77

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 DONN B. TATUM,	)	
Defendants.	)	

RESPONSE OF PLAINTIFFS TO APPLICATION OF DEFENDANTS FOR CERTIFICATION OF INTERLOCUTORY APPEAL

Plaintiffs Mesa Petroleum Co. ("Mesa"), Mesa Asset Co. ("Mesa Asset"), Mesa Partners II (the "Partnership") and Mesa Eastern, Inc. ("Mesa Eastern") hereby respond, pursuant to Supreme Court Rule 42, to the application (the "Application") of defendant Unocal Corporation ("Unocal") for certification of an interlocutory appeal from the temporary restraining order issued by this Court dated April 29,

1985 (the "Order") (attached as Exhibit A) granting plaintiffs' request for temporary injunctive relief enjoining Unocal from proceeding with its exchange offer of April 17, 1985 (the "Original Debt Tender"), as amended on April 23, 1985 (the "Amended Debt Tender"), and from soliciting tenders pursuant thereto or buying shares thereunder unless Mesa is permitted to participate therein to the same extent as other Unocal shareholders.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This is an action for declaratory and injunctive relief with regard to certain inequitable and illegal manipulations of Unocal's corporate machinery by the defendant directors. Plaintiffs filed their complaint herein on April 12, 1985, seeking declaratory and injunctive relief with respect to 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 for stockholder consideration and action at Unocal's annual meeting. On April 22, 1985, this Court issued an opinion granting injunctive relief with respect to Unocal's April 7 interpretation of its bylaw amendments (attached as Exhibit B).

Also on April 22, 1985, plaintiffs amended their complaint to challenge the Original Debt Tender. The very

next day, Unocal issued a press release announcing the Amended Debt Tender. Within a matter of hours, the plaintiffs moved for the entry of the temporary restraining order against the Amended Debt Tender. On April 29, 1985, this Court granted the temporary restraining order which is the subject of this Application.

The Amended Debt Tender is the most recent of numerous inequitable manipulations of Unocal's corporate machinery by the director defendants designed solely to defeat the tender offer made by the Partnership and Mesa Eastern and to defeat the Partnership's ongoing proxy solicitation. Defendants' self-entrenchment campaign commenced in December, 1984, with a program of threat and intimidation aimed at preventing Mesa's bankers from loaning the Partnership funds or participating in any credit agreement with the Partnership if the funds made available through any such arrangements would be used to purchase Unocal stock. Then, in rapid sequence after the Partnership announced its investment in Unocal on February 14, 1985, Unocal adopted certain notice bylaws to deprive Unocal stockholders of fundamental rights of corporate governance by limiting their ability to vote for persons as directors and to consider and act upon stockholder proposals (February 25); sued one of Mesa's banks and surreptitiously sent copies of the complaint in that suit to other of Mesa's bankers

(March 12); amended the bylaws of Unocal to change the quorum requirements for annual meetings of stockholders of Unocal (April 1); and sought to defeat the Partnership's proxy solicitation by announcing to stockholders, less than 30 days before the Unocal annual meeting of stockholders, that since the Notice Bylaws required 30 days' notice of stockholder proposals or nominations, and that since less than 30 days remained before the annual meeting, stockholder proposals or nominations not already made could not be considered at any adjournment of the annual meeting (April 7). Of course, this Court enjoined the latter inequitable and illegal behavior in its April 22 opinion.*

A. The Original Debt Tender.

On April 8, 1985, the Partnership and Mesa Eastern (the "Offerors") commenced an offer to purchase for cash 64 million shares of common stock of Unocal at $54 net per share (the "Offer"), which in addition to the shares

---

*In light of this Court's decision of April 22, 1985, Judge Tashima of the United States District Court of the Central District of California has preliminarily determined that management's proxy soliciation materials with respect to its interpretation of the 30 day notice bylaw are false and misleading and ordered Unocal's Annual Meeting adjourned until May 13, 1985 or until two weeks after corrective disclosures are made. Unocal Corp. v. T. Boone Pickens, Jr., No. CV 85-2179 AWT (ORDER) (C.D. Calif. Apr. 26, 1985) at 3 (attached as Exhibit C).

the Partnership already owns, would give the Offerors a majority of the outstanding stock of Unocal. The Partnership's Offer to Purchase disclosed that the tender offer was a step in obtaining the entire equity interest of Unocal for cash and securities valued at $54 per share.

Although defendants were unable or unwilling to offer an economically viable alternative to the Partnership's Offer, within a matter of days after it was commenced, defendants determined to oppose it. This opposition was not only swift and severe; it was also illegal.

On April 16, 1985, Unocal announced that it would "commence" an illusory offer to exchange 87,200,000 shares of its 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 this "offer" -- the Original Debt Tender -- were set forth in an Offer to Purchase dated April 17, 1985 (the "Original Debt Tender").

The Original Debt Tender was remarkable for several reasons. First, Unocal's obligation to accept shares for exchange was conditioned upon, among other things, the Offerors having first accepted for payment 64,000,000 shares

pursuant to the Offer. If the Offerors terminated their Offer without having accepted for payment 64,000,000 shares, or reduced the number of shares for which the Offer was being made, Unocal would have the right to terminate the Original Debt Tender without accepting or paying for any shares. Thus, the Original Debt Tender was entirely contingent on the Offerors' becoming the majority stockholders of Unocal, and purported to bind Unocal to consummate the exchange regardless of whether the Offerors, as majority shareholders, might think such action prudent or desirable. Indeed, the Original Debt Tender was structured so as to prevent even Unocal's majority shareholders from effectuating any change in it.

Second, the Original Debt Tender provided that Unocal would not accept for exchange, or issue securities in exchange for, any shares tendered by or on behalf of plaintiffs or their transferees. Thus, the Original Debt Tender purported to preclude some holders of Unocal common stock from participating in it, while permitting all other holders of Unocal common stock, including expressly the members of Unocal's board and management, to profit from it. The Board collectively holds over 980,000 shares of Unocal stock and would stand to receive over $70,000,000 from the Original Debt Tender. Not only did the Original Debt Tender discriminate against some stockholders and

favor others, but in fact it discriminated against plaintiffs and their transferees in favor of the very persons who stood as fiduciaries for them.

Third, defendants admitted in their offer to purchase that the Original Debt Tender was designed to thwart the Offer and to prevent or hinder plaintiffs' financing. Thus, it was not designed primarily to afford an economic opportunity to all Unocal stockholders, or even some of them, but instead was designed solely to prevent the Unocal stockholders from obtaining any enhancement of value for their shares because, if the primary goal of the Original Debt Tender -- defeat of the Offer -- were achieved, the Original Debt Tender would disappear by its own terms and no Unocal stockholder would receive anything for his or her shares.

The board made no effort to determine whether the Original Debt Tender was fair to the stockholders of Unocal as a whole or even whether the value of the securities offered in the Original Debt Tender was a fair price for Unocal shares. Rather, defendants simply set the price "offered" in the Original Debt Tender with the idea in mind that it was so high that the threat of consummation of the Original Debt Tender would cause plaintiffs to withdraw their Offer rather than risk buying into Unocal and triggering the Original Debt Tender.

B. The Amended Debt Tender.

Defendants were not content to rely on the Original Debt Tender to defeat the Offer. On April 23, 1985, one day after this Court granted temporary injunctive relief to plaintiffs on their interpretation of the bylaw claims and plaintiffs filed their amended complaint in this Court challenging the Original Debt Tender, defendants announced that they had amended the Original Debt Tender to impose immediate harm on the Offerors whether or not they went forward with their Offer. Under the Amended Debt Tender, Unocal proposed to exchange 50 million shares of its common stock for the consideration offered in the Original Debt Tender whether or not the Offerors purchase 64 million shares pursuant to their Offer. The remaining 37,200,000 shares subject to the Original Debt Tender would thereafter be purchased by Unocal if the Partnership was successful in purchasing a majority of Unocal's shares pursuant to the Offer. All of the terms and conditions of the Original Debt Tender were made applicable to the Amended Debt Tender, except, as noted, that under the Amended Debt Tender the purchase by Unocal of 50,000,000 of the 87,200,000 shares of Unocal common stock sought to be purchased was no longer conditioned on the consummation of the Offer. As with the Original Debt Tender, under the Amended Debt Tender the members of Unocal's board and management stand to profit

by some $70,000,000 at the expense of those stockholders whom they have disfavored and precluded from participation.

The purported rationale of the Original Debt Tender -- to provide Unocal stockholders an opportunity to exchange their remaining shares for a "fair" value if the Offer were consummated -- has now been abandoned. That alleged purpose cannot be advanced by the purchase of 50,000,000 Unocal shares pursuant to the Amended Debt Tender because defendants now have set Unocal upon a course by which it will purchase those shares regardless of whether the Offerors purchase shares under the Offer. Indeed, as admitted in the affidavit of Mr. Sachs, one of Unocals investment bankers, the 50,000,000 share figure was picked to insure the antitakeover effect of the Amended Debt Tender even if plaintiffs were allowed to participate in it. Sachs Aff. ¶42.

Plaintiffs believe that the securities offered per share in the Amended Debt Tender are worth more per share than the Unocal stock for which they will be exchanged, with the result that some Unocal stockholders, including the defendant directors, will profit at the expense of plaintiffs and any other Unocal stockholder who does not or cannot tender. Defendants purport to believe that the debt securities are of the same value as the Unocal stock for which they are being exchanged. Nevertheless, they are strongly recommending the Amended Debt Tender to their shareholders and

have stated that they will, together with the executive officers of the Company, all tender their Unocal shares. It is not hard to understand why with the market price of the stock at $46.

As the Court recognized and the parties unambiguously agreed (Transcript of oral argument of April 26, 1985, attached as Exhibit D, at 29, 58-59), such valuation issues were of no relevance to plaintiffs' motion for a restraining order. Instead, the issue presented to the Court was whether defendants legally or equitably can single out one of their 76,900 shareholders to deprive that single shareholder of rights and opportunities afforded the remaining 76,899.

It must be noted, however, that the statements made by defendants at page 2 of their Application regarding valuation of Unocal stock are blatantly false and misleading and should be disregarded by the Court. In light of the fact that the defendants' statements referred to above regarding valuation all were refuted by plaintiffs in their papers and argument in connection with the hearing on April 26, one can only assume defendants include them in their Application for Certification of Appeal for the "benefit" of the Supreme Court.* In case defendants' misstatements

---

*Indeed, defendants appear in several instances in their Application to have forgotten the Court to whom their Application is being presented. See Defendants' Application at 8 ("[T]his Court [should] resolve" the issue of plaintiffs' entitlement to relief as soon as possible; "[t]his Court has traditionally accepted interlocutory appeals"; "this Court has heard expedited appeals").

and distortions should reach their intended audience, plaintiffs briefly will attempt to set the record straight again.

First, defendants claim that "Mesa has . . . produced its own valuations of Unocal ranging from $64 to $86 per share." (Application, p.2). That statement is simply wrong -- and defendants know it. In fact, the internal valuation of Unocal to which defendants refer indicated only that Unocal stock might be worth $64 per share before the deduction of $1.333 billion of deferred income taxes and anticipated future income taxes from ongoing enterprises. (Third Tassin Aff. ¶9; attached as Exhibit E). Moreover, the only "valuation" of Unocal at $86 per share was, contrary to defendants' blatant misstatement, not performed by plaintiffs but rather by the investment banking firm of Donaldson, Lufkin & Jenrette. (Third Tassin Aff. ¶6). Plaintiffs have never adopted or concurred in that analysis and believe it to be significantly flawed. Id. Finally, again flatly contrary to fact, defendants state that Mesa has "appraised" Unocal at $74 per share. (Application, p.2). That figure also is the product of another entity, not endorsed by plaintiffs and which they believe to be likewise seriously flawed. Third Tassin Aff. ¶¶4, 5.

The only 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.

Under the Amended Debt Tender, as under the Original, plaintiffs and their transferees are specifically denied the opportunity to obtain the securities offered by Unocal. The effect of this discriminatory provision is that without injunctive relief plaintiffs and their transferees will be irreparably injured in four ways -- (1) the Partnership is deprived of its right as a shareholder to participate in the Amended Debt Tender on an equal and pro rata basis with all of Unocal's other shareholders, (2) the Offerors will be irrevocably deprived of the unique opportunity available to them to attempt to acquire Unocal without being deterred by illegal or inequitable acts, (3) the underlying asset value of the remaining Unocal shares is diluted, and (4) the market value of the Partnership's Unocal stock is adversely affected. Under such circumstances, entry of the restraining order was a necessary and proper exercise of this Court's discretion to prevent the Partnership from being irreparably harmed pending this Court's full hearing on plaintiffs' motion for a preliminary injunction on May 8, 1985.

ARGUMENT

UNOCAL'S APPLICATION MEETS NONE OF THE CRITERIA FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL UNDER SUPREME COURT RULE 42(b).

Supreme Court Rule 42(b) sets forth the criteria to be applied by this Court in determining whether to certify interlocutory appeals. That Rule provides that no interlocutory appeal will be certified by the trial Court, or accepted by the Supreme Court, unless the order sought to be appealed (1) determines a substantial issue; and (2) establishes a legal right; and (3) meets one or more of the criteria set forth in Supreme Court Rule 41(b) or 42(b)(i)-(v). The requirements of Supreme Court Rule 42(b) are set forth in the conjunctive and, accordingly, a failure to meet any one of the three prerequisites requires that certification of the interlocutory appeal be refused. See, e.g., Societe Holding Gray D'Albion S.A. v. Saunders Leasing System, Inc., Del. Supr., No. 347, 1981, Quillen, J. (Dec. 24, 1981)(ORDER) (attached as Exhibit F). As set forth below, Unocal has failed to establish the existence of any of the requisite criteria under Rule 42(b) to support its application for certification of an interlocutory appeal from the Order.*

*Defendants' reliance on the Committee Commentary to Rule 42 is misleading. (Defendants' Application at

[Footnote continued on next page]

A. The Order Does Not Determine A Substantial Issue.

It is well established under Delaware law that the grant or denial of temporary injunctive relief is not "a determination of a substantial legal issue" within the meaning of Rule 42(b). An order granting temporary injunctive relief is "interlocutory in the strict sense, that is, it affords plaintiff temporary protection pending the final outcome of the suit, and ... determines nothing finally against defendant." Consolidated Fisheries Co. v. Consolidated Solubles Co., Del. Supr., 99 A.2d 497, 500 (1953), overruled in part, Pepsico, Inc. v. Pepsi-Cola Bottling Co., Del. Supr., 261 A.2d 520 (1969).

In Martin v. American Potash & Chemical Corp., Del. Supr. 92 A.2d 295, 298 (1952), our Supreme Court stated:

> No appeal lies from an order in Chancery which is discretionary and preliminary, intended merely to preserve the status quo, and not determinative of substantive rights.

In Martin, the Court distinguished orders granting preliminary injunctive relief from those denying preliminary injunctive

---

[Footnote continued from previous page]

5). Although the Rule does serve the salutory purposes noted in the Commentary in a proper case, there is no suggestion that the entry of a temporary restraining order meets the Rule 42 standard. Defendants seem to overlook the fact that the Order is temporary, and does no more than maintain the status quo to prevent irreparable harm to plaintiffs.

relief. Where, as here, preliminary injunctive relief is granted to maintain the status quo, the order does not finally determine substantive rights, and hence is not appealable. In contrast, substantial legal rights may be determined where preliminary relief is denied. See Martin v. American Potash Chemical Corp., 92 A.2d at 297-98; Consolidated Film Industries v. Johnson, Del. Supr., 192 A. 603, 608 (1937) ("it is apparent that in most cases, an order, granting a preliminary injunction is of such a nature that it is not subject to appeal).* Defendants have not pointed to any authority for the interlocutory appeal of the granting of a temporary restraining order.

Moreover, a substantial issue is not presented merely because control of a corporation may be at stake or because the Order prevents a party from proceeding with a multi-million dollar transaction. In Telvest, Inc. v. Olson, Del. Ch., C.A. No. 5798, Brown, V.C. (Mar. 22, 1979) (attached as Exhibit G), the Supreme Court denied defendants' motion for certification of an interlocutory appeal from

---

*As the Court stated in GM Sub Corp. v. Liggett Group, Inc., Del. Supr., 415 A.2d 473, 479 (1980):

> Assuming that an interlocutory appeal of a temporary restraining order is reviewable at all, the test certainly would be whether the Vice Chancellor abused his discretion in entering it.

the Court's order granting a preliminary injunction restraining defendants from taking action to repel an anticipated take-over bid which would have resulted in a change of control. The day after entry of the order, plaintiff announced its intention to make a tender for defendants' stock. Defendants argued that the preliminary injunction had determined a substantial issue and established a legal right since continuation of the injunction would deny defendants one weapon with which to fight plaintiff's takeover bid. The Court denied the application for certification, however, concluding that no substantial issue was determined or legal right established merely because a tender offer was involved. Slip op. at 4. The Supreme Court also refused to accept the interlocutory appeal. See Outdoor Sports Industries, Inc. v. Telvest, Inc., Del. Supr., No. 73, 1979, Quillen, J. (May 2, 1979) (ORDER) (attached as Exhibit H). See also Reading Co. v. Trailer Train Co., Del. Supr., No. 97, 1984, McNeilly, J. (May 14, 1984) (ORDER) (attached as Exhibit I), in which the Supreme Court refused to accept an interlocutory appeal of an order of this Court denying injunctive relief with respect to a multi-million dollar debt restructuring.

Unocal attempts to overcome the well-established legal principle that no substantial issue is created by the grant or denial of a temporary restraining order by inaccurately representing both this Court's opinion and

the circumstances surrounding that opinion, and by then attempting to reargue its position below.

