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,	FILED UNDER SEAL
Defendants.	

PLAINTIFFS' OPENING BRIEF
IN SUPPORT OF
THEIR MOTION FOR A PRELIMINARY INJUNCTION

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NATURE AND STAGE OF THE PROCEEDINGS

This is an action for declaratory and injunctive relief with respect to (i) certain bylaws adopted by defendants which purport to limit the manner and timing of stockholder nominations for election of directors and the business which may be brought by stockholders before annual meetings of stockholders for their consideration and action and (ii) an offer announced by defendant Unocal Corporation ("Unocal") on April 16, 1985, and dated April 17, 1985 (the "Original Debt Tender"), as amended on April 23, 1985 and May 1, 1985 (the "Amended Debt Tender").*

Defendants 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 (collectively the "Director Defendants") are each directors of Unocal and constitute thirteen of the fourteen members of the board of directors of Unocal.

Plaintiffs Mesa Petroleum Co., a Delaware corporation ("Mesa"), Mesa Asset Co., a Delaware corporation wholly owned by Mesa ("Mesa Asset"), Mesa Partners II, a Texas general partnership (the "Partnership") and Mesa Eastern,

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*Where use of either "Original Debt Tender" or "Amended Debt Tender" might create confusion, the term "Debt Tender" will be employed. "Debt Tender" refers to the aggregate transaction of April 16, 1985, as amended on April 23, 1985 and May 1, 1985.

Inc., a Delaware corporation wholly owned by the Partnership ("Mesa Eastern") filed their complaint herein on April 12, 1985. On April 22, 1985, plaintiffs amended their complaint to challenge the Original Debt Tender. Also on April 22, this Court issued its opinion granting plaintiffs injunctive relief with respect to Unocal's April 7th interpretation of its bylaw amendments.

On April 23, 1985, defendants issued a press release disclosing that they had amended the Original Debt Tender. That same day, plaintiffs moved for the entry of a temporary restraining order enjoining Unocal from proceeding with the Amended Debt Tender, from soliciting tenders pursuant thereto and from buying shares thereunder. On Monday, April 29, 1985, this Court issued its opinion and order temporarily restraining defendant Unocal "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." Mesa Petroleum Co. v. Unocal Corp., Del. Ch., C.A. No. 7997, Berger, V.C., slip op. at 8-9 (Apr. 18, 1985).*

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*Copies of all unreported decisions cited herein are included in alphabetical order in the appendix to this brief.

On May 1, 1985, this Court denied Unocal's application for certification of an appeal from its April 29 temporary restraining order. On May 2, 1985, the Supreme Court deferred consideration of Unocal's application for acceptance of an appeal from the April 29 order until this Court has determined plaintiffs' motion for a preliminary injunction. This is plaintiffs' brief in support of that motion.

STATEMENT OF FACTS

A. The Partnership Invests In Unocal And Defendants Commence Their Manipulations To Thwart The Partnership With No Regard For Their Fiduciary Obligations.

The Court is now well aware of the illegal and inequitable maneuvers undertaken by defendants well before the Partnership made any proposal to Unocal or its shareholders. Those maneuvers have already been restrained on two occasions by this Court in granting temporary injunctive relief to plaintiffs. Accordingly, only the highlights of defendants' conduct which was the subject of those earlier motions will be repeated here, so as to show that defendants have demonstrated time and time again that they are incapable of exercising reasoned business judgment with respect to the Partnership or its Offer.*

Not long after the Partnership began to purchase shares in Unocal in October of 1984, defendants began a campaign to prevent the Partnership or anyone associated with it from investing in Unocal. First, defendants launched their threats against Mesa's lenders. Specifically, one of Mesa's principal lenders, Security Pacific National Bank ("Security Pacific"), was threatened with the loss

*The terms "Offer" and "Partnership Offer" herein refer to the Partnership's Offer to purchase 64,000,000 shares of Unocal stock for $54 per share announced April 8, 1985. See discussion at pp. 7-8, *infra*.

of business of Unocal and Union Oil Company of California, a wholly owned subsidiary of Unocal, and was ultimately sued for damages in excess of 55 million dollars for having done business with Mesa. These threats were extended to banks which participated in credit agreements with Mesa, including Texas Commerce, Mellon Bank and Mercantile Bank, by sending copies of the complaint in plain brown envelopes to the homes of officers and directors of those banks. (Affidavit of Sidney Tassin ("Tassin Aff.") ¶¶4,7).

Defendants stepped up their manipulations after the Partnership announced that it had invested in Unocal stock and that it intended to seek proxies in favor of adjourning the annual meeting of stockholders. (Tassin Aff. ¶8). Defendants reacted swiftly to these announcements by adopting three bylaw amendments designed (1) to limit the manner in which matters could be brought for stockholder action before an annual meeting, and (2) to reduce the number of shares which must be represented at the annual meeting to constitute a quorum. (Tassin Aff. ¶10).

As if this were not enough, after the Partnership announced its Offer, defendants belatedly issued their interpretation of the foregoing bylaw amendments which was designed to prevent the Partnership or any other stockholder of Unocal from making any proposal for stockholder action to be considered at an adjourned meeting. Thus the injunction entered by this Court on April 22, 1985 was based on a finding that "Unocal's failure to announce its interpretation of the bylaws until after the thirty day notice period had run was inequitable."

As these events demonstrate, from the moment defendants learned of the Partnership's investments in Unocal, they have tried to thwart the Partnership without consideration of the interests of Unocal and its stockholders.

B. Defendants Rubber Stamp The Debt Tender Proposals First Presented To The Board Only Five Days After The Partnership Offer Is Announced.

Apparently unsatisfied with the above-described manipulations, and unwilling or unable to offer an economically viable alternative to the Partnership's Offer, the Director Defendants embarked on a scorched earth policy by quickly approving the Debt Tender proposals which were first presented to the board at a meeting specially called shortly after the Partnership Offer was announced. Despite the radical and complicated nature of the Debt Tender proposals, the directors blandly endorsed them without questioning whether the measures were truly in the best interests of Unocal and all of its shareholders or whether they served any proper corporate purpose. As demonstrated below, the measures were not adopted as a result of the reasoned and thoughtful exercise of business judgment by fiduciaries, but as an attempt to protect the incumbency of the Director Defendants.

1. The Announcement Of The Partnership Offer.

On April 8, 1985, the Partnership commenced its Offer to purchase 64,000,000 shares of common stock of Unocal for $54 cash net per share. The purpose of the Offer, as is stated in the Offer to Purchase dated April 8, 1985, is as follows:

> The purpose of the Offer is to acquire a number of Shares which, when added to the Shares presently owned by the Partnership, will constitute a majority of the Fully Diluted Shares (as hereinafter defined) as a step in obtaining control of the Company and ultimately acquiring the entire equity interest in the Company. If the Purchasers purchase an aggregate of 64,000,000 Shares pursuant to the Offer, the Purchasers intend to seek maximum representation on, and possibly control of, the Board of Directors of the Company. In addition, the Purchasers currently intend to propose a transaction or series of transactions in which the Shares not owned by the Purchasers would be acquired in exchange for securities having an aggregate market value, in the opinion of an independent investment banker selected by the Purchasers and on a fully distributed basis as of the time the terms of such securities are determined, of approximately $54 per Share.

(Tassin Aff. Ex. N at 1).

The Partnership's Offer represents a substantial premium over the market value for Unocal stock. For the year and nine months prior to the time the Partnership began to accumulate stock, Unocal traded in a range between $27 and $41 per share. (Affidavit of Samuel A. Nolen ("Nolen Aff.") Ex. A at 18). During this two-year period, Unocal had not increased its dividends and its earnings for 1984 were substantially below its 1982 earnings. (Affidavit of Gregory P. Williams ("Williams Aff.") Ex. A).

The Offer reflects the Partnership's view of the value of the company as a going concern. (Tassin Dep. 519-20). Further, the price is comparable to the terms of the acquisitions of two integrated oil companies (Gulf and Getty) which are substantially similar to Unocal in size and nature of assets. Based on the statistics presented to the Unocal board, the median and mean price of the implied per share amounts for Unocal are $59 and $57 when compared to the Gulf and Getty acquisitions. (Affidavit of John F. Sorte ("Sorte Aff.") ¶17). Indeed, when the Offer is compared to the Gulf and Getty transactions, only four of the twelve comparative amounts are in excess of $60 per share, and none are in excess of $70 per share. (Third Affidavit of Sidney Tassin ("Third Tassin Aff." ¶7); Affidavit of John F. Sorte ("Sorte Aff.") ¶17).

There is absolutely no evidence in the record that the Partnership had any intention other than to acquire and operate Unocal as a going concern. When questioned in his deposition by Unocal's counsel as to whether he would accept "greenmail," Mr. Pickens replied:

> Let me first say there won't be any greenmail. We have never taken greenmail

> in any deal we have ever been involved in, and second we're on the record on this, that on April 22, New York, April 23 in Los Angeles that we will not accept greenmail.

(Pickens Dep. 138; <u>and</u> <u>see</u> Second Affidavit of William S. Coats, III ("Second Coats Aff.") Ex. C at 32).

2. <u>The April 13, 1985 Meeting: The Partnership Offer Quickly Declared Inadequate.</u>

Five days after the Partnership Offer was announced, the board of directors* met, and in the course of that one meeting decided that the Partnership Offer was "grossly inadequate" and that they would take steps to formally oppose it. The board members received neither an agenda nor any other written materials prior to the meeting. (Doheny Dep. 37-39; Brinegar Dep. 23, 25). Instead, a prepackaged set of transparencies or slides was shown on an overhead projector to the board members for the first time at the meeting. (Brinegar Dep. 27 and Ex. 2 and 3; Campbell Dep. 34-35). The board was shown ten slides when considering the Partnership Offer, eight setting forth the investment banker's methodology without numerical information (Brinegar Dep. Ex. 2, Slides 3-10) and two purportedly comparing the acquisitions of five oil companies (Brinegar

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*The board consists of eight outside directors (Ballhaus, Campbell, Doheny, Eamer, Harder, Jacobs, O'Malley and Tatum) and six management directors (Hartley, Brinegar, Burke, Henderson, McConnor, and Stegmeier). All of the directors except Tatum were present at the April 13 meeting (Affidavit of Richard K. Eamer ("Eamer Aff.") Ex. A at 1).

Dep. Ex. 2, Slides 11 and 11A).

Peter Sachs of Goldman Sachs & Company, Unocal's investment banker, made the slide show presentation and expressed the opinion that the Offer was inadequate.* However, his presentation on the value of Unocal was so incomplete, incomprehensible and ineffective that the board did not have adequate information on the intrinsic value of the shares of Unocal with which to evaluate the fairness of the Offer. Thus, although certain of the directors recall a slide presentation, directors Campbell and Doheny had no recollection of seeing the slides which dealt with the methodology utilized by the investment bankers (Campbell Dep. 68-76; Doheny Dep. 71-72), and directors Doheny, Campbell and O'Malley could not recall discussion of many of the specific topics which the slides purported to address. (Campbell Dep. 68-76; Doheny Dep. 66-72; O'Malley Dep. 23-26).

The investment bankers allegedly spent considerable time discussing with the board recent major business combinations in the oil and gas industry, as shown on Sachs' slides 11 and 11A. <u>See</u>, <u>e.g.</u>, Sachs Aff. ¶¶19-20. Certain of the directors specifically stated that they relied on that information in determining the value of the Unocal shares.

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*The phrase "grossly inadequate" was suggested not by a director or the investment bankers, but by an outside attorney attending the meeting. (Hobbs Dep. 71-72).

(Eamer Dep. 70; Campbell Dep. 63, 66). The facts, however, demonstrate that the directors were not informed as to the comparability of the companies, did not understand the basis on which the companies were being compared and did not inquire as to the reasonableness or relevance of the comparisons. For example, not a single outside director questioned on the point understood whether or not GAO, Aminoil and Superior Oil were integrated oil companies, and therefore directly comparable to Unocal. (Eamer Dep. 66-67; Doheny Dep. 8; Campbell Dep. 61-62; O'Malley Dep. 28-29).

Furthermore, no outside director has demonstrated an understanding of what is meant on slide 11 by such essential terms as the "Herold value" or the "price/SEC value" or the "NEB". (Eamer Dep. 67-68; Doheny Dep. 74; Campbell Dep. 42, 65-66; O'Malley Dep. 29). No director inquired as to how any of the figures on slides 11 and 11A should be adjusted in order to make the comparison relate to Unocal. Indeed, Brinegar testified that he doesn't recall any questions by members of the board concerning the comparative analysis in Slide 11. (Brinegar Dep. 39).

The investment bankers allegedly valued Unocal shares based both on an "orderly liquidation" and a "non-pressured sale" basis; however, they did not inform the directors whether there would be a different value for each basis. (Brinegar Dep. 38). Also, even though slide

6 indicates that the company was viewed on two bases "as a whole on basis of earnings, cash flow, book value, stock price" and "on business-by-business basis", the investment bankers did not indicate to the directors whether there would be any difference in price for these two bases. (Brinegar Dep. 37-38; Sachs Dep. 118). Slide 6 further indicates that the company was to be valued as a whole based on "earnings", "cash flow", "book value", and "stock price", yet the investment bankers did not state for the directors what value could be obtained using any particular basis.

The facts above demonstrate that the directors were not adequately apprised of the methodology of the investment bankers, and were not adequately advised of the facts or figures which might support the investment bankers' "bottom line". There is wide confusion as to what "bottom line" the investment bankers stated at the April 13 meeting. For example, Doheny recalled that Sachs said the range was $60 to $80 a share. (Doheny Dep. 60). On the other hand, Campbell does not recall any comment at the April 13 meeting which indicated that Unocal was worth more than $75 a share. (Campbell Dep. 50). Eamer states that "Mr. Sachs stated...a person seeking to <u>sell or liquidate the company in an orderly manner</u> would reasonably expect to obtain a price between $70 and $75 per share."* (Eamer Aff. ¶13)(emphasis added). On the other hand, Mr. Sachs' affidavit states "if Unocal were offered for <u>sale in a non-pressured situation</u> and interest solicited from a number of potential purchases, or if <u>Unocal were liquidated in an orderly manner</u>, Unocal shareholders could expect to receive an amount in excess of $60 per share." (Sachs Aff. ¶22)(emphasis added). Sachs did not give the board a going concern value (Sachs Dep. 118). Brinegar testified that (1) no Board member asked what each segment of the company was worth (Brinegar Dep. 38); (2) no one asked what the liquidation value of the company would be (Brinegar Dep. 37); (3) no one asked what the value of Unocal would be based on earnings, cash flow, book value and stock price (Brinegar Dep. 37); and (4) Sachs did not identify values for the company's oil and gas reserves, and that he didn't remember whether anyone asked Sachs to give those values (Brinegar Dep. 35).

There was also confusion as to what the investment bankers meant by the phrase "orderly liquidation". For example, Eamer understood that an "orderly liquidation"

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*Notwithstanding this statement in his affidavit, Eamer testified at his deposition that he believed on liquidation a price as low as $60 or $62 a share would be realized. (Eamer Dep. 78).

would take a year.* (Eamer Dep. 78-79). On the other hand, Jacobs and Campbell did not recall that there was any mention of how long it would take to liquidate Unocal. (Campbell Dep. 48; Jacobs Dep. 40). Messrs. Campbell and Jacobs also candidly testified that no one asked the investment bankers whether any company of comparable size to Unocal had ever been liquidated. (Campbell Dep. 48; Jacobs Dep. 40). Even if Sachs did mention a range for a "sale" with "interest solicited from a number of potential purchasers", no director bothered inquiring as to whether the investment bankers believed a "number of potential buyers" exist for Unocal. (Campbell Dep. 47).

Another area of confusion regarding the investment bankers' "bottom line" is the question of what after tax value would actually be received by the shareholders. Ballhaus, Harder and others considered the tax aspect very important. (Ballhaus Dep. 97; Harder Dep. 10; Tatum Dep. 21-24). However, there is disagreement among the directors as to what was said on this subject. For example, Eamer understood

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*While there is disagreement as to what was said as to the time which would be required for a sale or liquidation (compare Eamer Dep. 78-79 and Campbell Dep. 48), assuming, arguendo, that the investment bankers did quantify the amount of time required for liquidation as one year, the investment bankers should have informed the directors that it would be necessary to discount to present value the amount which might be received one year hence. This topic was not discussed.

that the original offer would be "tax free". (Eamer Dep. 41). Jacobs stated that he could remember no discussion of taxes. (Jacobs Dep. 49). Nonetheless, the offering circular indicated that the directors believed that capital gains treatment would govern the transaction.*

3. The April 13-15 Meetings: The Original Debt Tender Proposal Is Hastily Conceived.

Upon the advice of the Unocal investment bankers that "a substantial percentage of Unocal's stockholders would tender their shares into the Mesa offer" (Sachs Aff. ¶23) it was proposed on April 13 that Unocal issue debt in the amount of $6.1 to $6.5 billion to finance a self tender. Despite the fact that Unocal's investment advisors and management discussed a possible self tender at length between April 8 and April 13, the board received no notice prior to the April 13 meeting that the subject would be considered. (Ballhaus Dep. 33-34). Other than one Slide (Brinegar Dep. Ex. 2, Slide (13(b)) describing the offer, the board was given no written material to consider. (Hartley Dep. 90; Brinegar Dep. 61; Eamer Dep. 71-72). Thus, the

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*It might be noted here that the May 1 supplemental offer of Unocal indicates that if the Mesa group is included in the offer, the tax treatment may be at ordinary income rates. (Williams Aff. Ex. E at 2). The distinction between capital gains rates and ordinary income rates is significant, particularly if maximum rates are applicable. For example, Mr. Campbell purchased 5,000 shares of Unocal at $22. (Campbell Dep. 38-39). If the Mesa offer were treated as a capital gains transaction, the net after federal income tax would be $46. If the $72 offer by Unocal were treated as ordinary income, the net to stockholders with the same basis as Mr. Campbell would be $47.

board did not have before it such documents as (1) an analysis of the Offer to Purchase either by the investment bankers or management; (2) drafts of either the offer to purchase or the trust indenture; (3) documents analyzing the value of the proposed securities in the market place; (4) documents supporting the revaluation of Unocal's assets to $8,200,000,000 (revaluation was required by 8 Del.C. §160 before Unocal could incur $6.1 to $6.5 billion in debt); and (5) comparable supporting interest rate data for rates in excess of 13% (when interest on Unocal's existing debt was in the range of 8% to 10% (Hartley Dep. 133)). Although the investment bankers were proposing "the biggest offering of debt securities perhaps ever" (Hobbs Dep. 73), the board at its April 13 meeting considered the subject for only two hours. (Brinegar Dep. 72).

