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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. 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.	§	Civil Action No. 7997

JOHN D. KELLY, III

ANSWERING BRIEF OF DEFENDANT UNOCAL CORPORATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR INTERIM INJUNCTIVE RELIEF

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NATURE AND STAGE OF THE PROCEEDINGS

This action was commenced on April 12, 1985. On April 22, 1985 plaintiffs (referred to collectively as "Mesa") amended their complaint and sought preliminary relief challenging an exchange offer (the "Exchange Offer") whereby Unocal offered to exchange up to 87,200,000 of its shares for $72 principal amount of debt securities. The Exchange Offer was conditioned on Mesa purchasing at least 64,000,000 shares in its tender offer. On April 23, 1985 Unocal announced that it was waiving this condition with respect to 50,000,000 shares and would purchase such shares regardless of whether Mesa purchased shares in its tender offer.

On April 23, 1985 Mesa moved for a temporary restraining order enjoining Unocal from making the Exchange Offer or soliciting tenders or buying shares pursuant to that offer. This is the answering brief of defendant Unocal Corporation ("Unocal") in opposition to plaintiffs' motion for interim injunctive relief. Accompanying this brief are the affidavits of Richard K. Eamer ("Eamer Aff."), Franklin W. Hobbs, IV ("Hobbs Aff."), Peter Griggs Sachs ("Sachs Aff."), Margaret Knighton ("Knighton Aff."), the Second Affidavit of William S. Coats, III ("Second Coats Aff."), and the Second Affidavit of John J. Gavin ("Second Gavin Aff."). Unocal also relies on the record generated in connection with plaintiffs' prior motion for interim relief

in this action, and references to that record are in the same form as in Unocal's answering brief in opposition to that motion.

STATEMENT OF FACTS*

Background of the Mesa Offer

On February 14, 1985 the plaintiffs revealed that they had been secretly acquiring stock in Unocal. (Tassin Aff. Ex. A). Mesa continued acquiring stock thereafter under color of an "investment" intent.** (Id., Ex. B, C). On April 8, 1985, Mesa announced a cash tender offer for approximately 37% of the outstanding shares of Unocal at $54 per share (the "Mesa Offer"). (Id. Ex. N). The Mesa Offer is to be financed primarily through the sale of high yield debt securities commonly referred to as "junk bonds." This tender offer, if successful, would increase Mesa's holding of Unocal shares to approximately 50.4% of the total out-

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* The facts stated herein are supported by the affidavits of Messrs. Eamer, Sachs and Hobbs filed herewith, and the minutes of the meetings of Unocal's Board of Directors on April 13, 15 and 22 which have been substantiated by Mr. Eamer and attached as exhibits to his affidavit. Such minutes are entitled to a presumption of validity. Young v. Janas, Del. Ch., 103 A.2d 299, 303 (1954); Phoenix Finance Corp. v. Iowa-Wisconsin Bridge Co., Del. Super., 16 A.2d 789, 794 (1940). Other portions of the record relied on by Unocal are cited herein.

** On April 25, 1985, the United States District Court in Los Angeles found that Unocal had demonstrated a likelihood of success on the merits of its claims that Mesa had violated Sections 13(d) and 14(d) and (e) of the Securities and Exchange Act of 1934 because it had misrepresented its true acquisition intent, and had made materially false and misleading statements in its offer to purchase Unocal shares at $54 per share. The Court also found, based on this Court's ruling of April 22, 1985, that Unocal violated the securities laws by announcing its interpretation of the bylaw amendments. See Second Coats Aff. Ex. E.

standing. Mesa also disclosed in its offer to purchase that it intended to propose a second-step transaction in which the remaining 49% of Unocal's outstanding shares would be acquired in exchange for unspecified debt securities allegedly having an aggregate market value of approximately $54 per share. Tassin Aff. Ex. N.

The April 13 Board Meeting

On April 13, 1985 the Board of Directors of Unocal met to consider the Company's financial condition and prospects, the terms of the Mesa Offer, and other matters, including certain financial effects of the Mesa Offer and the second-step transaction. All the directors were present except for Mr. Donn Tatum. The majority of the 13 directors present were outside directors. At that meeting, which lasted more than eight hours, there were several presentations by Unocal's outside counsel with regard to the legal duties of the directors in responding to a bid for control of Unocal, and a presentation by Peter Sachs on behalf of Goldman, Sachs & Co., and Dillon, Read & Co., financial advisors of Unocal, with regard to valuations of Unocal performed independently by the two investment bankers beginning in early March, 1985. Mr. Sachs described the valuation methodology used by the bankers and the assumptions underlying their opinions. The principal purpose of these efforts was to reach a judgment as to the fairness of the Mesa Offer. Mr. Sachs expressed the opinion of both compa-

nies that the Mesa Offer was grossly inadequate and that the minimum cash value for 100% of Unocal's stock was in excess of $60 per share. Mr. Sachs emphasized that this figure was not an estimate of value, but the minimum amount that could be expected from a sale or orderly liquidation.

The Board then began an extensive discussion of the Mesa Offer and various other considerations surrounding it. Phillip Blamey, Vice President-Finance of Unocal, gave a presentation concerning the financial condition of Unocal and future estimated cash flows.

