this sort of selective group of six directors who, disregarding the other directors and based on a hypothetical alternative value where they say, "The value really isn't that much," they appear to concede the force of our argument but denegrate it in their answering brief at page 42 on the grounds that our argument is a technical argument based upon mechanical rules.

I submit that an interest of the amount of $70 million of these directors -- and that disregards the additional interest that they now have by accelerating the stock options of the employee directors, by granting themselves a cash alternative of their stock appreciation rights and by removing the restrictions on their existing option shares -- that doesn't even count in those numbers.

I suggest that no one has ever had the temerity to submit to a Delaware court before that a $70 million interest in which all of the directors share, that raising that is a technical argument upon mechanical rules.

We further submit, your Honor, that under the Fisher case, under American Potash, under Cheff v. Mathes, the burden is on the defendants not

just to show their purpose, that they had a reasonable purpose, but to show that the transaction that they propose is fair to all of the shareholders or, at a minimum, does not unduly favor one group of shareholders over another.

Defendants have seized upon the Cheff cases, since they were cited by Justice Moore, but, of course, they had been cited by both of the parties to your Honor and they were reflected in your Honor's opinion of April 29. And they somehow take Justice Moore's rather cryptic, we think, order and read it to believe that Justice Moore at least thinks the Cheff cases dictate another result.

The Cheff cases are basically not discrimination cases. And they are distinguishable for a series of factors. First of all, in those cases the dissident, the one being discriminated against, consents and is compensated. It's clear when you read those cases that they are not focusing on the other shareholders who aren't being bought out. They are focusing on the person who, as they say, is being forced out.

So the one discriminated against has the protection of consenting and being paid for his stock.

Secondly, as your Honor observed and as Cheff makes clear and as quoted in our opening brief, the other shareholders get the benefit of the removal of the dissidents. Here, of course, the dissident is not being removed and there is no sharing of benefits among all shareholders.

Importantly, in Cheff and in all of the other Cheff cases -- the repurchase of stock cases -- the directors did not participate in the sale. They did not get any of the proceeds. This is another, I think, critically distinguishing factor when you begin to examine the equities of the situation.

Fourthly, the Cheff cases, each and every one of them, has a dramatically different equitable effect in those cases than is present here, and that makes sense when you consider that in those cases generally speaking they are buying a single shareholder out at a price slightly over market. Now, the situation here, of course, is completely reversed, where they are offering to buy the stock from 70,699 shareholders, and excluding one, and where they make absolutely clear that it is at the expense of the one shareholder. And they are buying at a price 56 percent over market, and not just market. 56 percent

over an inflated market. You know, the present situation is a market price influenced by two competing tender offers. And we all know from the undisputed record that the unaffected market price of Unocal is in the thirties.

This, of course, has a dramatically different effect on dilution and market value and the balancing of the equities, as is really undisputed by either Unocal or the plaintiffs. There is nothing remotely like this economic equitable effect in any of the Cheff cases.

Now let's turn the situation around. If Cheff means, as the defendant suggests -- the defendants say, "You have 8 Delaware Code Section 160, that gives you the power to buy, and under Cheff if your heart is pure and you have a reasonable purpose, then you can buy and that's it." They read out of paragraph 6 of Justice Moore's order any requirement of fairness. It's simply gone.

Well, of course, we know that's not true from reading American Potash and the rest of them, but just consider if it was. Then they would say that Cheff stands for the proposition that you could buy out a single 86 percent majority stockholder at a premium

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of 56 percent over the market and not offer anything to the public shareholders who in that instance would hold 14 percent of the stock. And you could do it if the majority stockholder was a man like Mr. Goldsamt. Suppose you had Mr. Goldsamt and you had an independent board of directors and there were differences of opinion in the board room and there were disagreements as to about what to do. And Mr. Goldsamt said, "The heck with it. If you will buy me out at 56 over market, buy 86 percent so I get all bought out, then the rest of you can go hang together," I guess. Under Cheff that would be all right because you wouldn't examine the equitable purposes. If they genuinely had the purpose of wanting to remove this dissident, that would be it.