The Defendants' characterization of the Opinion oversimplifies its well-reasoned analysis in an attempt to assert that it somehow abandons well settled Delaware law. To the contrary, the Opinion merely applies this Court's decision 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) (attached as Exhibit J), reargument denied (February 21, 1980) ("February Op.") (attached as Exhibit K) and is in no way revolutionary or novel. Its analysis adroitly exposes the fatal flaw of the Amended Debt Tender, its undue favoritism of other shareholders, including the defendant directors, at the expense of the Partnership. This approach fully conforms with the Court's decision in Fisher which states:

> . . . a burden is imposed upon the corporation to show that there is a valid corporate purpose for limiting the offer and that in so doing it has not unduly favored one group over another.

5 Del. J. Corp. L. at 532. (emphasis supplied).

Again the Fisher court, in denying reargument, holds that:

> If the totality of the circumstances of the challenged tender offer are reviewed, it is clear that the burden is upon the defendants to demonstrate that the tender offer is fair to all the stockholders.

February Op. at 1.

Moreover, defendants' statement that this Court's finding of irreparable harm is "in direct conflict" with the holding in Unocal Corp. v. T. Boone Pickens, Jr., No. CV-85-2179 AWT (C.D. Cal. Apr. 29, 1985) (Defendants' Application, Ex. C), also fails to withstand analysis. The California federal court was presented with no affidavits showing that irreparable harm would be suffered by the counterclaimants in that case absent an injunction based on Unocal's alleged federal securities laws violations, unlike the situation here. (Defendants' Application, Ex. C at 11-12). Moreover, as argued by Unocal's attorneys to that court, the Securities Exchange Commission appears to have left the matter of discrimination in the context of tender offers "to be handled in the State Courts as it had been in the past." Id. at 15. Indeed, during the federal court hearing Unocal's lawyer informed the court of the ruling of this Court, noting that this Court's decision had taken "the wind out of my sails," id. at 18, and that the Unocal offer likely would be extended in light of this Court's ruling. Id. at 22-23. Of course, we now know that the Unocal offer has been extended to May 17. (See Exhibit L attached hereto).

In these circumstances, the Unocal offer already having been enjoined, the California court's holding that irreparable harm would not occur absent its injunction

is hardly surprising. In light of these critical differences between the mix of facts and circumstances presented to this Court and the California federal court, to claim that the two decisions are "in direct conflict" is inaccurate.

Defendant also misleadingly suggests that the Partnership "admits" that Unocal's purpose in discriminating against it was proper. (Defendants' Application at pp. 4-5). The Partnership has made no such admission. Indeed, the Partnership vigorously challenged Unocal's alleged purpose for discriminating against it in the proceedings before this Court. The mere fact that the Partnership chose not to challenge "[f]or purposes of this motion...the bona fides of Unocal's decision to oppose its tender offer." Mesa Petroleum Co. v. Unocal Corp., slip op. at 6, can hardly be seen as an "admission" that Unocal's purpose in discriminating against the Partnership was proper. See Hearing Transcript at the oral argument, Exhibit D at pp. 24-29.

Unocal's contention that the Order determines substantial issues is therefore meritless. The Order does not preclude Unocal from making a more convincing showing at the hearing on a preliminary injunction scheduled to be held on May 8, 1985. See Telvest, Inc. v. Olson, slip op. at 4. In sum, the temporary nature of the relief granted

demonstrates that no substantial issue was determined by the Order. Thus, certification should be denied.

Moreover, even if a substantial issue was determined by the Order, which it clearly was not, under Rule 42(b) defendants would have to establish that the Court, in determining that substantial issue also established a legal right. See Plant Industries v. Katz, Del. Supr., No. 123, 1981, slip op. at 1, Quillen, J. (May 1, 1981) (ORDER) (attached as Exhibit M); TRE Corp. v. Wylain, Inc., Del. Supr., No. 340, 1979, slip op. at 1, Quillen, J. (Dec. 17, 1979) (ORDER) (attached as Exhibit N). As is demonstrated below, defendants can make no such showing.

B. The Order Establishes No Legal Right.

The Order establishes no legal right. Examples of orders which establish "legal rights" justifying an interlocutory appeal are those which establish a legal right "necessarily controlling [the Court's] final decision," Consolidated Film Industries, Inc. v. Johnson, 192 A. at 609, or determine "an issue of law ... which had the plea been sustained ... would have been a complete bar to the complainant's case," Electrical Research Products, Inc. v. Vitaphone Corp., Del. Supr., 171 A. 738, 747 (1934). No such legal rights are decided by this Court's issuance of the Order.

Unocal's contention that the Order establishes legal rights because Unocal's right to protect itself against

a hostile tender offer is impaired and because it establishes the legal right of the Partnership not to be unlawfully discriminated against in the Amended Debt Tender is meritless. The very nature of a temporary restraining order militates against Unocal's contention that the Order establishes "legal rights." As the courts of this State have consistently held, the grant of injunctive relief does not establish legal rights. See Plant Industries, Inc. v. Katz, Del. Supr., No. 123, 1981, Quillen, J. (May 1, 1981) (ORDER)(attached as Exhibit M); TRE Corp. v. Wylain, Inc., Del. Supr., No. 340, 1979, Quillen J. (Dec. 17, 1979) (ORDER) (attached as Exhibit N); Huffington v. ENSTAR Corp., Del. Ch., No. 7643, Hartnett, V.C. (June 27, 1984) (ORDER) (attached as Exhibit O). The rationales of the Courts in these cases, which involved preliminary injunctions, apply with even more force where, as here, appeal is sought from a temporary restraining order.

Moreover, this same reasoning applies with greater force, where, as here, the preliminary opinion and order of the Court did not address all of the matters raised by the complaint or by the pending application for a preliminary injunction. See Plant Industries v. Katz, slip op. at 1-2. Indeed, where, as here, a preliminary injunction hearing is scheduled in the near future which will afford a better chance to develop those unaddressed issues

on a more complete record, the Supreme Court has deferred certification and ordered that the preliminary injunction hearing go forward. See Phillips Petroleum Co. v. Mesa Partners, Del. Supr., No. 333, 1984, slip op. at 3, Moore, J. (Dec. 11, 1984) (ORDER) (attached as Exhibit P).

Thus, the Order in fact establishes no legal rights; it merely stays the status quo pending the May 8, 1985 hearing, and prevents the Partnership from being irreparably harmed by the defendants discriminatory and inequitable Amended Debt Tender.

C. The Opinion Meets None Of The Other Criteria Necessary To Sustain An Interlocutory Appeal.

Having failed to establish that the Order determines a substantial legal issue or establishes a legal right, defendants argue that there are "important and urgent reasons" why an immediate appeal is needed. Defendants' contentions are meritless.

Defendants contend that because the purpose of the Amended Debt Tender is allegedly frustrated and because Unocal shareholders other than Mesa will allegedly "lose in whole or in part the benfits of Unocal's...offer, the Order in effect irreparably harms Unocal. However, this Court's findings and defendants' own admissions belie their claims of harm. Defendants themselves admit that the Amended Debt Tender will have the desired antitakeover effect,

even if Mesa is allowed to participate. As Mr. Sachs, one of Unocal's investment bankers, 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). Moreover, as this Court recognized in its opinion, "it is entirely within Unocal's control whether that hardship [deprivation of opportunity to participate in the Amended Debt Tender] will befall its shareholders." Slip op. at 8. Thus, none of the harms claimed by defendants occur.

Defendants' attempt to elevate the legal issues addressed in the Order into a question of law of first impression is similarly misguided. Indeed, in defendants' own papers and oral argument before this Court they admitted that the legal issues presented by plaintiff's motion for a restraining order were controlled by Fisher v. Moltz, Del. Ch., C.A. No. 6068, Hartnett, V.C. (Dec. 28, 1979), reprinted in 5 Del. J. Corp. L. 530 (1980). (Hearing Transcript, Exhibit D at 38). See also Mesa Petroleum v. Unocal Corp., slip op. at 3 ("Both sides agree that the decision in Fisher v. Moltz...states the legal principles governing a company's selective repurchase of its stock.") Thus,

the legal issues considered by this Court in granting the Order clearly were not issues of first impression in this state. Defendants' prior arguments to this Court are inconsistent with their making such a claim now.

Likewise, none of the other criteria necessary to sustain an interlocutory appeal under Rule 42(b) are met in this case. There are no conflicting opinions in the trial courts as to the questions of law presented (Rule 41(b)(ii)); no questions of law are raised relating to the constitutionality, construction or application of a statute* (Rule 41(b)(iii)); there was no challenge to the jurisdiction of this Court (Rule 42(b)(ii)); there was no reversal of a trial court or other decision (Rule 42(b)(iii)); the Order has not vacated any judgment of this Court (Rule 42(b)(iv)); and review of the Order will not terminate the litigation between the parties. (Rule 42(b)(v)). Indeed, plaintiffs are moving forward on their motion for a preliminary injunction which has been set down for a hearing on May 8, 1985, and which will provide a fuller legal and

---

*Unlike the present case, questions involving the constitutionality, construction or application of statutes were involved in Pfizer Inc. v. ICI Americas, Inc., Del. Supr., No. 328, 1984, Moore, J. (Nov. 29, 1984) (Order) (Exhibit E to Defendants' Application), and Plaza Securities Co. v. Datapoint Co., Del. Supr., No. 79, 1985, Moore, J. (Mar. 6, 1985) (Ex. F to Defendants' Application). Therefore, the criteria of Supreme Court Rule 41(b) were satisfied in those cases.

factual record for decision by this Court and review by the Supreme Court, if necessary.

In sum, defendants can meet none, let alone all, of the criteria necessary for an appeal to be certified by this Court. Accordingly, their application for certification should be rejected.

For the foregoing reasons, Unocal's applications should be denied.

Respectfully submitted,

Charles F. Richards, Jr.
Gregory P. Williams
William W. Bowser
C. Stephen Bigler
Robert W. Whetzel
Richards, Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899
(302) 658-6541
Attorneys for Plaintiffs

Dated: May 1, 1985

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on Tuesday, May 1, 1985, two copies of the Response of Plaintiffs Mesa Petroleum Co., Mesa Asset Co., Mesa Eastern, Inc. and Mesa Partners, II to Application of Defendant Unocal Corporation for Certification of Interlocutory Appeal were served upon:

A. Gilchrist Sparks, III, Esquire
Morris, Nichols, Arsht & Tunnell
1105 Market Street
P. O. Box 1347
Wilmington, Delaware 19899

Charles F. Richards, Jr.
Richards, Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899
(302) 658-6541
Attorneys for Plaintiffs

Dated: May 1, 1985

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

CAROLYN BERGER
VICE-CHANCELLOR

COURT HOUSE
WILMINGTON, DELAWARE 19801

April 29, 1985

Charles F. Richards, Jr., Esquire
Richards, Layton & Finger
P. O. Box 551
Wilmington, Delaware 19899

A. Gilchrist Sparks, III, Esquire
Morris, Nichols, Arsht & Tunnel
P. O. Box 1347
Wilmington, Delaware 19899

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

Dear Gentlemen:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

Carolyn Berger

CB:rsb

Xc: Register in Chancery

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

CAROLYN BERGER
VICE-CHANCELLOR

COURT HOUSE
WILMINGTON, DELAWARE 19801

April 22, 1985

Charles F. Richards, Jr., Esquire
Richards, Layton & Finger
P. O. Box 551
Wilmington, Delaware 19899

A. Gilchrist Sparks, III, Esquire
Morris, Nichols, Arsht & Tunnel
P. O. Box 1347
Wilmington, Delaware 19899

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

Dear Gentlemen:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

that apply in other areas of Delaware law for dissolutions, for partial liquidations, for dividends, for redemptions. When you are distributing the assets of the company in any of these ways, you must treat the shareholders fairly and equally; so in this exchange offer.

Now, here when we look at their purpose, they attempt to say, well, our purpose here is to drive off an evil raider, and we are protected under the business judgment rule in doing that. However, the specific purpose here we are focusing on is not their purpose to drive us off but their purpose in discriminating against us in this exchange offer. And here the very purpose is illegal per se, because the purpose is to favor one group over another. And that makes it invalid on its face.

The purpose, as they admit in their papers and in their offering circular, is to see that the defendants and their favorite shareholders get more money at the expense of plaintiffs. It couldn't be plainer. Indeed the Sachs affidavit explains just how the offer will have the effect of taking money from Mesa and transferring it to the defendants and to the other shareholders. Indeed he explains that it's a scheme to make Mesa pay $64.42 a share even if they don't want to, and even if at the time they are the controlling and majority shareholder in complete disregard of their responsibilities and duties to Mesa as such.

But Mr. Sachs concedes that it is not even necessary to exclude Mesa in order to accomplish their purpose of driving off the evil raider, and he does that at Page 21, Paragraph 42, where he says that "That's why they tendered for 50 million shares," dropping the so-called Mesa condition, because they thought that would be enough even if in his words Mesa forced its way in to accomplish their purposes.

It's also noteworthy that in the Sachs affidavit, while he attempts to deal with Mr. Tassin's second affidavit that the market price per share of

Unocal won't go down as a result of the completion of the 50 million share tender, Mr. Sachs is unable to make that statement. He's unable to offer the opinion that it won't have that effect.

Mr. Sachs has to content himself with the assertion which is notably weaker for an investment banker that it could be worth $72. There is no opinion by either firm that Unocal is worth $72.

Indeed in saying -- in expressing the opinion that it's fair to the receiving shareholders, they conceal their opinion as to what the value is if it's not -- I mean, the only firm opinion is they say it's at least 60. Of course if something is worth the 60, 72 is fair to those people who get it. 120 would be fair to the people who get it. That is, saying it's fair to the receiving people means it's just on the plus side of fair. It only means that it's not below fair. It doesn't mean that it's fair either for them, and then of course there is no statement that it's fair for anybody else.

Now, of course all of this complicated numbers argument they make with all of the mumbo jumbo of the good faith of the investment bankers going through all of these hoops is really ridiculous, and I

think can be put aside in view of the board's recommendation to all of their shareholders that they tender and the board's own tender. And I think it's noteworthy there that in terms of interest the board's interest here is enormous, it's concrete, it's specific. They would get up to $70 million for their stock if it was all accepted.

Now, this board's self-interest imposes a heavy burden of showing intrinsic fairness under our cases on the board, and deprives them of the business judgment rule if they had not already been deprived of it. We cited Aronson and Sterling and other cases in our brief and our letter.

But as we see from Fisher versus Moltz, where the board didn't have any conflicting personal interest as present here, the board did not enjoy the benefit of the business judgment rule in the first instance, but under the terms of making a discriminatory tender they had the burden without self-interest of showing its fairness. So here that burden should be doubly strict.

Now, their brief on the business judgment rule is simply beside the point for the reasons we have just explained. They are not

entitled to the business judgment under Fisher where they are discriminating among shareholders, and they are certainly not entitled to it because of their enormous self-interest. The question of whether or not it's a sound business judgment to try to defend the company against Mesa's efforts is really beside the point. That judgment is not under attack at this hearing today. What's under attack is the device they used to try to implement that judgment.

That is, granting that a board may in certain circumstances under the business judgment rule decide to defend against a takeover contest, that defense, or that business judgment power doesn't enable or allow a board to employ an illegal or an inequitable defense even if their purpose was otherwise sustainable in the sense of driving off an undesired and uninvited offeror. And I think that becomes evident when you look at the other defenses that have been employed and sustained under our cases.

We are all familiar with the sale of the crown jewel assets as in the GM Sub case. We are familiar with the defense of purchasing so-called dog assets. Of course there is always a dispute. The

corporation says oh, these aren't dog assets; these are good, and the raider says they are dog assets.

We are familiar with issuance of stock in order to dilute the raider's position, and we are familiar with white knight transactions where the board goes out and gets somebody else to come in and make an offer.

Now, in all of these the purpose may be to defeat, and the board's business judgment may be sustained, that it was a good idea to drive off this low or unwanted offer. But in all of them the shareholders are treated equally. So that whether the offeror wins or loses, he has the same values as everyone else.

I mean, if the board has made a good deal in selling its crown jewel assets, he as a shareholder benefits along with all the other shareholders. He is affected to the same extent whether he goes ahead and acquires the company or whether he doesn't. The same with issuance of additional stock. He may be diluted, but so are all other shareholders. He is treated on a pro rata basis.

That is exactly what is wrong with this technique. Here Mesa is going to be punished, and is

going to be hurt whether it goes forward or doesn't go forward, and it's being treated and unequally, and that is fundamentally unfair.

Now, if you really understand what Mr. Sachs is saying, what he is really saying is well, I sort of think this might be fair because Mesa might -- and I emphasize the word "might" because that's the word used by Sachs -- they might come out even. Now, how could that happen? They might come out even if they acquired a 100 percent of Unocal, and then could get control over the assets so they could implement this program of orderly liquidation he talks about.

Now, Sachs and Hobbs don't say that Mesa can do that under the different circumstances that exist here or under the circumstances of the very different Unocal that will exist after it's burdened with either the 3.9 billion dollars in additional debt or the 6.7 billion dollars in additional debt depending upon how successful their tender offer is, and of course they don't say anything about the effect of the restrictive covenants and the restrictions they are putting in which prohibit anybody acquiring Unocal from disposing

of the assets. I suspect that that possibility that Mesa might do just as well is not enough to sustain the defendants' burden.

If what the defendants have done here is sustained, I think a new principle of law will be born, and that principle is that a takeover bidder is not entitled to equal protection of the law. His rights can be treated differently from all other shareholders. If that is so, consider carefully there will be no more takeovers because no one will be able to take the risk of such discrimination and punitive treatment. If they can do what they are doing here, what's to stop them from continuing to exclude us as they in effect liquidate the company by paying out all of the equity to other shareholders leaving us owning a hundred percent of a debt-laden shell with no equity left, nothing.

