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IN THE SUPREME COURT OF THE STATE OF DELAWARE

UNOCAL CORPORATION, a Delaware corporation, Appellant, v. MESA PETROLEUM CO., a Delaware corporation, MESA ASSET CO., a Delaware corporation, MESA EASTERN, INC., a Delaware corporation, and MESA PARTNERS II, a Texas partnership, Appellees.	§ § § § § § § § § § § § § § § § §	No. 152, 1985

APPELLANT'S OPENING BRIEF

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NATURE OF THE PROCEEDING AND DECISION OF THE COURT BELOW

Unocal Corporation ("Unocal") appeals from the May 13, 1985 decision of Vice Chancellor Berger preliminarily enjoining its tender offer for 87.2 million of its shares in exchange for $72 in securities ("Exchange Offer").

In her opinion of May 13, 1985, the Vice Chancellor found (i) that the Board's decision to commence the Exchange Offer was based on the Board's good faith belief that the Mesa Tender Offer is inadequate (Op. 16),* (ii) that Unocal's consideration of the Mesa Offer was an informed one, undertaken with due care (Op. 20-21), and (iii) that Mesa's prior activities "justify a reasonable inference" that Mesa's principal objective is to be bought out at a substantial premium. (Op. 14). Moreover, the Court concluded that the Exchange Offer did not constitute an unlawful interference with Mesa's prospective business relations (Op. 21), was fully and frankly disclosed to Unocal's shareholders (Op. 22-23), and had no direct impact on Mesa's proxy solicitation. (Op. 21-22).

However, because the Vice Chancellor concluded (i) that a selective stock repurchase undertaken to defeat a hostile tender offer is not within the parameters of the

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* References to the Opinion of the trial court is cited in the form "Op. ___." References to Appellant's Appendix are cited in the form "App. ___." References to Appellant's Supplemental Appendix are cited in the form "Supp. App. ___." References to affidavits filed by Appellees are cited by the deponents name.

business judgment rule (Op. 19), (ii) that directors owe a duty of "fairness" to corporate raiders making concededly inadequate tender offers (Op. 18-20), and (iii) that the Exchange Offer "will make it more difficult for Mesa to succeed in its takeover efforts" (Op. 24), she preliminarily enjoined the Exchange Offer.

The Vice Chancellor made no finding that the directors were primarily motivated by a desire to perpetuate themselves in office or seek personal pecuniary gain. Nor did she find that $72 is not equal to the fair asset value of a share of Unocal stock. Indeed, she expressly viewed that question as irrelevant to her decision.

QUESTION PRESENTED

Whether a corporation, after its board of directors has determined in good faith that an admittedly inadequate tender offer made by a known corporate raider seeking selective treatment is not in the best interests of the corporation or its shareholders, may, in order to mitigate the ill effects of the inadequate offer on the other shareholders, repurchase less than a majority of its shares for a fair value without extending the offer to the raider?

SUMMARY OF ARGUMENT

1. The Exchange Offer, including the exclusion of Mesa therefrom, is on the record of this case a proper defense to Mesa's inadequate and coercive two-tier tender offer.

2. Although Unocal's board was not required to show that the Exchange Offer was fair to Mesa, in fact it has done so.

3. Mesa has failed to show that it will suffer any irreparable harm if the Exchange Offer is permitted to proceed.

STATEMENT OF FACTS

The Exchange Offer is a response to a hostile tender offer made by Mesa Petroleum Co. and certain affiliates, all controlled by T. Boone Pickens, Jr., (collectively "Mesa") in which Mesa seeks to acquire 51% of Unocal's outstanding shares for $54 cash, followed by a second step transaction, in which it will acquire the remaining shares for a debt package represented as having a value of $54. Such front end loaded two-tier tender offers are inherently coercive in that shareholders are stampeded into tendering into the front end cash tender in order to avoid the uncertainties surrounding the securities to be offered in the back end merger. (App. 403-04). Mesa does not contest this fact, and indeed admits that such offers are coercive. (Supp. App. 909-10).

In tendering at $54 per share, Mesa seeks to purchase Unocal for what it admits is an inadequate price. Mesa's own internal analysis, utilized both at its board meetings as well as in its attempts to obtain financing for its offer from others, "conservatively" values Unocal at $64 per share (App. 141-44) and also includes the value arrived at by John S. Herold, Inc. "a recognized authority," who appraised Unocal at $74 per share (App. 142) as well as the "widely accepted" Donaldson, Lufkin & Jenrette "net asset value" of $86 per share. (_Id_.). At the same time, Mesa's investment advisor, Drexel Burnham Lambert Incorporated, was preparing to distribute to its customers as part of its normal business a report valuing Unocal at $58 per share and stating that Unocal's shares would be worth up to $72.34 upon liquidation. (App. 168-69). On the date that report was to be released, Mesa retained Drexel and the report was never publicly distributed. (Supp. App. 919). This case is thus unique in that Mesa has _admitted_ that its offer is inadequate by at least $10 per share and perhaps as much as $20 or $30 per share.