Well, obviously that can't be the law. You would have to look at that and say you just can't pay out the net equity of the company to one shareholder and leave the others frozen out. And that in a slightly different degree is exactly what Unocal is proposing to do here.

I think we've seen -- I hope we've seen that the burden is on them to show intrinsic fairness, one, because of their interest, and, two, because

that's what Fisher and American Potash and Cheff all said: The defendants, when they are discriminating, they have the burden of coming forward and proving it is fair. But they also have the burden here because of their entrenchment motive. There never has been a case where you took the deposition of the defendant's directors and they said, "Yup! I cannot tell a lie. I did it with my little hatchet. My only interest was to preserve my job." I mean we are never going to find such deposition testimony and, not surprisingly, we don't have it here. But that doesn't mean that the Court can't look at the underlying circumstances, at the undisputed record, and draw its own inference of what was uppermost in the defendants' minds.

I think if there's anything clear from this record it is their scheming mentality, starting from way back in December when they first feared or suspected that somebody might be buying their stock.

One thing that's interesting to note is, they never gave any thought to negotiating a better deal for the shareholders with Mesa or with anyone else. It never occurred to them, "Hey, somebody is trying to buy us. Somebody is trying to give our

shareholders a substantial premium over the market. Maybe the thing for us to do would be to see that our shareholders got the best price." No. Never considered. Never talked to Pickens: "Will you pay more?" Never talked to anybody else: "Would you pay more?" Their sole motive was, "Let's drive them away."

Look at the deal they negotiated with their investment bankers. I mean it's unique. They agreed to pay their investment bankers $25 million in a year if their investment bankers could somehow arrange that they stay independent. It didn't matter whether the company was debt crippled. It didn't matter what the restrictive covenants were. It didn't matter what their capital budget for expenditures was. It didn't matter as long as they were independent. They didn't even have to be still breathing. If they had been bankrupt and independent, Dillon Read and Goldman Sachs would get paid $25 million and they would get paid more money for staying independent than if they were to arrange to sell the company. For whose benefit? For the benefit of all the shareholders.

Not only that, but just so they didn't try to sell the company anyhow, there's a cap on Goldman Sachs and Dillon Read's fees in case they

should try to sell the company and they don't get any more money if they get anything over $60 a share. There's a disincentive to come up with a high price.

The inside directors have substantial perquisites -- salaries, benefits and bonuses; indeed, I think it's really a checklist, as revealed in their proxies, of every benefit plan that you could possibly have, they have got it.

And finally, I think it reflects on their motive, and we'll talk more about it later when we come to that section.

You have to wonder at their sort of hasty and ill-considered judgments as we've reflected on them under the Van Gorkom sections of our brief. Why did they act in such haste? Why did they not get opinions? Why did they never consider the restrictive covenants and so forth? I think an explanation for that lies in their motive. They weren't concerned about that. They knew they wanted to keep their jobs. They wanted to keep in power, and they just said to the investment bankers and lawyers, "Look, we don't understand all this. You constructed the fence that will keep Mesa away and that's all we want to know. That's the only fact we are interested in."

I hope I've suggested that there are at least three independent reasons why the burden should be on the defendants to prove that the transaction is intrinsically fair.

Now I think we get down to what are the equities here. And under the Fisher test or under the Cheff test or under Aronson, if we start looking at the equities, is this situation fair? First of all, I would submit to the Court that because of the kind of discrimination involved here -- that is, the discrimination is designed and admitted to maximize the value to the other shareholders and to deprive one shareholder of the value. The very purpose of the discrimination is to see that one group gets more than the others.

With that as a purpose, I suggest that that makes it unfair and it doesn't matter whether your overall purpose of, "Well, we are defending against an inadequate offer," it doesn't matter whether that purpose was reasonably reached or not. But the particular way that this is designed to drive Mesa away is to punish and hurt Mesa, to deprive them of property rights, to deprive them of value and give the benefit to all of the other shareholders.

THE COURT: Mr. Richards, could I interrupt for just a second? This may be putting it fairly bluntly, but if Unocal had a proper basis for making a decision that Mesa was a threat to the company and it would not be in the company's best interests for Mesa to succeed in a takeover, why should Unocal then be required to act as a fiduciary with respect to Mesa? In other words, why should the standards of fairness have to apply to this particular stockholder that they have determined is going to injure the company, if not stopped?