For example, they buy 50 million shares. We don't go away. We say well, we are still forging forward. We're just going to reduce our offer. Fine they say. We'll buy another 50 million shares. Have you had enough yet? If they can do it once they can do it twice, and they can do it three times until finally all of the net equity is paid out to all of

the other shareholders leaving the 13.6 percent shareholder without any equity and with a company all of whose assets are completely burdened with debt.

And what about their fiduciary duties to us? There is not a single word in their brief. There is not a single word acknowledging that we are a shareholder, entitled to the same obligations of good faith and fair treatment as all of the other favored shareholders. There is no explanation in their brief of how they can disregard their fiduciary duties to us or how they can treat us inconsistent with their duty to all shareholders to treat them fairly. And what about in the event Part II of their tender offer is complete? What about their duty to us then as their majority shareholder, what the Delaware Supreme Court in the Martin Marietta case moral duty not to disregard the wishes of their controlling shareholder? Not a word in their brief or papers as to how it would be fair to make a gigantic and overwhelming tender offer or complete such a tender offer in the face of the fact that the majority shareholder didn't want them to do it, and with the evident admission by Mr. Sachs that at that point at least the whole purpose of it is to take money from Mesa without its consent and to convey it to the public shareholders.

Now, I think their numbers are really

irrelevant. The market price of this stock is $46. They are offering 72. They are taking it. They are recommending it. And we want it because we believe it to be above the fair value. And that is enough, that we want it. It doesn't matter if we are wrong. This Court doesn't have to resolve what the fair market value of Unocal stock is. In fact, we should have a right to decide for ourselves whether to tender or not. And it is the deprivation of this right which is the discrimination.

And I suggest to you on the showing made in the third Tassin affidavit that we have performed a very sophisticated analysis of these values and that the suggestion that the values equal or exceed $72 is not sustainable even if it was material to Your Honor's decision, which we think it is not.

Now, in addition to this inequitable effect, the tender offer and the timing of it five or six days before they thought they were going to have their meeting was designed to bolster up a sagging and losing proxy contest. The market perceives, as Mr. Carter explained, that if this tender offer is allowed to go forward and succeed, that the

very effect of its unfair and discriminatory treatment will have the effect of tending to deprive us to go away, and that will deprive shareholders of one of the principal reasons of voting for the adjournment; that is, the hope that Mesa will come forward with a proposal which they can consider at the adjourned meeting which they will find advantageous. Now, Mr. Carter's affidavit, and particularly Paragraph 7 of it, I think, is quite strong in terms of his reasoning.

Now, Mr. Gavin, of course, differs with respect to the conclusion, but -- and I think this is noteworthy -- in his affidavit he does not attack Carter's reasoning. He doesn't say that what Carter says is the perception and that the motivation is not true. He simply reaches a different conclusion.

I think it is ironic that they should have done this in the last five or six days, when the last time we were before this Court they were speculating that we might try something they called the Saturday Night Special, when they talked about how unfair it would be if we were to spring some new tender offer on their shareholders with only

ten days to go. Well, they have just Saturday-Night-Specialed their own shareholders, and they have done it in conjunction to try to tip the balance at their annual meeting.

Now, we think that having shown the discrimination, we have shown irreparable harm, because it can't be disputed that Unocal is a unique opportunity. The purchase of 50 million shares under these circumstances will irrevocably affect Unocal and this unique basket of assets. It will irrevocably change the circumstances of those people who are tendering and who are accepting and those people who remain outside the tender, and it will have its own irrevocable and at this point unpredictable and incalculable effect on all the subsequent events; that is, what would happen at the annual meeting, what would happen to our offer, what we would do next, what they would do next.

There is no way even by the payment of billions of dollars to restore the situation that the situation could be put back the way it is now. And we think the suggestion by Mr. Sachs and in the brief that because Unocal could respond in billions of dollars in damages completely misses the point.

The wrong that is being done is by the individual director defendants. It is they who would have to respond in billions of dollars in damages, because a remedy by which Unocal paid it, one of its shareholders, would be taking the damages at least to the present extent of 13.6 percent and using it to reimburse ourselves. But even were that not true, even if the Unocal directors had billions of dollars, we submit there is no way that money could be spread around to put everybody back into the position under which they were at the present.

Now, we think Plaza Securities is directly on point. And it holds that where a clear legal right is interfered with -- and here we think we have established that -- and where there is no way to restore us to the position which we now occupy -- and we think that Your Honor would be a magician if you were able to do that -- and where it would have an irrevocable effect on the proxy solicitation and the conduct of the annual meeting, that there has been a showing of irreparable harm. This Court, we submit, should not depart from the bedrock principles of Delaware law to approve the defendants' cynical, calculating and self-serving

self-tender. And I use each word advisedly. "Cynical" because their minutes show that they knew of its inequitable effect. They knew it might be illegal, but they decided to take the chance, calculating because of the evident guile of its investment bankers and lawyers in putting a plan together and taking the chance that this Court might strike it down, as it had struck down their interpretation of the bylaw.

And "self-serving," of course, because the defendants intend while pretending to fend off Mesa and to benefit their other shareholders to line their own pockets with the proceeds from this self-tender.

For all of these reasons we respectfully request that a restraining order be entered against this self-tender. Thank you.

THE COURT: I have a few questions, largely to make sure that I am not missing what you believe is at issue and what isn't at issue.

I believe that it is your position, at least as of today in this context, that you are not attacking the exchange offer per se as being beyond the business judgment of the directors as a

defensive maneuver to what they view as a hostile takeover attempt that is not in the best interest of its stockholders. In other words, you are not seeking relief on the grounds that you don't believe there was any basis for them to have made that business judgment; is that correct?

MR. RICHARDS: That is correct. I am not attacking, you know, whether or not they used due care and their proper experts and took enough time and thought about it. Of course, I am saying that even if they did all that, that that cannot bless something which is discriminatory on its face and has the purpose of discriminating, for the reasons that I have said.

THE COURT: Okay. Then if we are turning at this point to the Moltz decision, in terms of the discriminatory offer having to have a valid purpose, wouldn't you agree that in the broad sense, since you are not attacking this defensive maneuver, that the valid corporate purpose under Moltz would be an effort to thwart a takeover attempt that Unocal believes is not in the best interest of its stockholders?

MR. RICHARDS: No. I think that is a

subtle point, Your Honor. I would say no, because they say, you know, this is an anti-takeover defense, and I am saying, well, I am not challenging their right to construct anti-takeover defenses, but I am getting down I guess closer to what they have done and examining what is the purpose for the discrimination. And the purpose for the discrimination is to hurt us and to benefit others. And I am saying, you know, that is illegal and inequitable per se and that no greater business judgment, whatever they thought they were doing -- even if the Court were to find that they were attempting to exercise their best judgment and they were doing this to drive off Mr. Pickens, I am saying that what they have done, the more limited purpose of specifically discriminating, makes it illegal. And they might have a valid judgment that they want to drive off Mr. Pickens, but they have chosen an illegal or inequitable weapon.

I mean, there must be a line, there must be things that you can do and things that you can't do. I mean, you couldn't conduct a business judgment and decide, well, we will assassinate Mr. Pickens or we will blow up his house or something of this kind. I mean, you couldn't say, well, that

is a business judgment and everybody thought that would be the most effective way to remove him from the scene.

I don't know whether that is clear.

THE COURT: All right. I think perhaps all we have got is semantic problem at this point. You are going to what I would view as the second step under Moltz, which is that even if you have a proper reason for the discriminatory offer, that is not enough if it unduly burdens one group and is not justifiable in that step.

MR. RICHARDS: And there is sort of a third test added by Fisher on reargument which they clearly can't make, and that is it has got to be fair to all the shareholders.

THE COURT: Well, leaving that aside for the moment, what I am getting at is that it seems that the purpose aspect of it under Moltz is their defensive purpose of getting rid of this takeover threat, and that to accomplish that purpose they have put into place a discriminatory offer as opposed to the purpose of the offer being just to discriminate for the sake of discriminating. It is to discriminate for the sake of getting rid of Mesa.

MR. RICHARDS: Well, I mean, I see the semantic difficulty, and I see Your Honor's point. But, I mean, could you then have a proper purpose as an example I used for murder or arson? I mean, the board had a proper purpose, and it might be quite effective, too. But, I mean, there isn't the clear, bright line, in my mind, between the purpose here and the method of executing the purpose, which is per se invalid because it is not some inadvertent effect or it has some unfair effects. The purpose is to freeze them out with nothing and discriminate in favor of all of the other shareholders and, moreover, to make sure that they other shareholders get more than if you extended the offer to Mr. Pickens and his group as well.

And Mr. Sachs, I think, had made a further concession, in which he says it isn't even necessary to accomplish our purpose to exclude the Mesa group. That is why we picked 50 million shares. I mean, we can still drive them away and treat them fairly.

THE COURT: Okay. I think I understand the distinction you are drawing.

Also, I seem to be getting conflicting

impressions on whether the Court has to be concerned at this point with whether $72 in debt a share is or is not fair value.

MR. RICHARDS: Well, let me see if I can straighten that out. I guess our position is, first of all, that Your Honor doesn't have to be concerned with that. And then I guess the evidence that we have put in is, but if Your Honor thinks you do have to be concerned with that, we assert that their evidence is not credible. So it is an alternative position. And I think I didn't make that very clear in my argument.

THE COURT: Thank you.

MR. RICHARDS: Thank you.

MR. SPARKS: Your Honor, I think I will take Your Honor's questions as they come along, because I think I have answers for them.

THE COURT: Okay.

MR. SPARKS: Your Honor, this motion comes before the Court in a unique factual posture for at least five different reasons, and maybe six, because I must say I don't believe I really yet understand exactly the relief that Mr. Richards is seeking, but I am going to take his motion at its

face value, although his motion differs from his amended complaint, which came after the motion. The motion says enjoin the exchange offer. The amended complaint says enjoin the exchange offer and, in the alternative, let him into our offer with some sort of a mandatory temporary restraining order.

I don't know which it really is he seeks, but I'll try to deal as if we are seeking both.

First, Your Honor, Mesa is seeking to enjoin a tender offer which it has conceded is beneficial to Unocal's public shareholders. The offer has been characterized by Mr. Pickens as the best thing Unocal management has done for its stockholders. Indeed in Mr. Pickens' own notes, his handwritten notes which were produced to us yesterday, which amazingly are big enough for even the Court to see from that distance, he says: "That is good for all stockholders except us," and he goes ahead and says, "Go ahead and tender your shares, and vote for adjournment."

So he's telling the shareholders this is a good deal for them; that he wants to enjoin it. That I think immediately begins to show one dichotomy in his position versus those of the shareholders, and begins to show, as we will get to in more detail, the type of justification that permits us in our law, not withstanding Mr. Richards' version of it, and permitted us for many, many years, to take actions against raiders, against raiders who happen to hold stock.

I mean, there is nothing in our law that says that you cannot develop a defensive technique against a raider just because he happens to own stock. In fact most of the raiders that ever come down the road buy stock before they raid, and Mr. Richards' position taken to its logical extreme, it wouldn't stop takeovers. It would stop all defenses to takeovers. And our Supreme Court has spoken as recently as Pagoda and this Court as recently as Moran made it clear that directors and corporations may take action to oppose hostile takeovers that they have found to be inadequate or inappropriate for their shareholders.

That brings us to the next unique factual posture of this case, and that is that plaintiffs have conceded that the judgment made by the board -- actually two judgments made by the board, and before we get to this discrimination point -- those judgments being one, that the Mesa offer was grossly inadequate. They have conceded for at least the purposes of this motion that that was a valid judgment not under attack at least here. And the judgment, the corollary judgment to take action against Mesa indeed to take an exchange offer they

have conceded is within the scope of the business judgment rule is not attacked here. They say all of those things, all of those things are givens, and the Court therefore has to take them as givens for purposes of this motion.

Indeed they have a hard time attacking the bona fides of the judgment that it's an inadequate tender offer since, as Mr. Richards conceded just a moment ago, they themselves internally believe that the company as they state is worth something in the range of the mid-60's. We believe they have also made it clear that it's worth in their judgment a lot more than that, and I'll get to that.

Third, I have already covered the fact that Mesa has urged other stockholders to tender to Unocal while at the same time claiming in this Court that the fact that everyone else is tendering is damaging them.

Fourth, plaintiffs have placed no evidence in the record -- still haven't placed any evidence in the record, even though I saw the third Tassin affidavit in the middle of the argument -- there is still nothing in there but belief. No evidence in the record to rebut the reason and

deliberate conclusion reached by Unocal's independent board supported by the advice of its investment bankers that the $72 per-share price paid to purchase 50 million shares fairly reflected the underlying asset values of Unocal.

Indeed, Your Honor, once again we have a circumstance where Mr. Pickens publicly stated just three days ago in response to a reporter's question seeking confirmation that the per-share value was higher than $72 that John Herold figure is 73, and then he goes on and says Herold is a recognized authority.

So when it suits Mr. Pickens' purpose he says one thing. He does not come before this Court either by affidavit or by deposition, or anything else, to straighten out the record.

Indeed the Tassin affidavit is amazing. Mr. Tassin says in his affidavit that he can swear that Mr. Pickens believes that it's something other than 72. Well, Your Honor, where is the Pickens affidavit? Indeed where is the investment banker's affidavit on this issue.

We have two investment bankers' affidavits. Presumption of the business judgment rule,

a judgment by the board of directors, a presentation by the company's financial officer, and all we get in return is some language from Mr. Tassin that he believe that Mr. Pickens doesn't believe that $73 is an appropriate value for this company notwithstanding that Mr. Pickens said it three days ago.

Also on this point plaintiffs seem to suggest that we are just somewhere off the wall on this $72 number. We have all the proof that there is in the record. They have none.

Even from themselves they mention a $64 number. Mr. Richards mentioned a $64 internal number that Mesa had used.

Your Honor, I would direct Your Honor's attention to Exhibit A to the Coats affidavit. This document is marked confidential, and therefore I'm not going to read it in open court, but if Your Honor has that and can turn to it, I would simply direct Your Honor's attention to the last paragraph of the page, which is Page 31, and it's Exhibit A to the Coats affidavit.

(Brief pause)

Any luck?

THE COURT: I have it here. It's just a

question of where it is.

MR. SPARKS: If I may approach the Bench, this may save the Court looking for it.

THE COURT: Thank you.

MR. SPARKS: Your Honor, this document is an excerpt from a document that was sent by Mesa to the people from whom it's seeking to borrow the money to finance its offer, and I think if Your Honor simply looks at what they told those people, and the numbers that they put before those people, you will see that they really have no standing here to challenge the reasonableness, appropriateness, fairness, determinations that have been made variously by the board, by investment bankers with respect to the $72 number. Particularly the last paragraph there and the reference to "conservative" and the range of numbers they present on the next page. And I think they speak for themselves. Also they suggest that the investment bankers didn't give any comfort in this circumstance with respect to the $72 number.

I direct Your Honor's attention to Page 17 of the Sachs' affidavit where they say:

"Following Mr. Blamey's

presentation" -- he's the chief financial officer -- "I stated that in the opinion of Goldman Sachs and a person seeking to selling a company in an orderly liquidation might reasonably expect to achieve an aggregate value for the stock between 70 and $75 per share based upon the valuation analysis which we had carried out and described above. Mr. Hobbs of Dillon Read also stated that in the opinion of his firm a price range of 70 to $75 per share would be reasonably achievable under such a program."

The director had that information before them. They had the public information before them. They had their own judgment and knowledge of the company, and they concluded that $72 was a fair, not excessive, appropriate price. That is recorded in the minutes. None of that is rebutted.

There is no Van Gorkum challenge here. There hardly could be. It took the board nine hours here of presentations to determine before they reached their conclusion with respect to inadequacy, and indeed they adjourned and didn't make a decision with respect to the back-end tender offer until another meeting two days later after they received more presentations.

The bottom line is we have all of the evidence, and they have nothing but Mr. Tassin's belief. We have their admissions. They don't refute them. And on this record the Court can only conclude that $72 is an appropriate number.

Fifth and last, plaintiffs placed nothing in the record to rebut the fact as confirmed by Unocal's chief financial officer and its investment bankers that Unocal could respond to any award of money damages in this action.

Now, it's against that background that they argue that Unocal's board can't exclude Mesa from its exchange offer, and Mesa will be irreparably injured if the Court does not either, one, enjoin the offer, or two, order that Mesa be admitted to it.

Both sides agree, Your Honor, believe it or not, on one thing, and that is we have to look at Fisher versus Moltz. We have looked at it in our briefs, and I believe from Your Honor's comments from the Bench that Your Honor has also had a chance to take a look at Fisher versus Moltz. Let's look at it closely.

The first thing the case says -- and the case is absolutely clear about this -- is this:

"I'm aware of no Delaware case holding that there is an absolute prohibition against a Delaware corporation offering to purchase its shares from one or more of its stockholders without making a similar offer to all of its stockholders."

So much for Mr. Richards' per se rule which he urges upon the Court today. Directly contrary to Fisher versus Moltz.

Secondly, the Court holds that if you do make an offer to some but not to all stockholders, there must be a valid corporate purpose for the discrimination, and that it must not unduly favor one group of stockholders over another. And both of these tests are satisfied here on what is basically and uncontroverted record.

Let's review briefly -- and I think Your Honor had it before, so I don't know if I have to go into it much in depth -- but the two purposes for the exchange offer from the beginning. Those purposes have been to provide Unocal public stockholders with an appropriate value for approximately one half of their shares if the inadequate Mesa offer were to succeed, or in the alternative to prevent Mesa from succeeding with its

demonstrably inadequate offer. The Court has to accept the bona fides of the inadequacy of the offer at least at this point in the proceedings.