Following announcement of Mesa's Offer, the Unocal Board met on May 13 for over nine hours, receiving extensive detailed reports from two investment banking firms, outside lawyers, and in house financial experts. (Op. 4-9). The investment bankers had recently completed separate six week studies of Unocal and advised the Board that in their opinions (reached independently) Unocal had a value of $70 to $75 per share. (Op. 7). On April 13, 1985, the Board determined "in good faith" to reject the Mesa Offer as "grossly inadequate" and not in the best interests of Unocal and its shareholders. (Op. 16).

The Board was well aware prior to its April 13 meeting of Mesa's reputation as a corporate raider and one who seeks and has obtained selective treatment as a greenmailer. (E.g., App. 256, 261, 265-70, 275). Here, the Vice Chancellor found that the facts "justify a reasonable inference" that "Mesa's principal objective is to be bought off at a substantial premium." (Op. 14).

At the April 13 Board Meeting, Unocal considered various possible defenses designed to protect stockholders from Mesa's inadequate and coercive offer,* and received extensive presentations concerning a possible self-tender (Op. 5-7). However, no action was taken at that time. On April 15, the Board met again, for over two hours, with financial advisors and counsel present, and approved the Exchange Offer to Purchase up to 87 million of the Company's outstanding shares for senior securities designed to be worth $72 per share (Op. 9).

It is undisputed that, as formulated at the April 13 and 15 meetings, the purpose of the Exchange Offer was "to discourage Mesa's tender offer and to provide 'appropriate value' for those shares remaining after completion of the tender offer." (Op. 6). Accordingly, the Exchange Offer was not extended to Mesa, as this would tend to defeat both

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* The parties and the Vice Chancellor agree that corporate directors have a duty to protect the corporation and its stockholders from others, including inadequate or coercive "offers" for control by present stockholders. (Op. 12).

of its purposes: It would encourage, rather than discourage the Mesa Offer, since Mesa would be able to sell shares at $72 and later buy the equity represented by those shares for a price of $54, thus placing Unocal in the anomalous position of financing the very offer it was trying to defeat. In addition, each Mesa share purchased by Unocal would displace one share tendered by the public stockholders of Unocal, thereby reducing the value available to such stockholders.

As originally approved, the Exchange Offer was contingent upon Mesa acquiring control of Unocal (the "Mesa purchase condition"). However, the market became concerned that, if shares were tendered to Unocal, no shares would be purchased by Unocal or Mesa. (Op. 9-10). Accordingly, on advice from its investment bankers, Unocal decided on April 22 to waive the Mesa purchase condition with respect to 50 million shares. At that meeting, the Board reaffirmed its reasons for excluding Mesa from the Exchange Offer. (Op. 10).

Following announcement of the Exchange Offer, Mesa publicly encouraged Unocal shareholders to tender to Unocal and repeatedly announced its intention to acquire all of Unocal's shares. (Supp. App. 913). Thus, regardless of whether Mesa is excluded from the Exchange Offer, Mesa intends to acquire ownership and control of Unocal, albeit at a lower price. (App. 904-05).

ARGUMENT

I. IN THE CIRCUMSTANCES OF THIS CASE, UNOCAL'S DIRECTORS PROPERLY EMPLOYED THE EXCHANGE OFFER TO PROTECT UNOCAL AND ITS STOCKHOLDERS FROM MESA'S TACTICS.

A. Unocal's Board Concluded Reasonably And In Good Faith That Mesa's $54 Two-Tier Offer Was Coercive And Inadequate And That Mesa Sought Selective Treatment For Itself.

The Vice Chancellor correctly found that the Board's judgment that the $54 price was inadequate was made in good faith and was an informed decision. (Op. 16, 20-21). However, that judgment was not merely one that reasonable directors could make; it is a judgment that, on this record, reasonable directors had to make.

The undisputed objective facts are that Unocal is worth substantially more than $54 per share. See p. 4, supra.

Thus, Unocal's Board was, and this Court is, faced with a unique situation in which an offeror (Mesa) has sought to acquire control of a company at a concededly inadequate price. Mesa is thus attempting to capture for itself, and at the expense and to the detriment of all other Unocal stockholders, all of the value of Unocal above the admittedly inadequate price of $54 per share. If, for example, one accepts Mesa's $64 valuation, Mesa's total profit from acquiring for $54 per share the 153 million shares it does not presently own would be over $1-1/2 billion. Thus, even if Mesa were not successful in obtaining greenmail, it could obtain selective treatment for its shares by seizing for itself all of the values already present in Unocal through its concededly inadequate tender offer. As Judge Tashima held in the California Action, Mesa's clear intention from the outset was "to put Unocal 'in play' and thereby either obtain control or 'greenmail' the corporation in exchange for dropping its bid." Unocal Corp. v. T. Boone Pickens, Jr., supra, slip op. at 13. (Supp. App. 920 at 932). Either way, Mesa seeks a profit not available to other stockholders of Unocal.