The "offer," as ultimately announced on April 16, 1985 (the "Original Debt Tender"), consisted of an offer to exchange 87,200,000 shares of Unocal common stock for a package of its debt securities consisting, per Unocal common share, of (i) $20 principal amount of 14% Senior Secured Notes Due 1990, (ii) $32 principal amount of Floating Rate Senior Secured Notes Due 1991, and (iii) $20 principal amount of Senior Secured Extendible Notes Due 1997. The terms and conditions of the Original Debt Tender were set forth in an Offer to Purchase dated April 17, 1985. (Nolen Aff. Ex. A).

The board never questioned whether the proposals were in the best interests of Unocal and all its shareholders, and it certainly did not ask whether they were fair to the Partnership.* In fact, from the record it is plain that the defendants' only goal was to stop the Partnership Offer, and the device selected to achieve this goal -- the Original Debt Tender -- was specifically designed to exclude and thereby irreparably harm the Partnership. This goal is not denied by Unocal's chairman:

> Q. Why did you as chairman and chief executive officer of the company determine to distinguish between Mesa and any other shareholder of the company?
>
> A. Because Mesa was making a raid on our company.
>
> Q. Any other reason?
>
> A. None that I can think of.

(Hartley Dep. 82; Nolen Aff. Ex. A at 1, 7).

The presentation of the Original Debt Tender proposal at the April 13-15 meeting is remarkable for the meagerness of any discussion of its principal features; namely, (a) the basis of the $72 value per share; (b) the need for and the terms of the restrictive covenants; and (c) the appropriateness of excluding the Partnership as a participant shareholder. These aspects of the proposals seem to appear out of thin air.

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*Indeed, Mr. Campbell states that Hartley believes he can treat "long-term stockholders" differently from Mr. Pickens. (Campbell Dep. 129).

a. <u>The $72 value per share</u>.

In selecting the $72 value, the board acted with the same haste and lack of information that it has on other matters relating to the Partnership Offer. Mr. Brinegar testified only that a "range" was developed before the April 13 board meeting in a meeting of the executive committee (Brinegar Dep. 86-87); whereas, Hartley testified that the Executive Committee derived a price range of $70-80 per share before the April 13 meeting.* (Hartley Dep. 65). Without any explanation of underlying values Mr. Sachs announced to the board at the April 13 meeting that in an orderly sale or liquidation of Unocal, a person could realize values as high as $70 to $75 for the shares. (Eamer Aff. Ex. A at 14).

In order to explain how $7 billion in new long term debt might possibly be serviced, an in-house analysis was quickly thrown together based upon (1) revaluing the company's assets to more than $3 billion over the company's book net worth (Eamer Dep. 86); (2) decreasing the cash on hand for 1984 by $41 million at year end, and for 1985 by $77 million by year end (Eamer Aff. Ex. A at 13); and (3) reducing capital expenditures between $549 million and $970 million annually (Doheny Dep. 117). Based on

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*The board of directors had given management authority to purchase up to $100 million of Unocal stock in the open market, and management had elected not to repurchase Unocal's stock at prices substantially below $54. (Hartley Dep. 57-8) these assumptions, Blamey concluded that "the Company had adequate surplus to redeem approximately one-half of its outstanding shares."

Campbell did not recall the Blamey presentation at all. (Campbell Dep. 125-126). Doheny did not recall any explanation of the method of analysis used by Blamey. (Doheny Dep. 64). As Brinegar testified, the in-house analysis, upon which the financial wherewithal of the Debt Tender was based, was never subjected to any questioning by either the board or the investment bankers:

> Q. Okay. Were there any questions raised by any members of the board of Mr. Blamey during his analysis or presentation?
>
> A. Not that I recall.
>
> Q. Did Goldman Sachs or Dillon Read ever comment on this analysis or presentation as to the value of Unocal's equity?
>
> A. Again, we are not talking about the value of our equity. We are talking about a minimum value.
>
> Q. Minimum value.
>
> A. No, they did not.

(Brinegar Dep. 93). The investment bankers were "positive" that they gave no opinion as to whether Unocal could service the debt. (Sachs Dep. 120-21). Except for a few slides showing pro forma financial statements* there were no

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*No slides were presented on the revaluation of Unocal's assets to $8,200,000,000. (Hobbs Dep. 112-13; Brinegar Dep. 91).

written materials provided to the board on the valuations performed by Unocal's management, or on the debt to be assumed under the Debt Tender proposal (Hartley Dep. 62-63; Eamer Dep. 71-72).

Only two days after the Original Debt Tender was first proposed, the board met again on April 15, 1985, and after a brief meeting, resolved to implement the Original Debt Tender. (Eamer. Aff. Ex. A at 16). Four of the directors participated in that meeting via conference telephone. (Id.) The board minutes reflect that one of the directors so participating was Tatum who was in Japan and whose "telephone connection was not comprehensible." (Id.) Eamer participated by telephone from London (Eamer Dep. 23) and testified that he was on the phone from 3 a.m. to 6 a.m., that he was unable to write anything down because of a physical disability (Eamer Dep. 100), and that he never saw the slides shown at the April 15 meeting (Eamer Dep. 101). Nevertheless, Eamer submitted a lengthy affidavit on behalf of the defendants setting forth what purportedly transpired at that meeting.

As at the April 13 meeting, the board members physically present viewed transparencies shown on an overhead projector. Those participating over the telephone were not able to view the transparencies and were not given any materials to review as a substitute (Hartley Dep. 89-90). Thus, except for the "slide show" given to those directors attending in person, the directors were not given any written materials to review before, during or between the April 13th and 15th meetings. (Hartley Dep. 89-90; Brinegar Dep. 61; Eamer Dep. 71-72).

Mr. Blamey of Unocal management, and not the investment bankers, presented two slides and described the proposal to offer debt securities for $72 per share, a price determined by the executive committee. (Brinegar Dep. 86-87). Blamey then explained the ability of the company to finance the debt of $6.3 billion. (Eamer. Aff. Ex. A at 13, 17). Remarkably, the board members did not object to the terms of the Original Debt Tender even though Mr. Blamey could at best only promise no <u>immediate</u> ill effects from its implementation. Based on assumptions that capital expenditures in 1985 would be reduced by $549 million and dividends on common stock reduced by $156 million, Mr. Blamey could only promise "there is therefore no question that the Company can get through 1985." (Eamer Aff. Ex. A at 17). And, when asked how capital expenditures would be reduced by $549 million, he responded only that "this amount would come from discretionary capital expenditures and the reduction would not have an <u>immediate</u> <u>severe</u> effect on revenues." <u>Id</u>.

The investment bankers joined the meeting after Mr. Blamey's presentation and advised without explanation that they could "support a price of 72 as fair to those shareholders who tendered." (Hobbs Dep. 65). Again, the board members were mute -- no questions were asked of the investment bankers as to how they reached this conclusion (Ballhaus Dep. 76, 83), and according to Hobbs the investment bankers did not render any other opinion. (Hobbs Dep. 65). Indeed, the investment bankers were present at the meeting for only five minutes. (Sachs Dep. 116).

b. The restrictive covenants.

The directors were told that there should be restrictive covenants limiting the operations of Unocal in order to protect the holders of the debt instruments. (Brinegar Dep. 55). There was no other discussion regarding restrictions at any board meeting,* nor was the text of any of the covenants made available for the directors to review. (Campbell Dep. 101-02; Eamer Dep. 25; Doheny Dep. 38, 39, 106; Brinegar Dep. 55; Ballhaus Dep. 61, 136). Nevertheless, the board authorized Unocal management to execute the indenture setting forth the terms and conditions which impose sweeping restrictions on the financial management and operation of Unocal, as well as the rights of all Unocal shareholders, and include the following:

(1) The applicable interest rates on the securities would be increased by 175 or 200 basis points upon

*The slide purporting to set forth the terms of the debt securities (Brinegar Dep. Ex. 2, Slide 13B) shows only that there will be "substantial restrictive covenants."

a merger if certain coverage ratios declined by 33 percent or more from the ratios existing prior to the merger. The Unocal pro formas show that the issuance of securities pursuant to the Original Debt Tender reduces the ratio by 82 percent. (Williams Aff. Ex. B at Ex. T3C(1),(2)&(3)).

(2) Any increase in debt secured by a mortgage would be limited to five percent of "Consolidated Adjusted Net Assets", which computes to no more than $429 million, less "debt" attributed to all sale-leaseback transactions. (Williams Aff. Ex. B at §1010).

(3) Sale and leaseback transactions are restricted except to the extent of the secured debt. (_Id_. at §1011).

(4) The company can only issue senior debt if it is used to meet working capital needs. Such issues may not aggregate more than 8% of "Consolidated Adjusted Net Assets" during the entire period in which any of the securities remain outstanding. (_Id_. at §1012).

(5) If more than 10 percent of the Consolidated Net Assets are sold, proceeds must be applied to redeem the outstanding securities. (Williams Aff. Ex. C at §1014).

(6) Transactions with affiliates are limited. (Williams Aff. Ex. B at §1015).

(7) The issuance of stock and mergers by subsidiaries with any other entities are limited. (_Id_. at §1016).

(8) Amendments to the charter of Union Oil are disallowed so long as any of the securities are outstanding. (Id. at §1017).

(9) Dividends and investments by the company are capped, restricting payment of any dividend or the making of any investment by the company or its subsidiaries to an aggregate amount of $100,000,000 (i.e., less than one year's Unocal dividend) plus 50% of consolidated net income less 100% of consolidated net losses. (Id. at §1013).*

As the board minutes reflect, there was simply no discussion about the above terms and conditions of the indenture. (See Eamer Aff. Ex. A at 17). Thus Brinegar testified:

> Q. What restrictive covenants were explained to the Board? By that I mean were specific restrictions explained to the Board?
>
> A. I don't remember any.
>
> Q. Were the restrictive covenants ever given to the board in writing at any of its meetings between the 13th and the 22nd?
>
> A. No.

(Brinegar Dep. 54-55; accord Ballhaus Dep. 136). Even at his May 2 deposition, Ballhaus was totally unaware of the restriction on mergers (Ballhaus Dep. 61), and testified

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*General exceptions have been made to all restrictions to permit the formation of the comtemplated master limited partnership. See Williams Aff. Ex. D, Amendment 1, passim.

that he didn't know the effects of any of the restrictions on the company. (Ballhaus Dep. 62). Indeed, Hartley confirmed that these subjects were simply not discussed and that it was left to the "financial advisers" and the "[Unocal] financial department" to create the restrictive terms and covenants which would hereafter severally limit the future operations of the company. (Hartley Dep. 103).

Equally surprising is the lack of any explanation regarding the purpose of these restrictive covenants (Brinegar Dep. 54-55; Hartley Dep. 103-104), although it is apparent that the goal was to scare off the Partnership. Defendants self-servingly state that the purpose of the restrictions was to "protect the holders of the debt", when in fact, management and the investment bankers recognized that the restrictive covenants would inhibit Mesa's offer. (Hobbs Dep. 83-4). Moreover, the restrictions are unnecessary to protect holders of the debt (Sorte Aff. ¶¶31, 32, 33, 35) and the combination of restrictions is both unprecedented and exceedingly burdensome. (Sorte Aff. ¶38).

An example of the pervasiveness of the restrictive covenants is the experience Unocal has had already with respect to the master limited partnership. At the April 22 meeting of the board at which the Amended Debt Tender was authorized, the board also authorized management to take certain steps toward the establishment of a master limited partnership. (Second Affidavit of Sidney Tassin ("Second Tassin Aff.") Ex. L at 9). Unknown to the board, and indeed unknown to management, the investment bankers had so restricted the future operations of Unocal under the restrictive covenants of the April 15 indenture, that Unocal would have been prohibited from creating a master limited partnership. (Brinegar Dep. 148-49). It was not until after the meeting of April 22 that it was realized that amendments to the restrictive covenants would be required to allow the master limited partnership proposal to go forward. Ironically, Unocal was required to change the restrictive covenants as late as April 30 because Section 1013 of the trust indenture precluded Unocal from making its Amended Debt Tender. It was not until the April 30 draft trust indenture that a new exception, Section 1013(c), was added which permits the purchase or acquisition of "Common Stock in exchange for securities, cash, property or other securities."* (Williams Aff. Ex. C at ¶1013).

In addition to restricting in virtually every conceivable way the financial management of Unocal, the restrictions also provide that under certain circumstances the interest on the securities would be increased by 175 to 200 basis points.** The directors were not informed

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*Jacobs testified that he did not recall any discussion concerning changes to the restrictions at the April 29 meeting of the board. (Jacobs Dep. 31-32).

**One of the circumstances is upon a merger if certain coverage ratios decline by 33% or more from the ratios existing prior to the merger. (Williams Aff. Ex. B at T3C(1),(2),(3)). In fact the Unocal pro formas show that the issuance of securities pursuant to the original offer to purchase would reduce the ratio by 82%, and therefore would trigger additional basis points upon a merger.

at the April 15 meeting that a provision which would increase the interest to be paid on the securities would be included in the indenture. (Campbell Dep. 102; Doheny Dep. 106). There is no evidence that the financial information presented on whether Unocal could service the debt included information on whether Unocal could afford to pay 175 to 200 basis points more than the original interest rates. (Brinegar Dep. Ex. 2, Slides 14-22). In fact, the investment banker could cite to no other example of a debt security with a similar provision. (Hobbs Dep. 87).

c. <u>The discriminatory features</u>.

At the meeting on April 15, 1985 the board of directors determined to implement the Original Debt Tender "to prevent the acquisition of the Company at an inappropriately low price, and to assure shareholders of an appropriate value for their shares if an acquisition occurs." (Eamer Aff. Ex. A at 7). The Offer to Purchase and the testimony by the board members at their depositions emphasize only this purpose for the board's opposition to the Partnership Offer, and its adoption of the discriminatory Debt Tender. There has been no evidence that the Board acted to oppose the Partnership Offer to protect the corporation from a man with a "bad" business reputation or from policy proposals with which they disagreed.

The discrimination against the Partnership continued with the determination by the Unocal board at the

April 22, 1985 meeting that the Partnership should be prohibited from participating in the 50 million share waiver of the "Mesa condition". (Second Tassin Aff. Ex. C at 1). Again, the only reason stated for the exclusion was to prevent the Partnership from partially filling the proration pool and depriving other shareholders of the opportunity of selling some of their shares. (Sachs Aff. ¶44).

4. The April 22nd Meeting: The Amended Debt Tender.

Since the investment community did not take Unocal's first offer "seriously," and it was "not concrete enough" and contained "too many ifs", (Jacobs Dep. 54; Harder Dep. 82-83), the investment bankers recommended to the board that it waive a restriction in the Original Debt Tender to permit Unocal to "purchase 50 million shares of its common stock for $72 per share and senior secured notes whether or not the Mesa Group purchased 64 million shares pursuant to its April 8 tender offer." (Second Tassin Aff. Ex. A). The Amended Debt Tender proposal was presented to the board and then approved at a meeting on April 22, 1985 which began at 4:00 p.m. and ended at 6:15 p.m. (Eamer Aff. Ex. B at 1-3). Directors Ballhaus, Burke, Eamer, Harder, Jacobs, McConnor and Stegmeier participated in the meeting by telephone. (Eamer Aff. Ex. B at 1). Again, since there were no written materials other than the transparencies viewed by those directors present in person, those directors participating by telephone had no access to any materials.

One of the most significant omissions in the board meeting was the lack of any discussion concerning the terms and restrictions in the indenture which would govern the securities issued under the Amended Debt Tender (Jacobs Dep. 61; Ballhaus Dep. 59-61). This is perhaps even more significant than the lack of questions or discussion on this subject at the April 15 meeting, since the amended terms of the Unocal offer would now require the immediate issuance of $3.6 billion in debt and make immediately binding on the company the restrictions. Nevertheless, the board demonstrated no more curiosity or interest in these restrictive covenants at the April 22 meeting than they had at the earlier meeting. (Campbell Dep. 102-104; Ballhaus Dep. 59-61; <u>and</u> <u>see</u> Brinegar Dep. 54-55).

For example, O'Malley testified that he was unaware that the indenture had been changed to accommodate the Amended Debt Tender. (O'Malley Dep. 77-78). Indeed, neither Brinegar nor Ballhaus knew anything about the terms of these restrictive covenants on May 1 and May 2 when their respective depositions were taken. (Brinegar Dep. 54-55; Ballhaus Dep. 61). At no time during the April 22, 1985 meeting did anyone inquire about the restrictions or ask whether similar restrictions existed in other debt instruments to which Unocal or other companies were subject.

In a similar vein, the board did not consult with its investment bankers nor did it consider whether the value of the securities to be issued exceeded $72, though it had been reported in the Wall Street Journal on April 18, 1985 that the investment community viewed the debt securities as possibly trading at a value greater than par (hence giving tendering stockholders more than $72 per share). (Jacobs Ex. 3 at 2; and see Jacobs Dep. 57-59). Since the market value of the securities is expected to be approximately $75 (Sorte Aff. ¶47), the board is distributing $150,000,000 more in value then it intended. Moreover, the board did not consider whether there had been a change of circumstances between April 15 and April 22 which might necessitate that the terms of the debt securities be modified to reflect market conditions then existing.*

The minutes also do not indicate that the board questioned whether the Amended Debt Tender was fair to the Partnership. The board was apparently satisfied that the Amended Debt Tender served what they claim to be the legitimate purpose of fending off the Partnership offer, even though it retained the discriminatory features by excluding the Partnership. (Eamer Aff. Ex. A at 2). The board also gave no consideration to the effect of the Amended Debt

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*The board could not have received much assistance from the investment bankers in these respects since Mr. Sachs' presentation was "probably less than -- a couple of minutes" and no documents were presented to the Board. (Sachs Dep. 149).