The protection of Unocal's investor shareholders in light of the Mesa Offer was the subject of extensive discussion among the board members. Mr. Sachs presented to the board various alternative strategies available to protect Unocal's investor shareholders should the Board conclude that the two-step Mesa Offer was inadequate. One strategy suggested to protect investor shareholders included a self-tender by Unocal. In such a tender offer, Unocal would acquire those shares not purchased by Mesa at a price which would assure shareholders an appropriate value for their shares if an acquisition occurred or prevent the acquisition of Unocal at an inadequate price. The Board was advised by its investment bankers that, in order to accomplish the objectives, the offer could not be extended to Mesa. If Mesa were allowed to tender shares, it would partially fill the offer and deprive some of the stockholders of the opportunity to sell their shares for an adequate price.

Moreover, before Mesa would be able to return to Unocal's stockholders shares tendered to Mesa but not purchased because of proration, Mesa might be able to tender its shares to Unocal, thus selling a disproportionate number of its shares in the Exchange Offer. Finally, Mesa would be in the position of a trader, buying shares at $54 and selling them to Unocal for greater value, thereby reaping a profit at the expense of the investor stockholders, and placing Unocal in the position of financing Mesa's inadequate offer.

The outside directors of the Board then met separately. After further discussion, they agreed unanimously to advise the Board of their view that it should reject the Mesa Offer as grossly inadequate. They also discussed how the directors could protect stockholders against this inadequate offer, and the coercion inherent in the fact that the "back-end" of the Mesa Offer could not be guaranteed and might have a value even lower than the inadequate $54 per share. The outside directors unanimously agreed to recommend to the Board that Unocal pursue a self-tender offer as a means of giving stockholders a fairly priced alternative to the Mesa Offer and as a means of making it more difficult for Mesa to commence an offer that they had judged to be inadequate.

The entire Board reconvened and unanimously adopted a resolution rejecting the Mesa Offer as grossly inadequate and recommending that stockholders reject it. While the sense of the Board was that Unocal should prepare

a self-tender offer, it was decided that this should be specifically considered at a future meeting, thereby affording the Board more time to consider this option.

The April 15 Board Meeting

On April 15, the Board met again, with only Mr. Tatum absent. Sam Snyder, Assistant General Counsel of Unocal, and Philip Blamey, Vice President-Finance, made a detailed presentation to the Board of the proposed terms of a self-tender offer by Unocal. Mr. Sachs and Franklin Hobbs of Dillon, Read then both recommended a price of $72 a share as a fair price for the stock. After extensive discussion, the Board unanimously adopted a resolution authorizing the self-tender Exchange Offer.

The Exchange Offer

On April 17, Unocal filed its Exchange Offer with the Securities and Exchange Commission. Pursuant to its offer, if Mesa acquired 64,000,000 shares of Unocal stock through the Mesa Offer (the "Mesa purchase condition"), Unocal would purchase the remaining outstanding shares by exchanging, for each share, senior secured notes in the principal amount of $72.

The April 22 Board Meeting

On April 22, the Board of Directors again met to review and discuss the status of the Mesa Offer and the

Exchange Offer. Again, all Board members were present except Mr. Tatum. It was suggested to the Board that the Mesa purchase condition be waived as to 50,000,000 shares. This partial waiver was strongly recommended by both Goldman, Sachs and Dillon, Read to overcome a perceived concern on the part of stockholders that if shares were tendered to Unocal, no shares might be purchased by either offeror.

There followed a lengthy discussion, during which the directors focused again upon the purpose for excluding Mesa from the offer. It was pointed out that if the Mesa exclusion was omitted, Unocal's objective in providing an alternative for its shareholders would be thwarted. Further, if Mesa were permitted to tender to Unocal, Mesa would, in effect, be able to finance its inadequate $54 tender offer with the proceeds from Unocal's $72 offer. It was concluded that the Mesa exclusion must remain.

After further discussion, including presentations by the investment bankers and a Unocal financial officer, the Board adopted a resolution that Unocal waive the Mesa purchase condition with respect to 50,000,000 shares. This waiver was announced on April 23, and a written supplement to the Exchange Offer was filed with the Securities and Exchange Commission on April 24, 1985. Second Coats Aff. Ex. D.

Mesa's Response

Mesa's reaction to the waiver of the condition was immediate, although contradictory. On April 23, Mesa's Chief Executive Officer, Mr. T. Boone Pickens, Jr., in prepared remarks (see Second Coats Aff. Ex. C) advised Unocal shareholders to accept the Unocal offer. At a meeting of Unocal shareholders in Los Angeles at the Sheraton Grande Hotel, Pickens was asked, "Isn't the Company valued at higher than $72 as far as you know?" Pickens responded that the "John S. Herold figure is $73 a share -- recognized authority . . . ." (Knighton Aff. Ex. A at 6). At that same meeting, Mr. Pickens characterized the decision by Unocal's directors to eliminate the condition that Mesa purchase as "the first time the company has done anything for shareholders." Coats Aff. Ex. B.