The inadequacy of the Mesa Offer is compounded by the fact that the offer is a "two-tier" offer, i.e., higher quality consideration will be paid in the front-end tender offer than in the back-end merger. Stockholders faced with such an "offer" are not truly free to decline the front end, even if they believe it to be inadequate, because they know that if the offer succeeds, they will receive even less in the back-end merger, (here, unspecified, highly subordinated debt securities purportedly worth $54, rather than $54 in cash). There is unrebutted evidence that the two-tier Mesa Offer is coercive (App. 403-04). See also SEC Advisory Committee on Tender Offers, Report of Recommendations, p. 25 (two-tier offers "have coercive elements" and "the potential . . . for abusive tactics and practices."); Moran v. Household International, Inc., Del. Ch., C.A. No. 7730, Walsh, V.C., at 43 (Jan. 29, 1985), appeal pending, Del. Supr., Nos. 37, 1985, 47, 1985) (noting "the coercive nature of such tender offers").

B. The Board's Approval Of The Exchange Offer Was Made In Good Faith.

The Vice Chancellor found as a matter of fact that the directors' decision to proceed with the Exchange Offer "was made in the good faith belief that the Mesa tender offer was inadequate." (Op. 16). That finding was clearly correct.

First, a majority of Unocal's board is independent. (Second Amended Compl., ¶¶ 7-9). Second, the financial effect of excluding Mesa on most of Unocal's outside directors is *de minimis* and is shared pro rata with all stockholders other than Mesa. (See App. 31-32). Third, the directors' decision to tender shares was not made until *after* the decision to proceed with the Exchange Offer had been made (App. 272); and fourth, the directors decided to tender their shares upon the advice of counsel that it is customary for directors recommending an Exchange Offer to tender their personal holdings. (App. 388). There is no evidence that Unocal's directors acted to further any personal interest, and overwhelming evidence that they acted for the entirely proper purpose of seeking to protect Unocal's stockholders.

C. The Board Exercised Reasonable Care In Approving The Exchange Offer.

The Vice Chancellor also found as a matter of fact that the Board satisfied its duty of care to Mesa in considering the Mesa and Exchange Offers. (Op. 20-21). Unocal's Board met for a total of approximately fourteen hours on three occasions in connection with the Exchange Offer, and received the advice of management financial officers, two independent investment bankers, and three sets of outside counsel. Extensive discussion and questioning took place concerning all aspects of the Mesa Offer and the Exchange Offer. (E.g., App. 251, 272; 532; 717-18; 617; 681; 688; 703-04; 632-33; 676, 684). The thoroughness of the Board's consideration is remarkable considering the time pressures imposed by Mesa's suprise tender offer, made on the shortest timetable permitted by federal law.

D. In These Circumstances, Unocal's Directors Do Not Owe A Duty Of "Fairness" To Mesa.

Under these facts, well established Delaware law provides that the Board's adoption of the Exchange Offer is entitled to the presumptions of the business judgment rule. See May 2 Order of this Court at ¶ 6. However, the Vice Chancellor held that the Board had to prove, instead, the fairness of the Exchange Offer to Mesa. This was error.

The Vice Chancellor's analysis of the Board's duty to Mesa in the face of Mesa's quest for selective treatment at the expense of Unocal's stockholders begins, correctly, with a series of cases in which defensive techniques undertaken for the express purpose of deterring a raider have been found to be protected by the business judgment rule. GM Sub Corp. v. Liggett Group, Inc., Del. Ch., C.A. No. 6155, Brown, V.C. (Apr. 25, 1980) (sale of the company's "crown jewel" to a third party at a fair price); Pogo Producing Co. v. Northwest Industries, Inc., No. H-83-2667 (S.D. Tex., May 24, 1983) (non-discriminatory self-tender); Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981) (acquisitions made to create antitrust problems for the raider); Treadway Cos., Inc. v. Care Corp., 638 F.2d 357 (2d Cir. 1980) (issuance of a block of stock to a perspective "white knight" merger partner); Carter Hawley Hale Stores, Inc. v. The Limited, Inc., No. 84-220-AWT (C.D. Cal., Apr. 17, 1984) (market purchases of common stock and issuance of new preferred). (Op. 14-15). The transactions permitted in these cases were "unfair" to the raider in that they are designed to defeat his bid for control, either by making the company less attractive or by diluting his interest in it. Such transactions also benefitted third parties, or else the third parties presumably would not have entered into them. This case presents the question whether a corporation may take action which benefits its non-raider stockholders, rather than some third party, to protect those stockholders and discourage the raider. The fact that the raider may consider the transaction to be "unfair" to him is plainly irrelevant, since all defensive efforts are, by definition, "unfair" to the raider.