Tender on non-tendering shareholders. (Ballhaus Dep. 132-133). Indeed, even though this Court has ruled that the Amended Debt Tender inequitably discriminates against plaintiffs and has enjoined the defendants' offer from proceeding unless plaintiffs are permitted to participate, defendants persist in their unfair and discriminatory treatment of plaintiffs. For instance, in a May 1, 1985 letter to all shareholders, Unocal Chairman Hartley blamed Mesa for reducing values to be obtained by shareholders who tender pursuant to the Amended Debt Tender, even though the Partnership is doing nothing more than exercising its right, as a Unocal shareholder, to participate in the Amended Debt Tender:

> ...Unocal will permit shares owned by Mesa to be tendered. However, we continue to believe that it is appropriate to exclude Mesa from participating in the Unocal offer because purchases of Unocal shares from Mesa would limit Unocal's ability to offer its other shareholders an opportunity to exchange as many of their shares as possible for what we believe is fair value (in the form of the $72 per share package of Unocal securities). Mesa has said that all of the shares now owned by its group would be tendered if we were forced to abandon the exclusionary provision of our offer. You should note that if Mesa's shares were accepted in our offer, the percentage of every other shareholder's shares purchased in our offer could, because of proration, be reduced. Depending upon the number of non-Mesa shares tendered prior to the proration deadline and the total number of shares accepted for exchange, such reduction could be substantial.

(Williams Aff. Ex. E at 1). Of course, Mr. Hartley does not mention that those shares which he and the other defendants are tendering pursuant to the Amended Debt Tender will also enlarge the pool of shareholders tendering and decrease the benefit to all other tendering shareholders.

Thus, Mr. Hartley's statements casting Mesa as the "bad guys" for merely exercising a right enjoyed by all other Unocal shareholders is not only intentionally misleading and prejudicial, but also is further evidence of defendants' attempt to improperly solicit votes to defeat the Partnership's adjournment proposals.

5. The Valuation And Terms Of The $72 Debt Securities Have No Financial Basis And Are Commercially Unreasonable.

The debt securities to which Director Defendants have given their blessing as part of their Amended Debt Tender have no financial basis and are commercially unreasonable. In fact, as shown herein the directors were ignorant of and did not consider their terms, even though they have the most far-reaching effect on Unocal of any terms ever approved by its board of directors.

Starting with price, or stated value, the hard evidence of record is that Unocal's market price never exceeded $41 in 1984 until the Partnership began to purchase the stock. Its current market price is $46 and its all-time trading high was $56 back in 1980 when "expectations of future oil and gas prices were significantly more optimistic than today." (Third Tassin Aff. ¶10; Sorte Aff. ¶14). Despite these facts, neither Unocal's investment bankers nor the board members considered market price as an important indicator of the value of Unocal stock in connection with the board's consideration of the Partnership offer or the Debt Tender.

The Sachs analysis of the value of Unocal stock is flawed for several reasons. First, it is based at least in part on certain comparisons to other oil company acquisitions which have no relevance to Unocal. (Sorte Aff. ¶16). Second, the Sachs analysis is purportedly based upon the value of Unocal in an "orderly liquidation". However, Sachs never opined on the liquidation value of the Unocal stock, and did not tell the Board how long such an "orderly liquidation" might take, or whether "comparables" existed within the last 50 years. (Ballhaus Dep. 131). In fact, Sachs' reliance on liquidation value as a realistic fair market value for Unocal is not supportable for a number of reasons, including the fact that Unocal has announced no intention to liquidate, Herold's methods are inappropriate for ascertaining realistic liquidation values, and a liquidation of a company of the size and complexity of Unocal has never taken place. (Sorte Aff. ¶¶18-22).

Indeed, it is apparent that the $72 per share value placed upon the stock by the defendants and their investment bankers is derived by "blending" the $72 per share offer for 49% of the company with the $54 per share Partnership Offer for 51% of the company. (Sorte Aff. ¶24; and see, Eamer Dep. 93; Doheny Dep. 125). On a blended basis, the "fair value" of the stock would be $63 per share. Indeed, Mr. Sachs admits that the blended values of the stock would be approximately $64 and that "that price is obviously more favorable" than the Mesa offer. (Sachs Aff. ¶27).* However appropriate that approach might arguably have been when the offer was contingent on the Partnership acquiring 50% of the company at $54, it has no validity as applied to the present unconditional (in that respect) discriminatory offer.

Furthermore, the securities authorized by the directors to be exchanged for shares of Unocal are worth more than $72. (Sorte Aff. ¶46). At the April 15 meeting, the board authorized the issuance of securities with a par value of $72. Hartley testified that the value of securities was to be "at least" $72 and possibly more (Hartley Dep. 92). Another director based his affirmative vote for the original offer on his understanding that the investment bankers had given their opinion that the securities

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*It is curious that the board is now willing to purchase shares at $72. Although its board of directors had some time ago given management authority to purchase up to $100 million of Unocal stock in the open market, management had elected not to repurchase Unocal's stock at prices substantially below $54. (Hartley Dep. 57-58). This fact was not shared with the investment bankers hired by Unocal to, among other things, value the company. (Sachs Dep. 122).

would trade at par when issued. (Eamer Dep. 36-37).* Other directors understood the investment bankers gave that opinion on April 15. (Campbell Dep. 107; Brinegar Dep. 100). In fact, the written opinion of the investment bankers states clearly that no opinion is given as to the price at which the securities will trade when issued. (Nolen Aff. Ex. A at B-2, C-2; Sachs Dep. 114-15). The opinions of both investment bankers state in identical terms the following:

> We are expressing no opinion as to the prices at which the Securities may trade if and when the Company Offer is completed since such prices may be effected by the redistribution of the securities among the holders of the Shares and other investors.

(Nolen Aff. Ex. A at B-1, B-2; see also pp. C-1, C-2).

The avoidance of any opinion on the part of Unocal's investment bankers as to the price at which the debt securities would trade when issued is not surprising. As noted by Mr. Sorte, there is no precedent for many of the restrictive features of the securities (Sorte Aff. ¶32) which provide "substantial additional value that will be reflected in the trading prices of the Debt Securities." (Sorte Aff. ¶45). Moreover, even without regard to the unnecessary, commercially unreasonable restrictions, the securities are priced higher than necessary, which will cause the

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*The investment bankers, however, "have no expectations where [the securities] will trade, more, less or at par." (Sachs Dep. 115).

securities to trade significantly above par when issued. (Sorte Aff. ¶¶41-44). The fixed rate notes will likely trade at between 104% and 106% of principal amount on a fully distributed basis. (Sorte Aff. ¶41).

Similarly, analysis of the Unocal Floating Rate Senior Secured Note due 1991 indicates that these floating rate notes are structured to provide the holder with an unneccessarily high yield and that the floating rate notes will trade at approximately 103% of par on a fully distributed basis. (Sorte Aff. ¶42).

Likewise, the Unocal Senior Secured Extendible Notes are structured such that the interest rate is reset every three years at 120% of the Three-Year Treasury Rate. Similar securities of this type are reset at much lower percentages of the Treasury Rate and the provision of significantly higher interest to the Unocal note holder then is available in other extendible notes indicates that the extendible notes will trade at between 104% and 105% of par on a fully distributed basis. (Sorte Aff. ¶43).

Not satisfied with overpricing the securities, the directors added unnecessary and commercially unreasonable restrictive covenants to the securities in the hope of protecting their incumbency. A review of comparably rated securities reveals no precedent for many of the onerous restrictions found in the Unocal indenture. Thus, for example, the 175-200 basis point increase in the interest rates of the senior securities upon a merger by Unocal and a decline in Unocal's ratio of earnings to fixed charges is unprecedented. (Sorte Aff. ¶30). And, neither Drexel Burnham nor Dillon Reed was able to identify any publicly offered debt securities where there appears such a provision which so dramatically impedes the success of a merger or acquisition of a company. (Sorte Aff. ¶30; Hobbs Dep. 87).

Likewise, the pledge by Unocal of all of the stock of Union Oil Company of California, its largest and most valuable operating subsidiary, is unnecessary, gives excessive security to note holders and limits the assets of Unocal available for use in obtaining future financing. (Sorte Aff. ¶31). The result of this pledge is to make the securities worth more than their face value and to make Unocal less attractive to any potential acquiror. (Sorte Aff. ¶32). Other restrictions, and their exceedingly low trigger points, either add unnecessary value to the securities or serve only to make Unocal less attractive to any potential purchaser. (Sorte Aff. ¶¶34, 35, 36, 37, 38, 39).

The conclusion that the securities are overpriced and contain unnecessary restrictive covenants is confirmed by the market. "When-issued" trading of the securities began on May 3, 1985 and each of the securities was quoted at bid and offered prices in excess of par. (Sorte Aff.

¶44). In all likelihood, the securities will trade even higher on a fully distributed basis. (Sorte Aff. ¶44).

In sum, without any inquiry into the terms and conditions of the securities, the necessity for such terms and conditions or the effect of such terms and conditions on the continuing operations of Unocal, the Director Defendants authorized the Debt Tender using overpriced securities which contain commercially unreasonable and unnecessary restrictions.

6. The Director Defendants Have Huge Financial Interests In These Transactions.

The Director Defendants' interests in the transactions at issue in this action deprive them of the protection of the business judgment rule. The Director Defendants will reap enormous financial rewards if they are able to tender their personal stockholdings pursuant to the Amended Debt Tender and remain in office.

First, the Director Defendants have structured the Debt Tender so that they will be substantially benefited regardless of whether the Debt Tender's purpose of defeating the Partnership Offer is successful. Collectively, they beneficially own over 980,000 shares of Unocal stock. (Nolen Aff. Ex. A at A-1, A-2). The Defendant Directors will profit substantially by a purchase of their shares by Unocal for debt securities valued in excess of $72.

The Defendant Directors deliberately have structured the Debt Tender for their own personal financial benefit by their inclusion of the provision excluding the Partnership. By their own admission, the Debt Tender was structured to achieve its antitakeover purpose whether the Partnership was allowed to participate in it or not. (Sachs Aff. ¶42) Thus, the discriminatory provision is unnecessary to the Debt Tender's purpose of defeating the Partnership Offer and serves only to guarantee that the Director Defendants and other Unocal shareholders not so excluded get more money for their shares and to punish the Partnership for merely exercising its right to try to acquire control of the company. Indeed, Mr. Hartley has admitted that by excluding the Partnership the Director Defendants are able to pay themselves and the other non-excluded Unocal shareholders $2 more for their shares than they would otherwise be able to afford. (Third Tassin Aff. Ex. B at 2).* The $2 per share translates into an extra $2,236,194 for the Director Defendants alone, if both steps of the Unocal offer are consummated.

Moreover, Messrs. Brinegar, Burke, Hartley, Henderson and McConnor, who are all officers and directors of Unocal, are the five most highly compensated executive

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*Brinegar testified that the amount is "$3 or so a share" if the Partnership is excluded (Brinegar Dep. 19) which would proportionally increase the benefit to the Defendant Directors.

officers of Unocal and in 1984 received cash compensation (consisting of salaries and incentive awards made under a Unocal incentive compensation plan in 1985 based upon 1984 operations) in the respective amounts of $465,333, $475,000, $1,044,000, $366,667 and $381,667. (Affidavit of William S. Coats ("Coats Aff.") Ex. A at 5). In addition, they are participants in and have received significant awards under Unocal's Performance Share Plan of 1975, Employees Profit Sharing Plan, Employee Stock Ownership Plan, Stock Option Plan of 1975 and Long Term Incentive Plan of 1985. Under the Performance Share Plan of 1975, they were paid in 1985 $157,542, $157,542, $338,492, $112,728 and $136,444, respectively. (Williams Aff. Ex. M at 6). Unocal also made substantial contributions to the Employees Profit Sharing Plan in 1984.

Under the Stock Option Plan of 1975, these same five officers and directors were awarded options with stock appreciation rights at $38.0625 in respect of 41,667, 41,938, 91,785, 31,115 and 37,203 shares, respectively. (Id. at 7). One half of these grants became exercisable on April 9, 1985 and the remainder would have become exercisable on October 9, 1985. (Id. at 7). However, on April 29, 1985, the Compensation Committee of the board accelerated these options so that they could be tendered into one or more of the existing tenders. (Williams Aff. Ex. E at

8).* On the same date, the Committee determined that the stock appreciation rights could be paid entirely in cash. Thus, Brinegar, Burke, Hartley, Henderson and McConnor stand to receive now additional cash awards of $166,672, $167,752, $367,144, $124,464 and $148,816, respectively.** They also stand to obtain substantial retirement benefits, and benefits under Unocal's Long Term Incentive Plan of 1985. Also, members of the board of directors of Unocal who are not officers of Unocal receive fees for service on the board of directors, plus an additional fee for each board meeting and for each committee meeting attended. (Coats Aff. Ex. A at 4). Thus, the defendants have a clear and substantial financial interest in the Amended Debt Tender succeeding and in retaining their highly compensated positions at Unocal.

7. The Interests Of The Investment Bankers Who Advised Defendants Impaired Their Ability To Render Independent Financial Advice.

The terms of the investment bankers' fee arrangement make it impossible for them to render impartial financial advice to the defendants. The fee terms were drafted so that the bankers were given every incentive to reject

*At that same meeting the compensation committee also waived certain restrictions which prohibited certain officers and directors from tendering to permit these officers to tender their shares. (Jacobs Dep. at 9-10).

**This assumes defendants will receive in cash the difference between the current market price of Unocal stock ($46) and the option price ($38).

the Partnership Offer as inadequate and to develop an alternative plan which would entrench the directors and officers of Unocal.

The fee agreement provides that Goldman Sachs and Dillon Read will share fees as follows:

> (1) $3 million in cash payable at present;
>
> (2) $5,500,000 payable quarterly as long as no party has acquired at least 50% of Unocal's stock;
>
> (3) If at least 50% of Unocal is acquired by the partnership or another tender offeror, Unocal shall pay 2% of the amount by which the total of the transactions exceeds $54 times the number of shares of the Unocal stock included therein, not to exceed $19 million.

(Harder Dep. Ex. 3 at 1-2). In short, the investment bankers would receive up to $25 million if the company remained independent for one year, and would only earn a maximum of $22 million if the Partnership Offer succeeded.

This economic package, which so clearly influences the investment bankers to favor the management position of keeping Unocal from being purchased, was designed by an inside director, Brinegar. Brinegar testified that he developed this idea by himself, without direction from the board, and without a request from the investment bankers. (Brinegar Dep. 141-144).*

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*It should also be noted that the compensation of the investment bankers does not provide any premium for the sale of stock of Unocal above a level of $60 per share.

The board did not consider the investment bankers' contract until the end of the meeting on April 15. (Eamer Aff. Ex. A at 22). Thus the board did not know when the investment bankers' advice was rendered on April 13 and April 15 that their compensation package was biased in favor of independence.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF.

To obtain a preliminary injunction, a plaintiff need only show a probability of success on the merits and that irreparable injury will occur if the Court does not grant the relief sought. Mesa Petroleum Co. v. Unocal Corp., Del. Ch., C.A. No. 7997, slip op. at 6, Berger, V.C. (Apr. 18, 1985); Gimbel v. Signal Cos., Del. Ch., 316 A.2d 599, 602-03, aff'd, Del. Supr., 316 A.2d 619 (1974); Bayard v. Martin, Del. Supr., 101 A.2d 329, 333 (1953), cert. denied, 347 U.S. 944 (1954). The Court balances the harm to be suffered by the plaintiff in the absence of injunctive relief against any harm to the defendant if the injunction is issued, Hammermill Paper Co. v. Palese, Del. Ch., C.A. No. 7128, slip op. at 15, Longobardi, V.C. (June 14, 1983); Gimbel v. Signal Cos., but the Court has broad discretionary powers to grant or withhold a preliminary injunction. Joseph v. Shell Oil Co., Del. Ch., 482 A.2d 335, 344 (1984); Bayard v. Martin, Del. Supr., 101 A.2d 329 (1953), cert. denied, 347 U.S. 944 (1954).

This Court has not hesitated to provide injunctive relief when actions undertaken by a corporation's officers or directors would have the effect of undermining a challenger's opportunity to effect a change in corporate control. See, e.g., Mesa Petroleum Co. v. Unocal Corp., supra; American

Pacific Corp. v. Super Food Services, Inc., Del. Ch., C.A. No. 7020, Longobardi, V.C. (Dec. 6, 1982); Lerman v. Diagnostic Data, Inc., Del. Ch., 421 A.2d 906 (1980); Telvest v. Olson, Del. Ch., C.A. No. 5798, Brown, V.C. (Mar. 8, 1979); Petty v. Penntech Papers, Inc., Del. Ch., 347 A.2d 140 (1975); Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971); Bennett v. Propp, Del. Supr., 187 A.2d 405 (1962).

Plaintiffs demonstrate in Arguments II through VII below that they are likely to succeed in their claim that the Amended Debt Tender constitutes an illegal and inequitable manipulation in breach of the fiduciary duties of the Director Defendants. Moreover, for the reasons stated in Argument VIII below, plaintiffs will suffer irreparable harm absent injunctive relief, while the granting of the injunction sought herein would inflict little or no injury upon defendants. Accordingly, this Court should enjoin the Debt Tender.

II. THE DIRECTOR DEFENDANTS MUST DEMONSTRATE THE ENTIRE FAIRNESS OF THEIR ACTIONS TO ALL UNOCAL STOCKHOLDERS AND CANNOT SHIELD THEIR ACTIONS FROM JUDICIAL SCRUTINY BY RELYING ON THE BUSINESS JUDGMENT RULE.

Based on their papers at earlier stages of this proceeding, it is safe to assume that the primary defense asserted by the Director Defendants will be that their actions are protected by the business judgment rule and therefore should be upheld by this Court. As the Court held in its April 29, 1985 opinion (slip op. at 6), and 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), reargument denied, Del. Ch., C.A. No. 6068, Hartnett, V.C. (Feb. 21, 1980) ("February Op."), the business judgment rule has no application to a case such as this involving a discriminatory self tender offer.

Because defendants propose a discriminatory self tender offer they have "the burden ... to establish not only a valid corporate purpose for ... [the] 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." Mesa v. Unocal, slip op. at 6 (Apr. 29, 1985). Thus, since the Director Defendants have chosen to exclude the Partnership from the Amended Debt Tender, they can not now demand judicial deference to their actions by attempting to invoke the business judgment rule.

Moreover, irrespective of Fisher v. Moltz, defendants are not entitled to the protection of the business judgment rule. As the Supreme Court has recently stated, the business judgment rule applies only where certain conditions, not present here, exist.

"First, its protections can only be claimed by disinterested directors...." Aronson v. Lewis, Del. Supr., 473 A.2d 805, 812 (1984). Thus, directors who stand on both sides of a transaction or expect to derive from it a personal financial benefit not shared by all stockholders are afforded no assistance by the business judgment rule. Id. "Second, to invoke the rule's protection directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them. Having become so informed, they must then act with requisite care in the discharge of their duties." Id. Finally, the business judgment rule only applies to actions taken in good faith and not to actions designed to entrench management in office. See e.g., Petty v. Penntech Papers, Inc., Del. Ch., 347 A.2d 140 (1975) and the cases cited infra at 53.