However, Mesa has simultaneously filed this motion and a Second Amended Complaint alleging that the $72 in debt to be paid in the Exchange Offer exceeds the fair value of a share of Unocal stock, even though Pickens himself ascribes a higher per share value to Unocal than the Exchange Offer does and even though Pickens is encouraging Unocal's shareholders to tender to Unocal. Mesa also alleges that it would be damaged if the offer goes forward, yet Mr. Pickens tells shareholders "Let's take advantage of this offer," (Coats Aff. Ex. B, C) thus encouraging them to "damage"

Mesa. By reason of these public statements it is clear that, notwithstanding the contrary assertions in the Second Tassin Affidavit, Mesa and Pickens cannot truly "believe" that Mesa will be damaged if the Exchange Offer is permitted to proceed. Indeed, if the Exchange Offer is successful their percentage stock ownership in Unocal will rise from 13.6% to over 19%. Given Mesa's public confirmation that the underlying value of Unocal's stock is more than $72 per share and the fact that it solicited its financing for its $54 offer using a document showing Unocal's asset value to be as high as $86 per share, Mesa cannot seriously contend that the Exchange Offer is at an excessive price will thus harm it financially.

ARGUMENT

I. PLAINTIFFS HAVE NOT SATISFIED THE ESSENTIAL PREREQUISITES FOR THE EXTRAORDINARY RELIEF THEY SEEK.

It is axiomatic that a restraining order or preliminary injunctive relief is an extraordinary remedy under Delaware law and should never be granted unless the plaintiffs demonstrate: (i) a probability of ultimate success on the merits at a final hearing, (ii) that the failure to issue the relief will result in immediate and truly irreparable harm, and (iii) that the balance of hardships weighs in plaintiffs' favor. Weinberger v. United Financial Corp., Del. Ch., 405 A.2d 134, 137 (1979); 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 burden of establishing each of these prerequisites is a heavy one which rests squarely on plaintiffs, whatever the ultimate burdens at trial. Pantry Pride v. Georgeson, Del. Ch., C.A. No. 7848, Hartnett, V.C., slip op. at 4 (Nov. 20, 1984); Cascella v. GDV, Inc., Del. Ch., C.A. No. 5899, Brown, V.C., slip op. at 2-3 (June 21, 1979).*

This heavy burden cannot be satisfied merely by showing that there exists a dispute and that plaintiff or

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* Copies of this and all other unreported opinions referred to in this memorandum have previously been provided to the Court or are included in the Appendix filed herewith.

others might be injured. Rather, each of the required elements must be clearly established by plaintiffs, and preliminary injunctive relief "will never be granted unless earned." Lenahan v. National Computer Analysts Corp., Del. Ch., 310 A.2d 661, 664 (1973); Gimbel v. Signal Cos., Del. Ch., 316 A.2d 599, 603, aff'd, Del. Supr., 316 A.2d 619 (1974). Indeed, even where the Court is not persuaded by the arguments of a defendant, injunctive relief must be denied unless plaintiff can demonstrate his entitlement to relief. National Education Corp. v. Bell & Howell Co., Del. Ch., C.A. No. 7278, Brown, C. (Aug. 25, 1983).

As shown below, plaintiffs can show none of the essential prerequisites to injunctive relief. The exclusion of plaintiffs from Unocal's Exchange Offer is a sound business judgment taken for valid reasons and plaintiffs have demonstrated no probability of succeeding on the merits of their claims to the contrary. Even if they had, plaintiffs can demonstrate no irreparable injury justifying injunctive relief.

II. THE UNOCAL OFFER SERVES THE PROPER CORPORATE PURPOSES OF ENSURING UNOCAL'S PUBLIC SHAREHOLDERS A FAIR PRICE FOR THEIR SHARES AND OF DETERRING AN UNSOLICITED OFFER WHICH IS NOT IN THE SHAREHOLDERS' BEST INTERESTS.

A. Unocal's Board Is Obligated To Oppose Any Takeover Bid Which Is Not In The Best Interests Of Shareholders.

A corporation's directors are not under any obligation to accept an unsolicited tender offer, even when the proposed price includes a premium over the prevailing market price of the corporation's securities. Pogostin v. Rice, Del. Supr., 480 A.2d 619, 627 (1984); Moran v. Household International, Inc., Del. Ch., C.A. No. 7730, Walsh, V.C., slip op. at 44 (Jan. 29, 1985) (appeal pending); GM Sub Corp. v. Liggett Group, Inc., Del. Ch., C.A. No. 6155, Brown V.C. (Apr. 24, 1980); Panter v. Marshall Field & Co., 646 F.2d 271, 296 (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).

To the contrary, directors have a duty to "evaluate proposed business combinations on their merits and oppose those detrimental to the well-being of the corporation even if that is at the expense of the short term interests of individual shareholders." Panter v. Marshall Field & Co., 646 F.2d at 298; Heit v. Baird, 567 F.2d 1157, 1161 (1st Cir. 1977); Carter Hawley Hale Stores, Inc. v. The

Limited, Inc., C.A. No. 84-2200-AWT (C.D. Cal., Apr. 17, 1984), transcript at 78-79 ("once the Board determines that it believes the unfriendly offer is not adequate for its shareholders, then I think it has the obligation to take such actions as it feels is necessary to protect the rights of shareholders."); Northwest Industries, Inc. v. B. F. Goodrich Co., 301 F. Supp. 706, 712 (N.D. Ill. 1969).

The fact that some shareholders disagree with the Board's conclusions is not controlling. As the Court noted in Moran v. Household, supra, slip op. at 44:

> [T]he directors who have the responsibility for the governance of the corporation are entitled to formulate a takeover policy. . . even though the policy may not please all its shareholders.