The cases permitting defensive actions are consistent with Kors v. Carey, Del. Ch., 158 A.2d 136, 141 (1960), in which the Court of Chancery held that "directors, while bound to deal with stockholders as a class with scrupulous honesty, may in the exercise of honest business judgment adopt a valid method of eliminating what appears to them a clear threat to the future of their business by any lawful means." As the Vice Chancellor conceded, citing Cheff v. Mathes, Del. Supr., 199 A.2d 548 (1964), a selective repurchase of a dissident's stock "is a valid means of eliminating the perceived harm from a takeover." (Op. 17, emphasis added). See also Kors v. Carey, supra; Kaplan v. Goldsamt, Del. Ch., 380 A.2d 556 (1977).

In Cheff, this Court, relying upon the decision in Hall v. Trans-Lux Daylight Picture Screen Corp., Del. Ch., 171 A.2d 226 (1934), stated:

> Similarly, if the actions of the board were motivated by a sincere belief that the buying out of the dissident stockholder was necessary to maintain what the board believed to be proper business practices, the board will not be held liable for such decision, even though hindsight indicates the decision was not the wisest course [citing Kors v. Carey].

The Court in Cheff went on to summarize its burden of proof discussion as follows:

> The question then presented is whether or not defendant satisfied the burden of proof of showing reasonable grounds to believe a danger to corporate policy and effectiveness existed by the presence of Maremont stock ownership. It is important to remember that the directors satisfy their burden by showing good faith and reasonable investigation; the directors will not be penalized for an honest mistake of judgment, if the judgment appeared reasonable at the time it was made.

199 A.2d at 548.*

However, notwithstanding Kors and Cheff, the Vice Chancellor concluded that "good faith beliefs are not sufficient justification to discriminate" against a raider (Op. 19), and that the exclusion of Mesa from the Exchange Offer was not protected by the business judgment rule, but that instead Unocal had the burden of establishing the

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* Just three months ago, in Moran v. Household Int'l, Inc., supra, Del. Ch., C.A. No. 7730, Walsh, V.C., slip op. at 37 (Jan. 29, 1985) (appeal pending), the Court of Chancery interpreted the burden of proof holding in Cheff v. Mathes as follows (emphasis added):

> Household is not required, however, to demonstrate the intrinsic fairness of the Plan. The Cheff standard requires the defendant directors to show that their adoption of the Plan was "reasonable at the time" (199 A.2d at 555). The burden thus placed may be viewed as the burden of going forward on a showing of reasonableness rather than a burden of pursuasion. Because of the protection afforded directors by the business judgment rule the latter burden does not shift and remains with the plaintiffs.

fairness of the Exchange Offer as to Mesa (Op. 20). This conclusion is both contrary to precedent and wrong as a matter of policy.

In concluding that Unocal owed a duty of fairness to the raider, the Vice Chancellor distinguished Cheff v. Mathes, Kors v. Carey and Kaplan v. Goldsamt on the grounds that, in those cases, the dissident's stock was bought for a price he "presumably found to be acceptable." (Op. 18). In the context of this case, that holding stands squarely for the proposition that the only form of selective repurchase permitted in the face of a coercive and inadequate offer is greenmail. We submit that there is no basis for reading such a "consent" qualification into the Cheff line of cases. Those cases establish that, once good faith has been demonstrated, the business judgment rule applies.

The Vice Chancellor's view that Cheff and its progeny only apply if a stockholder consents to discrimination in its favor is directly contrary to Hall v. Trans-Lux Daylight Picture Screen Corp., supra, which was relied upon in both Kors v. Carey and Cheff v. Mathes. In Hall, the Court of Chancery held that incumbent directors could cause a corporation to bear the expense of a proxy contest against dissident stockholders who supported a merger which the incumbent directors considered to be unfair. See also Hibbert v. Hollywood Park, Inc., Del. Supr., 457 A.2d 339 (1983). Obviously, the dissident in Hall did not consent to the use of corporate funds in the proxy contest against him.

Similarly, in Edelman v. Phillips Petroleum Co., Del. Ch., C.A. No. 7099, slip op. at 7, Walsh, V.C. (Feb. 12, 1985), the Court of Chancery recently held that the action of Phillips in suing Mesa (and obviously expending corporate funds to do so) was "a proper exercise of managerial judgment as part of an overall effort to resist a potentially destructive tender offer." Once again, it can hardly be said that litigation against Mesa in that circumstance was "acceptable" to Mesa, or that Mesa consented to be sued.

Finally, in Kors and Cheff, it was the non-raider stockholders who were discriminated against by not having their shares repurchased. Yet, in neither case was those stockholders' consent to the discrimination either sought or obtained. In short, there is no basis in Cheff v. Mathes or its progeny for the Vice Chancellor's conclusion that business judgment standards apply only where stockholders whose shares are not purchased consent to a discrimination.