Since each of these factors is absent here, the Director Defendants are not entitled to the presumption of propriety afforded by the business judgment rule. The Amended Debt Tender, which the Director Defendants themselves conceived and now seek to implement, is a transaction from which these same individuals stand to reap enormous personal profit to the exclusion of the largest stockholder of Unocal. Their adoption of the Debt Tender fell far short of having been the considered result of careful analysis of all material information. And, despite their unsupported protestations to the contrary, the Director Defendants engaged in their campaign to defeat the Partnership Offer in order to continue their control over Unocal at whatever cost to the Unocal stockholders.

Thus, for all these reasons the Director Defendants cannot hide behind the business judgment rule; rather, they bear the burden of proving to this Court the entire fairness to <u>all</u> Unocal stockholders of their actions, two of which this Court has already preliminarily found to have been inequitable and improper. The Director Defendants cannot carry their burden.

A. <u>Defendants Cannot Bear Their Burden Of Proving That The Discriminatory Amended Debt Tender Serves A Proper Corporate Purpose And Is Entirely Fair To All Unocal Shareholders.</u>

Both plaintiffs and defendants agree, and this Court has held, that the legality of the Amended Debt Tender must be judged by the standards stated in <u>Fisher v. Moltz</u>. A defendant seeking to justify a selective tender offer bears the burden of proving "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," 5 Del.

J. Corp. L. at 532, in the sense that the tender offer is "fair to all the stockholders." Fisher, February Op. at 1; Mesa v. Unocal, slip op. at 6 (Apr. 29, 1985). As this Court has held, defendants are incapable of satisfying that burden and accordingly the Amended Debt Tender must be enjoined.

First, the admitted purpose of the discriminatory feature of the Amended Debt Tender, as opposed to the Debt Tender as a whole, is to increase the profit available to one group of stockholders by depriving another stockholder of any profit whatsoever. In defendants' own words: "[t]he Company is not offering to purchase Mesa Shares pursuant to the Company Offer because such exchanges would limit its ability to offer such value for as many other shares as possible." (Nolen Aff., Ex. A at 7. See also Defendants' Brief filed April 26, 1985, at 20-21). Indeed, as Mr. Hartley explicitly stated in a letter to Unocal stockholders dated May 1, 1985:

> However, we continue to believe that it is appropriate to exclude Mesa from participating in the Unocal offer because purchases of Unocal shares from Mesa would limit Unocal's ability to offer its other shareholders an opportunity to exchange as many of their shares as possible for what we believe is fair value (in the form of the $72 per share package of Unocal securities). Mesa has said that all of the shares now owned by its group would be tendered if we were forced to abandon the exclusionary provision of our offer. You

> should note that if Mesa's shares were accepted in our offer, the percentage of every other shareholder's shares purchased in our offer could, because of proration, be reduced. Depending upon the number of non-Mesa shares tendered prior to the proration deadline and the total number of shares accepted for exchange, such reduction could be substantial.

(Williams Aff. Ex. E at Ex. (a)(28)).

Thus, the purpose of the exclusion of the Partnership from the Amended Debt Tender admittedly is to accord one group of stockholders benefits by completely depriving another group of any benefit whatsoever. Defendants nowhere claim that the discriminatory provision is necessary to achieve the defeat of the Partnership's tender offer, the purported goal of the entire Debt Tender; instead, they admit the contrary. As Mr. Sachs states in his affidavit: "[T]he purchase of 50,000,000 shares would provide enough certainty to the Unocal Offer so that the desired level of tenders would be received from the public shareholders, even in the unfortunate event that Mesa Bidders might ultimately be able to force acceptance of their 13.6% block into the Unocal Offer." (Sachs Aff. ¶42).

The purpose of the discriminatory aspect of the Amended Debt Tender is clear -- to benefit favored shareholders. No precedent supports discrimination among stockholders for this purpose and none could, consistent with the fundamental tenet of Delaware law that all shareholders must be treated fairly and equally with respect to distributions of assets, whether in the form of dividends, redemptions, partial liquidations, dissolutions or the like. In addition, even if one does not distinguish between the purpose of the discriminatory provision of the Amended Debt Tender and the purpose of the Debt Tender as a whole, defendants can prove no valid corporate purpose for their actions.

The evidence of record and the circumstances surrounding the adoption of the Amended Debt Tender demonstrate that it was adopted for the purpose of continuing the Director Defendants and management in control of Unocal. It is simply not believable that defendants adopted their scorched earth policy merely because they deemed the price of the Offer to be inadequate, as they now claim. Having acted to entrench themselves, defendants are unable to prove a proper corporate purpose for adopting the Debt Tender and implementing its illegal discrimination feature.*

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*That the Debt Tender is intended for no proper corporate purpose and is designed solely as a punitive measure is further illustrated by Unocal's extension of the discriminatory provision to Mesa's transferees, regardless of their independence from Mesa. The effect of this provision is to eliminate the resale market for Mesa's shares by in effect "stigmatizing" them; the market value for Unocal shares which are unable to participate in the Unocal Offer will obviously be significantly less than those Unocal shares which may participate in the Unocal Offer. In short, so long as the Debt Tender goes forward and Mesa and its transferees are not allowed to participate, Mesa is in effect stuck with a large quantity of significantly devalued stock. Plaintiffs thought bills of attainder had been outlawed by Magna Carta.

Second, defendants cannot demonstrate that the Amended Debt Tender is fair to all of the stockholders to whom their fiduciary duties flow. Fisher, February Op. at 1; Mesa v. Unocal, slip op. at 6 (Apr. 29, 1985). There is simply no dispute that the Debt Tender provides immediate financial benefits to those stockholders, including the Director Defendants, who are able to tender into it, while a single stockholder, the Partnership, will receive nothing. As this Court held just 6 days ago, fairness requires more.

Without any support in law or logic, and in a transparent attempt to distort the plain language of Fisher, defendants claim that discrimination in the context of a tender offer is legal and equitable so long as the discrimination is no more than is necessary to achieve a valid corporate purpose (Defendants' Brief dated April 26, 1985 at 21-22; Hearing Tr. at 20-22).* Thus, defendants argue that as long as the end is justified, the means are legal. Defendants' argument is illogical -- fair does not mean necessary. Defendants' "analysis" allows no place for concepts of equity and equality -- only power and utility. As this Court held, that is not enough.

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*As set forth above, defendants' legal theory that the discriminatory provision of the Amended Debt Tender is legal because it is necessary to the accomplishment of the overall purpose of the Debt Tender is contrary to defendants' own admission that the Debt Tender will be successful regardless of whether the Partnership is allowed to tender into it. (See Sachs Aff. ¶42).

As this Court recognized (slip op. at 6), the Delaware cases involving repurchases of stock held by a dissident stockholder are not to the contrary. See Cheff v. Mathes, Del. Supr., 199 A.2d 548 (1964); Bennett v. Propp, Del. Supr., 187 A.2d 405 (1962); Martin v. American Potash & Chemical Corp., Del. Supr., 92 A.2d 295 (1952); Kaplan v. Goldsamt, Del. Ch., 380 A.2d 556 (1977); Kors v. Carey, Del. Ch., 158 A.2d 136 (1960). In such cases the repurchase serves the best interests of the corporation by removing a "threat" to the corporation.

B. The Cases Cited In The May 2 Order Support The Relief Requested Here.

Perhaps at this point it would be in order to consider the Order entered on May 2, 1985 by Justice Moore with respect to the question of certification. First, the merits of this case were not before Justice Moore on the question of certification.* Second, it is worth noting that the parties only appeared before Justice Moore and not before Justice McNeilly. Third, the action by a panel of only two appears to be contrary to Supreme Court Rules 2, 3, 42(d)(v) and Del. Const., art. IV, §12. Overlooking the procedural irregularities and the fact that in light of the matter before him, Justice Moore's comments would

*The record before Justice Moore was, of course, only the Application for Certification and Plaintiffs' Response.

appear to be merely preliminary and tentative and necessarily dicta, let us turn to the concerns articulated in the May 2 Order.

Justice Moore recites:

> 6) It is a well established principle of Delaware law that in the acquisition of its own stock a corporation may deal selectively with its shareholders provided the directors have not acted solely or primarily out of a desire to perpetuate themselves in office. Cheff v. Mathes, Del. Supr., 199 A.2d 548, 554 (1964); Bennett v. Propp, Del. Supr., 187 A.2d 405, 408 (1962); Martin v. American Potash & Chemical Corporation, Del. Supr., 92 A.2d 295, 302 (1952); Kaplan v. Goldsamt, Del. Ch., 380 A.2d 556, 568-569 (1977); Kors v. Carey, Del. Ch., 158 A.2d 136, 140-141 (1960). This right derives from the general powers conferred upon a Delaware corporation under 8 Del.C. §160 to deal in its own stock.

We have no quarrel with this recital of the law as far as it goes. We do not know whether the omission of the requirement found in Fisher and in this Court's April 29 opinion to treat all shareholders fairly and not to unduly favor one group over another is intentional or not. Perhaps it is left out here because referred to earlier in the Order. Clearly, the cases cited in paragraph 6 would not support the omission of this requirement.

In only one of them, American Potash, is the issue of discrimination even raised. The principles applied in American Potash are on all fours with those applied in Fisher and this Court's April 29 decision. Of course, American Potash supports the power to purchase selectively in a proper case, but it also acknowledges the concomitant duty to treat all shareholders fairly. Thus, in its key findings in relying on a decision by the House of Lords in British and American Trustee and Finance Corporation v. Couper [1894] A.C. 399, the Court quotes the following passage:

> 'There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar, would be most narrowly scrutinized by the Court, and that no such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or inequitably. But this is quite a different thing from saying that the Court has no power to sanction it.'

92 A.2d at 301. Our Supreme Court concludes that:

> The power to purchase shares of stock at private sale for retirement may, like other corporate powers, be abused; but the existence of that possibility does not deny the existence of the power.

92 A.2d at 301. The Court then goes on to determine whether the power was "inequitably exercised" in the case before it and concludes that it was not:

> We see no sound reason why it should be held as a matter of law that the method of reducing capital by purchasing shares at private sale for retirement may not be invoked simply because the purpose or motive of the reduction is to eliminate a substantial number of shares held by a stockholder at odds with management policy, provided of course that the transaction is clear of any fraud or unfairness.

92 A.2d at 302 (emphasis added). Again, the Court repeats the requirement, "provided" there was no "unfairness." In considering the fairness in American Potash, the Supreme Court considered that the other, nonselling shareholders consented to the purchase by action at a shareholders' meeting at which "less than three percent were voted in opposition." 92 A.2d at 297. Further, it is noteworthy that there was no contention that the price paid there was unfair, or discriminatory, or above market, unlike here where the price offered, $72, is 56% above current market and the payment of that price to favored stockholders will have a substantial dilutive effect on remaining shares in terms of underlying asset value and market trading value (Sorte Aff. ¶9).

The other cases cited by Justice Moore also are consistent with this Court's April 29 decision and the relief requested herein. Cheff v. Mathes involved, of course, the buy back of a dissident's stock. No claim was raised that it was inequitable to other shareholders because not extended to them. The price paid there was $14.40, which was:

> In excess of the market price prevailing at the time, and the book value of the stock was approximately $20.00 as compared to approximately $14.00 for the net quick asset value. The transaction was subsequently consummated. The stock option plan mentioned in the minutes has never been implemented. In 1959, Holland stock reached a high of $15.25 a share.

199 A.2d at 553. However, as the Court noted:

> However, as conceded by all parties, a substantial block of stock will normally sell at a higher price than that prevailing on the open market, the increment being attributable to a "control premium".
>
> * * *
>
> In any event, the financial expert produced by defendant at trial indicated that the price paid was fair and there was no rebuttal.

199 A.2d at 555. Thus, in considering the equities in Cheff the Court was not faced with the situation present here where a 56% premium per share is to be paid out to 70,599 shareholders holding 86.4% of the stock at the expense of one shareholder holding 13.6%.

Also of interest in Cheff is the Court's recital that:

> The mere fact that some of the other directors were substantial shareholders does not create a personal pecuniary interest in the decisions made by the board of directors, since all shareholders would presumably share the benefit flowing to the substantial shareholder.

199 A.2d at 554. Thus, the Cheff Court relied on the same factor found by this Court in its opinion in its discussion of cases like Cheff:

> 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.

Mesa v. Unocal, slip op. at 6 (Apr. 29, 1985).

Moreover, in Cheff, the Court noted that:

> To say that the burden of proof is upon the defendants is not to indicate however, that the directors have the same "self-dealing interest" as is present, for example, when a director sells property to the corporation.
>
> * * *
>
> Accordingly, these directors other than Trenkamp and Cheff, while called upon to justify their actions will not be held to the same standard of proof required of those directors having personal and pecuniary interest in the transaction.

199 A.2d at 554-55. By contrast, it can be seen that a higher burden must be imposed on the defendants here because they are "selling property to the corporation" and they do have a "personal and pecuniary interest in the transaction."

In sum, the distinctions between Cheff and the case at bar are clear and determinative. In Cheff the dissident shareholder had consented to the transaction and obtained an agreed price for his shares. Here, the Partnership has not consented and gets nothing. In Cheff, all the other shareholders received the benefit of the removal of the dissident. Here, that is not true. Instead, the other shareholders get unfair and unduly favorable treatment, $72 plus for a share selling at $46, and at the Partnership's expense. In Cheff, the directors did not participate in the sale. Here they do. In Cheff, there is a dramatically different equitable effect from buying from one shareholder at a price slightly over market, as opposed to here where Unocal is buying from 70,599 shareholders at 56% over market at the expense of one shareholder.

Bennett v. Propp is similarly inappropriate. In Bennett the company purchased shares on the open market, so all shareholders had the opportunity to be treated the same. Even so, the Court sounded a warning, applicable here as well:

> We must bear in mind the inherent danger in the purchase of shares with corporate funds to remove a threat to corporate policy when a threat to control is involved.

187 A.2d at 409. Kaplan v. Goldsamt is likewise dissimilar to the situation at bar. First, shareholder approval was obtained. So, as in American Potash, everyone in effect had consented. Second, in Kaplan, only 6% of the stock was bought back, a far cry from the diluting effect of repurchasing a minimum of 29% and up to 40% of the stock with the crippling effect of the self imposed debt restrictions and covenants.

Kors v. Carey is also not a discriminatory tender offer case. Rather, like Cheff, a dissident's stock was repurchased. The Court noted and emphasized the dissident's consent to "waive[ ] its opportunity to seek control." 158 A.2d at 142. Consider also the equities there. Only

16% of the stock was purchased in Kors and at only a 10% premium.* The Kors Court recognizes, as it must, that:

> In other words, directors, while bound to deal with stockholders as a class with scrupulous honesty, may in the exercise of their 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.

158 A.2d at 141 (emphasis added).

Accordingly, in summary, the cases cited by Justice Moore in paragraph 6 of his Order all support this Court's April 29 decision, to the extent they are applicable.

With this as background, we turn to paragraph 8 of Justice Moore's Order:

> 8. In our opinion the Vice-Chancellor should have a full opportunity in the first instance to consider the issues before her with the benefit of an enlarged record. Furthermore, on the papers before us we cannot determine whether the parties have articulated the following issues which the Vice-Chancellor should have an opportunity to consider:
>
> a) Does the directors' duty of care to the corporation extend to protecting the corporate enterprise in good faith from perceived depredations of others, including persons who may own stock in the company?
>
> b) Have one or more of the plaintiffs, their affiliates, or persons

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*The sixteen percent stock figure is noted at 158 A.2d at 139. The ten percent premium is calculated by taking the purchase price of $28 and dividing it by $25.375, the median between the high and low on the market on the date of purchase. 158 A.2d at 138.

acting in concert with them, either in dealing with Unocal or others, demonstrated a pattern of conduct sufficient to justify a reasonable inference by defendants that a principle objective of the plaintiffs is to achieve selective treatment for themselves by the repurchase of their Unocal shares at a substantial premium?

c) If so, may the directors of Unocal in the proper exercise of business judgment employ the exchange offer to protect the corporation and its shareholders from such tactics? See Pogostin v. Rice, Del. Supr., 480 A.2d 619 (1984).

d) If it is determined that the purpose of the exchange offer was not illegal as a matter of law, have the directors of Unocal carried their burden of showing that they acted in good faith? See Martin v. American Potash & Chemical Corp., 92 A.2d at 302.

Justice Moore introduces his questions by stating:

> Furthermore, on the papers before us we cannot determine whether the parties have articulated the following issues which the Vice-Chancellor should have an opportunity to consider."

It is hard to know just what the import of these questions may be. Assuming the answer to question (a) is yes, one also must assume that in protecting the corporate enterprise the Board is not free to engage in unlawfal or inequitable conduct, in violation of the principles enunciated in American Potash, Kors v. Carey and Fisher. Moreover, with respect to the "perceived depredations of others", certainly no such perceptions were set forth in the Unocal board minutes submitted to the Court or in the affidavits furnished by defendants on the plaintiffs' motion for a temporary restraining order. Moreover, Justice Moore surely did not believe an attempt to buy control of Unocal is a "depredation."

With respect to question (b), certainly there has been no evidence to support such an inference submitted to this Court to date. No doubt, Justice Moore's question will bring forth such charges. However, such an inference would be completely unfounded on this record. No such inference is drawn in the Unocal board minutes or in the deposition testimony of the Director Defendants. Even were such an inference permissible, the easy answer to it for the board of Unocal is to refuse to repurchase the Partnership's Unocal shares if they are offered. In fact, Mr. Pickens said several times in his open meeting with the Unocal shareholders on April 23, 1985 that he would not sell his Unocal shares back to the Company on terms more favorable than those offered to the other shareholders:

> "We will not accept greenmail. We will not even negotiate with management."
>
> * * *
>
> "We just want to be treated like other stockholders."

(Knighton Aff. Ex. A pp. 6, 8). On May 3, 1985 he testified unequivocally to the same effect. (Pickens Dep. 138).