Put simply, "shareholders do not possess a contractual right to receive takeover bids;" their "ability to gain premiums through takeover activity is subject to the good faith business judgment of the board of directors in structuring defensive tactics." Moran, supra, slip op. 20-21.

Thus, the Unocal Board was obligated to assess the two-tier Mesa Offer and, having concluded that it was inadequate, to attempt to defeat it and protect Unocal shareholders from its detrimental effects.

B. Unocal's Board Is Entitled To A Presumption That Its Decision And Strategy To Resist The Mesa Offer Were In Good Faith And For Proper Corporate Purposes.

When, as here, a corporation's Board has concluded that a tender offer or other takeover bid is not in the best interests of all shareholders or of the continuing business of the company, that decision and the strategy adopted to thwart the takeover threat are to be judged under, and are entitled to the presumptions of, the business judgment rule. Pogostin v. Rice, Del. Supr., 480 A.2d 619, 627 (1984); Kors v. Carey, Del. Ch., 158 A.2d 136, 141 (1960); see Panter v. Marshall Field & Co., 646 F.2d 271, 293-97 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); Treadway Cos. v. Care Corp., 638 F.2d 357, 380-83 (2d Cir. 1980); Johnson v. Trueblood, 629 F.2d 287, 292-93 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981).

The business judgment rule mandates that the decisions of corporate directors be upheld if the decisions were made in good faith and can be attributed to "any rational business purpose." Sinclair Oil Corp. v. Levien, Del. Supr., 280 A.2d 717, 720 (1971) (emphasis added); Warshaw v. Calhoun, Del. Supr., 221 A.2d 487, 492-93 (1966); Kors v. Carey, Del. Ch., 158 A.2d 136, 141-42 (1960).

Moreover, because Delaware law gives directors managerial prerogatives, Del. Gen. Corp. L. § 141(a), directors' actions are assumed to satisfy that test.

> It 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. . . . 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.

Aronson v. Lewis, Del. Supr., 473 A.2d 805, 812 (1984) (citations omitted).

Indeed, when, as is the case at Unocal, a majority of the members of a board are not employed by the company, the "presumption of good faith [the business judgment rule affords] is heightened." Moran v. Household International, Inc., Del. Ch., C.A. No. 7730, Walsh, V.C., slip op. at 32 (January 29, 1985); Panter v. Marshall Field & Co., 646 F.2d 271, 294 (7th Cir.), cert. denied, 454 U.S. 1092 (1981).

The business judgment rule protects not only a board's resolution to oppose an unsolicited takeover bid, but also its selection of tactics and maneuvers employed to defeat the raid. There is no question that repurchasing the company's own stock from less than all stockholders is an appropriate method of deterring a hostile bidder. Cheff v. Mathes, Del. Supr., 199 A.2d 548, 554 (1964); Martin v. American Potash & Chemical Corp., Del. Supr., 92 A.2d 295 (1952); Lewis v. Daum, Del. Ch., C.A. No. 6733, Brown, C. (May 24, 1984); Kaplan v. Goldsamt, Del. Ch., 380 A.2d 556, 568-69 (1977); Kors v. Carey, Del. Ch., 158 A.2d 136, 140-41 (1960); see Carter Hawley Hale Stores, Inc. v. The Limited,

Inc., C.A. No. 84-2200-AWT (C.D. Cal. Apr. 17, 1984); Pogo Producing Co. v. Northwest Industries, Inc., No. H-83-2667 (S.D. Tex. May 24, 1983) (applying Delaware law).

Thus, Unocal's selection of tactics to fend off Mesa is not to be second-guessed.

C. The Undisputed Record Is That Unocal's Board Acted In An Informed, Deliberative Manner, In Total Good Faith.

Although plaintiffs' brief contains some dramatic phrases alleging that Unocal acted hastily in response to the Mesa Offer, plaintiffs' counsel has stated that no attempt will be made on this motion to challenge the adequacy of Unocal's deliberations. Indeed, as set forth above and in the affidavits of Messrs. Eamer, Sachs, and Hobbs, the Unocal Board elected to oppose the Mesa Offer only after extensive deliberation in which it received and considered extensive analyses and opinions from two separate independent investment banking firms concerning the adequacy of that offer. Nor is there any claim in plaintiffs' papers that Unocal's Board was inproperly motivated in determining that the Mesa Offer was inadequate and should be opposed.* Accordingly, given the record before the Court and the presumptions of the business judgment rule, those decisions must be respected.

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* Mesa can hardly contest the good faith of Unocal's Board in concluding that the Mesa Offer is inadequate in view of Mesa's own valuation of Unocal, which greatly exceeds $54 per share.

III. UNOCAL'S FAIR VALUE EXCHANGE OFFER SERVES IMPORTANT CORPORATE PURPOSES AND DOES NOT UNDULY DISCRIMINATE AGAINST MESA.

As set forth above, there is no question that, having concluded that a takeover bid is undesirable, a corporation may repurchase a portion of its shares at a premium in order to defeat or deter the bid. Mesa asserts that, in adopting a strategy to defeat it, Unocal must employ methods that puts money in Mesa's coffers. There is no merit to this position.

A. A Corporation May Purchase Shares From Fewer Than All Of Its Shareholders In Order To Defeat A Takeover Bid Or Protect Shareholders From Its Ill Effects.