Both of these purposes are established as proper on the record, and the business judgment of the board in concluding that the Mesa offer is inadequate is uncontroverted. Indeed we have been through that. Admitted this afternoon.

The law in the cases of Cheff versus Mathes and Kaplan versus Galdsamt makes it clear that a buy-back of stock is a response to a takeover threat. Again, no contest from the other side. And Moran following other decisions has made it clear that the stockholders' ability to gain premiums through takeover activity is subject to the good-faith business judgment of a board of directors, instruction, defensive tactics. They basically conceded that by saying this is a good offer.

Now, these valid corporate purposes on this record today have to be accepted by the Court based upon where we are. That gets us then to the exclusion of Mesa and the justifications for that. And those valid business purposes also justify the exclusion of Mesa from the offer under the very

standard set forth in Fisher.

As the record shows, and as the board considered, and as the investment bankers considered, if Mesa were permitted to tender into the exchange offer, both of its purposes, both of its bona fide purposes for today's purposes would be frustrated.

As to the goal of providing additional value to Unocal's stockholders, if Mesa's inadequate offer succeeded, and were Mesa permitted to tender into the Unocal offer, each share that Mesa bought would displace one public share, and the result would be to the extent that happened it would defeat the very goal of giving stockholders the equivalent of $72 per share in value on the back end of the two-step Mesa Proposal instead of the $54 in securities which Mesa proposes to pay on the back end of its proposal. So Goal 1 is completely frustrated if they are permitted to tender.

Goal 2, which I mentioned before, is the alternative goal of deterring the inadequate offer completely. Once again, were Mesa permitted to tender, what would be happening? Well, what would be happening is that Mesa would tender to Unocal, and it would get $72 a share for stock it

bought at 40, and it would then turn around a utilize the $72 a share it got from Unocal to fund Mesa's subsequent purchases at the inadequate price of $54 a share, thus facilitating the very transaction which the board has found to be inadequate and coercive because it's a two-step tender offer, and people are forced to take paper of some uncertain quantity. Indeed apparently they haven't even been told really what it is yet because the judge out in California has told them they have to tell us in the future what that security really is.

They are forced in effect by the structure of that transaction which is deemed inadequate for the purpose of this proceeding to take that inadequate price. So that to permit them to tender in in effect would backfire. It would destroy the very bona fide purposes of shareholder protection that this offer was instituted for in the first place.

In the language of the case -- it's always good to pull the case out -- of Fisher we've got a valid corporate purpose. We've got a valid corporate purpose for opposing this inadequate offer, and the discrimination is necessary to make the offer

work. It's as simple as that. We have valid corporate purpose. It doesn't unduly favor one group over another because it's necessary to the purpose.

Now, to show how far out we've gotten, the only thing, analogy that came out to try to counteract that was something having to do with assassinating Mr. Pickens.

Your Honor, assassinating Mr. Pickens, one, would be illegal. It's a hypothetical that I think is far out in that sense. But it would also be more under anybody's argument -- more than was justified in order to accomplish the valid corporate purpose of defeating this tender offer. The duly limiting language, or duly unfavoring language in this context can only mean that yes, one, you have a valid corporate purpose, and two, you then can do what is necessary to achieve that valid corporate purpose in the nature of a discrimination, but not more.

We haven't done any more here than is necessary. We have done exactly what was necessary. We have excluded him because if we didn't it wouldn't work, and it wouldn't accomplish the purpose.

Now, apart from that -- and I think that's all you have to do to meet the Fisher test. Don't forget, for example -- I guess there are the greenmail cases which Mesa conveniently forgets, but in the greenmail cases, Kaplan versus Goldsamt, Cheff versus Mathes and other cases of similar ilk that have been considered in this and other courts, you can pay a premium. You can probably buy -- Unocal probably under Fisher versus Moltz could have paid more than fair value here to gain the benefit for the rest of its stockholders of protecting them against an inadequate offer. That probably would have been justified. So we really may not have to reach the question of $72. But if we do reach the question of $72, we come down to the point that they in terms of their capacity as a buyer are seeking to buy the whole company, are not being discriminated against.

The $72 is less than the $73 which even Mr. Pickens, probably contrary to his own interest, at the press conference two or three days ago has indicated is a fair value per share.

Now, unlike the exclusion in Fisher which the Court obviously viewed as a punitive one in

that case, this exclusion is not. Indeed the Sachs affidavit explains at Paragraph 30 if Pickens persists in his $54 offer after the exchange offer is completed he will still end up buying Unocal for an effective price of less than $65 per share ending up with assets that he himself concedes to be worth $73. So even on an economic basis in his status as an offeror there really isn't any discrimination much less an undue favor.

Put all this back into context. All of this comes up in the context of excluding somebody. You start in Fisher with the idea that you can exclude somebody. Fisher isn't the case where it's talking about letting somebody in and letting somebody partially in. Fisher is a case where you start off, the first question the Court asked is can you exclude somebody, and the answer to that question is yes. No per se rule that says you can't.

The second question is, do you have a valid corporate purpose for doing it. If the answer to that is yes, then the next question is, have you unduly favored one side over another in excluding the other side. And here we have done only what was necessary. And beyond that, it has been done in a way that, given his goal of acquiring the entire company, it does not punish him.

You go back to the facts in Fisher. It was a circumstance where the company was buying back stock from former employees. It was a closely-held corporation. And the discrimination there was, well, we are going to buy -- in the first place, there was no challenge to the first discrimination. We are not buying from people who are still employed. We are only buying from former employees. So there was sort of a valid discrimination that you started with. But it was within the category of employees who were no longer employees that there was an attempted discrimination between those who were lawfully competing with the company and those who were not. And the Court obviously concluded that that was punitive, vindictive, and they didn't have any purpose for doing that other than wishing that

these people, who the Court very candidly emphasized were lawfully competing, weren't competing. It is just not this case at all.

Your Honor, in short, the exclusion of Mesa is wholly justified on this record as being for a proper purpose, as not favoring the public stockholders any more than is necessary in order to achieve the goals of assuring that they receive fair value for their investment, they are not deprived of that value by Mesa's inadequate and coercive two-step tender offer. Indeed, the logical extension of Mr. Richards' position is that a board faced with an inadequate offer cannot take steps to fend off a raider if that raider also happens to own stock. And our cases, Cheff, Kaplan, Pogostin, Moran, make it clear that such stockholders, so long as they are pursuing personal goals which are contrary to the interests of other stockholders, may be treated, in the language of Fisher, as being in a different category than passive investors and that a board, in the language of Moran, may act contrary to their wishes to protect stockholder values. And that is what has happened here.

In short, Your Honor, there is no

probability of success on this claim.

Let me turn next to the question of irreparable injury. First with respect to their discrimination claim, plaintiffs don't have any. They have not met their burden of proof of showing that they will suffer any damage, since they continue to seek to purchase all of Unocal and the fair value of their stock which they will retain is by their own admission greater than $72 per share. And even if we don't rest on their admission, you have to rest on the fact that we have the board's judgment, we have the affidavits, we have their papers showing ranges of value, which I have shown to Your Honor. There is just no way that they can establish damage at this stage of these proceedings.

Secondly, even if they had made some showing of damage, they have not shown that Unocal would be unable to respond in money damages. To the contrary, the highly conservative analysis in the record of Mr. Blamey, as confirmed by both Dillon Read and Goldman Sachs, shows that Unocal's real net asset value even after the purchase of 87 million shares at 72 would exceed $2 billion. And even if Mesa were somehow able to convince this Court that

it had suffered some damage as a result of its exclusion with respect to its 24 million shares, and even assuming that there were no proration or constructive proration arising out of the fact that this is only an offer for 50 million shares out of a total of 180 million-some shares, and even if you assumed that the value of the shares held by Mr. Pickens fell to, say, the $30 figure that was mentioned by him in The Wall Street Journal yesterday or the day before, and even if he somehow convinced this Court that he didn't have any duty to mitigate damages, his maximum damage would still be less than half of the $2 billion number.

Mesa has not shown, as it must, that it will suffer any cognizable injury or that money damages are not completely adequate to satisfy whatever injury it might be found someday to have suffered. It doesn't have any irreparable injury.

The balance of hardships, Your Honor. We come back to the fact that we have told stockholders this is the first good thing that the company has done for you, and they have urged stockholders to tender into it. And yet they seek to enjoin the offer, which could deprive the public of a transaction

which plaintiffs themselves have characterized as good and would leave Mesa's offer, which on this record is inadequate, as the only one out there. It is a coercive two-step tender offer that people will be forced to tender into if it is the only one out there. And on this record it is inadequate. And under the law here, when you have an offer like that, Moran says those offers are coercive.

The more limited relief, if, indeed, they are seeking it -- and I don't really know if they are, because I still don't know what relief they are seeking -- of requiring that Mesa be permitted to tender is also contrary to the public interest, since it would subsidize and, hence, facilitate Mesa's concededly inadequate offer. And we have been through that before. Permitting them to tender, in effect, allows them to buy low, sell high, take the money that they have achieved from that and buy more stock, probably buy it lower than they have bought it before. Besides that, plaintiffs' claims can be satisfied by money damages.

Finally, on the equitable side, there is another issue, and it is raised by Mesa's public

urgings of stockholders to tender to Unocal. Now, as the Trounstine case in our brief makes clear, one simply cannot come into a court of equity and complain of damage which he has, in fact, encouraged. So here if you accept plaintiffs' arguments -- and I think what it really does is probably really shows that they probably don't believe, as Mr. Tassin says, that it is something less than 72, because if they believed it was less than 72 and they believed there was a chance that they were wrong on their discrimination claim, then what they are doing by encouraging stockholders to tender into Unocal's offer, as they have done -- and as I showed Your Honor, for example, in Mr. Pickens' own writing just a couple of days ago, for every share that is tendered, if they are right about values, if they are right and if they are right on the merits, they are being damaged. You just can't do that. You can't encourage people to go out and damage you and then come into a court of equity and complain about it, and Trounstine is right on point.

I think what it really does is shows the inconsistency of their position and explains to Your Honor why we haven't seen an affidavit of any

of their investment bankers in response to the Sachs affidavit and in response to the Hobbs affidavit and in response to the determinations of the board of directors, in response to the Blamey analysis, in response to Mr. Pickens' public statements. They haven't said it because they can't say it. $72 has to be accepted at this stage of these proceedings.

Having really recognized they have no irreparable injury and really not being able to turn the Fisher case into a per se case, contrary to what it flat on its face says it is, they turn to something that is some sort of proxy claim. And the trouble with the proxy claim is that they have tried to tell the Court about some sort of injury arising from the fact that we have changed our offer before an annual meeting. Well, they have forgotten to tell the Court what the violation of law is and what the legal principle is they are relying on.

Well, to state the question almost answers it. In their brief they claim that the exchange offer should be enjoined because the April 23 waiver interferes with their proxy solicitation. That is their claim. I don't know. Maybe it has been mooted by this adjournment of our meeting by the

federal court to May 13, maybe not. But anyway, there isn't any legal basis for the claim. They don't claim our offer is a sham. Indeed, they say it is very real, and they tell the Unocal stockholders to tender into it. And they don't claim that there is something that we haven't disclosed about it. It is a real, hard, objective event that has happened in the world.

This is not a case like the Lerman case and it is not a case like the case Your Honor decided a week ago, when we were before you, where anybody has changed the rules of a proxy contest in mid-stream, and it is not a case where anybody has been precluded from soliciting proxies or from voting proxies. Lerman has nothing to do with this. Neither does Your Honor's earlier decision.

What they are asking for is a rule of law that a contestant in a proxy contest refrain from other activity while an opponent is soliciting proxies. It is as simple as that. They want the world to stand still. They want to say, "Management, you can't do anything, even if there is a competing tender offer against you, while there happens to be a proxy contest going on at the same time."

Of course, the proxy contest that is going on at the same time is a proxy contest they have created. So, in effect, they create this scenario and then they seek to construct a rule that says, "You can't do anything substantively, Management, while the proxy contest is going on, because that could influence the vote." Of course, it could. And what they could do could influence the vote, too.

In fact, since this, since we have changed our offer, they have made announcement that they are going to change their offer. They have said, "We are going to lower the price." They said, "We are going to change it." The next day they said they are going to lower it. Those may also have effects on the proxy contest.

Indeed, if their rule were a rule, if there were anything to this -- it has nothing to do with the -- the only cases they cite in their brief are Schnell, Lerman and Your Honor's earlier decision. If there were such a rule, their own April 8 offer would have violated whatever this rule was, because we substantiated our solicitation of proxies on March 15.

Now, on April 8 they started a tender offer. There is an objective event. Does that violate some rule? Is something wrong with that? Of course not. It is simply something else that is happening at the same time as the proxy contest, but it is not a change in the rules of the game of the proxy contest.

Your Honor, there is no proxy claim here. It has nothing to do with Schnell or Lerman or anything else. And, indeed, I gather they are saying that -- I don't know what the claim is. I have done my best with it.

They haven't met their burden, Your Honor, of establishing any of the elements necessary here. They haven't established a reasonable probability of success. They haven't established a substantive per se violation of some sort because Fisher says there isn't such a thing, and we have been through the analysis. The purposes for the discrimination have been admitted. The effects which gave rise to the need to exclude Mesa are manifest. They are all in our papers, and again, there is nothing to contradict. The Tassin affidavit doesn't contradict those effects.

And they haven't done anything with respect to irreparable injury. They have no irreparable injury. They have not even attempted to make a showing that we couldn't respond to money damages. They can't make such a showing.

Your Honor, the record is all one way on this, and they have the ultimate burden on any motion for a preliminary injunction.

There is one other thing they mentioned. They tried to slip in at the end a concept of fairness arising from the reargument decision in Fisher. Let's just put that in context. They tried to say that meant either fair price or you have to treat everybody fairly by treating them the same.

Well, it cannot mean that. I suggest to your Honor it is a synonym for the word "unduly," because what we are talking about is a discrimination. We start with the proposition that there is a discrimination. Somebody is getting something. Somebody is having their stock bought and somebody else isn't. And then we say is the reason for that exclusion supported by a valid corporate purpose and is it necessary. That is really what Fisher says.

And then the second thing in Fisher,

the reargument opinion uses the word "fair" in that context. It can't mean is the price fair to the person that is being discriminated against, because you start with the proposition that he isn't getting anything. He is being discriminated against. That is what Fisher is all about. He is not getting anything, so it is not talking about price.

What is it talking about? Well, it is talking about, did you fairly discriminate against this person. Did you have a good reason and did you for some reason discriminate more than you needed to.

Your Honor, we haven't shot Mr. Pickens. If we had shot Mr. Pickens, I don't think I would be up here telling you that we had taken action which was undue in light of our business purpose. We have made a business decision that is unchallenged here, that this offer is inadequate. We have made a business decision to oppose it. We have developed a defensive strategy. We are allowed to do that under Moran, notwithstanding the fact that he is a stockholder. That is what Moran and all these other cases say. You can't insulate yourself from defensive tactics by becoming a stockholder. That is not what the principle of treating stockholders

equally means.

All these cases, Moran, Pogostin, Aronson, say you have the right when that stockholder is, in effect, a buyer and all the rest of your stockholders are sellers and he has got an inadequate price out there to take defensive techniques. And we have structured one that is reasonable. It is not punitive. And the restraint against him tendering is necessary to make it work. Indeed, if it was not in there, we would simply be facilitating the very offer that we are trying to protect the stockholders from, the very coercive two-step offer that they are otherwise going to be forced to tender into certainly if Your Honor were to enjoin this one. Thank you.

THE COURT: Mr. Sparks, I do have some questions.

I missed one in the number of what I asked Mr. Richards.

Does it matter for purposes of this decision whether the Court makes any finding whether there is any evidence as to the 72 price being a fair reflection of the value of Unocal stock or not?

MR. SPARKS: Your Honor, I don't really

think it does. I think Your Honor can decide in our favor without necessarily having to reach that. If Your Honor does reach it, the result is obviously the same. We ought to win under either circumstance.

But the reason I don't think it is necessary to reach it is the same reason that supports the ability to pay a premium to a raider in a green-mail case. You pay the extra money, and in the process of paying the extra money you get the benefit.

Here what we are doing, we are not paying the greenmailer here. We are paying the other stockholders. And we have a justification for doing that. His offer is inadequate. We have a valid purpose, and the discrimination is not more than it needs to be. The rule or the idea that a raider has to get paid off, which comes through at some point in their brief, in order for the discrimination to be valid would just turn the law on its head, and that is not the law and that is not Fisher, because Fisher says you can discriminate by making an offer to some and not all. That is what Fisher is all about.

So I think the purpose would support, in effect, the price. But we have the fortuitous

circumstance here that the price also happens to be one that is blanketed by his own numbers and is one that the board has found to be a price that fairly reflects the underlying asset values.

And don't forget, Your Honor, he is before the Court in his capacity as an offeror. He is not here as a stockholder. He is the buyer. All the rest of the stockholders are the sellers. He is in a different category. Our cases recognize it. He is seeking to acquire all the assets of this company. If he gets the company, there is no question that he can realize all those asset values.

THE COURT: Thank you. Getting back to the Moltz case, as I understand you, looking at the first step, you say, and I think to some extent your adversary agrees, that you have got the first step in the sense that you have a valid corporate purpose -- and I am sure now Mr. Richards will say that he doesn't agree to that -- but in any case, in terms of the defensive maneuver as a general concept.

MR. SPARKS: That's correct. And in terms, Your Honor, we believe also of the exclusion. In other words, you could imagine a case where there

could be some different kind of exclusion or something, and you would be measuring it. But here, this was the practical way to do it.