We submit that a discriminatory exchange offer is not necessary or appropriate to defeat greenmail. We futher submit that assuming a proper business judgment (overlooking, for the moment, the directors' personal financial interest, gross negligence and entrenchment motive), it does not follow that such a purpose validates an inequitable or unlawful act. Even suspicion of greenmail could not justify depriving the Partnership of their property rights flowing from their investment of over One Billion Dollars in Unocal. Pogostin v. Rice, Del. Supr., 480 A.2d 619 (1984) is not to the contrary. In that Rule 23.1 case, the Court found there were no sufficient allegations of self-dealing. Here, these are not just allegations, the self-dealing is admitted, even flouted in Unocal's offering circular. In Pogostin the Court noted that allegations of manipulation of corporate machinery by directors for the sole or primary purpose of perpetuating themselves in office would overcome the business judgment rule. 480 A.2d at 627. Here, the Court has already enjoined just such inequitable conduct in its bylaw interpretation opinion of April 22, 1985. Moreover, in Pogostin there was no defensive self-tender, whether discriminatory or not. In fact, the board undertook no defensive actions, it just turned the offer down. Pogostin is no support for defendants' conduct here.

We come then to the last of Justice Moore's questions:

> d) If it is determined that the purpose of the exchange offer was not illegal as a matter of law, have the directors of Unocal carried their burden of showing that they acted in good faith? See Martin v. American Potash & Chemical Corp., 92 A.2d at 302.

American Potash makes clear that the legality of the directors' purpose is not the end of the inquiry or the only consideration. As this Court found, if their overall purpose, "defense", was lawful, this does not mean that the means chosen is free from equitable scrutiny. We return again to the Lord Chancellor's remarks quoted in American Potash:

> 'There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar, would be most narrowly scrutinized by the Court, and that no such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or inequitably. But this is quite a different thing from saying that the Court has no power to sanction it.'

92 A.2d at 301. Moreover, even if the Court found the overall purpose lawful, we submit the specific purpose here of favoring all the other shareholders for the purpose of preferring them over one single shareholder is inequitable. How could such conduct be in conformance with the Unocal board's fiduciary duties to the Partnership? In short, the Unocal board's burden does not end with showing

good faith. In the light of Aronson as well as Fisher, the Unocal board has the duty of showing the transaction is intrinsically fair to all Unocal shareholders, including the Partnership.

C. The Director Defendants Stand On Both Sides Of The Debt Tender And Expect To Derive Personal Financial Benefit From It That Is Not Available To All Unocal Stockholders.

It is well-settled law in Delaware that directors who stand on both sides of a transaction or expect to gain personal profits that are not shared by all shareholders equally are not entitled to the benefits of the business judgment rule with respect to the transaction in question. Instead, they bear the burden of proving its entire fairness. Aronson v. Lewis, Del. Supr., 473 A.2d 805, 812 (1984); Sterling v. Mayflower Hotel Corp., Del. Supr., 93 A.2d 107, 110 (1952); Puma v. Marriott, Del. Ch., 283 A.2d 693, 696 (1971).

In Aronson, the Supreme Court specifically defined the self-interest which acts to divest a director of the protection of the business judgment rule. The Court stated:

> [the business judgment rule's] protections can only be claimed by disinterested directors whose conduct otherwise meets the tests of business judgment. From the standpoint of interest, this means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which

> devolves upon the corporation or all stockholders generally.

Id. at 812 (citations omitted) (emphasis added). Summarizing its earlier analysis in Aronson, the Supreme Court in Pogostin v. Rice, Del. Supr., 480 A.2d 619, 624 (1984) (emphasis added), stated "[d]irectorial interest exists whenever divided loyalties are present, or a director either has received, or is entitled to receive, a personal financial benefit from the challenged transaction which is not equally shared by the stockholders."

The Director Defendants cannot argue in good faith that they neither stand on both sides of the Amended Debt Tender nor expect to enjoy a personal financial benefit from that transaction which is not available to all Unocal stockholders. At the very same meeting wherein they decided to discriminate against the Partnership, the Director Defendants decided to include themselves within the group of favored stockholders. Indeed, each of the Defendant Directors has expressed his intention to tender his Unocal shares into the Amended Debt Tender which they approved and have recommended to the other Unocal stockholders (except the Partnership). Thus, each director will receive $72 face value for each of his shares of Unocal stock, which presently is trading at $46. As a result, the Director Defendants could personally receive up to $70,000,000 if this Court refuses to enjoin the Amended Debt Tender.

This Court has routinely applied the principles stated above to deny directors the benefits of the business judgment rule with respect to transactions in which they are personally interested. For example, in Kaufman v. Belmont, Del. Ch., 479 A.2d 282 (1984), a stockholder alleged that the board of directors of the defendant corporation had acted unlawfully by enabling certain directors and officers of the corporation who held outstanding stock options to reap substantial profits. In the wake of a tender offer, the board cancelled options which the directors and officers held, thereby enabling them to receive the difference between the tender offer price and the option price. In the context of determining a motion to dismiss pursuant to Chancery Rule 23.1, the Court discussed the "obviously" interested status of the two directors who held options (Bonniwell and Belmont):

> The plaintiff has created a reasonable doubt, as defendants concede, as to whether directors Bonniwell and Belmont could have disinterestedly considered a pre-suit demand. They were major beneficiaries of the challenged resolution -- each received $123,017 in connection with the cancellation of the option. In such a situation, they were obviously self-interested.

479 A.2d at 288. See also, e.g., Bergstein v. Texas International Co., Del. Ch., 453 A.2d 467 (1982) (directors who were eligible for stock appreciation rights under a stock appreciation plan were self-interested with respect to

the board's decision to adopt the plan).*

In their brief filed in opposition to plaintiffs' motion for a temporary restraining order, defendants disingenuously argued to this Court that they are disinterested with respect to the Amended Debt Tender. (Defendants' Brief dated April 26, 1985 at 24-25). In essence, the Director Defendants claim that they are not "interested"because all

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*Just three days after this Court's order enjoining the Director Defendants from illegally excluding the Partnership from the Debt Tender, the Defendant Directors took actions substantially similar to the interest-creating acts in Kaufman and Bergstein. In the amendment to its Schedule 13E-4 filed with the Securities and Exchange Commission (Williams Aff., Ex. E at Ex. (a)(27) at 8), Unocal revealed the following:

> Under the Company's Stock Option Plan of 1975, options covering an aggregate of 187,404 Shares have been issued to executive officers which would not ordinarily have been exercisable until October 1985. However, in the event of a tender offer for Shares or a proposed corporate reorganization presented to the shareholders for approval, the Compensation Committee of the Company's Board of Directors (the "Committee") had the sole discretion to declare these options to be immediately exercisable. In light of the Mesa Offer, on April 29, 1985, the Committee exercised such discretion and declared all of these options to be immediately exercisable. The Committee also determined that the stock appreciation rights coupled with these options could be paid in their entirety in cash. For further information concerning options held by the executive officers of the Company under such Plan, and the related stock appreciation rights, see page 11 of the Offer to Purchase.

stockholders other than the Partnership are entitled to receive the benefits available under the Amended Debt Tender.

Such a claim is obviously without merit. First, Aronson makes clear that an independent ground for finding that directors are interested in a challenged transaction is that they stand on both sides of the transaction. Here, there can be no doubt that the Defendant Directors both employed their power as directors to implement the Amended Debt Tender and are among the group of stockholders chosen to benefit by the Amended Debt Tender. Second, despite the Director Defendants' apparent belief to the contrary, the Partnership remains a stockholder of Unocal. Because the Partnership is precluded from participating in the Amended Debt Tender, the benefits available thereunder do not devolve upon "all stockholders generally." Aronson, 473 A.2d at 812 (emphasis added). "All stockholders" plainly does not mean "all favored stockholders" or "all but one."

D. The Director Defendants' Perfunctory And Uninformed Approval Of The Debt Tender Is Not Protected By The Business Judgment Rule.

Directors of a Delaware corporation owe an unyielding duty of care to the shareholders whose fortunes they determine. Smith v. Van Gorkom, Del. Supr., 488 A.2d 858 (1985). Before making any business decision directors must inform themselves of "all material information reasonably available." Id. at 872; Aronson v. Lewis, Del. Supr., 473 A.2d 805, 812 (1984). A director's affirmative duty to "inform himself in preparation for a decision derives from the fiduciary capacity in which he serves the corporation and its stockholders." 488 A.2d at 872. Fulfillment of that duty of care requires more than mere general knowledge of a subject, indeed, "[r]epresentation of the financial interests of others imposes on a director an affirmative duty to protect those interests and to proceed with a critical eye in assessing information." Id. Informed judgment must be "brought to bear with specificity on the transactions" under review. Kaplan v. Centex Corp., Del. Ch., 284 A.2d 119, 124 (1971) (emphasis added).

In determining whether directors have fulfilled their duty of care the Court must direct its inquiry "to the material or advice the board had available to it and whether it had sufficient opportunity to acquire knowledge concerning the problem before acting." Moran v. Household International, Inc., Del. Ch. C.A. No. 7730, slip op. at 32, Walsh, V.C. (Jan. 29, 1985) (appeal pending). Absent "deliberation and study", id. at 35, of "all material information", Van Gorkom, 488 A.2d at 872; Aronson, 473 A.2d at 812, the directors breach their fiduciary duty of care and lose the protection of the business judgment rule.

In Van Gorkom, the Supreme Court found that the directors of Trans Union breached their fiduciary duty of care when they acted without considering all available material information. Describing the meeting, the Court stated:

> Without any documents before them concerning the proposed transaction, the members of the Board were required to rely entirely upon Van Gorkom's 20-minute oral presentation of the proposal. No written summary of the terms of the merger was presented; the directors were given no documentation to support the adequacy of the $55 price per share for sale of the Company; and the Board had before it nothing more than Van Gorkom's statement of his understanding of the substance of an agreement which he admittedly had never read, nor which any member of the Board had ever seen.

488 A.2d at 874.

The Trans Union board meeting and the Unocal board meeting of April 13 are virtually indistinguishable in their irregularities. The Unocal directors were given short oral notice of the April 13 board meeting (Brinegar Dep. 23), were not told the purpose of the meeting (Ballhaus Dep. 33, 34), and were merely told that its purpose would be to discuss the "Mesa tender offer." (Doheny Dep. 37, 38). No agenda or similar documents were distributed to the board either in advance of or at the meeting. (Doheny Dep. 37-39; Brinegar Dep. 23, 25). Thus, despite the fact that the directors would be faced with evaluating a tender offer and that the proposed defensive transaction would be "the biggest offering of debt securities perhaps ever" (Hobbs Dep. 73), none of the directors had documentation in advance of the meeting to explain the complex nature of the debt securities or what was sought to be accomplished. Nor were any documents available at the meeting which might assist the directors. None had term sheets (Brinegar Dep. 25, 55; Doheny Dep. 38, 39), and the meeting focused almost solely upon whether the company's cash flow could support the enormous debt service involved in the Amended Debt Tender. The myriad of other material legal and financial considerations received little or no attention. Few if any questions were asked. No director asked for an explanation of the terms of the debt. (See Ballhaus Dep. 136; Brinegar Dep. 145, 146). The directors were content to abdicate their responsibilities and leave up to management all decisions relating to the terms of the debt. It is therefore not surprising that the debt securities contain a cornucopia of unusual provisions designed solely to preserve management's positions. (Sorte Aff. ¶¶32-38). The board simply abdicated its responsibilities.

1. The Unocal Board Had Insufficient Knowledge Of The Value Of Either Unocal Stock Or The Debt Securities Offered In The Debt Tender.

Despite the fact that no expert ever suggested to the board that Unocal stock was "worth" $72 per share (Doheny Dep. 59, 91; Ballhaus Dep. 144; Sachs Dep. 118), the board chose $72 as the value per share which would be offered in the Debt Tender apparently because $72 was within the range of liquidation values which Unocal's advisors considered "appropriate". (Sachs Aff. ¶35). Indeed, outside director Doheny testified at his deposition that <u>he did not have an opinion</u> as to the value of Unocal shares (Doheny Dep. 92) and did not know "what the company is worth." (Doheny Dep. 125).

Hartley's testimony also was enlightening on this subject. Hartley testified that prior to the April 13 meeting, the Executive Committee of the Board had developed a per share value for Unocal between \$70 and \$80 (Hartley Dep. 65) but was unable to recall whether either of Unocal's investment bankers had informed the Executive Committee of the value of Unocal's assets. (Hartley Dep. 69). Hartley's testimony is, however, subject to question. For example, if the Executive Committee actually developed such a value, why did it conceal that fact from the entire Board? Also if Hartley actually believes such value exists, why has he done nothing heretofore to realize it for the stockholders and why is he not recommending a liquidation of Unocal now to realize that value for all shares of stock?

Brinegar was uncertain whether the \$72 face value of the debt securities was determined at a meeting of the Executive Committee or through informal discussions with Hartley. (Brinegar Dep. 86). The evidence shows that the bankers never suggested a price for the company but only advised the board of a "ball park" figure. (Doheny Dep. 60). Mr. Doheny testified:

Q. Did anybody, either on April 13
or April 15, tell you what they
thought Unocal was worth on any
sort of basis?

A. Not a distinct or definite figure,
no.

* * *

Q. Did anybody at any of these board
meetings you attended ever say
every share of this company is
worth $72?

A. No.

* * *

Q. Did anybody say anything to that
effect?

A. No.

* * *

Q. Did Unocal ever ask the investment
bankers in your presence at any
of these meetings what they thought
all shareholders should receive?

A. Not that I know of.

(Doheny Dep. 59, 91-92). Brinegar candidly stated that at both the April 13 and April 15 meetings "there was no discussion in my memory of what the total debt should be or what the share price should be." (Brinegar Dep. 76). Hartley was likewise unable to remember any board member asking either of the company's outside investment bankers during the April 13-15 meetings exactly what the company was worth. (Hartley Dep. 72). Thus, the board made no determination that $72 was a fair price for Unocal shares and, in any event, would have had no basis for such a determination.

Similarly, the Director Defendants acted without any facts upon which to base a reasoned opinion that the value of the debt securities would be $72. Indeed, contrary to the defendants' claims in this litigation, Hartley's testimony demonstrates that the investment bankers "conservatively" priced the issue to trade at <u>at least</u> $72 per share. (Hartley Dep. 92). Moreover, the testimony of other board members demonstrates that they were wholly uninformed as to the price and market value of the securities.

Mr. Brinegar, for example, testified that the board passively accepted the investment bankers' pricing of the bonds, (Brinegar Dep. 120), without asking relevant questions:

> Q. But back to my question:
>
> No member of the board brought up the subject of the amount of the interest rates?
>
> A. The board accepted the banker's opinion.

(Brinegar Dep. 121).

* * *

> Q. Did any member of the board raise any question about whether the opinion [that the debt securities would trade at par] was correct or not?
>
> A. No.

> Q. Did anybody -- any board member ask how much over par the securities might trade at?
>
> A. No.

(Brinegar Dep. 100). Doheny was no better informed. He bluntly testified:

> Q. Do you think the debt instrument represents what the company is worth on a per-share basis?
>
> A. <u>I don't know.</u>

(Doheny Dep. 125) (emphasis added).

The board's disregard of its fiduciary duty is further illustrated by its conduct at the April 22, 1985 meeting when it authorized the Amended Debt Tender. At that meeting, there was no discussion concerning the effect the restrictive covenants would have on the ongoing operations of Unocal. In fact, the trust indenture was so restrictive that the Amended Debt Tender was not permitted by its terms. Only Unocal's most recent supplemental amendments to the trust indenture made it permissible. The board did not know or inquire as to whether the Amended Debt Tender was allowed under the indenture at the time it was authorized.

Even more significant is the board's total lack of knowledge about the value of the securities to be issued under the Amended Debt Tender. Although Hartley recognized that the securities might trade above par, and although on April 18, 1985 <u>The Wall Street Journal</u> reported that the securities might have a market value in excess of the $72 value placed on it by Unocal (Jacobs Dep. Ex. 3 at 2), the board's action was premised on a $72 stated value and the board never asked its investment bankers on April 22 what the market value of the debt securities would be. The failure to request such an opinion is significant because Peter Sachs had advised the board that he was more comfortable with a "price nearer $70 than a price nearer $75." (Jacobs Aff. Ex. IV at 28; Jacobs Dep. 62-63; Sachs Dep. 109). With unmistakable evidence that the consideration to be received by tendering stockholders might be outside the range of their investment bankers' opinion, the board had a duty to inquire. And if the board had so inquired, it would have learned that the value of the securities was at least $75 per share or an additional $150,000,000 cost to the Company. (Sorte Aff. ¶46). Finally, there is no evidence that the board asked nor that it considered whether there had been any material changes in conditions between April 15 and April 22 which would effect the terms and conditions of the debt securities.

In short, the Unocal board had no knowledge of the per share value of Unocal stock, or the value of the debt securities offered in exchange for that stock when it made the decision to commence the Debt Tender and the Amended Debt Tender. To permit this uninformed action to stand would be to make a mockery of Van Gorkom. The testimony indicates that despite their lack of knowledge, the Board, including both "management" and "outside" directors, failed to ask their advisors questions that could well have cured their ignorance.

2. <u>The Unocal Board Acted Without Knowledge Of All Material Facts Relevant To The Effect Of The Debt Tender On The Financial Viability Of Unocal.</u>

The board also heard a presentation by Phillip Blamey, Unocal's financial vice president. Mr. Blamey, although not an investment banker, presented an analysis of Unocal cash flow, and concluded that based upon his pro forma cash flow projections and the proposed interest rates on the debt securities, the company's cash flow would be sufficient to meet debt service. (Eamer Aff. Ex. A at 17). Mr. Blamey also presented analyses of the impact on cash flow of lower world prices for crude oil. (Eamer Aff. Ex. A at 17; Harder Dep. 56). Blamey's conclusion, as reported in the minutes of the April 15 meeting, was that there was "no question that the Company <u>can get through 1985</u>." (Eamer Aff. Ex. A at 17) (emphasis added).

Despite the short-term analytic perspective reflected in Mr. Blamey's conclusion, it was clear from Blamey's presentation that the company could service $6 billion in new debt only if it made a drastic restructuring of its expenditures. Indeed, the minutes of the April 15 meeting reflect that Blamey's pro forma analysis was predicated upon the elimination of $156,000,000 in annual dividends, and a further reduction of more than <u>one-half billion dollars</u> in budgeted capital expenditures. (Eamer Aff. Ex. A at 17). Despite this enormous reallocation of resources, so fundamental as to be validly termed a "restructuring", <u>only one director</u>, Mr. Ballhaus, inquired as to the source of the proposed $549,000,000 reduction in 1985 capital expenditures. In response to this <u>single</u> question concerning the reallocation of one-half billion dollars, the minutes reflect that "Mr. Blamey responded that this amount would come from discretionary capital expenditures and the reduction would not have an <u>immediate</u> severe effect on revenues." (Eamer Aff. Ex. A at 17). That answer satisfied the board.

