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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MESA PETROLEUM CO., a Delaware corporation, MESA ASSET CO., a Delaware corporation, MESA EASTERN, INC., a Delaware corporation, and MESA PARTNERS II, a Texas partnership,	§	
Plaintiffs,	§	
v.	§	Civil Action No. 7997
UNOCAL CORPORATION, a Delaware corporation, WILLIAM F. BALLHAUS, CLAUDE S. BRINEGAR, RAY A. BURKE, ROBERT D. CAMPBELL, WILLIAM H. DOHENY, RICHARD K. EAMER, FRED L. HARTLEY, T. C. HENDERSON, DONALD P. JACOBS, WILLIAM S. McCONNOR, PETER O'MALLEY, RICHARD J. STEGMEIER and DONN B. TATUM,	§	
Defendants.	§	

UNOCAL CORPORATION'S APPLICATION FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL

Defendant Unocal Corporation ("Unocal") hereby applies for certification of an interlocutory appeal from this Court's Opinion and Order of April 29, 1985 (the "Opinion") (Ex. A hereto) granting the motion of plaintiffs (collectively referred to as "Mesa") for a temporary restraining order.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This action involves an Exchange Offer by Unocal for shares of its own stock undertaken in response to a hostile tender offer by Mesa for control of Unocal.

Mesa secretly began accumulating Unocal stock in October of 1984. In February, 1985, Mesa disclosed that it owned over 5% of Unocal's shares, which it claimed were held for "investment" purposes.* On March 27, 1985, Mesa disclosed for the first time that it might seek to obtain control of Unocal. On April 8, 1985, Mesa commenced a hostile two-tier tender offer for Unocal, offering $54 per share in cash for approximately 37% of Unocal's stock and unspecified securities, purportedly worth $54 per share, for the remaining 50% in a subsequent "back-end" merger.

On April 13, 1985, Unocal's Board of Directors met for nine and a half hours and, after considering the advice of two independent investment banks and its lawyers, determined that Mesa's $54 two-tier tender offer was grossly inadequate. Mesa has since produced its own valuations of Unocal ranging from $64 to $86 per share, including an appraisal of Unocal at $74 per share. (Second Affidavit of William S. Coats, III, Ex. A). The Board considered various responses to protect its shareholders.

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* Judge Tashima of the Central District of California has subsequently found preliminarily that this statement by Mesa was false and misleading and has delayed Mesa's tender offer. Unocal Corporation v. T. Boone Pickens, Jr., et al., No. CV 85-2179 AWT (C.D. Cal. Apr. 26, 1985) (Ex. B hereto).

On April 15, 1985, Unocal's Board again met and deliberated extensively with its investment bankers and lawyers and unanimously determined to authorize an Exchange Offer whereby Unocal would offer to purchase approximately 49% of its outstanding shares for a package of $72 in principal amount of senior securities. The purpose of the Exchange Offer was (i) to partly mitigate the effects on Mesa's inadequate offer by providing Unocal's stockholders with a better price for a portion of their shares, and (ii) to deter Mesa's hostile tender offer. The Exchange Offer was conditioned on Mesa purchasing 64,000,000 shares in its tender offer (the "Mesa purchase condition"), but Unocal expressly reserved the right to waive this condition. The Exchange Offer was not extended to Mesa, and to do so would frustrate the purpose of the Exchange Offer. (Opinion p. 7).

On April 22, 1985, Mesa amended its complaint in a pending action against defendants in the Court of Chancery to challenge the Exchange Offer and Mesa's exclusion therefrom. At Mesa's request, a preliminary injunction hearing was scheduled for May 8, 1985, and expedited discovery was ordered. Extensive discovery by Mesa in contemplation of the May 8 hearing, including the production of documents and the depositions of at least eight of Unocal's directors and both of its investment bankers, is presently being conducted.

On April 23, 1985, Unocal announced that it was waiving the Mesa purchase condition with respect to 50,000,000 shares, and that it would be free to purchase such shares on April 30. The same day, Mesa filed a motion for a temporary restraining order. After expedited briefing, the Court of Chancery heard Mesa's motion on April 26. At the hearing, plaintiffs did not contest that the Exchange Offer would be a proper defensive response, so long as it did not exclude Mesa from participation in it. On April 29, 1985, Vice Chancellor Berger issued the Opinion enjoining Unocal from proceeding with the Exchange Offer unless Mesa is allowed to participate.

Also on April 29, the Central District of California ruled preliminarily that the Exchange Offer in excluding Mesa does not violate the Williams Act. Unocal Corporation v. T. Boone Pickens, Jr., et al., No. CV-85-2179 AWT (C.D. Cal. Apr. 29, 1985) (Oral Ruling at 24-29) (Ex. C hereto).

STANDARDS GOVERNING CERTIFICATION OF AN INTERLOCUTORY APPEAL

Supreme Court Rule 42(b) sets forth the criteria to be applied in determining certification of interlocutory appeals. Under that Rule, interlocutory appeals will be certified if the order sought to be appealed (1) determines a substantial issue; (2) establishes a legal right; and (3) meets one or more of the criteria set forth in Supreme Court

Rule 42(b)(i)-(v). The Rule is designed to permit interlocutory appeals which will advance the litigation below "if a threshold question can be resolved." (Committee Commentary to Rule 42). Thus, interlocutory appeals are to be permitted where "resolution of the questions of law on which the order is based will materially advance the litigation, protect a party from irreparable injury, or clarify an issue of general importance of the administration of justice." (Id.). Rule 42 is designed to embrace this standard. (Id.). Under the foregoing criteria, an interlocutory appeal is clearly appropriate.

THE OPINION DETERMINES SUBSTANTIAL ISSUES IN THIS LAWSUIT

The issue raised on appeal is whether Unocal in the exercise of its business judgment for the admittedly proper corporate purpose of opposing a financially inadequate hostile tender offer, may make an offer to purchase shares which excludes Mesa, the maker of the competing offer. The Opinion determines that Unocal may not make such an offer because as a matter of law it must show that the offer is "fair" to Mesa, and that Unocal could not make such a showing because the offer provided no "benefit" to Mesa. (Opinion p. 6).

Neither this Court nor any other court has ever before so held. To the contrary, the decision of this Court in Martin v. American Potash & Chemical Corp., Del. Supr.,

92 A.2d 295, 301 (1952) holds that a corporation may purchase its shares "without a pro rata offering to all holders of the class affected." The Opinion is also contrary to Fischer v. Moltz, Del. Ch., C.A. No. 6068, Hartnett, V.C. (Dec. 28, 1978) (Exhibit D hereto), which holds that selective issuer tender offers are permitted so long as they serve a valid corporate purpose and do not "unduly" favor one group of stockholders. (Slip op. at 3). Under Fischer, buying shares of some shareholders at fair value would surely not "unduly" favor those shareholders, and would thus be permissible. Yet such a purchase might well not "benefit" other shareholders, and would thus be precluded by the Opinion.

The Opinion also determines that Mesa will be irreparably harmed if it is improperly excluded from the Exchange Offer. This ruling is in direct conflict with the holding in Unocal Corporation v. T. Boone Pickens, et al., supra, that Mesa will not be irreparably harmed if it is wrongfully excluded from the Exchange Offer (Oral Ruling at 27-28).