This exclusion was necessary. That is what the record shows, and the reasons are there. The exclusion was necessary; and therefore, that satisfies the second leg.

THE COURT: That is what I wanted to get to. It seems to me that what you are saying in terms of the next step is that it is necessary to accomplish this purpose; and therefore, I think, almost by definition, as you see it, it does not unduly favor certain classes of stockholders because, having determined that your defensive maneuver is going to be an exchange offer at this price, the only way it will accomplish what you hope it will accomplish is if you leave Mesa or keep Mesa out of it.

MR. SPARKS: That's right. Otherwise, you are just financing their inadequate tender offer in a sense.

THE COURT: Okay. And my question is, n't it possible that the necessary-to-accomplish-your-purpose standard may be broader in the sense

that perhaps Unocal has an obligation to choose a defensive maneuver that will not require any discrimination against certain stockholders if there is another defensive maneuver that could also, if successful, keep Mesa from taking you over.

MR. SPARKS: Your Honor, there are two answers to that question.

First, the record is undisputed that other alternatives were considered here, and this was the one adopted. And I believe on the record the Court can only reach the conclusion that this is the one that the board in its business judgment considered would be the only one that would be effective.

But the real answer is in the case itself, because we are interpreting a case, and that is not the type of purpose that the case talks about. It talks about a valid corporate purpose for limiting the offer, and that in so doing it has not unduly favored one group over the other.

So focusing on the very case we are looking at and both sides have agreed is the appropriate one, the concept of valid corporate purpose has not been expanded to include the question of was there some other alternative apart from an

exchange offer, for example, that would have worked. The board obviously concluded that this was what would work. And the minutes indicate, although we deleted the future plans because some of the matters, you know, could still come up again, that they considered alternatives, and this was the one that they concluded in their business judgment with the advice of the bankers was the best bet, if you will. And it is the one they took.

But apart from that, the Fisher case is talking about a valid corporate purpose for limiting the offer. It is not asking do you have a valid corporate purpose for making the offer. Indeed, that is very clear from the context of the Fisher case itself, where the offer that was being made was one to former employees without being made to other employees. It was not an issue as to whether you could adopt an exchange offer at all or even a discriminatory one. The case really did focus in on the unduly discriminatory punitive concept. And there there was no valid purpose, because the only reason they were discriminating was because certain people who were former employees were, in the Court's language, lawfully competing

against them. In other words, the corporation really had no right to interfere with somebody lawfully doing something.

Here under our case law based upon the undisputed finding that this is an inadequate offer, and Moran, which says you have a right to seek to protect stockholders from those, and the fact that he has no right to conclude an inadequate offer, we have that privilege, if you will, to put him in a category that he has placed himself, frankly.

But the real answer to the question, the real answer is, interpreting the case and on the issues before the Court, a valid corporate purpose is a valid corporate purpose for limiting the offer, not a valid corporate purpose for selecting the exchange offer tactic as distinguished from some other tactic that might have been available but this board concluded in its business judgment really wasn't or, if not wasn't, certainly wasn't the best one to employ under the circumstances.

THE COURT: All right. Just one more question. On irreparable harm, without belaboring the point too much, could you explain to me in relatively simple terms exactly what would happen

if the exchange offer goes forward with Mesa not being allowed to tender and at some point after that time the Court determines that that was unlawful and that Mesa was entitled to participate or the offer, in fact, had to be rescinded. What step, literally, what could be done at that point to put things back?

MR. SPARKS: Mesa would come in here and they would have a value of $72 a share, and then they would try to show that by losing out on that offer, what they had left, which would be stock, or maybe they would have sold the stock on the market or mitigated or fixed their damages -- they would have tried to show in some way or form there was a spread there that they were entitled to be paid. And I don't know what their theory would be, but it would all come down to money, because what they are saying right now is, "We want to put our stock into this offer."

Now, with all their encouragement I am sure this offer is probably going to be over-subscribed. I have no factual basis for saying that, but we are asking people to tender, they are asking people to tender. I suspect everybody in the world

will tender. So it is going to be heavily prorated. So we are really probably only talking about some small fraction of their stock.

But be that as it may, if they are excluded from this offer and don't have a right to have it taken down with everybody else and they subsequently incur damage as a result of that, they come to the Court and they ask for it. And if they can prove that the discrimination was invalid under the circumstances as they exist today, then arguably they might be entitled to it, although there are all sorts of scenarios you can think of where they would really be estopped by many of their own statements as to the value of this stock from really recovering anything.

THE COURT: But if I understand Mesa's position correctly, Mesa is not interested in getting money at this point. Mesa wants to be a participant, in fact, wants to own a company that has a certain proportion of debt and equity, and how could you re-do that?

MR. SPARKS: They can't stop us in our business tracks. They also have no right to freeze the picture of this company as it stands today,

and they certainly can't be contending -- I don't think they are -- that we don't have the right to put debt out to our stockholders. In fact, that is the thing that they have said is so good. This is a great deal for stockholders. Tender. Go ahead and do it. They don't have a right to freeze this company in some sort of posture, and they don't have a right to make an inadequate tender offer. The Moran case makes that absolutely clear.

So they are not here protecting their status as an offeror in the future. What they are doing and what they have said today and what they have said in the affidavits is, they want to tender. They want to tender into this offer, and they want the debt.

Now, the debt is conceded by everybody to be fully valued at 72. Nobody is claiming it trades at a discount. It is as good as money. You get the debt, you sell it, and you can sell it. You can keep the debt. But it is money. It is basically money that they want from us.

They are asking this Court -- I don't know what they are asking this Court to do. Maybe they are asking the Court to enjoin the offer. And

I find that hard to believe after they have told the Court about the public benefit to the stockholders and after it is so clear now that they are pursuing their own interest, trying to buy a company at 54 that even they say here in court today has got an underlying value of -- they use 66 and they have got other numbers and they have said 73.

They are here in a capacity as somebody who wants to tender. Obviously, under those circumstances what they want is money. It is money damages.

THE COURT: Thank you.

MR. RICHARDS: First of all, I want to mention, in case I should forget later, that the Court and the parties are still under the deadline that existed earlier in the sense that there is the Bench on the West Coast that I reported at the beginning, and there haven't been any other events that have modified the fact that Unocal's proration date and the expiration of its offer is April 30 at midnight New York time, so that they can buy this Tuesday.

Now, Unocal's counsel made a couple of arguments, indeed, his principal arguments, which it seems to me are clearly and indisputably refuted by the papers before the Court.

First of all, he talks about some sort of inconsistent position and some sort of acquiescence in this offer by Mesa. And I suggest -- and I use these words advisedly -- that that really is patently absurd. I mean, we got the announcement of the offer, the modification of the offer, on the broad tape, and within a couple of hours we filed a motion for a temporary restraining order against it. "Ah, but," he says, "Mr. Pickens says that this is a good thing for the shareholders and they should tender

and that is inconsistent."

Well, let's look at what Mr. Pickens has said and passing aside that Mr. Pickens is not under oath in those declarations and we don't know whether we have an accurate transcript and they are, therefore, clearly hearsay, let's take them as if they were the hard, concrete evidence that Unocal says they are. I think they are dealt with in the third Tassin affidavit, particularly in Paragraph 2. And Paragraph 2 attaches a press release that was released to the media on April 24. And because of all the emphasis to this I want to read the press release.

"T. Boone Pickens, Jr., chairman of the board and president of Mesa Petroleum Company, stated that Mesa believes the Unocal Corporation exchange offer is illegal and is seeking to have the offer enjoined. In commenting on a report that he said that Unocal shareholders should accept the Unocal offer, Mr. Pickens said that the earlier quote did not fully set forth his remarks. He indicated that pending a judicial determination as to the validity of the offer, Unocal shareholders may wish to tender to Unocal in order to protect the value of their investments in the event Unocal purchases shares.

Mr. Pickens again urged the Unocal shareholders, "Vote to adjourn the Unocal annual meeting currently scheduled to be held April 29." And, indeed, that is exactly the same reason why Mesa itself wishes to tender. It wants to be treated pro-rata. It believes that this is a high offer compared to the value.

Now, I suppose the reason why Unocal can't understand that is because they are more cynical than Mesa. They evidently believe that the position Mesa should have taken was that it should have tendered itself if it believed that was advantageous, even though it thought the offer was illegal, but it should have told all the other shareholders not to.

We simply are not that cynical, and we have maintained all the time, and notwithstanding all the rhetoric against us, I think it can be shown that we have been consistently acting in order to enhance shareholders' values, and that is the results Mesa has brought to the shareholders of Gulf and Phillips and the other actions that Mr. Harley evidently sees as atrocities. And this view is explained in the Tassin affidavit.

Mr. Tassin says in Paragraph 2, "Such

press release correctly states the view of the plaintiffs." And then he explains, "As stated in the press release, it is plaintiff's view that the discriminatory feature of the amended debt tender, which would permit all Unocal stockholders except Mesa Partners to participate in the amended debt tender, is illegal. Plaintiffs have also stated that pending a judicial determination as to the validity of the amended debt tender, stockholders of Unocal may wish to tender their shares into it in order to protect the value of their investment in the event Unocal purchases shares."

And that is, if you read the notes of one of Unocal's lawyer's secretary's of the meeting, fairly what he said at the meeting at the time. He told people that Mesa thought it was illegal. He told people he thought we would sue but that it was, aside from that, a good offer and they ought to tender to protect themselves.

Now, they also rely on Mr. Pickens' out-of-court declarations for another thing. And it appears to be their principal evidence of value. They say there is an admission by Mr. Pickens that the stock of Unocal is worth 73 or more. And I ask

Your Honor to read carefully, if you haven't already had a chance, the Knighton affidavit. And looking at Page 6 -- and the page numbers are the telecopied page numbers in the upper right hand corner -- in the very first question and answer, as reported by Mrs. Knighton, to Mr. Pickens was, "Does Unocal's $72 per share reflect the true value of the stock?

"Answer: The cumulative value of the Unocal stock is about $63. That doesn't change anything."

Now, the part that Mr. Sparks has referred to appears on Page 8, where the question is, "Isn't the company valued at higher than $72 as far as you know?

"Answer: John S. Herold figure is $73 per share. Recognized authority. Management has done very little. Hartley addressed Congress, as I did. I didn't deserve to shake his hand. Hartley says it's only $35-$37. Today it's 49. If we go away, you have a $35 stock."

Now, it is evident that Mrs. Knighton was trying to take down notes of what was being said at a public meeting, and it is evident that these

are notes. Nobody speaks in that kind of cryptic language. So we have the defect of not having a full transcript.

But taking that as a full transcript, and assuming it was under oath and evidence taken in this case, it is preposterous to assert that that is an admission that Mesa believes the stock is worth $73, particularly when you put it face to face with the statement made on Page 6.

Now, next he refers to Exhibit A to the Coats affidavit, and he refers to how Exhibit A was used. Your Honor will look carefully through the record, and you will find there is not one iota of evidence in this record as to who prepared Exhibit A, for what purpose it was used or whether it was ever used at all. And Mr. Sparks' statement as to how it was used is, in fact, wrong. But there is nothing in the record whatsoever. It is just attached to the Coats affidavit.

Now, Unocal's argument appears to be simply that this discriminatory treatment is necessary. I suggest that the question isn't is it necessary. The question is is it inequitable or illegal.

If it's necessary and inequitable or illegal, then I think as Your Honor may have suggested by your question, Unocal should adopt a different strategy, because this one can't be used.

Now, I suggested the possibility of murder not because I was equating this to murder, but really because I thought it was a term that Mr. Hartley -- I understood him having started off by calling people murderers and rapists.

But what I meant to suggest here was let's assume that this is unlawful. It's a syllogism if you follow the argument the way Mr. Sparks does.

He says if we have a proper purpose, and it's necessary to do something, then it's okay. That makes it okay. That makes something that would otherwise be unlawful or inequitable okay.

I say we should start at the other end. Let's look and see if what they are doing is illegal or inequitable or contrary to the whole flow of the Delaware corporation law. And then we have to ask ourselves a question can it be done under a high sounding valid corporate purpose. And I take it the point of the murder analogy is to say that you can't do

an illegal or inequitable act and have a lofty corporate purpose. You have to use valid means to carry out your purposes.

Now, Unocal's person says oh, but you can't get that out of the Fisher case. I suggest that that is one of the things that can be meant by unduly favoring one group over another. I suggest that in this situation this discrimination unduly favors all the other shareholders over Mesa. It's because it's unlawful or inequitable, so they ought to adopt some other strategy. This is not the only defensive strategy that can be. Indeed all of the other defensive strategies that have traditionally been upheld by the Court as argued earlier are stratagies that affect all of the shareholders the same way. That is the sale of assets, the buying back of assets, white knight tenders, the issuance of securities, and so forth.

Now, I think that Mr. Sparks' argument was equally notable for some of the things that he didn't say. When he talked about the business judgment rule, and indeed throughout his argument he never referred to their self-interest, he never uttered a word as to how the business judgment rule can

protect directors who have proposed a self-tender that would benefit them to the tune of $70 million. Not a word. As far as his argument was concerned that fact doesn't exist.

Yet the law is absolutely clear that that deprives the defendants of the benefit of the business judgment rule, and imposes on them the burden of showing the intrinsic fairness of this transaction to all of the shareholders. He hasn't even maintained that it's intrinsically fair to Mesa.

Now, he says but what about greenmail? He says in greenmail that's okay. So this somehow might be okay. But he explains the difference in the way he explains it. He said -- he didn't completely say it. In greenmail of course the person selling the stock and the person buying it have agreed on the sale. Then he went on to say and the other shareholders benefit because the dissident is removed. So that all of the shareholders get something. The greenmailer, or the person selling his stock, he gets a price which he has negotiated and agreed on. The other shareholders, they get something. They get the removal of the dissident. He doesn't suggest that Mesa gets anything.

Now, I think that Your Honor grasped my argument -- of course I have no idea whether you accepted it -- as to this unique bundle of assets and this what was referred to earlier and then adopted by my friend in his answering brief of this kaleidoscope event and how all of the events are interrelated. And, you know, if this offer goes forward, then millions of shareholders -- or not millions of shareholders, but tens of thousands of shareholders owning millions of shares will change positions. Some will become tenderors, some will become buyers and sellers in the market, and everybody will sort of change places in the light of that fact, and Unocal will be different, and the universal shareholders will be different, Mesa will do something different, and Unocal itself will do something different. There is no way to ever unravel that and send the shares back and the money back, and undo all the market transactions, and have Unocal take back and Mesa take back whatever it will do.

But even if that wasn't true, let's suppose we accept Unocal's argument that while heck, Unocal has got a deep pocket, and we can respond -- you know, even though the damages might be over a billion

dollars, which he conceded, you know, we've got it. Just barely, he says, but we've still got it. We haven't hocked the company completely.

Well, I think that Thomas versus Kempner is clear authority for the proposition that where catastrophic damages may be imposed, and where the catastrophic damages might be imposed on a board of directors, as I suggest here they would be, that that itself is a reason for granting injunctive relief. And Your Honor may remember that in that situation there was a board of directors that was selling a rather large piece of land down in Sugarland, Texas, and they had arranged a sale of the assets subject to shareholder approval at about 23 or 23-1/2 million dollars, and a dissident family member came along and said I've got a higher offer here for 27 or 27-1/2 million, which he procured.

So the catastrophic damages there was some 4-1/2 million dollars, and there was no question but that the wealthy family involved, the Kempner family, had more than enough money to respond in 4-1/2 million dollars, and Chancellor Marvel said well, these kind of catastrophic damages are just not appropriate remedy, and rather than expose the

directors to that possibility I'm going to enjoin that transaction, and that's what he did.

Now, with respect to the proxy claim, he says he doesn't understand the proxy claim, and he doesn't understand what's the illegal act, what's the wrong. Well, the illegal act is what he contends is this illegal and discriminatory offer, and the offer is intended to, and will have an effect on the proxy solicitation. So if the offer is illegal, and it has this effect on the proxy solicitation just as Your Honor held that the interpretation of the bylaw was illegal, and now Judge Tashima has said that because of that their proxy disclosures were inadequate, now the meeting has got to be put off. There is the same connection. It's the illegal offer used to garner votes.

He says I don't understand the rule of law that that would apply. Well, the rule of law is that you can't commit an illegal act for the purpose of influencing a solicitation of votes.

Finally, at least for me, Your Honor brought the matter into its proper perspective with your next to the last question to Unocal's counsel, and that was where you asked a question which suggested

that if the exchange offer only works as an anti-take-over device by employing it in an illegal or inequitable manner, then defendants must chose another defense, and I think that's the essence of what we submit here.

On this record we are not getting into their judgment, which we will dispute later, as to whether or not it's a good faith judgment that we are somebody that should be discouraged, but we are saying even accepting that, that doesn't under that umbrella justify any steps that they might take, but that the Court has a responsibility to look at the step itself, and say is this a fair act. Is this equitable? Is this consistent with the defendants' fiduciary duties to Mesa Partners II as well? Mesa Partners II is a shareholder of Unocal. It's the largest shareholder. It holds over 23 millio shares, or 13.6 percent. It has an investment of over a billion dollars.

We just can't have a rule of law that because you are a raider and the management doesn't like you, that you can choose that person's investment, you can use it differently and apply different standards to it, and treat all of the other

shareholders -- favor them at the expense of the person you don't like.

Thank you.

MR. SPARKS: May I respond to one or two points that Mr. Richards has made that I didn't get a chance to respond to?

MR. RICHARDS: Well, Your Honor, I was more or less under the impression that bearing, it was my privilege to close.

THE COURT: I'll give you an opportunity to respond again, Mr. Richards.

MR. RICHARDS: Thank you.

