause issued March 22, 2007; Affirmation of Pamela Lynam Mahon, Esq., dated March 21, 2007, and the exhibits annexed thereto;

c) Amended Class Action Complaint, dated March 21, 2007;

d) Plaintiff's Memorandum of Law, dated March 19, 2007;

e) Letter from David A. Rosenfeld, Esq., dated March 23, 2007, with enclosure;

f) Preliminary Conference Order issued March 16, 2007;

g) Letter from Robert C. Myers, Esq, dated March 21, 2007;

h) Declaration of Stephen Campbell, dated March 23, 2007

I) Memorandum of Law of USI Defendants, dated March 26, 2007;

j) Memorandum of Law of Compass, dated March 26, 2007; and

k) Transcripts of the proceedings conducted before this Court on March 16, 21, and 26, 2007.

Accordingly, for the reasons stated and based upon the papers aforesaid, it is hereby

ORDERED that the motion by Levy Investments Ltd. for a preliminary injunction and other relief is denied in all respects; and is further

ORDERED that counsel for all parties shall appear before this Court on Friday, March 30, 2007 at 11:00 a.m. to address the issues relating to public access to the motion materials and this Decision and Order unless the Court receives prior to 5 p.m. on Thursday, March 29, 2007 a stipulation from counsel indicating that **all** material filed with the Court and listed above may be publicly filed together with a complete copy of this Decision and Order.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
March 28, 2007

**ENTER:**

**ALAN D. SCHEINKMAN**
**Justice of the Supreme Court**

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