Moreover, the imposition of a requirement that Unocal prove that the exclusion of Mesa was "fair" is contrary to the policy of our law that directors have a duty to act to protect stockholders in a tender offer context from perceived depredations. See Pogostin v. Rice, Del. Supr., 480 A.2d 619 (1984). Mesa, by its own selfish actions, has placed itself in a position which is hostile to the very stockholders Unocal seeks to protect. Mesa is not fettered by any requirement of "fairness" toward Unocal's shareholders. Indeed, as it boasted to the Chancery Court: "[T]he

Partnership has no fiduciary duty to the remaining Unocal stockholders to offer a 'fair' price." (Mesa Reply Brief at 13n.). To impose such a duty only upon Unocal's directors, who are seeking in good faith to protect the interests of those stockholders, would tilt the playing field in Mesa's favor and to hamstring the directors' good faith efforts to do their duty to protect Unocal's stockholders.

The Vice Chancellor's reliance upon Martin v. American Potash & Chemical Corp., Del. Supr., 92 A.2d 295, 302 (1952), to support her conclusion that any purchase of stock to eliminate the holdings of a dissident must be fair to the raider (Op. 18) is misplaced. The language in Martin relied upon by the Vice Chancellor states only that a repurchase transaction must be "clear of any fraud or unfairness." Since Martin was a case brought by stockholders to block a purchase of stock from a dissident, it simply did not raise the issue of whether a defensive stock repurchase must be fair to the raider. Moreover, this Court, in Cheff v. Mathes, after considering Martin, held that directors who authorize a selective repurchase in the face of a threat to corporate policy need only show that their actions were taken in good faith and after reasonable investigation to trigger the application of the business judgment rule, without any mention whatsoever of an additional "fairness" requirement. Under these circumstances, it is inappropriate to ignore Cheff and look instead to Martin for the rule of law which must govern this case.

Similarly, the "fairness" _dicta_ in the unreported decision in _Fisher v. Moltz_, Del. Ch., C.A. No. 6068, Hartnett, V.C. (Dec. 28, 1979), _reprinted in_ 5 Del. J. Corp. L. 530 (1980), upon which the Vice Chancellor continues to rely for the proposition that the business judgment rule does not apply to selective tender offers (Op. 19), is inapposite. Unlike this case, _Fisher_ did not arise in the context of a good faith director response to a stockholder who had taken a position adverse to the interests of all other stockholders. While _Fisher_ may apply where a stockholder has not taken action hostile to all other stockholders, it has no application whatsoever to the facts of this case.

The Vice Chancellor also erred in holding that the business judgment rule would not apply in this case because the directors will tender their stock into the Exchange Offer and derive a personal benefit not shared by Mesa. (Op. 19). This holding cannot be squared either with _Kors v. Carey_ or with the Vice Chancellor's finding that Unocal's directors acted in good faith in opposing Mesa's offer. Indeed, the Vice Chancellor conceded that, if Unocal is entitled to treat Mesa as being in a different category from other Unocal shareholders for purposes of defending against the takeover, this holding cannot stand "since the directors are receiving no benefit not shared generally by all shareholders (with the exception of Mesa)." (Op. 17).

While directors are obligated to deal with stockholders as a class, that obligation is qualified by their right to eliminate what appears to them a clear threat to the future of their business by any lawful means. Kors v. Carey, supra, 158 A.2d at 141. That qualification, which places the predator stockholder in a separate category from other stockholders, necessarily forms a basis for all the decisions cited in the Vice Chancellor's opinion and in defendants' brief below in which actions taken in good faith by directors against hostile offeror/stockholders have been sustained. So as to be consistent with Cheff v. Mathes and Pogostin v. Rice, the reference in Aronson to "all shareholders generally" must be deemed, in the takeover context, to be subject to the same qualification expressed in Kors v. Carey.*

Moreover, in light of the Vice Chancellor's finding that Unocal's directors acted in good faith, the fact that those directors have the opportunity to tender their shares along with all other stockholders of Unocal other

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* That a stockholder who has a personal position which is antagonistic the interests of a corporation or its other stockholders may be treated for business and legal analysis purposes as in a different category also finds support in other areas of our law. See, e.g., Youngman v. Tahmoush, Del. Ch., 457 A.2d 376 (1983) (recognizing that a plaintiff may be disqualified as a derivative plaintiff under Chancery Court Rule 23, if there is a clear economic antagonism vis-a-vis other stockholders); Roussel v. Tidelands Capital Corp., 438 F. Supp. 684 (N.D. Ala. 1977) (plaintiff seeking control precluded from presecuting a stockholder derivative suit to block a tender offer); Nolen v. Shaw-Walker Company, 449 F.2d 506, 509 (6th Cir. 1971) (plaintiff disqualified in stockholder derivative action based upon finding that his purpose in urging the maintenance of the action was to force the corporation to agree to a merger which he advocated).

than Mesa does not render this to be an interested transaction resulting in a "fairness" burden upon defendants. As the Court of Chancery held in Smith v. Good Music Station, Inc., Del. Ch., 129 A.2d 242, 246 (1957) (cited with approval in Cheff), "[W]e must therefore look to the reason for the rule [disqualifying a director from voting in upon an interested transaction] in order to test its applicability to 'new' situations." Here, the Court of Chancery found that Unocal's directors did act in good faith, and not for personal motives. Accordingly, there is no reason to deviate from the holding in Cheff that the business judgment standard applies.