MR. SPARKS: I just want to address the self-interest point. We addressed it in our brief, and I think it's all there, but basically there is some effort here to try to cram this into sort of a parents-subsidiary line of self-dealing basis.

If Your Honor recalls, the test in Sinclair versus Levien, even if it were applicable here it is to the exclusion and detriment of others stockholders. If somebody acts to the exclusion and anticipated detriment of other stockholders, they have a burden of proving intrinsic fairness. In the first place, I think on this record if we ever had

that burden under any of the scenarios, we have met it with respect to every aspect of it including the $72 based on the record that's here. But we don't think it has anything to do with this case for two reasons.

One, the directors -- By the way, the $70 million is a bit misleading. One director has most of that stock. The other 12 really have small interests. But apart from that, if the $72 number is right, the detriment leg of self-dealing even if it were applicable doesn't apply because they really haven't suffered the detriment arising out of this particular transaction.

Secondly, if you analyze it, the directors are being treated the same as all other 76,000-some odd passive investors. They are not taking anything more than those people or anything less. Indeed it would have been an anomaly for them not to have tendered their own shares into an offer they were recommending, and indeed the record shows that they did it after that type of a recommendation.

As to the fact that Mesa isn't in there, we've got a valid business reason why Mesa isn't there. It hasn't been challenged, and there

can't be a suggestion on this record, nor given the size of Mesa's holdings would it make any sense to say this was somehow motivated by the desire of these people to somehow not have -- be prorat ' in some very small fraction by some reason that Mesa wasn't in the offering, and they get a few more shares. On this record you can't reach that kind of conclusion.

But as a matter of law, if they are being treated with all other stockholders, that's not self-dealing. The only shareholder that's not in the picture is Mesa, and that's for a valid corporate reason on the record that they are not there.

Mr. Richards mentions catastrophic damage. There are two responses to that. One is they still have no showing of any -- that's a relative concept -- that that means it's going to cause some harm or damage to the corporation. We put in evidence that shows that the company could respond to this money damage. He hasn't even refuted that, much less put in something to show that in responding it would somehow be catastrophic. And he talks every now and then about the individuals as if

for some reason the damage comes from them. This is not a derivative suit, Your Honor, and we know why it's not. He cannot pick up in his present representative capacity for all the other shareholders of Unocal. He's on the other side of the fence. He's not suing these directors derivatively. He's suing Unocal and its directors. Unocal can respond to the damages.

Finally, just addressing all of the argument, it all comes back to his assumption. He assumes the discrimination is illegal or unlawful or inequitable. Fisher tells us that discrimination is okay so long as you meet certain tests. It's not illegal, inequitable on its face. Certain tests are to be met, and we havemet them. He keeps coming back to that with his predicate for this proxy claim and his other claims.

Thank you.

THE COURT: Thank you.

MR. RICHARDS: I really feel that I've addressed all of the points that Mr. Sparks mentions. I hope his feelings won't be hurt that I don't feel it's necessary to reply.

THE COURT: In that case we'll stand in

recess. I'll make every effort to get a decision out as promptly as possible.

- - -

(Court adjourned at 5:15 p.m.)

- - -

C E R T I F I C A T E

WE, HENRY D. SKOGMO AND LORRAINE B. MARINO, Official Reporters for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 86 contain a true and correct transcription of the proceedings as stenographically reported by us at the hearing in the above stated cause, before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF WE have hereunto set our hands at Wilmington, this 26th day of April, 1985.

Official Reporter for the
Court of Chancery of the
State of Delaware

Official Reporter for the
Court of Chancery of the
State of Delaware

- - -

Typed by:
Lucinda M. Reeder
and Patricia Hoffman

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, WILLIAMS. McCONNOR, PETER O'MALLEY, RICHARD J. STEGMEIER DONN B. TATUM,	)	
Defendants.	)	

THIRD AFFIDAVIT OF SIDNEY TASSIN

STATE OF DELAWARE)
: SS.
COUNTY OF NEW CASTLE)

Sidney Tassin, being duly sworn according to law, deposes and says as follows:

1. I am assistant secretary of Mesa Asset Co., a Delaware corporation, which is a plaintiff in this action

and is a general and the managing partner of Mesa Partners II, a Texas general partnership, which is also a plaintiff in this action. I make this third affidavit in support of plaintiffs' motion for a temporary restraining order to be presented on April 26, 1985 at 3:30 p.m. In connection herewith I have reviewed the affidavits submitted to the Court by defendants relating to such motion.

2. Attached hereto as Exhibit A is a true and correct copy of a press release issued by Mesa Petroleum Co. dated April 24, 1985, which has previously been produced to defendants in this action. Such press release correctly states the view of the plaintiffs on the question of whether stockholders of Unocal should tender their shares into the exchange offer announced by Unocal on April 16, 1985, as subsequently amended on April 24, 1985 (the "Amended Debt Tender"). As stated in such press release, it is plaintiffs' view that the discriminatory feature of the Amended Debt Tender, which would permit all Unocal stockholders except Mesa Partners II to participate in the Amended Debt Tender, is illegal. Plaintiffs have also stated that pending a judicial determination as to the validity of the Amended Debt Tender, stockholders of Unocal may wish to tender their shares into it in order to protect the value of their investment in the event Unocal purchases shares.

3. There is no contradiction between plaintiffs' view that the Amended Debt Tender as now structured is illegal and their view that stockholders of Unocal should consider tendering into it in order to protect the value of their investment. Plaintiffs believe that the value offered in the Amended Debt Tender would, if paid, have a substantial dilutive effect on the remaining shares, both in terms of underlying asset value and market trading value. Thus they believe that holders of Unocal stock should tender in order to protect their investment in Unocal and to maintain their pro rata position with other stockholders. At the same time, plaintiffs believe Mesa Partners II should be permitted similarly to protect the value of its investment in Unocal and to maintain its pro rata position with other stockholders, and that it will be irreparably harmed if it is not permitted to do so. Thus plaintiffs have not acquiesced in the making of the Amended Debt Tender as now structured, but have merely indicated that while they believe that it is illegal, it may be prudent for Unocal stockholders to tender into it to protect their investment pending a judicial determination by this Court as to its validity. If allowed to do so, Mesa Partners II would also tender into the Amended Debt Tender for the same purpose.

4. Although various of the Mesa documents have included analyses of the assets of Unocal, including analyses prepared by Mesa and by outside parties, plaintiffs have not expressed any opinion in any of the documents submitted by defendants as to the value of Unocal stock. However, in the papers defendants have submitted to the Court they have taken many facts and figures out of context and have misrepresented them as expressions of opinion by plaintiffs of the value of Unocal stock. For instance, in paragraph 45 of his affidavit, Mr. Sachs states that "...Mr. Pickens agreed with a John S. Herold, Inc. appraisal that Unocal is worth $73.90 per share." I can attest from personal knowledge that Mr. Pickens does not believe that a John S. Herold valuation is indicative of the true value of an oil company, particularly an integrated oil company, and specifically Unocal. Herold valuations are useful "broad brush" comparisons of various oil companies because they generally apply consistent methodology. However, the Herold valuations are limited in scope and are of nominal utility in determining the true value of an oil company's assets, either for purposes of investment or acquisition. Specifically, Herold completely disregards tax effects and tax liabilities which would be incurred as a result of the realization of values through either a "going concern" or "liquidation" scenario. Herold also disregards the

deferred income tax liability currently reflected on a company's balance sheet. In the case of Unocal the deferred tax liability at December 31, 1984 was $1.333 billion or $7.68 per Unocal share.

5. The current John S. Herold valuation of Unocal includes a $643 million "write up" of LIFO inventories, equivalent to approximately $3.70 per Unocal share. This write up is not tax-effected in the valuation to recognize the taxable recapture of LIFO reserves. Mr. Sach acknowledges in paragraph 10 of his affidavit that Goldman Sachs valued Unocal's LIFO inventories on an after tax basis, rather than on the pretax basis reflected in the John S. Herold valuation.

6. Similarly, Exhibit A to the Coats affidavit cites an $86 per share valuation of Unocal by Donaldson Lufkin & Jenrette ("DLJ"). The methodology applied in the DLJ valuation is a "present value of equity" methodology that, to my knowledge, is used only by DLJ. This methodology ignores significant tax effects and existing tax liabilities associated with a company's operation and assets, as does the John S. Herold methodology. Further, the DLJ methodology values non-oil and gas assets in a very simplistic "book value" manner. Historically, the DLJ valuations have been substantially higher than Herold valuations. Inclusion of the DLJ valuation on the "Comparison of Values" exhibit

was, indeed, for comparative purposes only. Mesa Partners II has not ever expressed a belief that Unocal's asset value was $86 per share in any context or scenario.

7. Exhibit A to Mr. Sachs' affidavit sets forth certain comparative ratios of recent merger and acquisition transactions in the oil and gas industry. As acknowledged in the affidavit, three of the five transactions analyzed were acquisitions of "independent" oil companies and, in my opinion, are not meaningful comparisons to Unocal. Each of the three independent oil company acquisitions were substantially smaller than Unocal and had substantially less diverse assets than Unocal. (If Unocal is valued at $72 per share, it is eleven times larger than the General American Oil transaction, seven times larger than the Aminoil transaction, and more than twice as large as the Superior Oil transaction). If Unocal is compared to the two integrated oil acquisitions (Gulf and Getty), which are substantially more similar to Unocal in size and nature of assets, the median and mean of the implied per share amounts for Unocal are $59.00 and $57.00, as opposed to the $68.50 and $62.36 cited in paragraph 21 of Mr. Sachs' affidavit. Indeed, when Unocal is compared to the two integrated oil transactions, only four of the twelve comparative amounts are in excess of $60 per share, and none are in excess of $70 per share.

8. According to Exhibit A to Mr. Sachs' affidavit, if Unocal is valued based on the ratio of acquisition prices to John S. Herold values of Gulf and Getty, a value range of $50 to $62 per share is indicated.

9. Mesa Partners II's analysis indicates a valuation of Unocal's assets less than $72 per share, so a repurchase of shares for $72 in debt securities would result in a significant dilution of asset values. On a going concern basis, before recognition of existing deferred income taxes and anticipated income taxes on future operations, Mesa Partners II's analysis indicates a valuation of $64 per share. (Coats Aff., Ex. A, p. 100497). Again, the existence of $1.333 billion of deferred income taxes reflected in the financial statements and the anticipated future income taxes from ongoing operations would be subtracted from the $64 valuation to achieve a net valuation. The reason that income taxes are not reflected in the Mesa analysis is that the amount and timing of future taxes can vary significantly under different financing or operating structures.

10. Mr. Sachs asserts in paragraph 46 of his affidavit that if Unocal purchases 50 million shares through its $72 exchange offer "...they [Mesa Bidders] will clearly benefit from their long-term investment in a company whose stock in the view of Goldman Sachs and Dillon Read could be worth at least $72." The statement is laughable and

contradictory to Mr. Sachs' statement in paragraph 34 that an aggregate value of $70 to $75 per share was a reasonable expectation of "...a person seeking to sell the Company in an orderly liquidation," not in an ongoing operations mode. In fact, the all time high market value achieved by Unocal stock was approximately $56 per share in late 1980, a time when expectations of future oil and gas prices were significantly more optimistic than today. Throughout 1984 until October 22, 1984 when Mesa Partners II began purchasing Unocal stock, the highest market value achieved by Unocal shares was approximately $41 per share.

11. It is my firm belief that a repurchase by Unocal of either 50 million or 87.2 million shares for $72 of debt securities would significantly and adversely affect the market value of the remaining Unocal shares, notwithstanding the "announced intention to prepare documentation for a master limited partnership" as cited in paragraph 45 of Mr. Sachs' affidavit. Other Unocal filings have indicated that documentation on the partnership arrangement will not be filed until June, 1985. Further, Unocal has not indicated any commitment, or even any present intention, to distribute units of the partnership to its shareholders. Unocal's equity would be reduced $3.6 billion by a 50 million share repurchase and $6.3 billion by an 87.2 million share repurchase. This results in a pro forma book value for the

remaining shares of $16.93 and a deficiency of $6.66 per share in the respective cases. These amounts compare to an actual book value of $32.78 per share at December 31, 1984. Also, the significant debt that would be incurred to purchase shares at an excessive price must be serviced, thereby diverting a substantial amount of Unocal's cash flow. Based on these and other factors, I believe that the market value of Unocal shares would be significantly impaired after a share repurchase on the terms contemplated in Unocal's Amended Debt Tender.

12. In their papers defendants have ignored the fact that the stockholders of Unocal other than Mesa Partners II who tender into the Amended Debt Tender will have the opportunity to convert some or all of their equity into debt, raising their status from common stockholders to senior creditors and thus enhancing the security of their investment. This takes on added significance given the fact that by reason of the Amended Debt Tender, Unocal will be a much more highly leveraged company than it is now. Thus the effect of the discriminatory provision of the Amended Debt Tender is to enable all stockholders of Unocal other than Mesa Partners II to enhance the security of their investment while actually making the investment of Mesa Partners II more risky.

13. The discriminatory provision of the Amended Debt Tender has also been admitted by Unocal's chairman, Fred Hartley, to make it possible to give the stockholders other than Mesa Partners II $2 more per share than if such provision was not present. Attached hereto as Exhibit B is a true and correct copy of a news article appearing in the Los Angeles Times on April 25, 1985, in which Mr. Hartley acknowledged that by excluding Mesa Partners II from the Amended Debt Tender "we get our shareholders another $2 a share."

14. In paragraph 36 of his affidavit, Mr. Sachs indicates that during the course of the week following the commencement of the original Unocal exchange offer, Goldman Sachs and Dillon Read "...became aware of various reports...(including reports that the Mesa Bidders' financial advisor, Drexel Burnham Lambert Inc., was soliciting additional financing..." To my knowledge, no additional financing was being sought by Mesa Partners II or its affiliates, nor had Drexel Burnham Lambert Inc., been authorized to seek additional financing on behalf of Mesa Partners II during that time period.

15. Defendants are also incorrect in asserting that the inclusion of Mesa Partners II in the Amended Debt Tender would enable it to use the funds obtained in the Amended Debt Tender to finance is own $54 offer. Mesa

Partners II has sufficient funding to consummate such offer regardless of whether or not it is paid $72 per share for some of its shares by Unocal.

Sidney Tassin

SWORN TO AND SUBSCRIBED before me this 26th day of April, 1985.

Notary Public

MESA PETROLEUM CO.

NEWS RELEASE

FOR IMMEDIATE RELEASE
April 24, 1985

Contact: David H. Batchelder
vice president
(806) 378-1055

AMARILLO, TEXAS -- T. Boone Pickens, Jr., Chairman of the Board and President of Mesa Petroleum Co., stated that Mesa believes the Unocal Corporation exchange offer is illegal and is seeking to have the offer enjoined. In commenting on a report that he said that Unocal shareholders should accept the Unocal offer, Mr. Pickens said that the earlier quote did not fully set forth his remarks. He indicated that pending a judicial determination as to the validity of the offer, Unocal shareholders may wish to tender to Unocal in order to protect the value of their investments in the event Unocal purchases shares. Mr. Pickens again urged that Unocal shareholders vote to adjourn the Unocal annual meeting currently scheduled to be held April 29.

# # #

EXHIBIT A

MS000001

Unocal's Hartley Says Pickens Faces Defeat at Shareholders Meeting

By [illegible] and [illegible]
Times Staff Writers

Declaring that T. Boone Pickens has already thrown in the towel, Unocal Chairman Fred L. Hartley said Wednesday that he doesn't anticipate coming to Pickens and his investors group at Unocal's annual meeting on Monday.

"I think we're going to win easily," Hartley said in his first interview since the Pickens group officially launched its two-step tender offer for Unocal on April 8. He would not specify how many shares have been committed to vote against the Pickens group Monday but said that, "even the votes we already have in," the vote is running heavily in Unocal's favor.

Pickens and his partners are waiting to have the meeting adjourned before any action is taken Monday and requested the two months while Pickens lines up support for his takeover plan. Analyst and some big institutional shareholders reportedly polled by The Times say they have noticed a shift in the momentum this week—from Unocal to Pickens.

Believes Firm Has Upper Hand

But Hartley believes Unocal has the upper hand with its offer of $72 a share for 50 million shares and with Pickens' acknowledgment that it was the best offer on the table. The Pickens group has offered $54 a share for 64 million shares.

"He's finished," Hartley said of his opponent. By recommending to Unocal shareholders attending a Mesa-hosted meeting in Los Angeles on Tuesday that they accept Unocal's offer, Pickens was throwing in the towel, Hartley said.

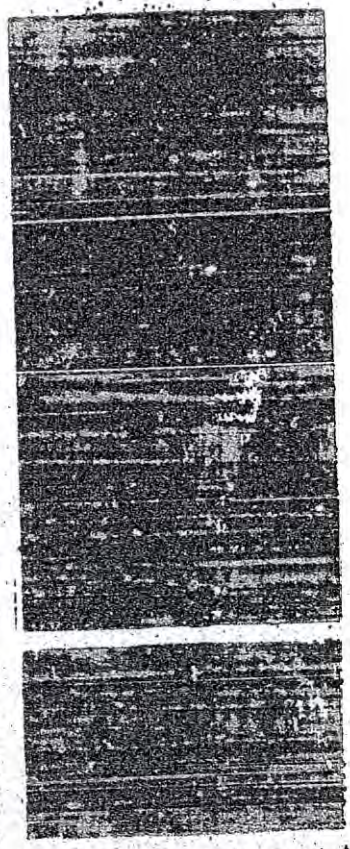
"He's not even looking for it. He's out of it," Hartley said.

Responding to Hartley's comment, Mesa's chief financial officer, David Batchelder, said late Wednesday that telling shareholders to take $72 instead of $54 is "not throwing in the towel, that's just common sense."

