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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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April 29, 1985

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Re: Mesa Petroleum Co., et al. v. Unocal Corporation, et al. - C. A. 7997
Date Submitted: April 26, 1985

Dear Gentlemen:

This is the decision on plaintiffs' second application for a temporary restraining order in connection with their ongoing efforts to takeover defendant, Unocal Corporation ("Unocal"). Plaintiffs, Mesa Petroleum Co. and related entities (collectively "Mesa"), seek a preliminary order restraining Unocal from consummating its amended exchange offer without allowing Mesa to participate in the offer on an equal footing with all other Unocal shareholders.

The background facts are summarized in Mesa Petroleum Co., et al. v. Unocal Corporation, et al., Del. Ch., C. A. No. 7997, Berger, V. C. (April 22, 1985) and will not be repeated here. It is sufficient to note that, in response to Mesa's cash tender offer for a majority of the stock of Unocal at $54 per share, Unocal commenced

an exchange offer on April 17, 1985. Under the terms of that offer, Unocal agreed to exchange 87.2 million shares of its common stock for a package of debt securities in the aggregate principal amount of $72. The exchange offer was conditioned, among other things, on Mesa consummating its tender offer and the exchange offer provided that neither Mesa, parties controlled by Mesa or parties to whom Mesa transferred its shares could tender their Unocal stock.

On April 22, 1985, Mesa amended its complaint to challenge the exchange offer and moved for a preliminary injunction which is presently scheduled to be heard on May 8, 1985. The next day, Unocal announced that it was amending its exchange offer to partially remove the Mesa tender offer contingency. Under the amended offer, Unocal will exchange for $72 in notes up to 50 million shares of its stock regardless of whether or not Mesa successfully completes its tender offer. The Mesa purchase condition remains in effect as to an additional 37.2 million shares and Mesa and its transferees continue to be precluded from participating in the amended offer.

Within hours after Unocal's announcement of the amended offer, Mesa filed this motion for a temporary restraining order. Mesa asserts that, if allowed to do

so, it would tender its stock to Unocal in the amended exchange offer. Absent Court intervention, Unocal will be able to take down its stock under the amended offer as of midnight on April 30, 1985.

Mesa argues that the amended offer should be enjoined because it unlawfully discriminates against one group of shareholders — Mesa and its transferees. Unocal acknowledges, as it must, that its amended offer is discriminatory in the sense that it excludes Mesa. However, Unocal argues that the amended offer is a defensive maneuver designed to fend off Mesa's takeover bid and, as such, is a valid exercise of the Unocal directors' business judgment. Both sides agree that the decision in Fisher v. Moltz, Del. Ch., C.A. No. 6068, Hartnett, V.C. (December 28, 1979) reprinted in 5 Del. J. Corp. L. 530 (1980) states the legal principles governing a company's selective purchase of its stock.

In Fisher, all of the stock of the closely held corporation at issue was owned by employees or former employees of the company's operating subsidiary. The holding company made a tender offer to all of the former employee shareholders except the four plaintiffs who were lawfully competing with the company. The Court stated:

> I am aware of no Delaware case holding that there is an absolute prohibition

> against a Delaware corporation offering to purchase its shares from one or more of its stockholders without making a similar offer to all of its stockholders. The Delaware rule, however, that corporate directors owe a fiduciary duty to the stockholders of a Delaware corporation mandates that when a corporation makes an offer to purchase the corporation's stock from certain stockholders and excludes the other stockholders from participation, a burden is imposed upon the corporation to show that there is a valid corporate purpose for limiting the offer and that in so doing it has not unduly favored one group over another. Slip Op. at 3.

The Court in Fisher held that defendants did not meet this burden and entered a preliminary injunction restraining the corporate defendant from consummating the tender offer pending a final determination on the merits.

The first issue under Fisher is whether Unocal has established a proper corporate purpose for excluding Mesa from its amended offer. Delaware courts and others applying Delaware law frequently have held that a corporation's directors may take steps to oppose and defeat a takeover bid which, in the exercise of their business judgment, they have determined not to be in the best interests of the company and its shareholders. See Pogostin v. Rice, Del. Supr., 480 A.2d 619 (1984); GM Sub Corp v. Liggett Group, Inc., Del. Ch., C. A. No. 6155, Brown,

V. C. (April 24, 1980); Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); Treadway Cos. v. Care Corp., 638 F.2d 357 (2d Cir. 1980); Johnson v. Trueblood, 629 F.2d 287 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981). More specifically, our courts have recognized that it is a proper exercise of business judgment for the directors to use corporate funds to purchase the stock of a dissident shareholder in order to eliminate a threat to the company's successful business policies. Cheff v. Mathes, Del. Supr., 199 A.2d 548 (1964); Martin v. American Potash & Chemical Corp., Del. Supr., 92 A.2d 295 (1952); Kaplan v. Goldsamt, Del. Ch., 380 A.2d 556 (1977).

Applying these principles to the facts of this case, Unocal argues that its directors' business judgment that the Mesa tender offer is grossly inadequate and should be opposed establishes a proper corporate purpose for the selective exchange offer. If, as the foregoing authorities suggest, it is permissible for a company to buy off the raider in order to defeat a takeover threat, Unocal questions how it could be impermissible to attempt the same result by providing the "innocent victims" the opportunity to participate in the exchange offer rather than the raider.