As every greenmailer knows, a corporation may at times find it desirable to repurchase its shares selectively.* Delaware law permits the selective repurchase of shares when the limitations serve a valid corporate purpose and do not unduly favor one group over another. As the Court held in Fischer v. Moltz, Del. Ch., C.A. No. 6068, Hartnett, V.C. (Dec. 28, 1978), relied upon by plaintiffs:

> Plaintiffs, in effect, urged that it is unfair for a Delaware corporation to make a stock purchase offer to some stockholders and not to others . . . 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

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* Mr. Pickens has benefitted from several such buy-backs.

> 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.

at page 3 (emphasis added).

It simply cannot be argued that a selective repurchase designed to defeat a hostile tender serves no valid corporate purpose. Cheff v. Mathes, Del. Supr., 199 A.2d 548 (1964); Martin v. American Potash & Chemical Corp., supra; Lewis v. Daum, supra; Kaplan v. Goldsamt, Del. Ch., 380 A.2d 556 (1977); Kors v. Carey, Del. Ch., 158 A.2d 136 (1960).

Plaintiffs' claim that the only stock which may be repurchased to defeat a raider is the raider's stock. (Pl. Brief 16-17). The case law is clearly to the contrary. A corporation is free to buy the public's shares to achieve the same goal. For example, in Carter Hawley Hale Stores, Inc. v. The Limited, Inc., supra, the court upheld a target corporation's repurchase of over 50 percent of its shares to defeat an offer which the board found to be inadequate. Similarly, in Pogo Producing Co. v. Northwest Industries, Inc., supra, the court, applying Delaware law, upheld a target's tender for almost 25 percent of its shares designed

to defeat a hostile tender offer. Mesa makes no effort to distinguish or even discuss such cases.

Plaintiffs' argument on this point reduces itself to this: It is a proper exercise of corporate power for management, having concluded that a minority shareholder's quest for control is inconsistent with the best interests of the remaining shareholders, to pay off the trouble maker -- even at a premium. However, say the plaintiffs, it is an abuse of corporate power for management to use its efforts and resources to protect the innocent victims of the raider's two-tier tender offer by purchasing their stock at a fair price. There is nothing in law or logic that requires Unocal to reward or compensate those it believes are injuring its public shareholders. If a selective stock buyback is proper when it benefits the raider, it cannot be invalid when used to ensure fair value to the victims of an inadequate tender offer.

Moreover, plaintiffs studiously ignore the obvious fact that including Mesa in the Exchange Offer would frustrate the very goals the offer is designed to achieve. First, Mesa's moving papers make clear that it still seeks control of Unocal. It intends to be a net buyer, not seller, of Unocal stock. To the extent that Unocal pays Mesa $72 per share to purchase Unocal stock from Mesa, it funds its subsequent purchases at the admittedly inadequate price of $54 per share. That strategy would subsidize Mesa's unfair tender offer, not defeat it, and would totally frus-

trate one of the Board's objectives in authorizing the Exchange Offer. Second, the Exchange Offer is limited initially to 50,000,000 shares. Every one of Mesa's shares purchased in the Exchange Offer would represent one share of an investor shareholder that would remain subject to the inadequate Mesa Offer. Thus, it is clear that the exclusion of Mesa from the Exchange Offer satisfies the corporate purpose requirements of Fischer v. Moltz.

B. The Unocal Offer Does Not Unduly Discriminate Against Mesa.

In stating the holding of Fischer v. Moltz, plaintiffs' brief repeatedly omits the important qualifier "unduly," arguing instead that Fischer forbids selective repurchases that favor one group over another at all. (Pl. Brief 14-15, 19). To the contrary, under Fischer, a company may repurchase its shares selectively for a valid corporate purpose if the different treatment inherent in any discrimination does not favor one group unduly -- i.e., more than is necessary to achieve the corporate purpose.

In Fischer, a closely-held company sought to purchase shares from its former employees, except from those in lawful competition with it. That discrimination was obviously viewed by the Court as punitive and was unrelated to any proper corporate purpose. But nothing in Fischer suggests that the larger discrimination involved in that case -- between former employees and all other shareholders

-- was in any way improper, whether or not the former employees received a premium for their shares. The Court in Fischer framed the question presented in that case as "whether a corporation may make an offer to purchase its own shares from a group of its stockholders (former employees) but exclude certain other members of the group from the offer." (Id. at 3). The Court found that the corporation had no valid purpose for excluding certain stockholders "in the same category" as others who were not excluded. (Id.). Here Mesa -- which unlike any other stockholder is making an inadequate offer to buy all the shares of the company -- is in a category by itself. As set forth above, the exclusion of Mesa's shares from the Exchange Offer is no broader than necessary to effect the legitimate goals of deterring the inadequate Mesa Offer and providing fair value to Unocal's investor shareholders. Accordingly, the Exchange Offer does not unduly discriminate against Mesa.

Indeed, wholly apart from the reasonableness of Mesa's exclusion, Mesa will not suffer any economic discrimination at all. Mesa's motion is premised on the assertion that "[v]alue in excess of the fair value of Unocal's shares" is being paid in the Exchange Offer. (Pl. Brief at 9). It is on that unsupported assumption that the plaintiffs claim to be damaged by the Exchange Offer.

But there is no evidentiary support in the record for this bald assertion. Plaintiffs' papers contain nothing more than the assertion of plaintiffs' "belief" that Uno-

cal's stock is not worth $72 per share. (Pl. Brief 18; Tassin Aff. ¶ 8). Whatever else this "belief" may be, it is not evidence. Plaintiffs present no expert opinions, valuation studies, or independent analyses of Unocal's value.