MR. RICHARDS: First of all, I think there's a difference between opposing an offer because of an inadequate offer. An inadequate offer doesn't injure the company. The inadequate offer is just a judgment about whether or not the other shareholders are going to get enough.

So there's some difference of opinion there. I mean there's some distinction between the Cheff cases where you have policies or a business reputation of an individual that will injure the company and all of its remaining shareholders, and simply saying, "We think we should get more." I mean, after all, what Mesa is doing is a constitutionally

protected right. It's not only -- not only is it protected by our legal system but it's at the core of our economic system that people have a right to go out and try to buy property and have a right to offer anything they want for it. The other side may have a right to resist that, but does their right to resist go so far as to infringe on Mesa's property rights and to unfairly deprive Mesa of their rights in their stock?

We are not talking about defeating their offer now. They could take steps to defeat their offer if all shareholders were treated the same. But what we submit they can't do is to confiscate or to take away or fail to observe Mesa's rights. There's no doctrine in our law and there are no cases cited that say because you are making a tender offer your directors no longer owe you any rights as a shareholder. I mean, indeed, they are paying us a dividend. They haven't claimed that, "We are not going to pay Mr. Pickens' dividends." Why not? They could have said, "Just giving him a dividend on his stock helps him to pay the interest on borrowing his loan." They haven't claimed that. Yet they have claimed they can make this discriminatory offer which has a much

more far-reaching effect.

They are fiduciaries for Mesa as a shareholder. And they can't deny those rights.

THE COURT: So is it your position that the fiduciary duty extends to all shareholders, notwithstanding -- and we are just making the assumption at this point -- notwithstanding the fact that one of those shareholders, let's assume, is out to destroy the company?

MR. RICHARDS: Yes, ma'am. "Out to destroy the company."

THE COURT: I'm putting it as extremely as I can.

MR. RICHARDS: Yes, ma'am, I think so. Because otherwise you put in the power of a board of directors the right to destroy the investment of any of its shareholders. You are making a proposal that I don't like, so you are not drawing any degrees. And neither are the defendants. They are saying, "If I'm making a proposal that you don't like, you can take away my property rights."

Well, you know, this shareholder has invested a billion dollars. Can the billion dollars of its investment be confiscated in order to drive him

away? You know, Mesa, whether they are an awful raider or not, is entitled to equal protection of the law.

It sort of reminds me of -- it's like in World War II perhaps where you say the goal is national defense and the Japanese have just attacked us at Pearl Harbor and they are probably all spying for their homeland, so we are going to lock up all the Japanese in concentration camps. We did that in World War II. But I don't hear anybody today, when they are out of the heat of the fray, defending that or thinking that was the honorable or proper thing to do, notwithstanding that the Supreme Court upheld.

And I think in the anguish of the fray here between the defendant management -- "We are defending the shareholders." That doesn't permit them to do anything. It doesn't permit them to destroy the rights of all of their shareholders, including a shareholder who is making a proposal that they may not like. They can try and drive him away in lots of other ways and they have cited some of the ways. They have said, "Well, look what happened in GM Sub," in their brief. But in GM Sub, okay, a crown jewel

was sold. That might have discouraged the acquiror, but the acquiror's share interest, his stockholder's interest in the company was not affected any differently than anybody else's. The selling company said, "Well, we sold the crown jewel for a good price." So the acquiror, he had his share interest and he got his aliquot share of that price.

The same thing is true when you buy dog assets. There's always an argument about whether a dog asset is a dog asset or not. Of course, the board of directors always says, "In our business judgment we evaluated all this and we thought it wasn't a dog asset." But whatever, all of the shareholders are treated equally.

The same thing is true in a dilutive stock issuance. "Okay, we are going to discourage this guy. He has 10 percent now. We are going to issue more stock. Now he has only got 5 percent." But everybody is treated the same. All shareholders are treated the same.

White knight. Same thing. In comes a white knight, and as we've seen in the Gulf/Chevron thing, everybody benefitted. But this is different. This is punitive. If you can do this, as we have