For purposes of this motion, Mesa does not dispute the bona fides of Unocal's decision to oppose its tender offer. However, Mesa contends that the business judgment rule has no application in deciding the validity of the defensive technique chosen by Unocal. The Fisher decision supports this view inasmuch as it places the burden on the corporate defendant to establish not only a valid corporate purpose for a selective tender offer but also that the tender offer is fair to all the shareholders in that it does not unduly favor one group over another. In a situation where a corporation buys back the dissident's stock, the remaining shareholders who are not given the opportunity to sell their stock at the same price presumably also are receiving a benefit from the transaction in that the entire corporation is being protected from the perceived harm that would befall the company if the dissident obtained control. By contrast, under Unocal's exchange offer, both of the "benefits" run to the shareholders other than Mesa. They are able to participate in the exchange offer and at the same time, if the offer accomplishes its intended purpose, Unocal is protected from the threat of a Mesa takeover.

Applying Fisher, I find that even if Unocal is able to prevail in establishing a proper corporate purpose

for the selective exchange offer, it is unlikely that it will be able to prevail on the issue of the overall fairness of the offers' exclusion of Mesa. It is not enough to say that the Mesa exclusion is necessary to accomplish the defensive goal of blocking Mesa's takeover bid. The principle that legally permissible conduct will not be tolerated if undertaken for an improper purpose, see Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971), does not operate in reverse. In other words, legally or equitably impermissible conduct cannot be justified by the fact that it was motivated by a proper purpose. Under Fisher it remains Unocal's burden to establish that the selective exchange offer is fair to all of its shareholders, including Mesa. On the present record I am satisified that it is unlikely that Unocal will be able to meet this burden or, to put it in the more familiar jargon, I find that Mesa has established a likelihood of success on the merits.

To prevail on its motion, Mesa must also establish the threat of imminent irreparable injury and that the harm it will suffer absent injunctive relief outweighs the harm to defendants if the injunction is granted. Gimbel v. Signal Companies, Del. Ch., 316 A.2d 599, aff'd., Del. Supr., 316 A.2d 619 (1974). On the issue of irreparable

injury, Unocal argues that any losses Mesa may suffer if found to have been wrongfully excluded from the exchange offer can be adequately compensated in money damages. However, the Unocal exchange offer cannot be viewed in isolation. As discussed above, one of the purposes of the offer and the Mesa exclusion is to defeat Mesa's take-over bid. Given that purpose, it seems somewhat inconsistent to argue that the only harm to Mesa will be monetary. If Mesa is prevented from acquiring Unocal in part because of an unlawful exchange offer, it will have been deprived of a unique opportunity the loss of which is not adequately compensable in money damages. Nor does it appear that rescission would be a feasible alternative.

In balancing the hardships, consideration has been given to the fact that thousands of Unocal shareholders may be deprived of the opportunity to participate in the exchange offer if the injunction is granted. However, it is entirely within Unocal's control whether that hardship will befall its shareholders. Under these circumstances, I am satisfied that the potential harm to Unocal's shareholders does not outweigh the potential harm to Mesa.

Based upon the foregoing, defendants are hereby temporarily restrained from proceeding in any way with

its Offer to Purchase announced on April 17, 1985 as amended by Supplement dated April 24, 1985 unless Mesa is permitted to participate in the exchange offer to the same extent and in the same manner as all other Unocal shareholders. This restraining order is conditioned upon Mesa filing a bond in the form attached on or before April 30, 1985 at noon in the amount of ten thousand dollars ($10,000).

IT IS SO ORDERED this 29th day of April at 4:45 p.m.

Very truly yours,

Carolyn Berger

CB:rsb

Xc: Register in Chancery

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

| | | |
|---|---|---|
| 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, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Civil Action No. 7997 |
| UNOCAL CORPORATION, a Delaware corporation, WILLIAM F. BALLHAUS, CLAUDE S. BRINEGAR, RAY A. BURKE, ROBERT D. CAMPBELL, WILLIAM H. DOHENY, RICHARD K. EAMER, FRED L. HARTLEY, T.C. HENDERSON, DONALD P. JACOBS, WILLIAM S. McCONNOR, PETER O'MALLEY, RICHARD J. STEGMEIER and DONN B. TATUM, | ) | |
| Defendants. | ) | |

BOND ON TEMPORARY RESTRAINING ORDER

KNOW ALL MEN BY THESE PRESENTS, that Mesa Petroleum Co., Mesa Asset Co., Mesa Eastern, Inc. and Mesa Partners II ("plaintiffs"), as principals, and The Aetna Casualty and Surety Company, a Connecticut corporation, as surety, are held and firmly bound unto Unocal Corporation, William F. Ballhaus, Claude S. Brinegar, Ray A. Burke, Robert D. Campbell, William H. Doheny, Richard K. Eamer, Fred L. Hartley, T.C. Henderson, Donald P. Jacobs, William S. McConnor,

Peter O'Malley, Richard J. Stegmaier and Donn B. Tatum ("defendants"), their successors, in office, assigns, agents, servants or employees, in the sum of TEN THOUSAND DOLLARS ($ 10,000.00 ), for the payment of which, well and truly to be made, the undersigned binds itself, its successors and assigns, by these presents.

WHEREAS, plaintiffs have obtained from the Court of Chancery of the State of Delaware a temporary restraining order against defendants, upon the condition that it execute and file with the Court a good and sufficient bond for the payment of such costs and damages as may be incurred or suffered by defendants, if they are found to have been wrongfully enjoined or restrained;

NOW, THEREFORE, the condition of this obligation is such that if plaintiffs shall pay any costs or damages which may be incurred by defendants, if they are found to have been wrongfully enjoined or restrained by such temporary restraining order, then this obligation shall be void. Otherwise, it shall remain in full force and effect.

IN WITNESS WHEREOF, The Aetna Casualty and Surety Company has hereunto set its hand and seal this _____ day of April, 1985, by its agent thereunto duly authorized.

THE AETNA CASUALTY
AND SURETY COMPANY

By_____
Attorney-in-Fact