Arrayed against this "belief" are (i) the affidavits of Unocal's two investment bankers stating that $72 per share is within the range that fairly values Unocal's net assets (Sachs Aff. ¶ 31, 35; Hobbs Aff. ¶ 14), (ii) the informed judgment of Unocal's independent Board that $72 is a fair price (Eamer Aff. ¶ 18; Sachs Aff. ¶ 35; Hobbs Aff. ¶ 14), (iii) Mr. Pickens' own public statement of April 23 endorsing John Herold's value of $73 per Unocal share (Knighton Aff. Ex. A), and (iv) the offering brochure circulated by Mesa to parties from whom it sought financing showing values for Unocal as high as $86 per share (Coats Aff. Ex. A). This record permits no other conclusion than that $72 is a fair, not an excessive, price for a share of Unocal stock. (Sachs Aff. ¶ 35; Hobbs Aff. ¶ 14).

Certainly there is nothing in the record to establish that "[v]alue in excess of the fair value of Unocal's shares will have been paid from the corporate coffers," or that "the value of [plaintiffs'] equity holding will have been slashed." (Pl. Brief 19). Because the Unocal offer exchanges stock for debt of equivalent fair value, it does not dilute any shares not bought in the offer. Thus, Mesa, which seeks to acquire 100% ownership of Unocal, will suffer no economic loss if the Exchange Offer proceeds.

meetings reflect, the directors were advised that, when directors recommend that shareholders sell their shares, the accepted and preferred practice is for the directors to back up their recommendation by selling their own shares.

IV. PLAINTIFFS HAVE NOT SHOWN A PROBABILITY OF SUCCESS ON THEIR PROXY CLAIMS

Plaintiffs seek to enjoin a multibillion dollar Exchange Offer on the grounds that it interferes with their proxy solicitation, relying on a non-existent legal principle and the speculation of their proxy solicitor. As with their other claim, plaintiffs' have failed to demonstrate the remotest probability of success.

They do not claim that the Exchange Offer is a sham, nor is there any claim that stockholders are being mislead as to the benefit to them of the Exchange Offer. Instead, plaintiffs claim that the Exchange Offer gives Unocal an advantage in the proxy contest and on that basis the offer should be be enjoined. There is no law supporting such a proposition. There has been no change in the rules of the proxy contest in mid-stream and no one has been precluded by the Exchange Offer from soliciting or voting proxies. (Compare Lerman v. Diagnostic Data, Inc., Del. Ch., 421 A.2d 906 (1980). There is simply no rule of law requiring that a contestant in a proxy contest refrain from engaging in other activity while his opponent is soliciting proxies. Indeed, if there were, the April 8 Mesa Offer as well as the publicized statement in the April 24 Tassin Affidavit that Mesa intends to change the price of the Mesa Offer, both of which occurred after Unocal began soliciting proxies in mid-March, would also violate that non-existent principle.

Just last week, plaintiffs were in this Court challenging amendments to Unocal's bylaws requiring 30 days' notice of proposals to be presented at Unocal's 1985 annual meeting. At that time, plaintiffs highlighted that there is a "fast-moving kaleidoscope of events" and that stockholders should therefore be free to react to those events (Tr. at 9). This week, Mesa does not like the events and therefore seeks to enjoin them, thereby depriving shareholders of the ability to react to them.

V. PLAINTIFFS HAVE ACQUIESCED IN THE EXCHANGE OFFER AND ARE THEREFORE BARRED FROM CHALLENGING IT.

Plaintiffs' Court filings appear to attack the Exchange Offer and allege that it will harm them (see Compl. ¶¶ 28, 55, 70; Pl. Brief 9-10, 26; Second Tassin Aff. ¶¶ 8, 10). Plaintiffs' public statements present a very different view. Mr. Pickens has publicly stated that the Exchange Offer is "the first time the company has done anything for shareholders" and has advised Unocal's shareholders to "take advantage of this offer" by tendering their shares to Unocal (Second Coats Aff. Ex. B). Plaintiffs are thus in the anomolous position of promoting the very Exchange Offer which they claim in this action will cause them irreparable injury.

It is a settled principal of Delaware law that one who acquiesces in an action has no standing in equity to complain against it. Trounstine v. Remington Rand, Inc., Del. Ch., 194 A. 95 (1937). In Trounstine, plaintiff transmitted shares to the corporation to be exchanged in a reclassification based upon a Delaware precedent holding such a classification to be lawful. The precedent was reversed by the Supreme Court, and the plaintiff then sought to challenge the reclassification. The Court rejected plaintiff's claim on the grounds that he had acquiesced in the reclassification and was therefore barred from attacking it. As the Court stated:

> The rule is a general one that he who participates in or acquiesces in an action has no standing in a court of equity to complain against it, even though the act be against the permission of the law . . . . As a general rule, equity will not hear a complainant to stultify himself by complaining against acts in which he participated or of which he has demonstrated his approval by sharing in their benefits.

See also Warren v. Warren, Del. Ch., C.A. No. 6111, Hartnett, V.C. (May 25, 1982) ("one who acquiesces in an act cannot later seek relief from the act in equity"); Rosenfeld v. Schwitzer Corp., 251 F. Supp. 758, 762 (S.D.N.Y. 1966) (the rule barring a shareholder from attacking a transaction in which he has acquiesced "prevents a shareholder from eating his cake and having it too").