Mesa has no right to have its shares repurchased and there is no burden to demonstrate that the Exchange Offer is fair to Mesa. The rule suggested by the Vice Chancellor would either tie the Board's hands in dealing with a dissident or require that Board Members forfeit their equity interest in the corporation when performing their duty to protect shareholders even when they are concededly acting in good faith. Such a result would stand law and equity on its head and, as a matter of policy, would discourage large shareholders from sitting on boards of a Delaware corporation.*

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* The presence of outside directors with larger stockholders on a board of directors is to be encouraged since, by reason of their holdings, they share a strong interest with other stockholders in managing the corporation so as to maximize stockholder values.

Once it has been determined that a selective stock repurchase defensive strategy is being pursued in good faith, there is no rational basis for imposing any higher burden upon directors to justify their actions than is applicable in other types of defensive strategies involving the selective use of stock of the target, such as issuing a block of stock to a prospective white knight. See, e.g., Treadway Cos. v. Care Corp., 638 F.2d 357 (2d Cir. 1980). Judging the Exchange Offer under the business judgment rule like all other defensive tactics, rather than under an unprecedented duty of "fairness" does not render such actions unreviewable. First, Cheff establishes that the directors must show, as they have done in this case, that their primary motive in authorizing a selective stock repurchase was to protect stockholders, not to further personal interests. Second, under Cheff, the Board's actions in authorizing a selective stock repurchase must be based upon "reasonable investigation." In other words, the Board continues to owe even to a predator stockholder the fiduciary duty of due care. Third, the business judgment rule only protects only rational acts of directors. Sinclair Oil Corp. v. Levien, Del. Supr., 280 A.2d 717, 720 (1971). Were a court to find that no reasonable director could conclude that the exclusion of a predator stockholder was reasonably calculated to ameliorate the specific threat posed to stockholders by the raider, then the Court could legitimately enjoin the offer. Fourth, any selective repurchase is constrained in terms of the price paid by the concept of waste, which would permit the Court to enjoin such an offer upon a finding that "no person of ordinary, sound business judgment would deem it [i.e., the stock purchased] worth what the corporation has paid." Saxe v. Brady, Del. Ch., 184 A.2d 602, 610 (1962).

In this case, defendants have met their burden of showing good faith and plaintiff has failed to make any showing that the Mesa Purchase Condition is not rationally related to Unocal's goal of either defeating the inadequate Mesa offer or, in the alternative, providing $72 in value for 49% of its stock in lieu of the inadequate $54 in highly subordinated securities which Mesa proposes to issue in its back-end merger. Moreover, plaintiffs have not even pleaded a claim of waste with respect to the $72 purchase price and in fact are estopped from doing so in light of their circulation to their own prospective investors of per share values of Unocal ranging up to $86.*

Any rule of law that requires that one seeking a personal advantage must consent to defensive actions taken against him cannot stand scrutiny. In the face of the coercive tactics being utilized today by stockholders such

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* Under our law, Mesa does not have a right to have its stock repurchased. See 8 Del. C. § 160(a). Thus, this case does not pose the question of whether a board of directors could act in good faith in the face of a hostile takeover threat to deprive a stockholder of a declared dividend to which he was otherwise entitled, to violate contract rights, or to infringe upon any other legal right.

as Mesa to take advantage of market aberrations and seize value from stockholders, this Court cannot, as a matter of policy, take from directors who have been elected as the representatives of those stockholders the ability to respond reasonably in the stockholders' interests to such tactics. This Court should reject the Vice Chancellor's novel embellishments upon the holdings in Kors and Cheff and reaffirm the policy of our corporate law supporting good faith actions by directors such as those here who seek in difficult circumstances to do their duty to protect stockholder interests.