Hartley said he is aware that Pickens might come back with a second offer. "He's trying to hurt the company, the company shareholders, by driving down the value of the stock, and if he ever came back for a second time and got our company on the cheap."

There is growing speculation in the investment community that Pickens might either drop his first offer altogether or just lay low for a while and let Unocal buy 50 million shares for $72 each. Then, the speculation continues, after the stock had dropped back closer to the $45 level where it was before the Pickens group launched buying, the group would come back with an offer for the rest of the company at

Pickens and UNOCAL, Page 7



Unocal Chairman Fred L. Hartley

EXHIBIT B

Los Angeles Times

UNOCAL: Takeover Bid

Continued from Page 1

something less than $54 a share.

Until Tuesday, the Pickens group's offer was the only firm bid for Unocal on the table. Unocal had said it would exchange debt securities valued at about $72 a share for 87 million of its shares—but only if the Pickens' group was successful in the first step of its two-tiered offer.

In the interview, Hartley explained why Unocal waited until this late in the takeover fray to make a firm commitment to buy back some of its shares.

"We finally became convinced that there was a very good chance that he was able to get his financing" to buy 64 million shares, Hartley said. "Very frankly, that amount of financing has not been achieved before."

The Pickens group announced April 12 that it had raised the $3.5 billion it needs to buy a majority interest in Unocal.

To buy back 50 million shares at the $72 price, Unocal will have to spend about $3.6 billion, raising the company's debt load to about $4.8 billion, a level that Hartley said he is not entirely comfortable with but that "does not put us into a catastrophic mode."

Because of that extra debt load, he said, Unocal will be forced to cut back its 1985 investment program of $2.1 billion by about $250 million.

His comments about the added debt burden illustrate a point reiterated several times during the 90-minute interview: Hartley leaves no doubt that he would prefer not to be taking the defensive maneuvers he has, but said in this "junk-bond irresponsible society," he hasn't any choice.

"It goes against my common sense," he said.

Asked how he can reconcile that attitude with Unocal's first stock-for-debt offer that would wipe out its net worth, Hartley replied that the move would "protect" Unocal shareholders from Pickens' junk-bond financing. The debt offered by Unocal is in the form of secured notes.

Hartley, in fact, directed much of his ire at the financial community for providing corporate raiders the wherewithal for such takeovers.

"The financial mafia on Wall Street is a new force to deal with," he said.

He repeated his longstanding criticism of tax laws that he maintains favor the raiders and their use of so-called junk bonds, securities issued on the strength of the assets of the target company.

He said the whole future of corporate America is at stake. Institutions that provide financing for hostile takeovers, he said, are "not concerned about the future of businesses in the United States and are quite happy to participate in their destruction."

Gulf Oil, for example, which was acquired by Chevron after fleeing from Pickens, "is gone," he said, "something we say murdered."

"The battle today is not Hartley versus Pickens or Unocal versus Mesa," he continued. "Our economic system is at stake." This "chain letter" is leading to the same situation that existed in the oil industry early in the century, when the government broke up the Rockefeller trust, he said.

"Communism is all debt. There is hardly any equity left in South America. . . . And now we're doing the same damn thing to ourselves," he said.

His criticism of Pickens and "his corp" is equally biting. They have "no manners, no morals, no integrity," he said.

He also took issue with Pickens' remarks that oil and gas exploration is currently too expensive to make economic sense, that oil companies are undervalued, that boosting the short-term interests of shareholders does not conflict with long-term interests and that big oil companies, including Unocal, are depleting their shareholders' assets by not replacing current production.

A "fable" is how he labeled Pickens' idea of undervalued stock. The stock price, he said, reflects earnings and earnings growth, not the assets. "The situation equates to you being worth more to your spouse dead than alive," because of life insurance and other benefits, he said. So, too, companies must be liquidated to realize the full value of the assets.

On exploration: "If I'd have been as unsuccessful as he's been in the

Please see UNOCAL, Page

UNOCAL

Continued from Page 9

last three years, I'd probably be talking the same way he is."

On reserve replacement: "Our record for the last two years has been very strong. Essentially, we've managed to maintain our reserves while increasing our production."

On long-term investments: "To stay in this business and grow in this business, you have to have a high technological content" that requires heavy expenditure in research and development.

Hartley said Unocal is "not seriously" considering other deals such as acquisitions. "I don't think we should assume we're smarter than the other guy running his company," Hartley said.

And he ruled out two strategies that other takeover targets have used in recent years: the payment of corporate blackmail, or "greenmail," as it is called, and bringing in a "white knight"—that is, a buyer more acceptable to management. "The white knight business has sort of run its course," he said.

About his decision to exclude the Pickens group from Unocal's tender offer, Hartley said Pickens isn't a shareholder with a long-term interest in Unocal. "He is a raider of Unocal." By excluding Pickens from the offer, "we get our shareholders another $8 a share."

When he speaks of Unocal shareholders, he said, he means such people as the families that have owned Unocal stock for 75 years.

"We have a responsibility to protect the long-term investors of this company," he said.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SOCIETE HOLDING GRAY D'ALBION S.A.,

Plaintiff Below, Appellant,

v.

SAUNDERS LEASING SYSTEM, INC., a Delaware corporation, et al.,

Defendants Below, Appellees.

§ § § § § § § § § § § § § § §

No. 347, 1981

Submitted: December 23, 1981
Decided: December 24, 1981

Before DUFFY, QUILLEN and HORSEY, Justices.

RECEIVED
DEC 24 1981
R.F.B.

ORDER

This 24th day of December, 1981,

Upon consideration of the record on plaintiff's appeal of an interlocutory order from the Court of Chancery in Civil Action No. 6648, it appears to the Court that:

(1) Given the record, opinion and decision below, we assume the application below was in substance one for a preliminary injunction. We note, however, that, even with such stature, conclusions reached either at the trial or appellate level remain preliminary.

(2) Insofar as the recapitalization is concerned, the interlocutory order, given the detailed expressions in the

opinion, determined a substantial issue, and may arguably have the effect of determining a legal right in the sense of mooting the litigation. It does not appear, however, that an interlocutory appeal should be viewed for Rule 42 purposes as potentially terminating litigation simply because the plaintiff might abandon the suit if it loses again on the interlocutory appeal. Compare Pepsico, Inc. v. Pepsi-Cola Bottling Co. of Asbury Park, Del.Supr., 261 A.2d 520, 521 (1969). Moreover, given the breadth of the relief sought and the options available if the plaintiff is ultimately successful, it does not appear that a review of the interlocutory order will terminate the litigation. Furthermore, it does not appear to this Court -- due to the customary abuse of discretion scope of review on interlocutory appeals from preliminary injunction matters [Gimbel v. Signal Companies, Del.Supr., 316 A.2d 619 (1974)] and our inability to disagree with the Chancellor's conclusion that, at this stage of the case, plaintiff has not met its burden of showing a reasonable probability of ultimate success entitling it to present injunctive relief -- that there exist important or urgent reasons for an immediate determination. In particular, we agree with the Chancellor's denial of a general injunction on the recapitalization implementation pending appeal and this conclusion makes the interlocutory appeal itself less significant.

(3) Insofar as the 75% aggregate voting power charter amendment is concerned, the decision of the Chancellor fails

to establish a legal right and there is no apparent reason at this time why any further litigation should not proceed in ordinary course at the trial level.

NOW, THEREFORE, IT IS ORDERED that the interlocutory appeal is

REFUSED

and the application under Supreme Court Rule 32(a) is moot which constitutes a final determination under the Chancellor's order of December 21, 1981.

BY THE COURT:

William T. Quillen

Justice

79-24

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

GROVER C. BRAM
VICE-CHANCELLOR

March 22, 1979

COURTHOUSE
GEORGETOWN, DELAWARE

Edward B. Maxwell, II, Esquire
Young, Conaway, Stargatt & Taylor
Post Office Box 607
Wilmington, Delaware 19899

Steven J. Rothschild, Esquire
Prickett, Ward, Burt & Sanders
Post Office Box 1328
Wilmington, Delaware 19899

Re: Telvest, Inc. v. Olson, et al.
Civil Action No. 5798
Submitted: March 20, 1979

Gentlemen:

Pursuant to Supreme Court Rule 42 defendants (hereafter "OSI") have moved for leave to file an interlocutory appeal from the order of this Court of March 15, 1979 granting a preliminary injunction to the plaintiff Telvest, Inc. ("Telvest"). This order temporarily enjoined OSI from distributing an issue of shares created and designated as preferred stock pursuant to a resolution of OSI's board of directors.

The Constitution of this State provides, and the case precedents are legion in holding, that an appeal may lie from an interlocutory order, but only if the interlocutory order (1) determines a substantial issue and (2) establishes a legal right. Rule 42 embodies this require-

ment.

This test is not necessarily measured against the type of order entered. This is particularly true in the case of a preliminary injunction which, by definition, does not constitute a final adjudication on the merits. Rather, it seems, the governing standard must be the effect of the order when measured against the circumstances of the particular case.

The factual backdrop here is an admitted attempt by OSI, ostensibly to protect all of its common shareholders, to impose, by director resolution, supermajority voting requirements as to any take-over attempt being made by a party owning 20 per cent or more of OSI's voting stock. Telvest is a 20 per cent owner. The preliminary injunction from which this appeal is sought to be taken has prevented OSI, for the time being, from distributing the stock which would put these more stringent voting requirements into effect. The restraint was based on the preliminary determination that the proposed preferred stock distribution plan, accomplished by director resolution and in the absence of approval by the existing shareholders, appeared in all likelihood to be in violation of several provisions of the Delaware corporation statutes as well as certain case precedents.

To this extent, the preliminary injunction maintained the status quo existing at the time the suit was filed. Prior to the entry of this order, Telvest had disavowed any present intention to seek a take-over of OSI. It indicated only a continuing intention to acquire additional OSI stock through open market purchases.

However, on March 16, 1979, the day after the preliminary injunction was entered, Telvest served notice of a tender offer for OSI stock pursuant to 8 Del.C. § 203. This action has given impetus to OSI's Rule 42 application.

OSI argues that the preliminary injunction has determined a substantial issue and has established a legal right, namely, it has deprived OSI of the right arguably given to it by its certificate of incorporation and the Delaware statutes to take prompt action by director resolution to protect its shareholders from an undesirable business combination now being openly pursued by Telvest. In other words, it is saying that unless it can obtain immediate appellate review of this Court's interlocutory order, its proposed stock distribution plan may now be rendered moot by the announced, future actions of Telvest based upon a preliminary determination by this Court of OSI's legal rights under Delaware law. Thus analyzed, OSI is arguing that it should be permitted an appeal, not

because of the status of affairs as of the time the injunction was entered, but because of events that have transpired since that time. This seems apparent because the right to take prompt action which it feels has been decided adversely against it did not become critical until such time as Telvest announced its tender offer.

Rule 42 requires that an application for an appeal from an interlocutory order must be first addressed to the trial court. If the application is denied by the trial court, a notice of appeal may nonetheless be filed with the Supreme Court. Rule 42(c)(iv). The Supreme Court then may either accept or refuse the appeal. Rule 42(c)(vi).

Quite frankly, I cannot reasonably anticipate how the Supreme Court might react to OSI's argument. However, since I view its position to be premised in the main on an event which has taken place after the entry of the preliminary injunction order here, I am not inclined to agree that the order, when entered, determined a substantial issue and established a legal right within the meaning of Rule 42. If the circumstances do justify an appeal, I think that in this case it is a decision which must emanate from the appellate authority and not from this Court.

The motion of OSI to supplement the record in this Court is granted. The motion of OSI for leave to take an

interlocutory appeal pursuant to Supreme Court Rule 42 is denied. IT IS SO ORDERED.

If counsel feel that the entry of a separate, formal order is required, I hereby give my authorization to either Chancellor Marvel or Vice Chancellor Hartnett to execute an agreed-upon form of order during my absence from the State.

Very truly yours,

GCB:mlw

cc: Register in Chancery

IN THE SUPREME COURT OF THE STATE OF DELAWARE

OUTDOOR SPORTS INDUSTRIES, INC., a Delaware corporation,

Defendant Below, Appellant,

v.

TELVEST, INC., a Delaware corporation,

Plaintiff Below, Appellee.

No. 73, 1979

Submitted: April 4, 1979
Decided: May 2, 1979

Before HERRMANN, Chief Justice, and QUILLEN and HORSEY, Justices.

ORDER

This 2nd day of May, 1979,

Upon examination of appellant's Notice of Appeal of Interlocutory Order from the Court of Chancery in Case No. 5798, it appears to the Court that:

(1) The case is presently focused on a situation which is largely factual and does not lend itself to an immediate review by this Court.

(2) The Court of Chancery, as a trial court of general jurisdiction with the extensive powers related to such jurisdiction, is better able than this Court to handle a case in the context of a fluid factual situation.

NOW, THEREFORE, IT IS ORDERED that the interlocutory appeal is

REFUSED.

BY THE COURT:

William T. Quillen
Justice

IN THE SUPREME COURT OF THE STATE OF DELAWARE

READING COMPANY, a Pennsylvania corporation, Plaintiff Below, Appellant,	§	
v.	§	No. 97, 1984
TRAILER TRAIN COMPANY, a Delaware corporation, Defendant Below, Appellee.	§	

Submitted: April 16, 1984
Decided: May 14, 1984

Before McNEILLY, MOORE and CHRISTIE, Justices.

ORDER

This 14th day of May, 1984,

Upon due consideration of appellant's Notice of Appeal From Interlocutory Order filed pursuant to Supreme Court Rule 42, it appears to the Court that:

(1) The appellant has failed to establish the requirements necessary to support its application to prosecute an interlocutory appeal. There is no showing that the Order of the Court of Chancery denying appellant's request for a preliminary injunction determined a substantial issue, established a legal right, and met either of the other requirements listed in Supreme Court Rule 42(b).

NOW, THEREFORE, IT IS ORDERED that the interlocutory appeal is

REFUSED.

BY THE COURT:

John J. McNeilly
Justice

FISHER v. MOLTZ

No. 6068

Court of Chancery of the State of Delaware, New Castle

December 28, 1979

Plaintiffs, former employees of C. J. Lawrence & Company, Inc., brought this application for a preliminary injunction against the corporate defendants to compel defendant to extend their offer to repurchase shares to include the plaintiffs or in the alternative to enjoin the consummation of the offer. The repurchase offer was not made to any present employees of the corporation, but it was made to all former employees except the plaintiffs in this action. The court of chancery, per Vice-Chancellor Hartnett, granted the injunction on the basis that the corporate defendants had not met their burden of showing that there is a valid corporate purpose in making the stock purchase offer to some former employees and not others.

1. Corporations ⟸ 312(5), 316(1), 320(11)

It is well settled that a Delaware corporation may purchase its own shares for a valid corporate purpose.

2. Corporations ⟸ 174, 316(1)

Corporate directors owe a fiduciary duty to the stockholder of a Delaware corporation. The burden is imposed upon the corporation to show that there is a valid corporate purpose for limiting the offer to purchase shares and that in doing so it has not unduly favored one group over another.

3. Injunctions ⟸ 132, 137(4), 147, 152

An injunction will be issued at preliminary stage where the plaintiffs have shown the reasonable probability of ultimate success upon a final hearing on the merits.

4. Injunctions ⟸ 132, 136(3)

Injunction will be granted when it is reasonably necessary for the preservation of the status quo.

5. Injunctions ⟸ 136(3), 137(2), 137(4), 151, 152

The injunction will be granted when it will not unduly harm anyone, because its effect will be merely to postpone the consummation of the offer until the final ruling.

Charles S. Crompton, Jr., Esquire, Potter, Anderson & Carroon, P.O. Box 951, Wilmington, DE 19899

Edmund N. Carpenter, II, Esquire, Allen M. Terrell, Jr., Esquire, Richard D. Kirk, Esquire, Richards, Layton & Finger, P.O. Box 551, Wilmington, DE 19899.

HARTNETT, *Vice-Chancellor*

This is my decision on plaintiffs' application for a preliminary injunction, which is granted.

The facts are uncontroverted. The corporate defendants are: C. J. Lawrence & Company, Inc., a Delaware corporation, which is a holding company which owns substantially all of the stock of Cyrus J. Lawrence Incorporated, a Delaware corporation, which is engaged in the securities business in New York. The named individual defendants who have not been served in this action, are the directors of C. J. Lawrence & Company, Inc.

On December 11, 1979, C. J. Lawrence & Company, Inc. made an offer to purchase all of its shares of stock owned by certain persons. The persons to whom the offer was made were former employees of Cyrus J. Lawrence Incorporated. The offer was not made to any present employees of Cyrus J. Lawrence Incorporated but it was made to all former employees except the plaintiffs in this law suit.

The plaintiffs left the employment of Cyrus J. Lawrence Incorporated in 1976 or 1977 and sought to sell their stock in C. J. Lawrence & Company, Inc. back to the corporation without success. They then commenced a suit in the United States District Court for the Southern District of New York to compel the purchase of their stock by C. J. Lawrence & Company, Inc. They were mostly unsuccessful in that suit but it is still pending.

Plaintiffs, on December 21, 1979, commenced this action seeking interim injunctive relief to compel the defendants to expand their offer to repurchase shares of C. J. Lawrence & Company, Inc. to include the plaintiffs, or in the alternative to enjoin the consummation of the offer.

All the persons who were recipients of the offer to purchase have accepted the offer and tendered their shares, but final consummation of the offer will not occur until January 3, 1980—apparently for tax reasons.