There are even stronger reasons for denying relief in the present case than there were in Trounstine. Here, plaintiffs have not only acquiesced in the transaction which they now seek to challenge, but have actually promoted it and recommended it to Unocal's stockholders. Thus, any harm of which plaintiffs complain is in large measure self-inflicted. As this Court has stated, "in good conscience I cannot permit the plaintiffs to knowingly create their own crisis and then take advantage of it on the grounds that they will be irreparably harmed unless the Court intervenes." O'Brien v. State of Delaware, Del. Ch., C.A. No. 838(K), Brown, C. (July 3, 1984). As a court of equity, this Court will not lend its aid to one who has been guilty of conduct which violates the fundamental conceptions of

equity jurisprudence. Jones v. Bodley, Del. Ch., 39 A.2d 413 (1944). Plaintiffs' promotion and recommendation of the Exchange Offer to Unocal's stockholders precludes them from challenging that offer in this Court.

VI. PLAINTIFFS CANNOT CARRY THEIR BURDEN OF ESTABLISHING THE IMMINENT IRREPARABLE HARM ESSENTIAL FOR THE EXTRAORDINARY RELIEF THEY SEEK.

Plaintiffs have not demonstrated, and cannot demonstrate, that they or anyone else will be irreparably harmed if their application for injunctive relief is denied.

Numerous cases have indicated that the fundamental prerequisite for the entry of preliminary injunctive relief is the demonstration of imminent irreparable injury. E.g., Sandler v. Schenley Industries, Inc., supra, 79 A.2d at 610; Allied Chemical & Dye Corp. v. Steel & Tube Co. of America, supra. Thus, "[a]n injunction, being the 'strong arm of equity,' should never be granted except in a clear case of irreparable injury and with full conviction on the part of the court of its urgent necessity." State v. Delaware State Education Ass'n, Del. Ch., 326 A.2d 868, 872 (1974), quoting 1 J. High, High on Injunctions § 22 (4th Ed. 1905).

Even where, unlike here, substantial injury can be shown, that alone will not suffice; an "injunction will never issue merely because there is a threat of very great injury." Bayard v. Martin, Del. Supr., 101 A.2d 329, 334 (1953), cert. denied, 347 U.S. 944 (1954). Rather, preliminary injunctive relief "should not be granted unless truly irreparable injury would be suffered by the party seeking such relief. . . ." Thomas C. Marshall, Inc. v. Holiday Inn, Inc., Del. Ch., 174 A.2d 27, 28 (1961) (emphasis supplied). When the plaintiff "can point to no immediate

threat of irreparable and immediate injury," the injunction must be denied. Levin v. Metro-Goldwyn-Mayer, Inc., Del. Ch., 221 A.2d 499, 505 (1966).

A. Plaintiffs' Exclusion From The Exchange Offer Cannot Constitute Irreparable Harm Since Relief Is Available Upon Final Hearing That Is Fully Adequate To Remedy Any Harm Plaintiffs Can Establish.

Plaintiffs assert that if they were permitted to do so, they would tender into the Exchange Offer. Plaintiffs further assert their belief that debt securities offered in the Exchange Offer are worth more than the Unocal stock. According to plaintiffs, the exclusion of plaintiffs from the Exchange Offer thus results in irreparable injury.

Plaintiffs' request for injunctive relief is without merit and is totally unpersuasive because, as a matter of law, where monetary damages after a final determination on the merits affords adequate relief, irreparable injury cannot be shown, and an injunction should not issue. Bayard v. Martin, 101 A.2d at 334 (1953); FMC Corp. v. R. P. Scherer Corp., Del. Ch., C.A. No. 6889, Longobardi, V.C., (Aug. 6, 1982) slip op. at 12; Kahn v. Household Acquisition Corp., Del. Ch., C.A. No. 6293, Brown, V.C. (Dec. 12, 1980), slip op. at 9; High On Injunctions § 68 (4th Ed. 1905). Indeed, Plaza Securities Co. v. Datapoint Corp., Del. Ch., C.A. No. 7932, Brown, C. (Mar. 5, 1985), aff'd, Del. Supr.,

No. 79, Horsey, J. (Mar. 8, 1985), the very case relied on by plaintiffs, acknowledges this very point.

In Plaza Securities the Court specifically found that "money damages cannot adequately compensate for the interference with [plaintiff's] legal right" and that this finding is necessary to satisfy the irreparable injury requirement. C.A. No. 7932, slip op. at 15. The only other case cited by plaintiffs is Fischer v. Moltz, supra. There, based upon the record before him, the Vice-Chancellor concluded that a preliminary injunction was reasonably necessary for the preservation of the status quo. He did not hold that such relief was in any way automatic or that the requirement that plaintiff show irreparable injury was somehow waived. Moreover, since there was only one offer in Fischer, the Court found the effect of an injunction "will be merely to postpone consummation of the offer until after a final ruling." Id. This is in sharp contrast to the present situation where there are two competing offers and an injunction enjoining the Exchange Offer while the Mesa Offer is free to proceed would have drastic and far-reaching consequences. (Sachs Aff. ¶¶ 49-51).