THE OPINION ESTABLISHES THAT MESA HAS A LEGAL RIGHT TO PARTICIPATE IN ANY EXCHANGE OFFER BY UNOCAL

By determining that Unocal cannot make a selective tender offer unless it can show a fair "benefit" to the persons excluded, the Opinion establishes the legal right of

Mesa to participate in any defensive offer made by Unocal, and thus satisfies this prong of Supreme Court Rule 42.

UNOCAL'S APPLICATION FOR CERTIFICATION MEETS THE REQUIREMENTS OF RULE 41 AND INTERLOCUTORY REVIEW OF THE OPINION WILL SERVE THE INTERESTS OF JUSTICE

Under Supreme Court Rule 42(b)(i), an interlocutory appeal may be heard if it meets any of the criterion applicable to proceedings for certification of questions of law set forth in Rule 41. Rule 41, in turn, states that certification may be accepted where there are important and urgent reasons for an immediate determination by the Court of the question to be certified.

If the Opinion is accepted as correct, Unocal cannot proceed with the Exchange Offer without extending it to Mesa. Thus, that Offer's purpose, which the Opinion recognizes is to deter Mesa's inadequate offer, will be frustrated, and Unocal's shareholders will lose in whole or in part the benefits of Unocal's $3.6 billion offer.

The Opinion expressly recognizes that under well-established law, it would be perfectly permissible to pay Mesa a "greenmail" premium to prevent its obtaining control of Unocal. No authority requires, and no reason commends itself as to why Delaware law should require (as the Opinion does), that a raider who holds stock can be paid off but not excluded from a competing tender offer.

If as the Opinion has held, threatened frustration of Mesa's tender offer for control of Unocal is irreparable harm requiring extraordinary temporary relief, Unocal and its stockholders are also irreparably harmed by the wrongful issuance of that relief. It is in the interests of all parties concerned that this Court resolve this issue as expeditiously as possible.

This Court has traditionally accepted interlocutory appeals from orders granting or denying injunctions, particularly where decisions address important issues of law which are central to the merits of the case. In the past several months this Court has heard expedited appeals from such orders in, for example, Pfizer v. ICI Americas, Inc., Del. Supr., No. 328, 1984, Moore, J. (Nov. 29, 1984) (Order) (Ex. E hereto) (interlocutory appeal from the denial of a preliminary injunction) and Plaza Securities Co. v. Datapoint Co., Del. Supr., No. 79, 1985, Moore, J. (Mar. 6, 1985) (Ex. F hereto) (interlocutory appeal from the denial of a preliminary injunction).

The Opinion establishes a threshold question of law which is of critical importance both to the public at large and to the further prosecution of this case in the trial court. Accordingly, the interests of justice will be

served by the Supreme Court promptly hearing an appeal of the Opinion.

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April 30, 1985

COURT OF CHANCERY
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April 29, 1985

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

Dear Gentlemen:

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

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

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

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

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

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

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

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

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

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

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

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

V. C. (April 24, 1980); Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); Treadway Cos. v. Care Corp., 638 F.2d 357 (2d Cir. 1980); Johnson v. Trueblood, 629 F.2d 287 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981). More specifically, our courts have recognized that it is a proper exercise of business judgment for the directors to use corporate funds to purchase the stock of a dissident shareholder in order to eliminate a threat to the company's successful business policies. Cheff v. Mathes, Del. Supr., 199 A.2d 548 (1954); 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

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNOCAL CORPORATION,

Plaintiff,

v.

T. BOONE PICKENS, JR., JACK E. BROWN, CYRIL WAGNER, JR., WAGNER & BROWN, MESA PETROLEUM CO., MESA SOUTHERN CO., MESA ASSET CO., CY-41, INC., JACK-41, INC., MESA PARTNERS II,

Defendants.

NO. CV 85-2179 AWT

MEMORANDUM DECISION

MESA PARTNERS II,

Counterclaimant,

v.

UNOCAL CORPORATION,

Counterdefendant.

FACTUAL BACKGROUND

On February 14, 1985, defendant and counterclaimant, Mesa Partners II ("Mesa II"), a Texas partnership,[1] filed a

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Schedule 13D with the Securities and Exchange Commission ("SEC") reporting that it had acquired 12.6 million shares (approximately 7.3 percent) of the common stock of plaintiff Unocal Corporation ("Unocal"). Mesa II stated that it had acquired the shares solely for the purpose of investment and had no present intention of seeking control or attempting to direct the basic policy decisions of Unocal. However, Mesa II expresely reserved the right to reevaluate its purpose with regard to its investment and to take more aggressive measures including an attempt to obtain control of the corporation. On February 15 and February 21, 1985, Mesa II amended its 13D to reflect further purchases of Unocal common but did not amend its statement of purpose.

On March 27, 1985, Mesa II filed a third amendment to its 13D indicating that the partnership owned 23.7 million shares (13.6 percent) of Unocal. This amendment also stated that Mesa II had reconsidered its original purpose with regard to its investment in light of changing market conditions and certain actions taken by Unocal that demonstrated the corporation's reluctance to engage in a "restructuring process" and that it now was considering attempting to obtain control of Unocal or to participate in the formulation of basic corporate policy. Unocal commenced this action on April 1, 1985, alleging that Mesa II's initial 13D and the February 15 and 21 amendments violated §13(d) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §78m, in falsely stating that Mesa II's purpose in acquiring Unocal shares was solely for investment and for failing to disclose that Mesa II's true purpose in acquiring the shares was either to seek control of Unocal or to "put into play" Unocal

common stock.

The Unocal annual meeting, including the election of three directors, is now scheduled for April 29, 1985. On February 25, 1985, the Unocal Board of Directors adopted a by-law amendment which requires 30 days' notice for shareholder nominations of directors and for submission of proposals for consideration at an annual shareholders' meeting. Unocal shareholders were informed of this amendment and of the annual meeting date in a proxy solicitation mailed by Unocal on March 18, 1985. One week later, Unocal's President and Chairman, Fred L. Hartley, mailed an open letter to Unocal shareholders in which he set forth his opposition to forced restructuring of oil companies and appended a copy of a letter which he had sent to the Chairman of the Federal Reserve and certain members of the Administration decrying the takeover movement in the oil industry.

On March 28, 1985, Mesa II informed Unocal of its proposal to postpone the April 29 meeting and election of directors until June 28, 1985 and to change the record date for determining which shareholders would be entitled to notice and voting rights at the adjourned meeting. On April 7, Unocal, in a proxy solicitation letter, urged its shareholders to reject the adjournment proposal, stating that Mesa II's proposals were not in the best interests of Unocal shareholders. The letter further noted that Mesa II had not submitted any proposals for shareholder consideration nor, in management's opinion, could it because it had failed to submit any such proposal at least 30 days prior to the scheduled April 29 meeting as required by the

by-laws. It was Unocal's position that even if the annual meeting were to be adjourned, notice of any matters to be brought before the adjourned meeting would have to be given 30 days before the date of the original meeting, i.e., 30 days before April 29. These proxy materials are alleged to have violated §14(a) of the Exchange Act in that: (1) Unocal failed to disclose that the 30-day notice requirement was a hasty and recent response to Mesa II's stock acquisitions; (2) Unocal's construction of the 30-day requirement conveyed the false impression to shareholders that Mesa II would be precluded from presenting any proposals at an adjourned shareholders meeting; and (3) Unocal failed to disclose that the by-law amendment was of questionable legality under Delaware law.[2]

On April 8, 1985, Mesa II in concert with its wholly owned subsidiary, Mesa Eastern, Inc., made a tender offer for 64 million shares of Unocal common at $54 cash per share. The offer was to remain open until May 3, and tendered shares could be withdrawn until April 26. The offer was conditional on, among other things, a minimum of 64 million shares being validly tendered and not withdrawn; shares would be subject to purchase on a pro rata basis if the shares tendered exceeded 64 million. Mesa II further stated its intention, if the tender offer were to be successful, of acquiring the remaining shares of Unocal in a subsequent transaction in exchange "for securities having an aggregate market value, in the opinion of an independent investment banker selected by the Purchasers . . . of approximately $54 per share."