Not one director followed up to ascertain the economic, financial or social effects of reallocating $549,000,000 from a single year's budget. Even more disturbing, no one stopped Blamey to ask what the phrase "immediate severe effect" meant. Did the elimination of one-half billion dollars in annual capital portend middle or long-term effects on revenues, or on the company's ability to survive? No one asked and they were not informed. In fact, the ensuing discussion, as reflected in the minutes, focused solely upon the new debt's immediate impact upon cash flow. (Eamer Aff. Ex. A at 17).

The testimony demonstrates that the planned capital reallocation is even more drastic than reflected by the minutes. Mr. Doheny testified that the Blamey presentation included expenditure cuts ranging between $450,000,000 and $970,000,000 annually for five to six years. (Doheny Dep. 116-117). Despite the staggering restructuring under way, Hartley testified that he neither remembers what Mr. Blamey said to the board at a meeting held just two weeks earlier or whether Blamey indicated specific areas which would be cut. (Hartley Dep. 107).

In short, the directors demonstrated only passing interest in the most fundamental aspects of a corporate restructuring transaction involving expenditure cuts of between $500,000,000 and almost $1,000,000,000 per year, for five to six years. One question was asked by one director, and the answer to that question -- itself perhaps even more disturbing than the huge reallocation of resources -- was not pursued. This wholesale failure of the Unocal board to inform itself of material facts concerning the effect of the Debt Tender on the continued financial viability of Unocal is clear, tangible and grossly negligent and a blatant breach of the director-fiduciaries' duty of care.

3. The Director Defendants Approved The Debt Tender With Virtually No Understanding Of The Terms, Covenants And Restrictions Of The Trust Indenture.

The minutes of the April 15 board meeting reflect that in that brief meeting only passing reference was made to the terms of the trust indenture under which the company would be governed for years as a result of the Debt Tender. (Eamer Aff. Ex. A at 17). The minutes note only that Blamey told the Board that the tender would require a Trust Indenture which:

> would impose significant restrictions on future payment of dividends by the Company, the incurring of future debt ... and other corporate actions.

(Eamer Aff. Ex. A at 17).

Indeed, no specific questions were asked concerning the effect the restrictions would have on the company's future. (Harder Dep. 120; Campbell Dep. 102-03). Mr. Brinegar, an inside director, was unable to remember <u>any</u> discussion concerning the effect of the proposed restrictions on the company. (Brinegar Dep. 118). Chairman Hartley testified that the board was told only that the debt securities would carry "all of the necessary covenants." (Hartley Dep. 103, 104).

No specific covenants were explained to the board. (Brinegar Dep. 54-55; Hartley Dep. 103, 104; Ballhaus Dep. 61). None of the directors at the meeting saw a proposed form of indenture.* None of the directors at the meeting had a "term sheet" or synopsis of the material restrictions in the indenture. (Brinegar Dep. 25, 55; Doheny Dep. 38,

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*Although a director need not read every document which he approves in haec verba, <u>Van Gorkom</u>, 488 A.2d at 883, n. 25, a director's failure to inform himself of <u>material</u> information before acting is a breach of the director's duty of care.

39). Indeed, no form of restrictive covenant was given to the board either on April 13, 15 or 22, (Brinegar Dep. 55), and no form of comparable instrument was presented to the Board. (Brinegar Dep. 141). Not surprisingly, the board was never informed which restrictions would be placed in the Indenture, or the effect these restrictions would have on the company. No discussion of these covenants (Ballhaus Dep. 136) or their effects on the Company took place. (Ballhaus Dep. 62; Brinegar Dep. 145-146). Mr. Campbell, an outside director, testified that he did not know -- and still does not know -- which restrictions are included in the Indenture. (Campbell Dep. 103-04). Campbell also testified that he was and is wholly uninformed as to the effect the restrictions will have on the operations or ability to finance the Company. When given the opportunity to inform himself of the proposed restrictions, director Campbell chose <u>not</u> to question the available experts. (Campbell Dep. 104). Nor did the experts volunteer any advice to the board concerning the effect of or reasons for any of the covenants. (Sachs Dep. 130-31). Mr. Eamer's testimony was substantially the same. (Eamer Dep. 25). In substance, the board acted without any information concerning the indenture restrictions, which, by their terms, will bind the board's discretion for years to come.

Nor can it be argued that the indenture restrictions were not material to the decision to commence the self-tender. Unocal's Offer to Purchase unambiguously states that the company's "business operations will be significantly affected" by the Indenture restrictions. (Nolen Aff. Ex. A at 3). In addition, the indenture provides (with yet another unrealistic exception) for a significant and unprecedented increase in interest rates on the debt securities in the event of the merger or consolidation of the company with any other corporation. (Williams Aff. Ex. B, T3C(1),(2) & (3)).

The restrictions imposed by the indenture are unnecessary and commercially unreasonable. (Sorte Aff. ¶39). In fact, they are unprecedented in their scope when compared to comparably rated securities. (Sorte Aff. ¶29). It is customary for any underwriter to carefully describe the terms and implications of debt securities to the issuer. (Sorte Aff. ¶28). The reason for this practice is that the management and directors of a company need to evaluate the terms of the securities (especially the restrictive covenants) so that the impact on future operating strategy and results of the company can be evaluted. (Sorte Aff. ¶28). Yet, in this case the investment bankers were present for but five minutes at the April 15 board meeting at which the restrictions were approved (Sachs Dep. 116) and they failed to explain, nor were they asked for, any specifics of the restrictive covenants which so greatly and unnecessarily bind the Company. (<u>See</u> Sachs Dep. 130-31). Lacking this information, the board could not, and did not, evaluate the impact of the restrictive covenants on the future of the Company.

In short, no one presented information concerning the proposed restrictions (Hartley Dep. 103, 104; Eamer Dep. 31), and no questions were asked. (See Brinegar Dep. 54-55, 118; Doheny Dep. 106). Certainly, Delaware law demands more of directors authorizing the largest debt issue ever.*

4. The Director Defendants Breached Their Duty Of Care By Improperly Delegating Board Powers.

The statutory duty to manage the corporation, 8 Del.C. §141(a), gives rise to a "general principle[ ] that directors may not delegate their duty to manage the corporate enterprise." Lehrman v. Cohen, Del. Supr., 222 A.2d 800, 808 (1966); and see, Adams v. Clearance Corp., Del. Supr., 121 A.2d 302 (1956); Field v. Carlisle Corp., Del. Ch., 68 A.2d 817 (1949). Evidencing their failure to carefully consider the consequences of their actions, in approving the Amended Debt Tender the Director Defendants breached their fiduciary duties by delegating the authority to restrict board power to corporate officers. Clarke

*Indeed, even if -- contrary to fact -- the Unocal board did have all material facts before it, its wholesale failure to examine carefully all material aspects of the transaction violated of their duty of care. Lutz v. Boas, Del. Ch., 171 A.2d 381, 395 (1961), and compare Gimbel v. Signal Cos., Inc., Del. Ch., 316 A.2d 599, aff'd 316 A.2d 619 (1974).

Memorial College v. Monaghan Land Co., Del. Ch., 257 A.2d 234 (1969). By resolution, the board authorized the officers of the company to execute the Trust Indenture:

> setting forth such covenants restricting the future actions of the Company and its subsidiaries as such officers may deem appropriate for the protection of the holders of such securities and containing such other terms, conditions, and provisions as such officers may deem necessary or appropriate ...

(Eamer Aff. Ex. A at 19) (emphasis added). This "blank check" delegation of directorial power, which purports to authorize officers to enter covenants restricting "future actions" of the company and its board of directors, highlights the carelessness with which the board acted and constitutes a *per se* breach of the directors' duty of care. *Id.*

Clarke is almost on all fours. There, the board passed a resolution purporting to authorize officers to conclude a sale of substantially all the assets of the corporation for no less than a specified amount. Chancellor Duffy struck down the resolution as a breach of duty and an illegal delegation of power. The Court stated:

> [T]he delegation here was to officers, not a committee of directors...
>
> In my judgment the resolution was an invalid delegation by the Board of Directors of the authority and responsibility conferred on it by the stockholders.

257 A.2d at 241 (emphasis in original). Under the rule of the Clarke case, the Director Defendants have committed a *per se* breach of the duty of care. No other holding is possible if the Court is to give effect to the "cardinal precept" of the corporation law, reiterated in Aronson, that directors manage the business and affairs of the corporation.

On the record before this Court only one conclusion is possible: Unocal so badly wanted to frustrate the Partnership Offer that it was willing to rush into an agreement which stripped fundamental powers from the board of directors without giving due care and informed consideration to all material facets of that agreement. The Director Defendants having breached their paramount duty of care, the protection ordinarily afforded their actions by the business judgment rule is inapplicable in this case.

E. The Attempt By The Director Defendants To Entrench Themselves In Office Is Facially Improper And Wasteful And Must Be Enjoined.

Under Delaware law, management may not employ the corporation's processes or assets for the purpose of perpetuating its control in the face of a legitimate bid for control. Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971); Bennett v. Propp, Del. Supr., 187 A.2d 405 (1962); Petty v. Penntech Papers, Inc., Del. Ch., 347 A.2d 140 (1975); Condec Corp. v. Lunkenheimer Co., Del. Ch., 230 A.2d 769 (1967); Canada Southern Oils, Ltd. v. Manabi Exploration Co.; Telvest, Inc. v. Olson, Del. Ch., C.A. No. 5798, Brown, V.C. (Mar. 8, 1979). Despite their hollow protestations of good faith, the evidence of record plainly demonstrates that the Director Defendants' resolve to defeat the Offer at all costs resulted from their desire to entrench themselves and the Unocal management headed by Mr. Hartley.

The Delaware courts have repeatedly held improper similar courses of action designed to entrench management. For example, the courts have found it impermissible for a corporation to issue shares of its stock for the purpose of maintaining management in control or to enable a particular person or group to maintain or obtain voting control. Condec Corp. v. Lunkenheimer Co.,; Canada Southern Oils, Ltd. v. Manabi Exploration Co.,; Aldridge v. Franco-Wyoming Securities Corp., Del. Ch., 42 A.2d 879 (1945); Yasik v. Wachtel, Del. Ch., 17 A.2d 309 (1941); Kingston v. Home Life Ins. Co., Del. Ch., 101 A. 898 (1917), aff'd, Del. Supr., 104 A. 25 (1918).

Similarly, directors may not use corporate assets to repurchase shares of stock of their corporation in order to enable them to continue themselves in office. Petty v. Penntech Papers, Inc.. Nor, as is demonstrated below, may management take action in the face of a contest for corporate control adverse to the interests of a tender offeror who has become or has a right to become the majority stockholder of the corporation. Martin Marietta Corp. v. The Bendix Corp., Del. Supr., No. 298, 1982, Quillen, J. (Sept. 21, 1982) (ORDER); Condec Corp. v. Lunkenheimer Co.

Thus, in Petty v. Penntech Papers, Inc., the directors of Penntech Papers, Inc. sought to redeem all the shares of a class of voting preferred stock other than those held by two members of the board of directors. The effect of the selective repurchase was to ensure that the two members of the board of directors whose shares were not to be redeemed would retain their control over the corporation following the imminent expiration of a voting trust agreement pursuant to which, at the time of the proposed selective redemption, they held voting control. The Court enjoined the proposed repurchase, stating:

> The basis for plaintiff's suit is that Penntech's present management is about to use $1,900,000 of corporate funds for the sole and improper purpose of perpetuating itself in office. Clearly directors of a corporation stand in a position of trustees with the stockholders, and the utmost good faith and fair dealing are required of them, especially where their individual interests are concerned. Moreover, the fact that charter or by-law provisions may technically permit the action contemplated does not automatically insulate directors against scrutiny of purpose.
>
> * * *
>
> At this juncture, to redeem all other preferred stock, but none of their own, so as to continue their own business incentive...does not appear sufficient to carry the day....

347 A.2d at 143 (citations omitted).

Similarly, despite their purported motivations, the Director Defendants have engaged in a course of conduct designed to thwart the Offer for no proper business purpose but instead solely to perpetuate themselves in control. Indeed, in management's zeal to protect their control over Unocal, they have engaged in hastily conceived actions which threaten to destroy Unocal as a viable entity. This was precisely the type of conduct condemned by the Court in Joseph E. Seagram & Sons, Inc. v. Abrams, 510 F. Supp. 860 (S.D.N.Y. 1981), where the Court stated:

> It is inconceivable that an alleged flourishing enterprise has authorized its board to subject the assets and character of the company to a scorched earth policy to be accomplished in the name of an exercise of business judgment...

510 F. Supp. at 861.

Defendants inevitably will attempt to camouflage their true motives by claiming that their actions were in no way designed to perpetuate their control of Unocal, but rather merely to deter a tender offer the price of which they deemed inadequate. As set forth above, however, the hasty and totally uninformed manner in which the Defendant Directors acted and their willingness to inflict irreparable harm on Unocal in order to defeat the Partnership's Offer belie their professed motivation. The claim of the Director Defendants that their opposition to the Mesa offer is a result of their studied and impartial opinion that the price offered is too low rings hollow. They acted to continue their control over Unocal.

As noted above, nowhere in their Offer to Purchase, or in their board minutes, or in their affidavits submitted to date, have defendants claimed that they were acting to protect the corporation from a man with a bad business reputation or from policy proposals they disagreed with. In the light of Justice Moore's Order, such arguments may now make their appearance.

It is important to recognize that in addition to the other distinctions previously noted above at pp. 56 to 60 with respect to Cheff v. Mathes, Del. Supr., 199 A.2d 548 (1964), Kaplan v. Goldsamt, Del. Ch., 380 A.2d 556 (1977), and Kors v. Carey, Del. Ch., 158 A.2d 136 (1960), this case does not fit within those decisions for additional reasons. Unlike Kaplan v. Goldsamt, there is no long history here of bitter policy divisions or sharp personality differences in the board room. As noted above, no director has testified that he voted for the Debt Tender based on policy differences with Mr. Pickens as to the operations of Unocal. No such differences were discussed or considered. Indeed, if anything, the Debt Tender will have the effect of "restructuring" Unocal in much the same way that Mr. Pickens has been advocating, if we forget for the moment about its discriminatory feature, its improper purpose, the grossly negligent way it was adopted, and the other flaws discussed herein.

Nor is this case like Cheff v. Mathes where the board made a careful investigation and considered the dissident's reputation and history as a liquidator. Mr. Pickens and Mesa have liquidated no one and have not proposed the liquidation of Unocal (Knighton Aff. at 2), and the possibility was not even considered or discussed by Unocal's board.

Kors v. Carey was a situation where there were fundamental policy differences between a major stockholder and its chairman on one side and management on the other as to how to run the corporation's business. No such policy differences exist or were considered here. Mr. Hartley may not like Mr. Pickens and may not want to lose his job to him, but that does not bring this situation within this line of cases.

If in response to Justice Moore's invitation, Unocal tries to twist what has happened here and bring it under this line of cases, it will be identical in this respect to Bennett v. Propp, where the Supreme Court said:

> The argument that Little was dangerous because of his record as a "liquidator" was answered by the Vice Chancellor. He found from the evidence that the attacks at the trial on Little were largely afterthoughts.

187 A.2d at 409.

In summary, the directors acted for the purpose of entrenchment. Any contention now made of policy differences with Mr. Pickens are afterthoughts induced by Justice Moore's Order.

F. The Director Defendants Are Unable To Bear Their Burden Of Proving The Entire Fairness Of The Amended Debt Tender To All Unocal Stockholders.

For the reasons stated above, the Director Defendants are not entitled to rely on the business judgment rule. Accordingly, the Director Defendants have the burden of demonstrating:

> their utmost good faith and the most scrupulous inherent fairness of the bargain. The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.

Weinberger v. UOP, Inc., Del. Supr., 457 A.2d 701, 710 (1983) (citations omitted); see also Sterling v. Mayflower Hotel Corp., Del. Supr., 93 A.2d 107, 110 (1952) ("Since they stand on both sides of the transaction, they bear the burden of establishing its entire fairness, and it must pass the test of careful scrutiny by the courts.").*

*See also Andresen v. Bucalo, Del. Ch., C.A. No. 6372, Hartnett, V.C., slip op. at 7-8 (Mar. 14, 1984); Bastain v. Bourns, Inc., Del. Ch., 256 A.2d 680, 681 (1969), aff'd, Del. Supr., 278 A.2d 467 (1970); David J. Greene & Co. v. Dunhill International, Inc., Del. Ch., 249 A.2d 427, 431 (1968).

The burden placed on the Director Defendants is one they simply are incapable of satisfying. Defendants seek to transform a profitable corporation into one heavily burdened with debt. A substantial distribution of the assets of the corporation will be paid to all of its stockholders but one. Thus it is logically impossible for defendants to prove that their acts are fair to all Unocal stockholders. Indeed, neither of the investment banking firms retained by the Director Defendants was willing to opine that the Debt Tender was fair to all stockholders.

Defendants' efforts to justify their actions by claiming that the debt securities offered in the Amended Tender are worth no more than their face value of $72, and that Unocal stock also is worth $72, fail miserably. Even assuming defendants were correct in their "valuation", which the evidence demonstrates they are not, no one contends that the Partnership is able to realize $72 in exchange for its stock. If defendants' plan to cripple Unocal with debt is permitted to be effectuated, the market price of Unocal stock will drop dramatically. Their offer to purchase states in bold face type: "THE CONSUMMATION OF THE COMPANY OFFER MAY SIGNIFICANTLY ADVERSELY AFFECT THE MARKET PRICE FOR ANY SHARES THAT REMAIN OUTSTANDING THEREAFTER." (Nolen Aff. Ex. A at 3). Unless the Amended Debt Tender is enjoined, that price is the <u>only</u> price available to the Partnership for its Unocal stock.

Because the Director Defendants are utterly incapable of proving the "scrupulous inherent fairness" of the Amended Debt Tender "sufficient to pass the test of careful scrutiny" as applied by this Court, the Amended Debt Tender must be preliminarily enjoined.

III. THE DIRECTOR DEFENDANTS OWE A DUTY TO THE PARTNERSHIP NOT TO COMPLETE THE AMENDED DEBT TENDER.

The second step of the Amended Debt Tender by its terms will only be consummated when the Partnership owns over 50% of the stock of Unocal and possesses the legal right to exercise control over its affairs. Since the second step would be contrary to the interests and expressed desires of the Partnership, its effectuation would constitute a breach of the fiduciary duties of the Director Defendants to the Partnership and, for this reason alone, must be enjoined.