II. EVEN IF UNOCAL'S BOARD WERE REQUIRED TO SHOW THAT THE EXCHANGE OFFER IS FAIR TO MESA, IT HAS DONE SO.

After erroneously determining that the Exchange Offer as a defensive technique should be judged on the basis of a unprecedented duty of fairness, the Vice Chancellor swept aside voluminous evidence concerning the fair value of Unocal's stock and erroneously concluded that Unocal had "made no effort to establish the fairness of the exchange offer . . . to Mesa." (Op. 20). Instead, she held that the Exchange Offer was unfair to Mesa because the debt securities to be issued will trade at least at $72 and the market price for Unocal stock was $49 per share at the time the exchange offer commenced, concluding that, "regardless of whether $72 per share is the true value of Unocal, those who are excluded (i.e., Mesa] will not be able to realize that value." (Op. 20). As set forth below, even if Delaware law required the Board to demonstrate anything more than its good faith, the record is clear that $72 fairly states the underlying asset value of a share of Unocal stock. Moreover, because Mesa ultimately intends to own all of Unocal, it would as a 100% owner be able to realize those values. See Smith v. Van Gorkom, Del. Supr., 488 A.2d 858, 875-76 (1985). Only by closing ones eyes to the fact of Mesa's status as an offeror seeking 100% control of Unocal could one conclude on this record that Mesa was harmed in any way by the Exchange Offer.

Although Mesa seeks to buy all of Unocal for only $54 per share Mesa's analysis opines that Unocal's net asset value is between $64 per share and perhaps as high as $79 per share; John S. Herold, Inc. values Mesa at $74 per share; Donaldson, Lufkin & Jenrette, at $86 per share; and Burnham, Mesa's investment banker, at $69.44 and $72.34 per share. See p. 4, supra.

These valuations of Unocal stockcoincide with the views of Unocal's two investment bankers, who independently concluded that $72 is within the range of values that may fairly be assigned to Unocal's stock. (App. 408, 410; 353). If there were any doubt as to the propriety of the $72 price -- and on this record, we submit, there can be none -- it is dispelled by Mr. Pickens recent response to a question at a press conference as follows:

> "What do you think Unocal's worth per share?" . . . "Oh, I just go from the

> John S. Herold number on it and I believe it's something just under $80 a share."

(Supp. App. 915). Just a few weeks ago, Mr. Pickens gave a similar response to a meeting of Unocal stockholders:

> "Isn't the company valued at higher than $72 as far as you know?" . . .
> "John S. Herold's figure is $73 per share, recognized authority."

(Supp. App. 916-17). Since Mr. Pickens holds these views, it is not surprising that he considers the Exchange Offer to be a "reasonable offer" (App. 729). and is trying to participate in it.

For the reasons stated in Argument I, Unocal believes that it is not required to show that the Exchange Offer is fair to Mesa. However, even if there were any such requirement, it has been objectively satisfied by Mesa's own use of valuations of Unocal at prices exceeding $72 per share. Thus, even were the Vice Chancellor correct in holding that "[g]ood faith beliefs are not sufficient justification to discriminate against . . . a shareholder" (Op. 19), much more has been shown here. The undisputed evidence <u>created by Mesa</u> demonstrates both the inadequacy of its $54 offer and the fairness of the $72 value being paid in the Exchange Offer.

Therefore, the Exchange Offer takes nothing from Mesa and if Mesa proceeds with its announced intention of acquiring Unocal, the Exchange Offer will neither prevent that acquisition nor deprive Mesa of its pro rata share of Unocal's assets.

III. THE COURT BELOW ERRED IN HOLDING THAT MESA WOULD SUFFER IRREPARABLE HARM MERELY BECAUSE THE EXCHANGE OFFER "WILL MAKE IT MORE DIFFICULT FOR MESA TO SUCCEED IN ITS TAKEOVER EFFORTS."

Preliminary injunctive relief may not be awarded unless plaintiffs demonstrate imminent irreparable injury. *E.g.*, *Levin v. Metro-Goldwyn-Mayer, Inc.*, Del. Ch., 221 A.2d 499, 505 (1966); *Thomas C. Marshall, Inc. v. Holiday Inn, Inc.*, Del. Ch., 174 A.2d 27, 28 (1961); *Sandler v. Schenley Industries, Inc.*, Del. Ch., 79 A.2d 606, 610 (1951); *Allied Chemical & Dye Corp. v. Steel & Tube Co. of America*, Del. Ch., 122 A. 142 (1923).

The Court below did not find that the $72 Exchange Offer constituted a waste of corporate assets or even an unreasonably high value to place on Unocal's underlying assets. Indeed, in terms of the underlying value of its shares, the record evidence is that Mesa as a buyer will suffer *no* injury if it is ultimately determined that it has been wrongfully excluded from the Exchange Offer, much less irreparable injury.

The Court below based its finding of irreparable harm entirely on its conclusion that "the substantial debt to be incurred as a result of the exchange offer together with the restrictive covenants in the indenture will make it *more difficult* for Mesa to succeed in its takeover efforts." (Op. 24) (Emphasis added). Thus while the Vice Chancellor paid lip service to the undisputed proposition that "Mesa is not entitled to have Unocal's assets frozen" and is not entitled to a particular balance sheet (Op. 24), that is precisely the basis on which she based her conclusion that irreparable injury may result.

Moreover, the mere unsupported possibility that the Exchange Offer may make the acquisition more difficult.