On April 12, Mesa II mailed proxy materials to Unocal

shareholders soliciting their support for Mesa II's proposals to adjourn the shareholders meeting and defer the election of directors or, in the alternative, requesting shareholders to abstain in the voting for directors. The solicitation letter included the statement "We believe that you have nothing to lose, and a considerable amount to gain, from this brief adjournment." The letter also stated that the purpose for the adjournment was to permit Unocal shareholders to evaluate Mesa II's tender offer and the response of the Unocal Board of Directors to that tender offer.

On April 16, 1985, Unocal filed a first amended complaint in this action. In addition to the allegations regarding §13(d), Unocal alleged that Mesa II's offer to purchase disseminated in connection with its tender offer violated §14(d) and (e) of the Exchange Act in failing fully to disclose the details of the financing the offerors had obtained and of the "second-step" of the transaction. The first amended complaint also alleges that the proxy materials disseminated by Mesa II are false and misleading in violation of §14(a) of the Exchange Act.

In its motion for preliminary injunction now before the Court, Unocal claims that it will be irreparably injured unless the Court issues an injunction (1) requiring Mesa II to rescind all purchases of Unocal common made after February 14; (2) forbidding Mesa II from voting the above described shares while its rescission offer remains open; (3) preventing Mesa II from voting any proxies received in response to its April 12 solicitation; and (4) prohibiting Mesa II from accepting any shares tendered in response to its April 8 "Offer to Purchase".

Based on its counterclaim (which has since been amended to allege further claims), Mesa II has also moved for a preliminary injunction. It seeks an Order (1) voiding all proxies received by Unocal with respect to the upcoming annual meeting; (2) requiring Unocal to disseminate revised proxy materials correcting the false and misleading statements previously disseminated by the corporation and prohibiting it from issuing any other proxy materials until the above described corrective measures are completed; and (3) setting a new Record Date for determining voting rights with respect to a postponed Annual Meeting.

DISCUSSION

The Preliminary Injunction Standard

In this Circuit, a party seeking preliminary injunctive relief must demonstrate a combination of either: (1) probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1201 (9th Cir. 1980); Benda v. Grand Lodge, IAM, 584 F.2d 308, 314-315 (9th Cir. 1978), cert. dismissed, 441 U.S. 937 (1979); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86, 88 (9th Cir. 1975). Under either test, plaintiff must make some showing of possible success on the merits, i.e., he must show at least "a fair chance of success on the merits". Benda, supra, 584 F.2d at 315. Moreover, in the context of actions brought under the Williams Act, a showing of irreparable harm is required before a party can obtain injunctive relief. Rondeau v.

Mosinee Paper Corp., 422 U.S. 49, 61 (1975); Pacific Realty Trust v. APC Inv., Inc., 685 F.2d 1083, 1086 n.5 (9th Cir. 1982).[3]

Section 13(d)

1. The Statutory Obligation. Section 13(d) of the Exchange Act requires anyone who becomes the beneficial owner of more than five percent of any registered equity security, within 10 days of exceeding the five percent threshhold, to file a Schedule 13D containing all of the required information. The 13D information relevant to Unocal's motion is the following:

> Item 4. Purpose of Transaction.
>
> State the purpose or purposes of the acquisition of securities of the issuer. Describe any plans or proposals which the reporting persons may have which relate to or would result in:
>
> (a) The acquisition by any person of additional securities of the issuer, or the disposition of securities of the issuer;
>
> (b) An extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the issuer or any of its subsidiaries;
>
> (c) A sale or transfer of a material amount of assets of the issuer or any of its subsidiaries;
>
> (d) Any change in the present board of directors or management of the issuer, including any plans or proposals to change the number or term of directors or to fill any existing vacancies on the board;
>
> (e) Any material change in the present capitalization or dividend policy of the issuer;
>
> (f) Any other material change in the issuer's business or corporate structure . . . .;
>
> . . .
>
> (j) Any action similar to any of those enumerated above.

17 C.F.R. §240.13d-101.

Unocal has alleged that Mesa II's original Schedule 13D was deficient in failing to disclose that its true intent in acquiring Unocal stock was to put Unocal "in play" and thereby either obtain control at an unfair price or otherwise profit from the destabilization its tactics would create. The starting point in assessing a purchaser's obligation to disclose a control purpose[3] is the definition of "control" in Rule 12b-2, made applicable to Schedule 13D filings by 17 C.F.R. §240.12b-1. This rule provides:

> The term "control" (including the terms "controlling," "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

17 C.F.R. §240.12b-2.

Consistent with the provision's purpose of protecting the investing public through full and fair disclosure of a purchaser's intentions, courts have construed the term broadly and found that substantial influence or working control is sufficient. Chromalloy Am. Corp. v. Sun Chemical Corp., 611 F.2d 240, 247 (8th Cir. 1979). "[T]he notion of control is not limited to cases in which a person has or seeks ownership of a majority interest in an issuer's securities or majority representation on a board of directors." Graphic Sciences, Inc. v. International Mogul Mines, Ltd., 397 F. Supp. 112, 125 (D.D.C. 1974).

Another issue the courts have wrestled with is to what extent a purchaser is obligated to disclose tentative plans. In Chromalloy, the court held that "Item 4 specifically requires

disclosure of a purpose to acquire control, regardless of the definiteness or even the existence of any plans to implement this purpose." 611 F.2d at 247. See also Marshall Field & Co. v. Icahn, 537 F. Supp. 413, 416 (S.D.N.Y. 1982) (where a purchaser "is motivated primarily by plans, however tentative, which would seriously alter" the business of the target, the court questions whether the purchaser "is not obligated . . . to inform the marketplace of the kind of plans being considered"); Riggs National Bank v. Allbritton, 516 F. Supp. 164 (D.D.C. 1981) (where no final decision has been made, purchaser obligated to disclose intent). Thus the prevailing view is that although a purchaser is not obligated to disclose tentative or inchoate plans or proposals in a 13D, it is obligated to disclose a purpose to control or influence a corporation even if it has not settled on the means to achieve that purpose.

2. Analysis. In its initial Schedule 13D filed February 14, Mesa II stated that "the Partnership has acquired the Shares held by it solely for the purpose of investment and has no present intention of seeking to obtain control of the Company or to participate in the formulation, determination or direction of the basic business decisions of the Company." It also stated that it believed that there was a potential for substantial appreciation in the market value of Unocal shares based on the fact that other oil companies had enhanced share values by participating in a "restructuring" process that Unocal had yet to commence. Mesa II revealed an intent to continue to purchase Unocal stock and to review its investment. It also reserved "its right to and may in the future change its purpose

in respect of its investment . . . and take such actions . . . (including, without limitation, acquiring additional Shares other than as set forth above, seeking to obtain control of the Company or to participate in the formulation . . . of the basic business decisions of the Company or disposing of the Shares now held by the Partnership)."