In Martin Marietta Corp. v. The Bendix Corp., Del. Supr., No. 298, 1982, Quillen, J., (Sept. 21, 1982) (ORDER), the Delaware Supreme Court established that a board has a "moral duty" not to act so as to inflict injury upon its majority stockholder. In that case, Bendix had made a tender offer for shares of Martin Marietta, and Martin Marietta responded by making a cross-tender for shares of Bendix. After Bendix's acquisition of a majority interest in Martin Marietta, but prior to the time that Bendix could exercise its voting control, stockholders of Bendix tendered sufficient shares of Bendix to Martin Marietta to enable Martin Marietta to purchase a majority position in Bendix. Like the Unocal offer, the Martin Marietta offer was only to be consummated if Bendix first purchased a majority position in Martin Marietta. On appeal from a denial by the Court of Chancery of preliminary injunctive relief sought by Martin Marietta to restrain Bendix from holding, or effectuating the results of, a Martin Marietta stockholders' meeting which Bendix had called, the Supreme Court affirmed this Court's denial of injunctive relief and succinctly expressed the duty which the board of directors of Martin Marietta owed to Bendix, its majority stockholder:

> 5. If the Martin Board so acts [to exercise its control over Bendix by consent prior to the date on which Bendix could exercise its control over Martin Marietta] after September 16, 1982 [the date on which Bendix purchased sufficient shares to give it control over Martin Marietta] to gain control of the Bendix Board, it will do so in violation of a moral duty to its majority stockholder, Bendix. While this may be an enforceable duty under Maryland law, even if it is not, it is a proper consideration as to whether a Delaware equity court will intervene on Martin's behalf.
>
> 7. In seeking preliminary relief below, Martin is in effect asking the Court of Chancery to assist it in a violation of a duty to its own majority stockholder, Bendix. As the Chancellor noted:
>
> > "Not to be overlooked in the overall picture is the fact that Martin Marietta is intending to use Delaware law, § 228, to circumvent the position obtained by Bendix, the result of which, if successful, will serve to perpetuate Martin Marietta's management in office before Bendix can lawfully remove it under Maryland law."

Order of September 21, 1982 at ¶¶5, 7 (citations omitted) (emphasis added).* Thus, the Court held that the board of directors of Martin Marietta owed Bendix, its majority stockholder, a duty not to take action injurious to the interests of Bendix, even though it had a legal right to do so.

The next day, immediately prior to the time Martin Marietta was to purchase shares of Bendix pursuant to its offer, Bendix moved for preliminary injunctive relief in the Court of Chancery restraining Martin Marietta from acquiring Bendix shares and from voting any shares of Bendix owned by it or otherwise attempting to exercise the rights of a voting Bendix stockholder. At oral argument, Chancellor Brown commented on the meaning of the Supreme Court's order as follows:

> There seems to be an implication running through this . . . to the effect that, for whatever the reason, Martin Marietta has some moral duty or obligation not to do anything that would prevent Bendix from completing what it now wants to do.

---

*The Supreme Court's statement that a corporation owes a moral duty to its majority stockholder not to act in a manner contrary to the interests of the majority stockholder is particularly significant in view of the fact that after Justice Quillen expressed the concept at the hearing before the Supreme Court panel, counsel for Martin Marietta strenuously objected, both at the hearing and in writing following the hearing, to the inclusion of any language expressing that concept in the Supreme Court's order. <u>See</u> Letter of R. Franklin Balotti to The Honorable William T. Quillen dated September 21, 1982 (Williams Aff. Ex. F). Notwithstanding Martin Marietta's objection, the order subsequently issued contained the language set forth above expressing the concept stated by Justice Quillen at the hearing.

* * *

> [I]t could be said that [the Supreme Court] found some moral obligation or moral duty to desist from all efforts once your opponent gets a majority interest in you.... If that is true, we won't ever have to put up with another counter-tender offer case, which may have a lot of benefit based on what I have seen in this one.
>
> * * *
>
> But there won't be any need to make a defensive tender offer if a moral obligation arises once the person or the party who has made the original offer takes down the stock and you are required to desist.

Martin Marietta Corp. v. The Bendix Corp., Del. Ch., C.A. No. 6942, Brown, C. (transcript of Sept. 22, 1982) at 38-41.

Based on his reading of the Supreme Court's Order, the Chancellor enjoined Martin Marietta from voting any Bendix stock owned by it or otherwise attempting to exercise any of the rights of a voting Bendix stockholder. Martin Marietta Corp. v. The Bendix Corp., Del. Ch., C.A. No. 6942, Brown, C., (Sept. 22, 1982) (ORDER). Indeed, in that Order, the Court specifically referred to the Supreme Court's Order of September 21, 1982 as a basis for its action.*

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*This duty of a corporation and its directors to its majority stockholder, expressed by the Supreme Court and followed by this Court in Martin Marietta, is neither new nor novel. Thus, in Canada Southern Oils, Ltd. v. Manabi Exploration Co., Del. Ch., 96 A.2d 810, 814 (1953), the Court held that "majority voting control is a right which a court of equity will protect" from dilution by management. Moreover, in Moore v. Linahan, 117 F.2d 140 (2d Cir. 1941),

[Footnote continued on next page]

The real evil of this portion of Unocal's defensive maneuvering is that it is intentionally designed to injure its majority stockholder. The fact that the injurious mechanism has been put in place before the Partnership becomes the majority stockholder is irrelevant, as demonstrated by this Court's analysis in Bendix. The injury will and can only take place to a majority stockholder of Unocal, whom the directors are obligated to protect. It makes no difference whether the duty is called moral or fiduciary, all stockholders, especially majority stockholders, are entitled to be treated fairly and equitably by their management.

Here, contrary to the equitable principle recognized and applied in the cases discussed above, Unocal seeks judicial sanction of a scorched-earth policy specifically and admittedly calculated to injure the Partnership once it becomes Unocal's majority shareholder. Accordingly, the injunctive relief sought by plaintiffs should be granted.

[Footnote continued from previous page]

cert. den., Sargent & Co. v. Moore, 314 U.S. 628 (1941), the Court reversed an order confirming a plan of reorganization in bankruptcy where the incumbent board, contrary to the known wishes of the majority stockholder, caused the bankrupt corporation to file an answer admitting the material averments of the involuntary petition. Judge Learned Hand stated that "although directors, so long as they hold office and use an honest judgment, are immune from the control of their shareholders, the power to commit a corporation one day before they know they are to be displaced, to a course known to be disapproved by the majority is not one to be generously extended. Normally, the shareholders should have their way." 117 F.2d at 144 (citation omitted).

IV. THE AMENDED DEBT TENDER CONSTITUTES TORTIOUS INTERFERENCE WITH THE PROSPECTIVE ADVANTAGE OF THE PARTNERSHIP AND UNOCAL'S OTHER STOCKHOLDERS.

The Mesa Offer represents a prospective economic advantage to the Partnership as well as to Unocal's remaining stockholders. The Partnership has the opportunity to purchase Unocal shares, while the remaining Unocal Stockholders have the opportunity to receive $54 cash for their shares. However, the Debt Tender was admittedly designed solely to prevent consummation of the Offer and, if permitted to stand, will prevent both the Partnership and Unocal's other stockholders from ever realizing their prospective economic opportunities. Thus, the Amended Debt Tender tortiously interferes with the prospective economic advantages of both the Partnership and the Unocal stockholders and must be enjoined.

The Supreme Court of Delaware has stated the elements of the tort of interference with prospective business advantage as follows:

> (a) [T]he reasonable probability of a business opportunity, (b) the intentional interference by defendant with that opportunity, (c) proximate causation, and (d) damages, all of which must be considered in light of a defendant's privilege to compete or protect his business interests in a fair and lawful manner.

<u>DeBonaventura v. Nationwide Mutual Insurance Co.</u>, Del. Supr., 428 A.2d 1151, 1153 (1981). <u>See also</u> <u>Bowl-Mor Co., Inc. v.</u>

Brunswick Corp., Del. Ch., 297 A.2d 61, 65 (1972).* As was recognized by this Court in Gilbert v. El Paso Co., Del. Ch., C.A. No. 7075, slip op. at 6, Walsh, V.C. (Nov. 27, 1984), a tender offer gives rise to a potential contractual relationship -- the contract arising when the shareholders accept the tender offer by tendering their shares.

In the present case, the Amended Debt Tender is admittedly designed to defeat the Offer both by making the acquisition of Unocal shares less attractive to the Partnership and deterring Unocal's other stockholders from tendering their shares to the Partnership. Thus, the Director Defendants have attempted to induce the Unocal stockholders not to enter into a prospective contractual relation with the Partnership and have sought to prevent the Partnership from acquiring the prospective relation. This blatant interference with the Offer, effected by the illegal Unocal self-tender in breach of the Director Defendants' fiduciary

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*Accord Restatement (Second) of Torts §766(B) (1979) ("One who intentionally and improperly interferes with another's prospective contractual relation...is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.").

duties, is a classic example of tortious interference with a prospective contractual relationship.*

The Second Circuit Court of Appeals has recognized that such unwarranted and improper interference with the consummation of a tender offer can give rise to a claim for tortious interference with a prospective advantage. Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 360 (2d Cir.)(emphasis added), cert denied, 414 U.S. 910 (1973):

> Under well recognized common law principles, interference with a "prospective advantage", such as the opportunity to purchase property, gives rise to a cause of action in the person injured where the means of interference adopted alone is unlawful, even though the purpose in itself may be justifiable. Prosser & Smith, Cases and Materials on Torts, 1131-52 (1967). [Chris-Craft] therefore probably could state a claim for relief in most state courts against each of the defendants for tortious interference. Through unlawful and deceptive practices, they allegedly have denied [Chris-Craft] a fair opportunity to succeed in its tender offers.

The Amended Debt Tender improperly denies the Partnership the opportunity to succeed in their tender offer and denies Unocal's other stockholders the opportunity to enjoy the financial benefits such success would entail.

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*In addressing the same question, the Supreme Court likewise recognized that a tender offeror has a common law cause of action for damages under principles of interference with a prospective economic advantage when a third party interferes with the offer. Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 40-41 (1977).

There is no justification for this intentional and tortious interference with the prospective economic advantages of the Partnership and the remaining Unocal stockholders.

Accordingly, plaintiffs having demonstrated the prima facie elements of defendants' tortious conduct, it is incumbent upon the defendants to demonstrate that their actions were "a fair and lawful means of protecting [their] own business interests...". 428 A.2d at 1153. _See also_, _Bowl-Mor Co. v. Brunswick Corp._, Del. Ch., 297 A.2d 61 (1972) (holding that once plaintiff meets the burden of establishing the elements of tortious interference, the burden of proof shifts to defendants to demonstrate that their conduct was "privileged"); W. Prosser, _Law of Torts_ §130 at 953 (4th Ed. 1971) (the plaintiff has the burden of establishing the "'prima facie tort', casting upon the defendant the burden of avoiding liability by showing that his conduct was privileged."). Because defendants are unable to prove that their interference with the Offer is fair, lawful and privileged, the Amended Debt Tender should be enjoined.

V. THE AMENDED DEBT TENDER CONSTITUTES A CONVERSION OF THE PARTNERSHIP'S PROPERTY AND OF ITS RIGHTS AS A UNOCAL STOCKHOLDER.

The Amended Debt Tender works a conversion of the Partnership's assets because it eliminates the Partnership's right and ability once it becomes a majority shareholder to effectuate a back-end transaction at a "fair" price, and instead forces the Partnership to make payments to the Director Defendants and others for the remaining Unocal shares at a price significantly higher than the Partnership is willing or has any obligation to pay. That the Amended Debt Tender has this intent and effect is admitted by Mr. Sachs, one of Unocal's investment bankers, who states:

> Given that the Mesa Bidders owned approximately 13.6% of Unocal's outstanding stock and assuming that they were to purchase, in accordance with the Mesa Offer, an additional 36.4% at $54 per share (resulting in their owning approximately 50% of such stock), followed by a purchase by Unocal pursuant to its offer of the remaining 50% at $72 per share, the Mesa Bidders would, in effect, have paid a combined average per share price of $64.42 for all of the shares not owned by them at the commencement of the Mesa Offer.

(Sachs Aff. ¶27).

Thus, by defendants' own admission, the Amended Debt Tender forces the Partnership, without its ever agreeing to do so, to pay at least $1.56 billion dollars* more to the Director Defendants and other Unocal shareholders for their Unocal shares than the Partnership is willing or required to pay, or than Unocal's stock is worth. In short, while the Partnership's only obligation under Delaware law is to pay Unocal shareholders a "fair" price in any back-end transaction, the Amended Debt Tender forces the Partnership, against its will, to pay a substantial premium over and above a fair price or that which it is willing or required to pay for the Unocal stock and to put that money into the pockets of the Director Defendants and others. This manipulation of Unocal's corporate machinery is both without precedent and constitutes a conversion of the Partnership's property.

Moreover, those stockholders of Unocal other than the Partnership who tender into the Debt Tender will have the opportunity to have some or all of their equity in Unocal converted into senior debt, raising their status from common stockholders to senior creditors. (Third Tassin Aff. ¶12). By so subordinating the Partnership to Unocal's other shareholders and impairing the incidents of the Partnership's ownership of Unocal stock, the Amended Debt Tender

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*The $1.56 billion figure is derived as follows: the premium paid ($64.42 - $54 = $10.42) per share is multiplied by the total number of shares not owned by the Partnership at the commencement of the Offer (173,900,460 total shares - 23,700,000 shares owned by the Partnership = 150,208,460) 150,208,460 X $10.42 = $1,565,172,153.20.

constitutes a conversion of a portion of the Partnership's interest as a Unocal stockholder in favor of those who are permitted to accept the Debt Tender, including the Director Defendants.

The Amended Debt Tender will have a devastating impact upon the value of the equity of the remaining Unocal shareholders, including the Partnership. Payment of dividends to the remaining shareholders will be restricted. (Nolen Aff. Ex. A at 15). Because the shares may be delisted from the New York Stock Exchange and other exchanges, the value of Unocal shares as margin collateral for loans made by brokers will be impaired. (Nolen Aff., Ex. A at 14).* The market value of the remaining Unocal shares will be "significantly adversely affected." (Nolen Aff., Ex. A at 10). Moreover, any right to distribution of Unocal's assets upon liquidation will be subordinate to the rights

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*Unocal has displayed a remarkably cavalier attitude toward the possibility of delisting in light of the recognized benefits that such listing confers upon a corporation and its shareholders. <u>See</u> <u>Norlin Corp. v. Rooney, Pace, Inc.</u>, 744 F.2d 255, 268-69 (2d Cir. 1984) ("[L]isting on the New York Stock Exchange carries with it implicit guarantees of trustworthiness. The public generally understands that a company must meet certain qualifications of financial stability, prestige, and fair disclosure, in order to be accepted for that listing, which is in turn helpful to the sale of the company's securities.") Indeed, because of these recognized benefits of NYSE listing, the court in <u>Norlin</u> upheld the lower court's finding that the threat of delisting in and of itself constituted irreparable harm to Norlin's shareholders. 744 F.2d at 269.

of those former Unocal shareholders whose shares have been exchanged for debt pursuant to the Amended Debt Tender. Finally, the Partnership's equity in Unocal will be materially adversely affected by the restrictive provisions contained in the indenture.

Representing a flagrant attempt to convert the property of one stockholder and convey that property to the Defendant Directors and other stockholders, the Amended Debt Tender must be enjoined.

VI. THE AMENDED DEBT TENDER IMPERMISSIBLY INTERFERES WITH THE PARTNERSHIP'S PROXY SOLICITATION.

Under Delaware law, shareholders have a "right to a full and fair proxy contest." American Pacific Corp. v. Super Food Services, Inc., Del. Ch., C.A. No. 7020, slip. op. at 12, Longobardi, V.C. (Dec. 6, 1982). Of course, this right cannot be exercised when the calculated acts of management create shareholder confusion and bewilderment. Id. at 9, 11; see Mesa Petroleum Co. v. Unocal Corp., Del. Ch., C.A. No. 7997, slip. op. at 9-10, Berger, V.C. (Apr. 22, 1985). The illegal Amended Debt Tender, hurriedly launched after this Court struck down defendants' manipulative interpretation of Unocal's bylaws, eviscerates plaintiffs' right to a full and fair proxy contest and must be enjoined.

The Director Defendants have used the illegal Amended Debt Tender since its inception to confuse and influence the shareholder electorate. In full page ads in the Wall Street Journal, they have trumpeted the value of this discriminatory tender offer and urged stockholders to re-elect them to their directorships based on the supposed merits of their illegal offer. (Williams Aff. Ex. G). The potential effect of this and defendants' other efforts to deceive was succinctly stated by Donald C. Carter, a veteran of over 120 proxy contests, as follows:

> [A] considerable number of shareholders will lose heart and will independently determine to either vote for management or fail to vote altogether on the adjournment

> proposals, not because they are not for the proposals, but because they feel the cause has been lost by Unocal's latest ploy.

(Third Carter Aff. ¶7).

More recently, defendants have sent confusing and misleading signals to their stockholders regarding the continued viability of the Amended Debt Tender. On April 25, Unocal declared that it would go forward with the first step of the Amended Debt Tender regardless of whether the Partnership would be able to participate in the offer. (Williams Aff. Ex. H). April 30 brought an announcement that Unocal would await "future litigation developments" before deciding whether to proceed with the Amended Debt Tender. (Williams Aff. Ex. I). In the early afternoon of May 1, 1985, defendants proclaimed to the financial press that they would "definitely proceed" with Amended Debt Tender even if the Partnership, by reason of this Court's order, would be able to participate. (Williams Aff. Ex. J). Within hours, however, defendants sang a new tune. Under a second release, they cautioned that they reserved the right to "scrap" the Amended Debt Tender should they be unsuccessful in excluding the Partnership. (Williams Aff. Ex. K). A New York Times headline aptly summarized defendants ever-shifting position on this obviously crucial issue: "Unocal Wavers on Buyback." (Williams Aff. Ex L). These contradictory releases only compound the serious effect of the illegal Amended Debt Tender on the Partnership's proxy solicitations.

This Court has repeatedly enjoined illegal or inequitable conduct that affords management an unwarranted advantage in a proxy contest, Mesa Petroleum Co. v. Unocal Corp., slip. op. at 7 (Apr. 29, 1985); see Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971), and will not countenance such conduct regardless of management's intent. Lerman v. Diagnostic Data, Inc., Del. Ch., 421 A.2d 906, 914 (1980). Thus, any contention by the defendants that the effect of their actions were unintentional or carried out for some "lawful" purpose is unavailing.