[1] It is well settled that a Delaware corporation may purchase its own shares for a proper corporate purpose. 8 *Del. C.* § 160(a); *Cleff v. Mathes*, Del. Supr., 199 A.2d 548 (1964); *Kors v. Carey*, Del. Ch., 158 A.2d 136 (1960); *Martin v. American Potash & Chemical Corp.*, Del. Supr., 92 A.2d 295 (1952); *Kaplan v. Goldsamt*, Del. Ch., 380 A.2d 556 (1977). Presumably, although no case has been cited in point, a corporation may purchase its shares from one or more persons without

making a similar offer to all stockholders, if done for a proper corporate purpose.

The question presented here, therefore, is whether a corporation may make an offer to purchase its own shares from a group of its stockholders (former employees) but exclude certain other members of the group from the offer.

[2] Plaintiffs, in effect, urged that it is unfair for a Delaware corporation to make a stock purchase offer to some stockholders and not to others, citing: *Singer v. Magnavox Co.*, Del. Supr., 380 A.2d 969 (1977); *Sterling v. Mayflower Hotel Corp.*, Del. Supr., 93 A.2d 107 (1952); and *Petty v. Penntech Papers, Inc.*, Del. Ch., 347 A.2d 140 (1975). I am aware of no Delaware case holding that there is an absolute prohibition against a Delaware corporation offering to purchase its shares from one or more of its stockholders without making a similar offer to all of its stockholders. The Delaware rule, however, that corporate directors owe a fiduciary duty to the stockholders of a Delaware corporation mandates that when a corporation makes an offer to purchase the corporation's stock from certain stockholders and excludes the other stockholders from participation, a burden is imposed upon the corporation to show that there is a valid corporate purpose for limiting the offer and that in so doing it has not unduly favored one group over another. See HENN, *Law of Corporations* § 241; *Singer v. Magnavox Co., supra; Tanzer v. Int'l. Gen. Ind.*, Del. Supr., 379 A.2d 1121 (1977).

In this case the corporate defendants have not met their burden of showing that there is a valid corporate purpose in the making of a stock purchase offer to certain employees who are no longer employed by Cyrus J. Lawrence Incorporated, and excluding certain others in the same category, i.e. the plaintiffs here.

[3] I am therefore convinced, at least at this preliminary stage, that plaintiffs have shown the reasonable probability of ultimate success upon a final hearing on the merits. *Bayard v. Martin*, Del. Supr., 101 A.2d 329; *Allied Chem. & Dye Corp. v. Steel & Tube Co.*, Del. Ch., 122 A. 142 (1923).

[4] I am also convinced that injuctive relief is reasonably necessary for the preservation of the status quo, the protection of plaintiffs rights or the prevention of irreparable harm. 42 AM. JUR.2d, *Injunctions* § 15; *Danby v. Osteopathic Hospital Ass'n. of Del.*, 101 A.2d 308 (1953); *Bayard v. Martin, supra; Thos. C. Marshall, Inc. v. Holiday Inn, Inc.*, Del. Ch., 174 A.2d 27 (1961).

[5] The granting of interim injunctive relief will not unduly harm anyone since its effect will be merely to postpone the consummation of the offer until a final ruling. *Bayard v. Martin, supra; Thos. C. Marshall, Inc. v. Holiday Inn, Inc., supra; Allied Chem. & Dye Corp. v. Steel & Tube Co., supra.*

The defendants' claim that relief cannot be granted in this case because of the absence of indispensable parties; i.e. the persons to whom an offer to purchase has been made, is without merit. The present case is distinguishable from *Elster v. American Airlines*, Del. Ch., 106 A.2d 202 (1954). The subject of this suit is the offer to purchase made by the defendants. If the offer violates Delaware law its consummation clearly may be stopped by this Court. It is the allegedly improper offer by the corporation to selectively purchase its own shares which is before me—nothing else. See: Chancery Rule 19.

A preliminary injunction will, therefore, be entered against the consummation of the offer to purchase its share made by C. J. Lawrence & Company, Inc. upon plaintiffs posting an appropriate bond in the sum of $10,000.

VALHI, INC. v. PSA, INC.

No. 5730

Court of Chancery of the State of Delaware, New Castle

March 6, 1980

Valhi, Inc. was owner of 700,000 shares in PSA, Inc. Valhi, Inc. filed a class action derivative suit against PSA, Inc., acting as representative plaintiff. Valhi, Inc. entered into agreement of amendment to a call option with PSA, Inc. The agreement purported to end the litigation between the two corporations by providing for the sale of Valhi, Inc.'s shares to PSA, Inc. Intervenor Wied filed an application with the court of chancery pursuant to Rule 23.1 to have notice given to all other stockholders of PSA, Inc., claiming the agreement to be a settlement or compromise of a derivative action. No injunction order issued preventing the sale, so the agreement was consummated. Intervenor Wied now seeks sanctions against Valhi, Inc., for carrying through the sale while it was under attack in the court of chancery. The court of chancery, per Chancellor Marvel held that a basic purpose of Rule 23.1 and its notice requirement is to insure judicial supervision over derivative actions so that another stockholder can object to the compromise or intervene and continue the litigation. However no notice is necessary when there is no showing that compensation passed directly or indirectly between the defendant and the representative plaintiff. Chancellor Marvel ruled that no purpose would be served by giving notice to the other stockholders since no "settlement fund" was received from PSA, Inc. Because no identifiable compensation could be found passing between defendant and

Following Document's

IS

Photo Copy's

Also Best Copy

AVAILABLE

CC-30

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

MAURICE A. HARTNETT, III
LEE CHANCELLOR

COURT HOUSE
DOVER, DELAWARE
GEORGETOWN, DELAWARE
WILMINGTON, DELAWARE

21 February 1980

Charles S. Crompton, Jr., Esquire
POTTER, ANDERSON & CORROON
P. O. Box 951
Wilmington, DE 19899

Edmund N. Carpenter, II, Esquire
RICHARDS, LAYTON & FINGER
P. O. Box [illegible]
Wilmington, DE 19899

RE: Fischer et al v. Moltz et al
Civil Action #6068 (1979) - New Castle County
Date submitted: February 19, 1980
ON DEFENDANTS' MOTION FOR REARGUMENT: DENIED.

Gentlemen:

On December 28, 1979, I granted plaintiffs' motion for a preliminary injunction. Defendants subsequently filed a motion for reargument pursuant to Rule 59(f) which is herein denied. So ordered.

The motion for reargument restates the arguments made by defendants at the hearing on the preliminary injunction. Nothing contained in the motion is sufficiently persuasive to change my ruling——at least at this stage of the proceedings.

If the totality of the circumstances of the challenged tender offer are reviewed, it is clear that the burden is upon the defendants to demonstrate that the tender offer is fair to all the stockholders. This they have not yet done.

Some of these circumstances are: the corporation making the tender offer (C. J. Lawrence & Company, Inc.) is a holding company of Cyrus J. Lawrence Incorporated; the stock of the offeror corporation

is closely held; all the stockholders are employees or former employees of Cyrus J. Lawrence Incorporated; the tender offer was made to all former employees except for the four plaintiffs who had voluntarily left the employment of Cyrus J. Lawrence Incorporated and engaged in lawful competition with it; the excluded former employees had instituted a suit against the defendant corporations in the District Court of New York seeking to obtain a redemption of their stock; the stock being sought in the tender offer was, in part, to be available to grant stock options to employees of Cyrus J. Lawrence Incorporated; the tender offer was authorized by the directors of C. J. Lawrence & Company, Inc.; and all the directors of C. J. Lawrence & Company, Inc. are employees of Cyrus J. Lawrence Incorporated.

The fiduciary duty owed to the stockholders by the directors of C. J. Lawrence & Company, Inc. is not limited to a situation involving the squeeze out of minority stockholders. Roland Intern. Corp. v. Najjar, Del. Supr., 407 A.2d 1032 at 1036 (1979).

The plaintiffs seek to enjoin the consummation of a tender offer. It is the tender offer which is under attack, not any agreement between the corporation and the six former employees who received the tender offer. The indirect impact upon them is not sufficient to hold them to be indispensible parties. A.S.G. Industries, Inc. v. MLZ, Inc., Del. Ch. (C.A. #5573, 6-8-78).

In equity and good conscience this action should proceed among the parties before the Court and not be dismissed because of the

absence of the six former employees of Cyrus J. Lawrence Incorporated who were the recipients of the unconsummated tender offer. WRIGHT & MILLER, Federal Rules of Practice & Procedure, Civil §1611. Chancery Rule 19(b).

Yours truly,

MAR/sdw

cc: Register in Chancery
File

DJ 8:40 AM APR 30 A31

UNOCAL EXTENDS EXCHANGE OFFER

LOS ANG -DJ- UNOCAL CORP. SAID IT HAS EXTENDED THE PRORATION WITHDRAWAL AND EXPIRATION DATES UNDER ITS PENDING EXCHANGE OFFER TO MIDNIGHT EDT ON MAY 17.

THE FEDERAL DISTRICT COURT IN LOS ANGELES YESTERDAY DENIED THE APPLICATION OF MESA PARTNERS II FOR A PRELIMINARY INJUNCTION REQUIRING UNOCAL EITHER TO ADMIT MESA PARTNERS II INTO THE 87.2 MILLION SHARE UNOCAL EXCHANGE OFFER OR DROP THE OFFER. JUDGE A. WALLACE TASHIMA RULED THAT FEDERAL LAW DOES NOT REQUIRE AN ISSUER COMPANY'S TENDER OFFER TO BE MADE TO ALL HOLDERS OF ITS STOCK.

ALSO YESTERDAY THE DELAWARE COURT OF CHANCERY GRANTED A TEMPORARY RESTRAINING ORDER AGAINST UNOCAL IN AN ACTION BROUGHT BY MESA BASED ON DELAWARE STATE LAW. THE TEMPORARY RESTRAINING ORDER PROHIBITS UNOCAL FROM PROCEEDING IN ANY WAY WITH ITS EXCHANGE OFFER UNLESS MESA IS PERMITTED TO PARTICIPATE TO THE SAME EXTENT AS OTHER UNOCAL SHAREHOLDERS.

UNOCAL SAID IT CONTINUES TO BELIEVE THAT IT IS APPROPRIATE TO EXCLUDE MESA FROM PARTICIPATING IN THE EXCHANGE OFFER AND WILL MAKE EVERY EFFORT TO OBTAIN A CHANGE OR REVERSAL OF THE DELAWARE COURT'S RULING.

THE COMPANY SAID THAT IT WILL AWAIT FURTHER DEVELOPMENTS IN THE DELAWARE LITIGATION BEFORE MAKING A FINAL DETERMINATION WHETHER OR NOT IT WILL ACCEPT SHARES TENDERED BY OR ON BEHALF OF MESA OR ITS TRANSFEREES.

8:45

Following Documents

IS

Photo Copy's

Also Best Copy

AVAILABLE

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PLANT INDUSTRIES, INC., a Delaware corporation,

Defendant Below, Appellant,

v.

HYMAN KATZ,

Plaintiff Below, Appellee.

No. 123, 1981

Submitted: April 30, 1981
Decided: May 1, 1981

Before HERRMANN, Chief Justice, and DUFFY and QUILLEN, Justices.

ORDER

This 1st day of May, 1981,

Upon consideration of the contentions of the parties submitted in writing by the defendant's Notice of Appel from Interlocutory Order and plaintiff's Response thereto, it appears to the Court that:

(1) The Chancellor's interlocutory order of April 23, 1981 granting a preliminary injunction determined a substantial issue but did not finally establish a legal right. Supreme Court Rule 42(b)(i).

(2) It is factually not clear that the failure of immediate review will cause irreparable harm to the defendant.

(3) Since the preliminary opinion and order did not address all of the matters raised by the complaint or even by

the application for a preliminary injunction, immediate review would have little effect on "considerations of justice" as between the parties. Supreme Court Rule 42(b)(ii)(D).

(4) The case is presently focused on an overall situation which is largely factual and difficult to compartmentalize into crisp legal issues for interlocutory appeal.

(5) Review of the grant of a preliminary injunction under an abuse of discretion standard would be at best of limited precedential value...Gimbel v. Signal Companies, Inc., Del.Supr., 316 A.2d 619 (1974).

NOW, THEREFORE, IT IS ORDERED that the interlocutory appeal is

REFUSED.

BY THE COURT:

William J. Duffy
Justice

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TRE CORPORATION and
TRELAIN CORPORATION,

Defendants Below,
Appellants,

v.

WYLAIN, INC.,

Plaintiff Below,
Appellee,

v.

STATE OF DELAWARE,

Intervenor Plaintiff
Below, Appellee.

No. 340, 1979

Submitted: December 13, 1979
Decided: December 17, 1979

Before DUFFY, QUILLEN and HORSEY, Justices.

ORDER

This 17th day of December, 1979,

Upon consideration of the contentions of the parties submitted in writing and at oral argument, it appears to the Court that:

(1) The order of the Trial Court determined a substantial issue but did not establish a legal right within the meaning of Rule 42 and Rule 41, which should be immediately determined by this Court in an interlocutory appeal.

(2) The following factors have been considered in determining whether the appeal should be accepted:

(a) the provisional nature of the order of the Court of Chancery; (b) the failure of the defendants, who now seek a final determination by the Delaware Courts on the merits of the issue presented, to agree in the Court of Chancery to a final judgment with its clear

and definite consequences; (c) the failure of the defendants to make any effort to isolate procedurally the claim that the statute is unconstitutional on its face, from related claims which might require a supplemental record and an evidentiary hearing; and (d) the pendency of active litigation between the parties elsewhere and, given the full factual and procedural context, the uncertain standard of review and uncertain effect of this Court's decision on appeal from a provisional remedy.

NOW, THEREFORE, IT IS ORDERED that the interlocutory appeal is refused.

BY THE COURT:

William J. Zilles
Justices

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Roy M. Huffington, et al., Plaintiffs, v. Enstar Corporation, et al., Defendants.	)	Civil Action No. 7643

ORDER DENYING LEAVE TO APPEAL FROM INTERLOCUTORY ORDER

This 27th day of June, 1984, the plaintiffs having made application pursuant to Rule 42 of the Supreme Court for an order certifying an appeal from the interlocutory order of this Court dated June 20, 1984, denying plaintiffs application for a preliminary injunction and the Court having found that such order determines substantial issues but does not establish legal rights and that none of the criteria of the Supreme Court Rule 42(b) apply;

IT IS ORDERED that the Court's order of June 20, 1984, is not certified to the Supreme Court of the State of Delaware for disposition in accordance with Rule 42 of that Court.

Vice Chancellor

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PHILLIPS PETROLEUM COMPANY, a Delaware corporation,	§	
Defendant Below, Appellant,	§	
v.	§	No. 333, 1984
MESA PARTNERS, a Texas partnership,	§	
Plaintiff Below, Appellee.	§	

O R D E R

This 11th day of December, 1984, it appearing that:

1) On December 7, 1984, the Court of Chancery granted the plaintiff a temporary restraining order prohibiting the defendant from commencing any judicial proceeding and from prosecuting any judicial proceeding instituted after 10:30 a.m. on December 5, 1984, in any court of any state other than the Court of Chancery, that would require litigation of the terms or provisions or enforceability of a contract known as the Standstill Agreement. The defendant was further restrained from taking any steps to effectuate a temporary restraining order which it obtained on December 6, 1984 in the District Court of Washington County, State of Oklahoma.

2) The temporary restraining order issued by the Court of Chancery applies to the defendant, its successors and assigns, its directors, officers, agents, servants, subsidiaries, shareholders, employees and attorneys, and all persons in active concert or participation with the defendant or each other.

3) A hearing on plaintiff's motion for a preliminary injunction is scheduled before the Court of Chancery at 3:00 p.m. on Monday, December 17, 1984.

4) The [illegible] issue before the Court of Chancery is the validity and/or enforceability of the Standstill Agreement, which by its terms is governed by Delaware law. Thus, the present temporary restraining order issued by the Court of Chancery maintains only the status quo pending resolution of such legal issues.

5) On December 7, 1984, the trial court certified this matter to us as an interlocutory appeal pursuant to Supreme Court Rule 42. However, by separate order also dated December 7, 1984, the Court of Chancery refused to stay its outstanding temporary restraining order because "the potential harm to plaintiff if a stay were entered outweighs the potential harm to defendant from the continued effectiveness of the outstanding temporary restraining order."

6) On this record it does not appear that the temporary restraining order meets the criteria of Supreme Court Rule 42. Thus, the Court is not presently satisfied that the temporary restraining order decided any substantial issue relating to the actual merits of this litigation -- the validity and/or enforceability of the Standstill Agreement. Moreover, on this record it cannot be said that the grant or denial of injunctive relief established any legal rights. Finally, there is no suggestion in the documents filed by the plaintiff that the Court of Chancery

lacked jurisdiction of either the subject matter or the parties. At most the allegations relate to the doctrine of forum non conveniens. Thus, it cannot be said that at this time there exist important or urgent reasons for an immediate determination of the Court of Chancery's action.

7) In view of the hearing scheduled on Monday, December 17, 1984, on the plaintiff's application for a preliminary injunction, the parties will have a more adequate opportunity to develop a record upon which this Court may consider the exercise of its jurisdiction over this interlocutory appeal.

8) Following the December 17, 1984, hearing in the Court of Chancery and any action that court may take as a result thereof, the parties will be permitted to supplement the record relating to the criteria for the acceptance of an interlocutory appeal under Supreme Court Rule 42, and for any other relief they deem appropriate. Until such time, action on the certification of this interlocutory appeal will be deferred.

NOW, THEREFORE, IT IS ORDERED that the hearing on a preliminary injunction scheduled before the Court of Chancery on Monday, December 17, 1984, shall proceed, and until the issues pending before the Court of Chancery at the December 17, 1984, hearing are decided by that court, action by this Court on the application for the certification of an interlocutory appeal, pursuant to Supreme Court Rule 42, is DEFERRED.

BY THE COURT:

Justice