Unocal contends that Mesa II's initial 13D was false and misleading in stating that the stock purchases were solely for investment purposes and that Mesa II had no intention of seeking control of Unocal or attempting to influence its basic corporate policies. On the contrary, Unocal asserts, Mesa II's true purpose was "to extort economic benefit by means of public declarations of an intent to obtain control of Unocal, or to initiate a tender offer or to seek to participate in the basic business decisions of Unocal, and then to dispose of their stock in a market inflated by their destabilizing activities." 1st Amend. Comp. at ¶40(a).

Proving the intent behind the acquisition of stock "obviously is difficult, particularly where only limited discovery is possible." Gulf & Western Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687, 696 (2d Cir. 1973). It is, thus, not surprising that there is not any direct evidence that Mesa II's intent was anything other than that described in the initial 13D. Unocal's case is a circumstantial one, based on defendants' past and present conduct.

First, as is well known, the Mesa entities are dealmakers which have targeted six oil companies for acquisition in the past three years and in none of these cases has Mesa

remained a passive investor.[4] Courts have held that the prior practices of parties may be a relevant factor in determining intent under these circumstances. Gulf & Western, 476 F.2d at 696; Kirsch Co. v. Bliss & Laughlin Ind., Inc., 495 F. Supp. 488, 501 (W.D. Mi. 1980). See also F. R. Evid. 404(b). While this factor alone is not determinative of the intent issue, it is highly probative under the circumstances of the present case and the unique reputation of Mesa II and its principals and their past conduct cannot be disregarded.

Second, the fact that Mesa executives systematically destroyed notes and other documents, together with the habitual inability of Mesa executives to recall discussions concerning the subject of intent, strongly suggests a studied effort by Mesa to conceal its true intent. At a talk earlier this month on "Takeovers" to a group of lawyers in Galveston, Texas, defendant Pickens' statements included the following:

> * And so I caught onto that pretty quick. I don't have any files.
>
> * What I'll do on anything that is that I feel should not - we, we, we have a shredder in my secretary's office, and I shred anything that is not going to be of any use.
>
> * But anyway, the what we - what we do is try to keep those files clean and not have something stupid come out of these.

In the context of this case, I infer adversely to defendants that destroyed documents and unrecalled testimony would have been favorable to plaintiff. See Devitt & Blackmar, Federal Jury Practice and Instructions, §§ 15.09 (suppression of evidence) & 72.17 (failure to produce available evidence).

Third, the high cost of the financing which Mesa II

obtained to finance the acquisition of Unocal stock shows that Mesa II's true purpose could not have been that of passive investment. Indeed, defendants have stated that unless the price of Unocal stock were to increase, their investment was a losing proposition due to the interest costs. It is reasonable to draw the inference from the fact that Mesa II was paying substantially higher interest costs than the return (dividends) it received on Unocal stock that Mesa II did not intend to be a passive investor. See Dan River v. Unitex Ltd., 624 F.2d 1216 (4th Cir. 1980).

The initial 13D intimated that potential appreciation in the value of Unocal common could be realized only if Unocal participated in a "restructuring process." Given the widely known views of Unocal management on "restructuring" a rational investor in the position of Mesa II at least had to have had the intent actively to seek Unocal's restructuring at the time the initial 13D was filed. It had to have been within Mesa II's contemplation from the beginning that passivity would not convert Unocal's management to restructuring. In the circumstances of this case, it defies common sense to believe that Mesa II's state of mind was "solely for investment." Finally, Mesa II's explanation for changing its purpose is not credible. In its third amendment to the 13D, Mesa II stated that it had reevaluated the original purpose for the acquisition of Unocal stock because (1) Unocal's Chairman had publicly announced his opposition to Unocal's participation in a restructuring process; (2) Unocal had amended its by-laws to make it more difficult for shareholders to present proposals at a shareholder meeting; and

(3) Unocal had attacked Mesa II by filing a lawsuit against one of its lenders. As Unocal argues, and as set forth above, Mesa II was well aware of the opposition of Unocal's chairman to the restructuring of the corporation prior to commencing its investment in the company. The by-law amendment would be significant only to a shareholder interested in influencing the basic policy decisions of management, i.e., not of interest to a passive investor, and Mesa II had specifically desclaimed any such intent. Finally, Unocal's suit against one of Mesa II's lenders could not have been decisive because that lender had previously announced its intention to withdraw from its lending relationship with Mesa II. Thus, none of the purported justifications explains the sudden change in purpose. These rather weak change-of-mind explanations further support the inference that Mesa II's purpose from the beginning was to attempt to obtain control of Unocal. Mesa II is, of course, attempting just that by its tender offer, less than two months after the filing of its initial 13D.

In summary, the Court finds with respect to Mesa II's intent that Mesa II from the outset intended to put Unocal "in play" and thereby either obtain control or "greenmail" the corporation in exchange for dropping its bid. Given this intent, it is clear that the initial Schedule 13D and the first two amendments violated the statute. The Court finds and concludes that Unocal has demonstrated probable success on the merits of its §13(d) claim.

Section 14(d)

The purpose of the Williams Act is to provide the

investor with the relevant facts in deciding whether to accept a tender offer. Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 27 (1977). Consistent with this purpose §14(d) of the Act requires that upon the commencement of a tender offer, the bidder disclose detailed information about the offer. 15 U.S.C. §78n(d)(1); 17 C.F.R. §240.14d-6 (1984). The required information includes a statement of the sources of the funds to be used to purchase the tendered shares and any plans or arrangements to finance or repay such borrowings. Item 4(b) of Schedule 14D, 17 C.F.R. §240.14d-100. Second, the bidder is required to disclose its plans or proposals for the target company including plans relating to extraordinary corporate transactions such as a merger, material changes in the capitalization of the company and any material change in the corporate structure or business of the company. Item 5(a), (d) & (e) of Schedule 14D, 17 C.F.R. §240.14d-100.

Section 14(e) of the Exchange Act makes it unlawful:

> to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, . . . in connection with any tender offer. . . .

15 U.S.C. §78n(e). The Supreme Court in the context of proxies has defined a "materially omitted fact" as follows: "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). This definition has since been applied in the tender offer context. Pacific Realty Trust, 585 F.2d at 1088.

I find that Unocal has demonstrated probable success on

the merits of its Williams Act claims. In its April 8 offer, Mesa II indicates that Mesa Asset will contribute $800 million to the partnership to finance the purchase of shares under the offer. The offer states that Mesa Asset will receive these funds from Mesa who will in turn obtain such funds from a variety of sources, principally from borrowings. With respect to repaying these borrowings, the offer states:

> It is anticipated that the borrowings . . . will be refinanced or will be repaid from funds generated internally by Mesa or other sources, which may include proceeds of the sale of debt or equity securities of Mesa or the sale of assets of Mesa. No decision has been made concerning this matter and decisions will be based on Mesa's review from time to time of the advisability of selling particular securities or assets of Mesa, as well as on interest rates and other economic conditions.

