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COURT OF CHANCERY
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April 22, 1985

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JOHN D. KELLY III
CHANCERY

Re: Mesa Petroleum Co., et al. v. Unocal Corporation, et al. - C. A. 7997
Date Submitted: April 18, 1985

Dear Gentlemen:

This is the decision on plaintiffs' application for a temporary restraining order enjoining defendants from enforcing those portions of certain bylaw amendments which regulate the nomination of directors and the procedures by which shareholders may present business at annual meetings. This litigation is one facet in the current effort by plaintiffs, Mesa Petroleum Co. and related entities (collectively "Mesa"), to takeover defendant, Unocal Corporation ("Unocal"), a Delaware corporation engaged in petroleum, chemical, geothermal and metals operations.

The facts, for the most part, are undisputed. On February 14, 1985, Mesa disclosed in a Schedule 13D that it had acquired approximately 12.6 million shares or 7.3 percent of the common stock of Unocal. According

to that filing, Mesa acquired the stock solely for the purpose of investment. By February 22, 1985, Mesa had increased its stake to 9.7 percent, still for the stated purpose of investment only.

The bylaw amendments at issue were unanimously adopted at a Unocal Board of Directors meeting held on February 25, 1985. They provide, in relevant part:

> ARTICLE III
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> Section 6. Voting. ...A nomination shall be accepted, and votes cast for a proposed nominee shall be counted by the inspectors of election, only if the Secretary of the Company has received at least 30 days prior to the meeting a statement over the signature of the proposed nominee that he consents to being a nominee and, if elected intends to serve as a director. Such statement shall also contain the Unocal stock ownership of the proposed nominee, occupations and business history for the previous five years, other directorships,...and all other information required by the federal proxy rules in effect at the time the proposed nominee submits said statement.
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> Section 7. Notice of Shareholder Business. At an annual meeting of the shareholders, only such business shall be conducted as shall have been properly brought before the meeting. To be properly brought before an annual meeting, business must be (a) specified in the notice of meeting (or any supplement thereto) given by or at the direction of the Board of Directors, (b) otherwise

> properly brought before the meeting by or at the direction of the Board of Directors, or (c) otherwise properly brought before the meeting by a shareholder. For business to be properly brought before an annual meeting by a shareholder, the Secretary must have received written notice at least thirty (30) days prior to the meeting. A shareholder's notice to the Secretary shall set forth as to each matter the shareholder proposes to bring before the annual meeting (a) a brief description of the business desired to be brought before the annual meeting....Notwithstanding anything in the Bylaws to the contrary, no business shall be conducted at an annual meeting except in accordance with the procedures set forth herein.

At the time these amendments were adopted, at least some members of Unocal's board were concerned that Mesa might not continue as a passive investor much longer. If Mesa were to present a proposal at the annual meeting scheduled to be held on April 29, 1985, the directors were concerned that management and Unocal's shareholders might not be given a fair opportunity to consider the proposal. According to the affidavit of Unocal's assistant general counsel, the board was advised that these amendments would prevent Mesa from gaining an "unfair advantage" and would have the beneficial effect of promoting the orderly conduct of meetings and permitting Unocal to respond to shareholders' nominees and proposals.

On March 28, 1985, in an amendment to its Schedule 13D, Mesa disclosed that it had acquired 13.6 percent of the common stock of Unocal and that its purpose included possibly obtaining control of Unocal. On the same day, in furtherance of this purpose, Mesa provided notice to Unocal of its intention to present two proposals at the April 29 annual meeting. The proposals are (i) to adjourn the annual meeting for two months and to have a new record date set in connection with the adjourned meeting and (ii) to rescind any action taken at the meeting prior to the approval of adjournment.

Mesa's purpose in proposing the adjournment was to allow Unocal's shar holders adequate time before voting on the election of directors to consider any plan Mesa might present to acquire Unocal or effectuate a restructuring or recapitalization of the company. On April 8, 1985, Mesa commenced a tender offer for 64 million shares of Unocal at $54 per share. If the Unocal stock is purchased pursuant to the offer, which is set to expire on May 3, 1985, Mesa will then own slightly over 50 percent of Unocal's outstanding common stock. The offering circular discloses that Mesa's current intent, following the tender offer, is to propose a second step transaction whereby

the remaining publicly held shares will be exchanged for securities valued at $54 per share.

By letter dated April 7, 1985, Unocal's shareholders were advised of the company's interpretation of its new notice bylaws. The letter explained that the timeliness of a shareholder proposal under the thirty day notice provision is determined by reference to the originally scheduled meeting date regardless of whether the meeting is adjourned. The letter advised that, under Unocal's interpretation of its bylaws, even if Mesa were successful in obtaining a two month adjournment of the annual meeting, it would be precluded from presenting any proposals at the adjourned meeting.

On April 12, 1985, in accordance with its previously announced intention to do so, Mesa began soliciting proxies in favor of its adjournment proposals. The proxy statement, like the earlier offering circular, states Mesa's intent to propose a second-step transaction whereby it would obtain the entire equity interest in Unocal if the tender offer is successful.