Defendants may assert that the issuance of an injunction on the present facts will unduly constrain management's ability to respond in a proxy contest. This assertion would miss the point. This Court's injunction will not prevent a proper response, but merely the use of an illegal device to the detriment of an insurgent.

Thus, as did Judge Tashima of the California District Court, this Court should enjoin defendants from continuing their attempt to gain victory in the pending proxy contest through deception and coercion. If defendants hope to convince the Unocal stockholders of the merits of their views, they must do so without the aid of the latest product of their illegal manipulations -- the Amended Debt Tender.

VII. THE DIRECTOR DEFENDANTS HAVE BREACHED THEIR FIDUCIARY DUTY OF COMPLETE CANDOR.

Unocal's Original Offer to Purchase is materially false and misleading because it both grossly misstates and omits altogether information critical to an informed shareholder decision as to whether to tender into it. Under Delaware law, the Defendant Directors have a fiduciary duty to disclose with complete candor all germane facts concerning the Debt Tender. Lynch v. Vickers Energy Corp., Del. Supr., 383 A.2d 278, 281 (1977); see also Joseph v. Shell Oil Co., Del. Ch., 482 A.2d 335, 340 (1984). As the Supreme Court recently stated in Smith v. Van Gorkom, Del. Supr., 488 A.2d 858 (1985):

> In Lynch v. Vickers Energy Corp., supra, this Court held that corporate directors owe to their stockholders a fiduciary duty to disclose all facts germane to the transaction at issue in an atmosphere of complete candor. We defined "germane" in the tender offer context as all "information such as a reasonable stockholder would consider important in deciding whether to sell or retain stock." Id. at 281. Accord Weinberger v. UOP, Inc., supra; Michelson v. Duncan, supra; Schreiber v. Pennzoil Corp., Del. Ch., 419 A.2d 952 (1980).

Id. at 890. Unocal's Original Offer to Purchase falls far short of this standard and Unocal has failed to cure the misrepresentations and omissions demonstrated herein in its Amended Offer. Accordingly, the Director Defendants have breached their duty of complete candor.

A. Defendants Failed To Disclose That The Unocal Board Rejected The Partnership's Offer And Adopted The Debt Tender Without Adequate Information Or Knowledge Regarding The Value Of Unocal.

As is demonstrated in detail above (see supra 72-80), the Director Defendants rejected the Partnership's Offer and adopted the Debt Tender without having been presented with reasonably adequate information with respect to the value of either the company or the debt securities to be issued in the Debt Tender. Not only does the failure to obtain such crucial information prior to making such fundamentally important decisions violate their fidicuiary duty of due care, but the Director Defendants' failure to disclose that they acted without that information also violates their duty of complete candor.

The Supreme Court recently enforced the duty of directors to disclose that they lacked material information prior to approving a fundamental corporate transaction. In Smith v. Van Gorkom, the Supreme Court held that directors failed to fully inform stockholders of all material information regarding a merger recommended by the board because the directors failed to disclose "[t]he fact that the Board had no reasonably adequate information indicative of the intrinsic value of the Company...." 480 A.2d at 890. The Court concluded: "the Board's lack of valuation information should have been disclosed." Id.

As in Van Gorkom, neither the Original Offer to Purchase nor the Amended Offer contain any statement regarding the Unocal board's lack of valuation information. Unocal stockholders were informed only that the Partnership's Offer is "grossly inadequate" and that "the value of the Securities to be issued in exchange for each Share in the Company Offer is fair." (Nolen Aff., Ex. A at 8). Nowhere do the defendants reveal that their conclusions are not supported by <u>any</u> valuation analysis. Rather, as in <u>Van Gorkom</u>, defendants "cloaked the absence of such information ... [t]hrough artful drafting." 488 A.2d at 890-91.

Moreover, in <u>Van Gorkom</u> the Court held references to a "substantial premium" that would be offered in the merger to be misleading because management failed to disclose that it had failed to "assess the premium offered in terms of other relevant valuation techniques, thereby rendering questionable its determination as to the substantiality of the premium over an admittedly depressed stock market price." 488 A.2d at 891. In the present case, defendants' statement that the Partnership's Offer is "grossly inadequate" is unsupported. This fact, however, was not disclosed to the Unocal stockholders. Defendants' inadequate disclosures constitute a breach of their duty of complete candor.

B. <u>Defendants Failed To Disclose That The Unocal Board Approved The Debt Tender Without Having Considered The Effect On Unocal's Operations Of The Indenture Restrictions And The Capital Budget Reductions Made Necessary By The Debt Tender.</u>

The indenture executed pursuant to the Debt Tender will severely restrict numerous aspects of the future operations of Unocal. As demonstrated above (see supra, 80-83), the Director Defendants gave virtually no consideration to those restrictions prior to approving the Debt Tender. Like their lack of valuation information, defendants' failure to act with full knowledge of the impact of the indenture would be material to Unocal stockholders in evaluating the consequences of tendering or not. Moreover, defendants' failure to disclose that they gave no consideration to the drastic reductions in the Unocal capital budget that would inevitably result from the Debt Tender is a material fact that should have been disclosed. Again, as in Van Gorkom, defendants' nondisclosure of the information and analysis, or lack thereof, upon which their recommendation in favor of the Amended Debt Tender was based, constitutes a breach of their fiduciary duty of complete candor.

C. Defendants Failed To Disclose Their Knowledge Prior To Approving The Debt Tender Of The Questionable Legal Validity Of Its Discriminatory Provision.

At the time it approved the Debt Tender, the Unocal board knew full well that the exclusion of a single stockholder from a tender offer was of questionable legal validity. Indeed, one of its attorneys advised the board at its April 13 meeting that such discrimination was "without close precedent". (Eamer Aff., Ex. A at 9). Unocal's counsel further advised "while there would be some risks," he believed Unocal "should" prevail in any legal challenge to the discriminatory provision of the Debt Tender. Moreover, although defendants undoubtedly knew that their fiduciary duties run to all Unocal stockholders, they failed to obtain an opinion from any of their advisors that the Debt Tender is fair to all stockholders. (Sachs Dep. 127-28).

Defendants failed to advise the stockholders that their offer might be held to be illegal and that they expected Mesa to challenge its validity. (Eamer Aff. Ex. A at 9). Rather, they unconditionally recommended the Debt Tender to their stockholders. Defendants' breached their duty of complete candor by refusing to advise their stockholders of the legal questionability of their offer.

D. Defendants Failed To Disclose The Effect Withdrawal Of The Mesa Offer May Have On The Market Price Of Unocal Stock.

Though the Offer to Purchase states that one of the purposes of the Debt Tender is to "cause Mesa Bidders to terminate the Mesa Offer" (Nolen Aff. Ex. A at 7), nowhere are Unocal shareholders informed of the adverse impact withdrawal of the Mesa offer may have on the market price of Unocal's shares. The chart and text on page 18 of the Offer to Purchase clearly indicate that the unaffected market price of Unocal shares is in the middle $30 range. The current market price is in the upper $40 range. Therefore, if the Debt Tender is successful in achieving its purpose of causing the Offerors to withdraw their Offer, the market price of Unocal stock is expected to drop from its current level to the level of the unaffected price. (Sorte Aff. ¶23). In short, if the Debt Tender is successful, Unocal shareholders will not only be deprived of the opportunity to receive the cash premium for their shares available pursuant to the Offer, but the market value of their Unocal stock also will decline significantly. This adverse ramification of acceptance of the Director Defendants' recommendation is not disclosed.

E. The Offer To Purchase Misrepresents The Extent Of The Fairness Opinions Given By Unocal's Investment Bankers.

The Offer to Purchase fails adequately to advise shareholders of the limited scope of the fairness opinions given by Unocal's investment bankers. Those opinions state only that, on April 17, 1985, the consideration to be received pursuant to the Debt Tender by Unocal shareholders would be fair to the shareholders who actually receive it. Contrary to the representation in the Offer to Purchase (Nolen Aff. Ex. A at 9), the opinions do not state that the Debt Tender would be fair to all Unocal stockholders or to those tendering at the time they actually exchange their stock for the various debt securities. In short, there is nothing in the "fairness opinions" which states that the Debt Tender will be fair to Unocal shareholders at the time their shares are exchanged.

F. The Original Offer To Purchase Failed To Disclose Adequately That, If Successful, The Debt Tender Would Preclude Unocal's Shareholders From Receiving Any Cash Premium For Their Shares.

The Original Offer to Purchase failed to disclose that if the Debt Tender achieves its purpose of "caus[ing] Mesa Bidders to terminate the Mesa Offer" (Nolen Aff. Ex. A at 7), Unocal stockholders will be deprived of any opportunity to receive a cash premium for their shares. Instead, the Offer to Purchase misleadingly suggested that the Debt Tender "offer[s] [Unocal share holders] an opportunity to exchange their Shares for a fair value" (id. at 8), and stated that the Unocal board "RECOMMENDS THAT SHAREHOLDERS TENDER NONE OF THEIR SHARES PURSUANT TO THE MESA OFFER AND TENDER ALL OF THEIR SHARES TO THE COMPANY PURSUANT TO THE COMPANY OFFER." (Id. at at 2)(emphasis in original).

The Original Offer to Purchase failed to state, however, that if more than 49% of Unocal's stockholders followed the Board's recommendation, all Unocal stockholders would be deprived of the opportunities represented by the Partnership and Unocal offers because the Partnership Offer would fail and the condition necessary for the Unocal Offer to occur would not take place. In short, Unocal's Offer to Purchase failed to disclose clearly that, if the Original Debt Tender was successful, no Unocal shareholder would receive anything from either Mesa or Unocal. This deception continues with respect to the second step of the Amended Debt Tender. If the Director Defendants are successful in their efforts to defeat the Offer, the benefits supposedly available under the second step will evaporate.

G. Defendants Failed Adequately To Inform Unocal Shareholders Of Their Rights Under Delaware Law And Under Unocal's Certificate of Incorporation In Any Second-Step Transaction.

The Offer to Purchase discloses that one of the purported reasons for launching the Debt Tender was to protect Unocal shareholders because of "uncertainty as to the value of the securities issued in any Mesa Second-Step Transaction, if it were effected" (Nolen Aff. Ex. A at 8), and strongly implies that the value of any securities issued by Mesa in any such second-step transaction may be unfair or inadequate. (Id. at 8). The Offer to Purchase either fails to disclose, or buries under an unrelated heading, that under Delaware law a majority shareholder, which the Partnership would be if the first-step of the Offer is successful, would owe a fiduciary duty to minority shareholders to offer them fair consideration in any such second-step transaction. Moreover, also buried is the fact that under Unocal's Certificate of Incorporation, any second-step transaction may be subject to the approval of the holders of at least 75% of Unocal's outstanding shares. (Tassin Aff. Ex. J ¶8). Finally, Unocal shareholders may have appraisal rights arising from any such second-step transaction.

VIII. PLAINTIFFS WILL BE IRREPARABLY HARMED ABSENT INJUNCTIVE RELIEF AND THE BALANCE OF HARDSHIPS TIPS IN THEIR FAVOR.

A. Plaintiffs Will Suffer Irreparable Injury If Relief Is Not Granted.

As this Court held in its April 29 opinion, the Partnership's Offer presents a unique opportunity to acquire Unocal, the deprivation of which is not adequately compensable with money damages. Slip op. at 8. Unocal admits that the purpose of the Amended Debt Tender is to thwart the Partnership's bid for control. Given that goal, defendants cannot be heard to argue that any harm to Mesa can be compensated by money damages. Unocal is a unique collection of assets which will not be available in the future should the Offer be defeated by defendants' manipulations. No order of this Court will be able to revive plaintiffs' present opportunity to acquire Unocal -- it will be forever lost.

Thus, the Amended Debt Tender should be enjoined. Courts have frequently recognized that "once the tender offer has been consummated it becomes difficult and sometimes virtually impossible, for a court to 'unscramble the eggs.'" Ronson Corp. v. Liquifin Aktiengesellschaft, 483 F.2d 846, 851 (3d Cir. 1973). As this Court held in Joseph v. Shell Oil Co., Del. Ch., 482 A.2d 335, 344 (1984), permitting an unlawful tender offer to proceed "would constitute such harm as could not easily be unscrambled and is therefore irreparable."

Given the complicated, interlocking nature of the various components of the Amended Debt Tender, it is difficult to imagine how the eggs could be "unscrambled" here. Once the Amended Debt Tender is consummated, it could never be unravelled and the present status quo could never be regained. See Gimbel v. Signal Cos., (Del. Ch.), 316 A.2d 599, 603 aff'd, Del. Supr., 316 A.2d 619 (1974) ("it is not difficult to imagine the various obstacles to [a rescission remedy] including, tax consequences, accounting practices, business reorganizations, management decisions concerning capital investments, dividends, etc. and a host of other problems which as a practical matter will make rescission very difficult indeed"). Further, as the Court found in Petty v. Penntech Papers, Inc., Del. Ch., 347 A.2d 140, 143 (1975), where a corporation purchases shares of its own stock and that purchase is later found wrongful, "a voluntary return of the redemption price by the former owners would seem a dim prospect," and in itself constitutes sufficient irreparable harm to enjoin the threatened action. Thus, once the Amended Debt Tender is consummated, plaintiffs will have been deprived permanently of any opportunity to acquire Unocal without suffering the impact of defendants' unlawful acts and will see their own investment of over

One Billion Dollars irreparably and incalcuably injured. Moreover, as was recognized in Gimbel v. Signal Cos., 316 A.2d at 604 (Thomas v. Kempner, Del. Ch., C.A. No. 4138, Marvel, C. (Mar. 22, 1973)), where a damages claim is enormous in terms of dollars, it may well be a meaningless alternative. While the Director Defendants can be expected to argue that Unocal can respond to any award of money damages, it is they who must remedy the results of their breaches of duty. Contrary to the Defendant Directors' claims, directors are not subject to personal liability only where they are named as defendants in derivative actions. See, e.g., Smith v. Van Gorkom.

As an additional element of irreparable harm, for the reasons stated in the Third Carter Affidavit the Amended Debt Tender is currently impeding the ongoing proxy solicitation of the Partnership and will continue to do so unless enjoined. As this Court recognized in its April 22 Opinion, impairment of a proxy solicitation constitutes irreparable harm and in itself justifies interim injunctive relief. Mesa v. Unocal, slip op. at 9-10 (Apr. 22, 1985); see also Schnell v. Chris-Craft Industries, Inc., 285 A.2d at 439; Lerman v. Diagnostic Data, Inc., 421 A.2d at 908. As with their earlier attempt to dissuade Unocal stockholders from submitting their proxies to plaintiffs, defendants' current efforts to defeat the Partnership's proxy solicitation through coercion, confusion and misinformation must not be countenanced. Such effects cannot be quantified, and cannot be remedied with after-the-fact relief. If the Unocal shareholders' decision-making is apt to be affected by the unlawful Amended Debt Tender, this court should act to enjoin it.

B. The Balance Of Hardships Tips Decidedly In Favor Of Plaintiffs.

In sharp contrast to the extraordinary harm which will occur if the actions threatened by the board of directors of Unocal are not enjoined, no harm will befall Unocal if it is enjoined from completing the Amended Debt Tender. As the Court found in Petty v. Penntech Papers, Inc., the harm which may arise from a corporate purchase of its own shares outweighs that which the corporation may suffer as a result of delay, and injunctive relief is accordingly warranted. 347 A.2d at 143. Thus, this Court properly disposed of Unocal's contentions that its stockholders may be harmed absent injunctive relief -- any such harm is within Unocal's own control. Mesa v. Unocal, slip op. at 8 (Apr. 22, 1985).

Moreover, that the injunctive relief sought will prevent the board of directors of Unocal from expending or committing Unocal to expend tremendous sums of money in their effort to maintain incumbent management in control hardly tips the balance of hardships in Unocal's favor. The interest of incumbent management in retaining itself in control in the face of a legitimate bid for control is not one which a court of equity should protect, nor one that should be given consideration in balancing the hardships between plaintiffs and defendants. Indeed, as the Supreme Court stated in Schnell v. Chris-Craft Industries, Inc., tactics designed to maintain management in control are "contrary to established principles of corporate democracy" and "may not be permitted to stand." 285 A.2d at 439. Accordingly, the injunctive relief sought by Plaintiffs should be granted.

CONCLUSION

Plaintiffs will suffer irreparable harm unless this Court preliminarily enjoins defendants from continuing the Amended Debt Tender. For all of the reasons advanced herein, plaintiffs respectfully request that a preliminary injunction in the form prayed for be entered.

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Attorneys for Plaintiff

Dated: May 5, 1985

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.	:	

PRELIMINARY INJUNCTION

Plaintiffs Mesa Petroleum Co., Mesa Asset Co., Mesa Eastern, Inc. and Mesa Partners II having moved for the issuance of a preliminary injunction pursuant to Chancery Court Rule 65, and the Court having considered the application, the briefs and other papers submitted by the parties, and the arguments of counsel:

IT IS HEREBY ORDERED this ____ day of May, 1985, at __________ o'clock __.m., for the reasons set forth in this Court's Opinion dated May ___, 1985, as follows:

1. Defendants, their successors, assigns, directors, officers, agents, employees, attorneys, servants, subsidiaries and shareholders, and all persons in concert or participation with them and all other persons having actual notice of this order are preliminarily enjoined from consummating or taking any action in furtherance of the offer announced by Unocal on April 16, 1985, and dated April 17, 1985, as amended April 23, 1985 and May 1, 1985.

2. This order is conditioned on plaintiffs giving security by filing a bond in the form annexed hereto on or before May ___, 1985, at _______ __.m., which form is hereby approved, which bond need only be executed by a surety in the amount of ________________ _____________ ($_____________) for the payment of such costs and damages as may be incurred or suffered by defendants or any other party who is found to have been wrongfully restrained.

____
Vice-Chancellor

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 PRELIMINARY INJUNCTION

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. Stegmeier and Donn B. Tatum ("defendants"), their successors, in office, assigns, agents, servants or employees, in the sum of ______________________ ($__________), for the payment of which, well and truly to be made, the undersigned binds itself, its successors and assigns, by these presents.

WHEREAS, plaintiffs obtained from the Court of Chancery of the State of Delaware a preliminary injunction against defendants, upon the condition that they 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 preliminary injunction, 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 May, 1985, by its agent thereunto duly authorized.

THE AETNA CASUALTY AND SURETY COMPANY

By ________________________________
Attorney-in-Fact