However, a contemporaneous document prepared by Mesa II's investment banker, Drexel Burham Lambert, Inc., with respect to the offer -- on April 8, 1985, the same date of Mesa II's offer -- recites a materially different scenario. The document, entitled "Confidential Memorandum Regarding Proposed Financing of a Tender Offer," was prepared to describe the proposed acquisition of Unocal to prospective investors to finance the tender offer.[5]

The Drexel Burham Confidential Memo reveals that after a second-step transaction in which Mesa Eastern (whose only asset is Unocal stock) and Unocal are merged, the surviving corporation will take out an $889 million bank loan and distribute the proceeds to Mesa II to retire its margin debt in exchange for Mesa II's Unocal shares. The Confidential Memo further indicates that the $889 million bank loan is assumed to be repaid out of

the cash flow of Unocal. Defendants have made no attempt to reconcile these two statements. Given the nature of the contemporaneous plan described in the confidential memo, the statements made in the offer concerning the method of repaying the bank loan are untrue and, therefore, misleading.

Unocal has also demonstrated probable success on the merits on its claim that the offer omitted material facts. As noted above, a bidder is required to disclose its plans or proposals with respect to the target company. In this regard, Mesa II's offer states that if the tender offer is successful:

> the Purchasers currently intend to propose a transaction or series of transactions in which the Shares not owned by the Purchasers would be acquired in exchange for securities having an aggregate market value, in the opinion of an independent investment banker selected by the Purchasers and on a fully distributed basis as of the time the terms of such securities were determined, of approximatly $54 per Share.

The offer further states that funds generated from Unocal's operations would be sufficient to finance the transaction described above.

While not contending that these statements are untrue, Unocal contends that they are misleading because of the omission of material facts concerning Mesa II's plans for the second-step transaction. The Confidential Memo indicates that the securities Unocal shareholders would receive in the second-step transaction would be subordinated to the Mesa Eastern debt of $2.4 billion, the aforementioned bank loan of $889 million and Unocal's long-term debt. Moreover, the capitalization of the merged entity will differ significantly from that of Unocal at present. The Confidential Memo indicates that at present Unocal's

long-term debt amounts to approximately 16 percent of total capitalization; after completion of the second-step transaction, the merged entity's long-term debt would amount to 83 percent of total capitalization. Finally, the Confidential Memo indicates that as one means of paying off this debt, the merged entity's capital expenditures would be significantly reduced. This information demonstrates that Mesa II possessed certain plans concerning changes in the capitalization and business of the target that were not disclosed to investors.

Mesa II argues that its disclosures in the offer are sufficient to apprise any reasonable shareholder that the surviving corporation after the second-step transaction would be highly leveraged and that funds derived from Unocal operations would be used to pay off the debt defendants would incur in financing its purchases of Unocal stock. However, to perform such an analysis, the shareholder would have to refer to three distinct parts of a 31-page single spaced document. Under these circumstances, I cannot agree with defendants that it is obvious from the offer that a massive change in the capitalization of the corporation would occur as a result of the contemplated transactions.

I find also that Unocal has demonstrated probable success in establishing that the untrue statement and omissions are material. As an initial matter, the type of information at issue here has been deemed sufficiently material by the SEC to require it to be set forth in Schedule 14D. Second, I reject Mesa II's argument that the only concerns of the reasonable shareholder are that the securities to be exchanged in the second

step are intended to be independently valued at $54 and that Mesa II expects to have sufficient funds to pay for them. Individuals will have different preferences in choosing between securities exhibiting varying rates of risk and return. The information concerning the company's capital structure and the extent of the security's subordination set forth in the Confidential Memo, but not disclosed to Unocal shareholders in the offer, is of critical importance in evaluating the riskiness of the securities to be offered in the second-step. The offer simply does not disclose the degree to which the securities are to be subordinated to other debt.

Finally, the Confidential Memo indicates that Mesa II apparently has developed a plan to restructure Unocal. If the tender offer were to succeed, after the second-step, the surviving entity would be far more highly leveraged with much less of a commitment to foreign and domestic exploration than Unocal at present. In view of the characteristics of the battle for control now occurring, the nature of any "restructuring" that would occur as a result of Mesa II's succeeding would, apart from its effect on value, be substantially likely to be considered by a reasonable shareholder in deciding whether to tender.

Clearly, if corrective disclosures are not required, shareholders will be forced to make the decision regarding the Mesa II offer without material information required under the securities laws. See Pacific Realty Trust, 685 F.2d at 1086. As numerous courts have noted, once the tender offer is consummated, it will be virtually impossible for this Court to undo the transaction which would leave Unocal and its shareholders without

an adequate remedy at law. See, e.g., Pabst Brewing Co. v. Kalmanovitz, 551 F. Supp. 682, 695 (D. Del.), aff'd, 707 F.2d 1394 (3d Cir. 1982). Any harm to defendants will be minimized since the injunction will extend only until Mesa II corrects the deficiencies and a reasonable period is allowed to elapse after these corrections are disseminated for withdrawl of stock already tendered.

Section 14(a)

Both sides have alleged that the other has solicited proxies in violation of Section 14(a) of the Exchange Act. This provision makes it unlawful for "any person" to solicit "any proxy or consent or authorization," except in accordance with the rules and regulations promulgated by the SEC. Rule 14a-9(a) requires that proxy statements not be false or misleading:

> No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

17 C.F.R. §240.14a-9(a) (1984). The purpose of this provision is to "prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitations." J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964). In TSC Indus., Inc., 426 U.S. at 449, the Supreme Court set forth the standard for determining materiality pursuant to §14(a): "An omitted fact is material if there is a substantial

likelihood that a reasonable shareholder would consider it important in deciding how to vote."

1. The Sufficiency of Mesa II's Proxy Materials

On April 12, 1985, Mesa II issued proxy materials to Unocal shareholders requesting their support for its proposal to postpone Unocal's Annual Meeting and the election of directors for two months. Mesa II also submitted a proposal to rescind any action taken at an April 29 meeting other than the adjournment described above. Alternatively, Mesa II recommended that shareholders vote to "abstain" with regard to the election of directors.

Unocal argues that Mesa II's proxy materials are misleading in four respects. As discussed below, I find that Unocal has failed to demonstrate even a fair chance of success on the merits with respect to these claims.

First, Unocal objects to the bold-type statement appearing in the first paragraph of a solicitation letter written on behalf of Mesa II by defendant T. Boone Pickens, stating: "We believe you have nothing to lose, and a considerable amount to gain, from the brief adjournment." Unocal also argues that this statement is misleading because an adjournment poses significant risks to Unocal shareholders and that a delay in the election of directors will prevent the board from reacting to Mesa II's offer from a position of strength. However, as Mesa II notes, the independence of the Board is not at issue since only three of thirteen directors are up for election. Moreover, if the election was postponed, under Delaware law, the current directors would remain in office until reelected or until a successor is

elected. Finally, Unocal contends that the adjournment proposal, if successful, could be perceived as a vote of no-confidence in management and thereby chill its ability to respond to the Mesa II proposals.

As an initial matter, it is not for the Court to conclude that the consequence suggested by Unocal -- a weakening in the ability of the Unocal Board to resist Mesa II's proposals -- is or is not in the best interests of the shareholders. Indeed, this is implicitly one of the primary issues that each shareholder must decide for himself or herself. I must agree with Mesa II that the statement Unocal objects to is unlikely to be perceived by shareholders as anything other than a statement of opinion. I find that Mesa II's stated belief that shareholders would benefit from an adjournment, would not "divert a reasonable shareholder from the task of coolly determining how best to vote his shares in light of the opposing platforms." See Kennecott Copper Corp. v. Curtiss-Wright Corp., 449 F. Supp. 951, 960-61 (S.D.N.Y.), rev'd on other grounds, 584 F.2d 1195 (2d Cir. 1978) (prediction of victory in proxy fight found not to violate Rule 14(a)-9).