To round out the chronology of events relating to Mesa's takeover attempt, it should be noted that on April 17, 1985 Unocal responded to Mesa's tender offer by commencing an exchange offer for up to 87.2 million

shares of its stock. Pursuant to the Unocal offer, which is conditioned, among other things, on Mesa consummating its tender offer, each share of Unocal stock would be exchanged for a package of debt securities having an aggregate principal amount of $72. Unocal's offering circular states that its board unanimously authorized the exchange offer in order to provide Unocal's shareholders an opportunity to obtain fair value for their shares following the Mesa tender offer and to make it more difficult for Mesa to complete its tender offer, which the Unocal board determined is grossly inadequate.

The foregoing is intended only to highlight the sequence of events against which Mesa's application for a temporary restraining order must be considered. Time does not permit a fuller description of the moves and countermoves of the parties including alteration of the quorum requirement for the annual meeting and the institution of no fewer than five lawsuits in various state and federal courts around the country.

It is settled law that preliminary injunctive relief will not be granted unless plaintiffs establish both a probability of success on the merits and the threat of imminent irreparable harm. Bayard v. Martin, Del. Supr., 101 A.2d 329 (1953). In support of its claim on

the merits, Mesa argues that the bylaws should be struck down for any of three reasons. First, they conflict with 8 Del. C. §211(b) by limiting the shareholder-generated business which may be transacted at an annual meeting to those matters which were properly noticed thirty days in advance. Second, the bylaws operate inequitably by, among other things, imposing the notice restrictions on shareholders but not management. Finally, the bylaws allegedly were adopted for the improper purpose of thwarting Mesa's takeover bid and thereby entrenching management in office.

On the issue of irreparable harm Mesa argues that Unocal's interpretation of the bylaws notice requirements as applied to an adjourned meeting is having an immediate chilling effect on Mesa's ongoing proxy solicitation. Simply stated, if no shareholder proposals may be presented at an adjourned meeting, there is no reason to vote in favor of adjournment. In addition, Mesa contends that the bylaws' interference with the corporate franchise provide an independent basis for a finding of irreparable harm.

Unocal responds that there is insufficient evidence from which to conclude that its adjournment interpretation is having a chilling effect on Mesa's proxy solicitation.

An executive of the proxy solication firm retained by Mesa provided an affidavit stating his opinion that Unocal's bylaws interpretation will have a significant chilling effect on Mesa's proxy solicitation whereas an executive of Unocal's proxy solicitation firm submitted an affidavit expressing the opposite view.

As to Mesa's second claim of irreparable harm, Unocal points out that there is no evidence that Mesa or any other shareholder has been prevented from presenting a proposal because of the thirty day notice requirement. Mesa's adjournment proposals were noticed in accordance with the bylaws and, presumably, will be presented at the annual meeting. Based upon the present record, Mesa apparently has no interest in presenting any other proposals on April 29th and its present intent to present proposals at an adjourned meeting date are contingent not only upon the annual meeting, in fact, being adjourned, but also on the success of its tender offer. Accordingly, Unocal argues that any harm Mesa may suffer is purely speculative at this point.

In the recent case of Plaza Securities Company v. Datapoint Corporation, Del. Ch., C. A. No. 7932, Brown, C. (March 5, 1985), aff'd., Del. Supr., No. 79, 1985, Horsey, J. (March 8, 1985), Chancellor Brown found that the irreparable injury requirement is satisfied, "[w]here

the legal right granted by the law appears to be clear, where interference with that legal right will necessarily occur in the absence of injunctive protection by the Court, and where it reasonably appears that money damages cannot adequately compensate for the interference with that legal right...." Slip Op. at 15. In Datapoint, plaintiffs announced their intention to solicit consents pursuant to 8 Del. C. §228 to remove and replace the Datapoint board of directors. The company responded by adopting a bylaw which would delay the effectiveness of such a consent procedure for at least forty five days after the consents had been obtained. The Court found, among other things, that plaintiffs "undoubtedly" would be impeded in their consent solicitation effort if the Datapoint bylaw were allowed to remain in effect pending final disposition of the claim. Slip Op. at 16.

I find the analysis in Datapoint to be controlling as to both aspects of the claimed irreparable injury in this case. Notwithstanding Unocal's opinion evidence to the contrary, I am convinced that its adjournment interpretation of the bylaws will impair Mesa's ongoing proxy solicitation efforts and will cause irreparable harm if no preliminary determination is made as to the merits of Mesa's position. Undoubtedly, there are Unocal share-

holders who will vote against adjournment for the sole reason that they believe that no shareholder proposals could be presented at an adjourned meeting. If that belief is misplaced, the harm to Mesa will not be adequately compensable in money damages. Thus, I find that Mesa has met its burden of demonstrating immediate irreparable harm on the claim that the bylaws are invalid as applied to a greater than thirty day adjournment of the annual meeting.