First, even if the Exchange Offer were to interfere with Mesa's tender offer, that is not actionable:

> [Plaintiff] suggests that it has suffered "special injury" in that [the corporation] is allegedly attempting to frustrate its right to acquire additional shares by means of a tender offer. . . . <u>However, the "right" to make a tender offer is not a contractual right owed to the shareholder by the corporation.</u>

<u>Crane Co. v. Harsco Corp.</u>, 511 F. Supp. 294, 304 (D. Del. 1981) (emphasis added). Second, the Court recognized that Mesa had not "establish[ed] that it will be crippled by" the Exchange Offer. (Op. 24). Third, Mesa's executives testified that Mesa will acquire all of Unocal's stock whether or not Mesa is excluded from the Exchange Offer. (App. 904-5; 588). Fourth, Mesa has stated that it may <u>lower</u> its tender offer price if the Exchange Offer proceeds -- thus making Mesa's acquisition of Unocal <u>less</u> expensive. Fifth, if Mesa is excluded from the Exchange Offer, its ownership of Unocal will <u>increase</u> from 13.6% to 19%, thus aiding its acquisition efforts, not making them more difficult. There is thus nothing to support the Vice Chancellor's conclusion that the Exchange Offer makes Mesa's acquisition of Unocal "more

difficult," or to support the proposition that a finding of "more difficult" is equivalent to the showing of "irreparable injury" necessary to sustain a claim for preliminary injunctive relief.

In addition, the Vice Chancellor's reasoning is internally inconsistent and seriously flawed. Her conclusion that Mesa will suffer irreparable injury is based on the assumption that Mesa is a buyer of Unocal stock, notwithstanding that the Court's finding that Mesa has a probability of success on the merits is premised upon Mesa's status as a seller of stock. If Mesa is (as it proclaims) a buyer of stock intent on owning all of Unocal, then it suffers no injury by the Exchange Offer. It will be "able to realize" the full asset value of Unocal stock when it is sole owner of the Company. If Mesa is a seller of stock (as the Courts' finding of liability assumes) then money damages are clearly adequate to compensate Mesa if it has been wrongfully excluded from the Exchange Offer. E.g., Bayard v. Martin, Del. Supr., 101 A.2d 329, 334 (1953); Kahn v. Household Acquisition Corp., Del. Ch., C.A. No. 6293, Brown, V.C., slip op. at 91 (Dec. 12, 1983). By failing to treat Mesa consistently, the Vice Chancellor gives Mesa the best of two hypothetical worlds.

Faced with the same arguments of irreparable injury, Judge Tashima found that Mesa had failed to establish potential irreparable harm:

> Even assuming that Unocal's purpose in making the Offer is to frustrate Mesa

> II's takeover bid, not a single fact (other than the purpose itself) is set forth from which irreparable harm could be inferred. And while it is equally true that _if_ Mesa is prevented from completing its acquisition of Unocal, it will have been deprived of an unique opportunity, again, there is not a single fact stated or found from which it can be inferred that the Offer will or may have that effect. The most that can be inferred is that the Offer, if completed will reduce the value of the acquired company. Mesa II has made no argument that it has legally protectible right to acquire Unocal at any stated value. Although the prize may be reduced in value by completion of the Offer, it can be argued that rather than preventing acquisition by Mesa II, Mesa II's acquisition efforts will be aided, since its 13.6 percent share of Unocal common will increase to 19 percent of shares outstanding after exchange of approximately 30 percent of the now outstanding non-Mesa II shares for debt securities. In short, I cannot agree that any basis exists upon which a finding of irreparable harm can be predicated.

Unocal Corp. v. T. Boone Pickens, et al., No. CV-85-2179-AWT (C.D. Cal. May 1, 1985) (slip op. at 5-6). While Mesa contended before the court below that Judge Tashima's ruling was distinguishable because Mesa had submitted no facts demonstrating irreparable injury in that action, Mesa has still not submitted any evidence in this action suggesting that the Exchange Offer will inhibit its tender offer or otherwise harm it. As shown above, the evidence is to the contrary.

Here, Mesa seeks to enlist the aid of this Court to facilitate a plainly inadequate and coercive tender offer. It is a well established principle of equity, however, grounded in considerations of public policy, that the Court will not acknowledge a plaintiff's rights, or award him a remedy, where to do so would violate principles of fair dealing and righteous conduct. Bodley v. Jones, Del. Supr., 59 A.2d 463, 469 (1947). To grant injunctive relief to Mesa in these circumstances would help clear the way for Mesa's inadequate offer. Based on its own conduct, Mesa is not entitled to such relief.

For the reasons stated herein and in Judge Tashima's opinion, it is clear that there is no factual support for the Court's finding of irreparable injury and Mesa is not entitled to injunctive relief.

CONCLUSION

For the reasons stated herein the opinion and Order of the Chancery Court enjoining the Exchange Offer should be reversed.

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