Second, Unocal argues that Mesa II's recommendation that shareholders abstain in the election of directors is misleading. Unocal notes that because a director must be elected by a majority of the shares voted under Delaware law, a vote to abstain is equivalent to a vote in opposition. I do not find the recommendation misleading. It is clear from the proxy materials that a primary purpose of the adjournment proposal is to defer election of directors. Thus, it is difficult to conceive of how

any reasonable shareholder could construe an "abstention" vote in this context as having an effect other than making it more difficult for a Unocal nominee to be elected. Moreover, there is some validity to Mesa II's argument that if it had stated that an abstention was equivalent to a negative vote, it could have conveyed the false impression that an ouster of the Unocal directors was proposed as opposed to a deferral of decision during which time the current directors would maintain their positions. Accordingly, I find that Unocal has not demonstrated a fair chance of success on the merits with respect to this issue.

The same conclusion is mandated with respect to Unocal's contention that the proxy materials are misleading in failing to disclose the possibility that, if the meeting were postponed, Mesa II could at the reconvened meeting vote any shares acquired through its intervening tender offer. After reading Mesa II's proxy materials, the reasonable shareholder would be well aware of this possibility. The pending tender offer is referred to more than once in the proxy materials and it is made clear that Mesa may begin purchasing shares under it after May 3. Moreover, the proxy materials state that "the purpose of the Offer is to acquire a number of shares which, when added to the shares presently owned by Mesa Partners II, will constitute a majority of the outstanding shares as a step in obtaining control of Unocal and ultimately acquiring the entire equity interest in Unocal." These statements should make it obvious to a reasonable shareholder that a potential consequence of adjourning the April 29 meeting is that Mesa II would be the

majority shareholder at the reconvened meeting, if its tender offer were successful. I find that the failure of Mesa II to spell this possibility out in those precise words is neither misleading nor a material omission.

Unocal next contends that the reasons set forth by Mesa II for the adjournment -- to permit shareholders to evaluate the Mesa II tender offer and the response of the Unocal board to that offer -- are misleading. Unocal notes that under Rule 14e-2(a), it was required to respond to Mesa II's tender offer by April 19 and that it in fact responded on April 13. Although true, this position is too narrow. It is clear from the proxy materials that Mesa II was concerned not only with the response mandated by the SEC, but also with other defensive actions designed to deter shareholders from tendering their shares.

Unocal also argues that shareholders did not require a two-month adjournment in order to consider the Mesa II tender offer. While this may be true, Unocal has neglected another justification for the two-month adjournment that appears in the proxy materials. In those materials, Mesa II states that it intends to "deliver notice to Unocal 30 days in advance of the reconvened Meeting and present one or more proposals at such reconvened Meeting in furtherance of its intent to obtain control of and the entire equity interest in Unocal." Thus, I am unable to conclude that Mesa II's statements as to the purposes of the proposed adjournment are misleading in any material respect.

Unocal has failed to demonstrate even a fair chance of success on the merits with regard to its claims that the Mesa II proxy materials include false statements or omissions of material

fact. Accordingly, Unocal's request for preliminary injunctive relief pursuant to §14(a) of the Exchange Act must be denied.

2. Sufficiency of Unocal's Proxy Materials

Mesa II has presented a multitude of claims under §14(a) of the Exchange Act. Most of the facts relevant to these claims have been summarized above. After analyzing each claim, this Court has determined that Mesa II has demonstrated a fair chance of success with respect to only one -- that involving management's construction of 30-day notice provision regarding shareholder proposals and the nomination of directors. With respect to the other claims, Mesa II has failed to establish that the statements or omissions were both false and material. Accordingly, these claims will be denied.

In its supplemental April 7 proxy solicitation letter, Unocal stated that the timeliness of a shareholder proposal under the 30-day notice provision is determined by reference to the originally scheduled meeting date regardless of whether the meeting would be adjourned. The letter further stated that, under Unocal's interpretation of its by-laws, even if Mesa II were successful in adjourning the annual meeting, it would be precluded by the 30-day notice requirement from presenting any proposals at the adjourned meeting.

Mesa II contends that Unocal's interpretation of the 30-day notice requirement was contrary to Delaware law. It further argues that the statement in the April 7 proxy materials was misleading in failing to reveal that management's interpretation of the 30-day notice requirement was questionable under Delaware law. Moreover, Mesa II argues that this omission

was material in that the reasonable shareholder would be chilled from voting in support of Mesa II's adjournment proposal if he thought that Mesa II would be precluded by Unocal's by-laws from taking any substantive action at an adjourned meeting.

On April 22, 1985, the Delaware Chancery Court issued a temporary restraining order enjoining Unocal from enforcing its 30-day notice requirement according to the interpretation set forth in the April 7 proxy materials.[6] The Chancery Court found that Mesa has established a likelihood of success on the merits with regard to its claim that Unocal's interpretation of the 30-day notice requirement was invalid. It also found that in the absence of an injunction, Mesa II would suffer irreparable injury as a result of the adverse impact that Unocal's adjournment interpretation has had on Mesa II's proxy solicitation. An intermediate state court decision is a "datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the State would decide otherwise." West v. American Tel. & Tel. Co., 311 U.S. 223, 237 (1940). See also Fleury v. Harper & Row Publishers, Inc., 698 F.2d 1022, 1026 (9th Cir.), cert. denied, 104 S. Ct. 149 (1983) (with respect to federal courts sitting in diversity). Since plaintiffs have not cited any authority to the contrary, this Court will accept the Chancery Court's interpretation of Delaware law for purposes of this motion.

Unocal argues that despite the fact its interpretation has been ruled invalid, it was not misleading because it was made in good faith on the advice of counsel. The case law relied on

by plaintiff is inapposite. In Shapiro v. Belmont Indus., Inc., 438 F. Supp. 284, 293 (E.D. Pa. 1977), the court found that "a proxy statement need not present a shareholder's unproved and unannounced legal theory as to the consequences of certain corporate actions where the underlying facts are either fully presented in the proxy statement or obvious to shareholders." See also Voege v. Magnavox Co., 439 F. Supp. 935, 942 (D. Del. 1977). Although Mesa II did not specifically announce its legal theory until its proxy solicitation of April 12, it delivered its adjournment proposals to Unocal on March 28. These adjournment proposals only make sense under the assumption that Mesa II could offer proposals at an adjourned meeting. Thus, Unocal clearly should have anticipated a legal challenge to its by-law interpretation and disclosed this contingency in its proxy materials. Accordingly, I find that this was not an instance involving an unannounced legal challenge; therefore, the precedent relied on by plaintiff is inapplicable. Moreover, it should also be noted that certain facts that would have potentially enabled shareholders to critically evaluate Unocal's interpretation were not made available in the proxy materials to shareholders. For example, shareholders were not informed that the 30-day notice requirement was a recently adopted by-law that represented a significant departure from long-standing precedent. This further distinguishes the case at bar from those relied on by plaintiff.

On the issue of materiality, the parties have submitted completely contradictory affidavits. Under the TSC Indus. standard, however, the Court finds that the omission is material.

The reasonable shareholder would most certainly take pause prior to voting for adjournment if he believed that such action was futile, i.e., that Mesa II could not submit proposals or nominate directors at an adjourned meeting. Moreover, unless this §14(a) violation will be remedied, Mesa II will suffer irreparable injury in that some shareholders may have submitted proxies opposing the adjournment proposals or failed to revoke such proxies on the continued mistaken belief that management's interpretation is valid.