Even if plaintiffs were ultimately able to demonstrate on final hearing that Unocal unduly discriminated against them and that they suffered economic injury as a result, such damages could easily be quantified. There is no question that Unocal is financially able to respond to such an award. (Sachs Aff. ¶¶ 33, 48; Eamer Aff. Ex. A,

pp. 12-13 and 17, indicating a surplus asset value of approximately $2 billion after the full 87,000,000 share Exchange Offer). Plaintiffs have no evidence to the contrary. On this record, irreparable injury cannot be established.

B. The Increased Debt After The Exchange Offer Cannot And Does Not Constitute Irreparable Injury Since Relief Is Available Upon Final Hearing.

Plaintiffs next allege that Unocal's increased debt after the Exchange Offer will negatively alter its capital structure, resulting in a reduction of the value of plaintiffs' stock. They further allege that a monetary recovery to remedy plaintiffs' injury is not possible from the individual defendants. Again, plaintiffs' argument for injunctive relief is unsound.

First, like plaintiffs' other irreparable injury contentions, this argument is premised on their unsupported belief that the $72 per share price in the Exchange Offer is too high. As previously noted, the record contradicts this assertion. Plaintiffs additionally assert that the $72 per share price in the Exchange Offer will impose crippling debt on Unocal. Once again, the record contradicts this assertion. In fact, Unocal has adequate net worth and can service and retire this new debt as it becomes due. (Sachs Aff. ¶ 33).

Second, if the Court after final hearing on the merits were to conclude that plaintiffs were somehow harmed, monetary damages from Unocal would provide full and adequate compensation. Plaintiffs' allegation that the individual defendants would not be able to provide such damages is irrelevant.* The corporation is capable of paying such damages (Sachs Aff. ¶ 48) and therefore entry of interim injunctive relief is improper.

C. Plaintiffs' Claim That Stockholders Will Be Confused Is Meritless, And In Any Event Plaintiffs Lack Standing To Assert A Claim On Behalf Of Unocal's Investor Stockholders.

Plaintiffs also complain that Unocal's other stockholders will be irreparably injured by having to decide whether to tender their shares into the Exchange Offer without knowing whether plaintiffs are free to tender and thus to what extent they may be prorated. This claim is a red herring. The investor shareholders are primarily concerned with the economics of the competing offers. If they find the Unocal offer to be attractive on a per share basis, they will tender into the Exchange Offer for as many shares as possible, regardless of proration.

In addition, plaintiffs have no standing to complain on behalf of other shareholders. Plaintiffs attempt

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* Plaintiffs have sued individually, not derivatively, and therefore cannot be heard to seek relief directed solely against the individual defendants.

to portray themselves as advocates for the other shareholders, but the fact is that they are seeking to gain control of Unocal for $54 per share in an unsolicited two-tier tender offer while conceding that the fair value of Unocal's shares is substantially higher. In light of their position as buyers of Unocal stock, plaintiffs cannot purport to represent Unocal's other stockholders with respect to the Exchange Offer.

* * *

In sum, plaintiffs have failed to establish the essential prerequisite of irreparable harm. Thus, the extraordinary relief of a temporary restraining order cannot be granted.

D. The Balance Of Hardships Weighs Decidedly Against The Plaintiffs.

Apart from plaintiffs' failure to demonstrate any irreparable injury, which by itself requires the denial of their motion, the adverse and irreparable effects of any injunction upon the other Unocal stockholders and upon Unocal itself demonstrates that no restraining order should issue. If ever there were a case where the balance of hardships tips against plaintiffs, this is it.

Plaintiffs have publicly and repeatedly told the Unocal stockholders that the Exchange Offer is attractive, that it is the "first time the company has done anything for shareholders," and that stockholders should tender into the

Exchange Offer. To enjoin the Exchange Offer, conceded by plaintiffs to be advantageous to the other Unocal stockholders, would impose substantial and irreparable hardship on these other stockholders. Entry of a temporary restraining order will cause a loss of confidence in the financial community that shareholders will be able to have the benefit of the $72 Exchange Offer. This, coupled with Mesa's inadequate offer then being the only available offer, will result in a drop in the market price of Unocal stock. (Sachs Aff. ¶ 49). In addition, Unocal will be irreparably harmed since it will lose the opportunity to accept shares tendered pursuant to the Exchange Offer before Mesa is able to accept shares pursuant to the inadequate $54 offer. (Sachs Aff. ¶ 50).

Moreover, any injunction designed to force Unocal to include Mesa in the Exchange Offer will coerce Unocal into subsidizing the inadequate Mesa Offer. This is because Mesa will be able to apply the $72 per share it would receive from Unocal to their purchases of shares from other shareholders at the inadequate price of $54 per share, thereby dramatically reducing Mesa's cost of purchasing Unocal shares. (Sachs Aff. ¶ 51).

In contrast to the strong public interest favoring continuation of the Exchange Offer due to the conceded benefits to Unocal's other stockholders, denial of plaintiff request for extraordinary injunctive relief would not cause significant hardship to plaintiffs. After a final hearing

on the merits an award of monetary damages would afford full relief. Accordingly, plaintiffs have failed to demonstrate that the balance of hardships weighs in their favor and preliminary injunctive relief cannot be granted.

CONCLUSION

For the reasons stated herein and in the affidavits filed herewith, the relief requested by plaintiffs should be denied in all respects.

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