However, the same factors are not present with respect to the overall validity of the bylaws. If plaintiffs prevail as to the adjournment issue and they obtain the necessary votes to adjourn the meeting, it appears that they will have an opportunity to give the notice required by the bylaws nd present at the adjourned meeting any shareholder proposal they wish to make. Even assuming that, pursuant to 8 Del. C. §211(b), Mesa has an unfettered right to present any proper business at an annual meeting without any advance notice, there is no showing on the present record that the bylaws necessarily will interfere with that right. Until such time as Mesa or another shareholder seeks to present a proposal that cannot be presented in accordance with the bylaws, there is only a hypothetical threat of injury. Based upon my

finding that there is no threat of immediate irreparable harm as to this portion of Mesa's claim, I will not address the merits for to do so under these facts would be tantamount to an advisory opinion. Cf. FMC Corporation v. R. P. Scherer Corporation, Del. Ch., C.A. No. 6889, Longobardi, V. C. (August 6, 1982).

Turning to the merits of the adjournment claim, Mesa relies primarily on the decisions in Lerman v. Diagnostic Data, Inc., Del. Ch., 421 A.2d 907 (1980) and Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971) in support of its position that the adjournment interpretation is inequitable and thus invalid. In Schnell the Delaware Supreme Court held that management may not use corporate machinery for an improper purpose even if the action taken is legally permissible. Defendants there advanced the shareholder meeting date for the purpose of thwarting a proxy contest and in order to perpetuate management in office.

The Schnell holding was based upon a finding of improper purpose. In Lerman, however, certain bylaw amendments were struck down without regard to defendants' motives because of the inequitable effect of those amendments. The Lerman defendants adopted a bylaw requiring shareholders to submit their nominations for the board

of directors at least seventy days in advance of the annual meeting. The annual meeting date, which was to be set by the board, was fixed sixty three days after its announcement, thus making it impossible for a shareholder to comply with the seventy day notice requirement. The Court invalidated defendants actions based upon a finding that their "conduct was both inequitable (in the sense of being unnecessary under the circumstances) and had the accompanying dual effect of thwarting shareholder opposition and perpetuating management in office." Lerman v. Diagnostic Data, Inc., Del. Ch., 421 A.2d 907, 914 (1980).

Mesa argues that the Lerman holding is directly on point. Unocal's adjournment interpretation was not announced until April 7, 1985, thereby making it impossible for Mesa to comply with the thirty day notice requirement. The adjournment interpretation is inequitable because it is unnecessary to the stated purpose of the notice bylaws. If thirty days advance notice is sufficient to allow the shareholders and the company to evaluate and respond to any proposals or nominees, then it would seem that thirty days notice before the adjourned meeting date would accomplish that purpose. Instead, under Unocal's interpretation, ninety days advance notice is being required under the facts of this case. Finally, as in Lerman,

the adjournment interpretation is impeding Mesa's takeover attempt and thereby helping to perpetuate management.

Unocal strenuously objects to this characterization. The bylaws were adopted on February 25, 1985 at a time when Mesa purportedly was a passive investor. There were no bylaw amendments adopted or other board actions taken on April 7, 1985. All that happened was that Unocal disclosed its interpretation of the bylaws — an interpretation that Mesa clearly anticipated and that, in Unocal's view, is mandated by Delaware law. Thus, Unocal did nothing to make it impossible to comply with the thirty day notice requirement and to the extent that Mesa now finds itself in a difficult position, it is a problem of its own making.

However, Unocal's efforts to distinguish Lerman do not address the equitable principles applied there and equally applicable here. The notice bylaws do not expressly provide how they are to operate in the case of an adjournment and there is no settled Delaware law from which Unocal's interpretation could have been determined with any reasonable certainty. Although there is authority for the proposition that an adjourned meeting is considered a continuation of the original meeting, Atterbury v. Consolidated Copper Mine Corp., Del. Ch., 20 A.2d 743 (1941), there is also a statutory requirement

that new notice be given for an adjourned meeting if the adjournment is for more than thirty days. 8 Del. C. §222(c). Thus, there was a reasonable basis for either interpretation of the new notice bylaws. Under these circumstances, and with the knowledge that Mesa believed it would be possible to present a shareholder proposal before the adjourned meeting, Unocal's failure to announce its interpretation of the bylaws until after the thirty day notice period had run was inequitable. Nor does it matter that on April 7th there was only an announcement as opposed to some board action. The effect of that announcement was the same as if Unocal had adopted a new bylaw amendment governing the notice requirements for adjourned meetings.

Based upon the foregoing, I find that Mesa has established a likelihood of success on the merits on its claim that the adjournment interpretation of the bylaw amendments is invalid. As noted earlier, I also find that Mesa is threatened with immediate irreparable harm as a result of the adverse impact that Unocal's adjournment interpretation is having and will continue to have on Mesa's proxy solicitation. A temporary restraining order will issue upon the posting of a bond in the amount of $10,000. I request that Mesa submit a form of order in

accordance with this opinion, on notice, as promptly as possible.

Very truly yours,

Carolyn Berger

CB:rsb

Xc: Register in Chancery