Mesa II's other claims under §14(a) can be dealt with briefly. As noted above, the Court finds that the counterclaimant has failed to establish a fair chance of success on the merits with respect to any of these claims. Mesa II has made claims regarding the by-law amendments other than the one analyzed above. These claims involve Unocal's failure to disclose the motive behind certain amendments and the procedures with which they were adopted. The primary purpose of these claims appears to have been to establish a context for the claim involving the construction of the 30-day notice requirement by Unocal. Mesa II has not argued and the Court does not find that any deficiencies with regard to Unocal's reporting concerning the purposes behind the by-law amendments or the manner in which they were adopted are material when considered in isolation.

Mesa also argues that letters sent by Unocal's Chairman Hartley on February 19 and March 25, as well as certain statements made orally by him, about defendant T. Boone Pickens are proxy solicitations containing false and misleading statements or omissions. As an initial matter, the Court

believes that there are significant questions concerning whether the communications were solicitations within the context of Rule 14a-1. Solicitation is defined to include "the furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy." 17 C.F.R. §240.14a-1. We note that the letters referred to above were mailed prior to the date on which Mesa II announced its intention to acquire control of Unocal and to submit proposals for adjournment of the annual meeting. As to the oral statements, they appear to have been primarily made at congressional hearings.[7]

Even assuming such statements do constitute solicitations, Mesa II would still have failed to establish a violation of §14(a). The letters objected to contain self-laudatory statements about the prospects of Unocal and criticisms of the restructuring and take-over processes in the oil industry. Mesa II argues that these statements are misleading in that Unocal has failed to provide its shareholders with differing views. Section 14(a) does not require management to include dissenting views on subjects such as the general condition of the company or developments within the industry in which it functions. Finally, even if such disclosures were required, the omission in this case would not be material. The failure of Unocal to present opposing views in its proxy materials should not impede a reasonable shareholder from independently evaluating the bases for Hartley's opinions concerning the future of Unocal and that of the oil industry. Mesa II has publicly presented its views on the need for

restructuring Unocal. Under these circumstances, given the total mix of information available, the reasonable shareholder will not be impeded or misled in determining how to vote.

With regard to statements made orally by Mr. Hartley concerning Mr. Pickens, Mesa II failed to argue that they are material. Under certain circumstances, statements impugning the character of one's opponent in a proxy battle may constitute a violation of §14(a). See SEC Note to Rule 14a-9, 17 C.F.R. §240.14a-9. However, because Unocal shareholders have been subjected to a massive amount of information both through the proxy materials and through press accounts of the battle between Hartley and Pickens, the failure of Unocal to apologize for or retract Hartley's perhaps regrettable statements would not have influenced the reasonable shareholder.

Finally, Mesa II contends that Unocal's intention to use discretionary authority conferred on management by proxies sent to shareholders with Unocal's March 18 solicitation to vote against the Mesa adjournment proposals unless those proxies are revoked, violates SEC Proxy Rule 14a-4(c). That provision states that:

> A proxy may confer discretionary authority to vote with respect to any of the following matters:
>
> (1) Matters which the persons making the solicitation do not know, a reasonable time before the solicitation, are to be presented at the meeting, if a specific statement to that effect is made in the proxy statement or form of proxy.

17 C.F.R. §240.14a-4(c) (1984).

First, Mesa II argues that Unocal violated Rule 14a-4(c) by facilitating the distribution of the March 18 prox-

form after March 28 when it was informed of Mesa II's intent to submit adjournment proposals. Given the fact that there is no support in the record for this assertion and that Unocal denies it, I find that Mesa II has failed to establish a fair chance of success with respect to this claim.

Second, Mesa II argues the use of any discretionary authority by Unocal derived from the March 18 proxies is unlawful now that Unocal has been informed of the content of Mesa II's adjournment proposals. However, the Court agrees with Unocal's position that the Rule in question permits management to vote the originally obtained proxies if it takes affirmative steps to place the adjournment proposals before the shareholders and provides them with an opportunity to revoke their prior proxies and to vote on the adjournment proposals. I also note that Unocal presented the precise question discussed above to the SEC. Although courts generally have refused to accord weight to a clearance of proxy materials, "a limited exception exists, however, where the precise facutal or legal question has been brought to the attention of the SEC prior to the issue of the form, and the SEC has subsequently allowed the form to be sent to shareholders." Pabst Brewing Co. v. Jacobs, 549 F. Supp. 1068, 1072 (D. Del.), aff'd, 707 F.2d 1392 (3d Cir. 1982). Under these circumstances, the SEC's inaction may be accorded some weight. Id. Accordingly, I find that Mesa II has failed to demonstrate a fair chance of success on the merits with respect to this claim as well.

REMEDY

The purpose of preliminary injunctive relief in

Williams Act cases is not punitive, but to require corrective disclosure of information in compliance with the statute and rules so that public shareholders will have an adequate data base on which to formulate their response to any cash tender offer. Rondeau, 422 U.S. at 58. In this case, since no control or "blocking position" was achieved during the 13D filing period to March 27, and because Mesa II's cash tender offer is still open,

> The short of the matter is that none of the evils to which the Williams Act was directed . . . is [further] threatened in this case.

Id. at 59. The same equitable considerations apply to relief pendente lite for violation of the proxy solicitation rules. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 386 (1970).

After consideration of the balance of hardships and irreparable harm which may result from action or inaction by the Court, including harm to public shareholders of Unocal, as well as to the parties, the Court has concluded that requiring corrective disclosure and postponement of the annual meeting is warranted. Corrective disclosure by Mesa II and extension of the tender offer's withdrawal date for three weeks is a sufficient interim remedy to meet the purposes of the Williams Act. Since, as indicated, no control or blocking position was achieved during the time the deficient Schedule 13D's were outstanding and because extension of the withdrawal date together with the corrective disclosure, will allow shareholders ample opportunity to make an informed decision on whether to tender, further relief in the form of rescission, prohibiting the voting of shares or otherwise, is unnecessary to address any immediate and irreparable harm caused by defendants' Williams Act violations.

With respect to plaintiff's proxy solicitation violation, a like remedy of corrective disclosure and adjournment of the meeting is appropriate to afford public shareholders of Unocal the opportunity to consider their vote in an atmosphere sufficiently removed from the taint of improper solicitation materials.

This Memorandum Decision, together with the oral findings made in open court, constitute the Court's finding of fact and conclusion of law as required by F. R. Civ. P. 52(a). I emphasize that on these motions the findings are only those of probable success on the merits and not on the merits. A preliminary injunction order shall be entered accordingly.

Dated: APR 26 1985

A. WALLACE TASHIMA
United States District Judge

FOOTNOTES

1 The partners of Mesa II are: (1) defendant Mesa Asset Co., a Delaware corporation which is an indirect wholly-owned subsidiary of defendant Mesa Petroleum Co.; (2) defendant Cy-41, a Texas corporation, wholly owned by defendant Cyril Wagner; and (3) defendant Jack-41, Inc., a Texas corporation, wholly owned by Jack E. Brown. Defendants Wagner and Brown are the sole partners of defendant Wagner & Brown. Defendant T. Boone Pickens is the Chairman of the Board of defendant Mesa Petroleum Co. The term "Mesa II" will be used to refer to the defendants collectively.

2 On April 22, 1985, the Delaware Chancery Court issued a Temporary Restraining Order enjoining Unocal from enforcing its construction of the 30-day notice requirement. See discussion infra at 25.

3 Defendants claim that in securities cases, the only proper standard is "irreparable harm and a likelihood of success on the merits," citing Rondeau and Realty Trust. While these cases approve such a standard, they do not exclude application of the "alternate" test. As for the irreparable harm requirement of Rondeau, it has long been a part of the required showing in this Circuit. See, e.g., Los Angeles Memorial Coliseum Comm'n, 634 F.2d at 1202-03.

4 Unocal also notes that Mesa Petroleum Co. has consented to a permanent injunction against violating §13(d) of the Exchange Act. The injunction arose from Mesa's conduct with regard to its acquisition of stock in Gulf Corporation in early 1984. However, this consent decree cannot be considered to be probative of any matter at issue here. F. R. Evid. 408.

5 Mesa II refers to this document as its Private Placement Memorandum.

6 Mesa Petroleum Co., et al. v. Unocal Corp., et al., C.A. No. 7997 (Apr. 22, 1985, Del. Ch.).

7 Although it is unnecessary to decide the issue, even assuming that Congressional testimony would otherwise amount to a "solicitation" under the SEC's proxy rules, such statements would likely enjoy a First Amendment immunity. Cf. Eastern RR Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (right to petition government exemption from Sherman Act); UMW v. Pennington, 381 U.S. 657, 669 (1965) (same).

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE A. WALLACE TASHIMA, JUDGE PRESIDING

- - -

UNOCAL CORPORATION,

Plaintiff,

vs.

T. BOONE PICKENS, JR., JACK E. BROWN, CYRIL WAGNER, JR., WAGNER & BROWN, MESA PETROLEUM CO., MESA SOUTHERN CO., MESA ASSET CO., CY-41, INC., JACK-41, INC. and MESA PARTNERS II,

Defendants.

CIVIL ACTION
No. CV 85-2179-AWT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, April 29, 1985

COPY

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Unocal vs. Pickens, et al — Monday, April 29, 1985

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PROCEEDINGS — Page

LOS ANGELES, CALIFORNIA; MONDAY, APRIL 29, 1985; 1:40 P.M.

THE CLERK: Item 9, CV 85-2179-AWT, Unocal Corporation vs. T. Boone Pickens, Jr., et al.

Counsel, announce your appearances, please.

MR. DIAMOND: Michael Diamond for defendant movant, Mesa Partners.

MR. STRATTON: Walter Stratton of Gibson, Dunn & Crutcher, and Donald Sloan and Henry Lasser for the plaintiff Unocal Corporation.

THE COURT: This is your motion, Mr. Diamond.

MR. DIAMOND: Yes, it is, your Honor.

THE COURT: Go ahead. Is there anything you want to add to your papers?

MR. DIAMOND: Just a couple of things, your Honor.

I think the issue before the Court, as I think is made obvious by the shortness of the papers, if you will, is a fairly simple and straightforward one: Whether or not the tender offer, which contains some manifestly unfair provision as discriminatory over Unocal does, can be enjoined by this Court under the Williams Act.

Unocal has essentially come back and argued that the Williams Act was not intended and cannot be interpreted to provide power to this Court to prohibit something substantively unfair.

I think that we can get unnecessarily involved in a distinction between procedure and substance, perhaps,

but it is our position that the Williams Act has, since its inception, and the SEC has, since it began issuing regulations under the Williams Act, provided for procedural fairness to shareholders as part of its clear powers in carrying out the intention of Congress.

The Unocal papers at Page 17 say that the Commission's rules cannot serve, by implication or otherwise, to foster purposes which Congress did not have in passing the enabling statute -- in this case we are referring to 13(e), which, of course, since this is a tender offer by an issuer, Section 13(3) would apply, as well as 14(e).

Under that interpretation, it would appear that Unocal would say that the SEC could not even pass a rule in this area because they claim that the Williams Act's intentions do not reach this type of conduct.

I would submit, your Honor, that the rules which we cite in our brief, clearly set forth that the SEC believes it has the power, and that Congress believes it has the power to regulate substantive unfairness.

The one I think we have discussed in our briefs, the attempt by Unocal to turn what we see as purely substantive rules such as proration, wil the rule 10b-13 prohibition on buying while the tender offer is going on -- these are not purely disclosure matters, they are rather efforts to make sure that all shareholders are treated

fairly by the offer.

The one rule which we do cite which isn't discussed in the Unocal papers, is 13e-4(F), which is entitled -- and has many subsections -- the manner of making a tender offer, and deals with various items and it has indeed a Rule 13f-4(6), which is similar to 10b-13, and requires that you can't buy a security which was the subject of a tender offer even until 10 days after the offer is over. I can't quite see how that is a disclosure rule.

I think the issue before the Court is not whether or not a rule which would prohibit this type of conduct could be made by the SEC in furtherance of the Williams Act, what we submit is its clear purpose as the SEC said in its releases; but whether or not, because there is no specific rule on the issue, the Court cannot act in spite of what we claim to be a manifest violation of the intention of the Act.

On this issue, your Honor, we have submitted in our reply brief a long quote in the Edgar vs. MITE case, which sets forth the well-known and often-articulated purpose of the Williams Act to avoid tipping the balance in a tender offer between the two sides, that we contend this sort of an offer which can exclude a large shareholder from its provisions can give the issuer a weapon to do just

that.

I would submit that a tender offer made by an outsider to everyone, all shareholders of the company, other than management, would I think be held to be manifestly unfair, or a tender offer made by management to only arbitrageurs.

I think that drawing the line becomes impossible, and that is why the Act clearly at least intends in our view that it be open to all.

I think given the philosophy of the J.I. Case vs. Borak decision, the Court should look to the real purposes of the Securities laws and give remedies where those purposes would be served would apply here.

This is a question which we cannot, in our view -- it cannot be that the Court, in interpreting carrying out the purposes of the Williams Act, must feel constrained to ignore this conduct.

It is our position that that would fly in the face of J. I. Case and Edgar against MITE, and of the clear intention of Congress in passing the statute.

THE COURT: Mr. Diamond, first of all, let me ask you, have you had any further word from the Delaware Court?

MR. DIAMOND: No, your Honor. I checked before we came over, and I am advised that the Court has said it

will either issue a decision at the very end of today, which will be, I guess, about 15 or 20 minutes in Delaware, or tomorrow morning.

And we have no other indication than that.

THE COURT: What precisely is the alleged violation of state law in that case?

MR. DIAMOND: I think there are several, your Honor. I think it is alleged again to be unfair as a matter of policy under Delaware law.

I think there is an argument that it is a discriminatory redemption under Delaware law, and that those statutory provisions which provide how a company can buy back its own shares cannot be interpreted to allow them to exclude arbitrarily certain shareholders.

We have submitted, I think, briefs on all sides of this attached to our papers.

THE COURT: All right. What do you claim would amount to irreparable harm to Mesa Partners II if a preliminary injunction is not issued -- in other words, are you talking about something more than money damages?

MR. DIAMOND: Yes, your Honor, I think I am, and it is not just the Mesa Partners II, but to the other shareholders.

The situation would become impossible to unravel because of the change in the proration rate. If the Court

felt that Mesa Partners II tender should be accepted and it were not, for example, there are approximately 150 million Unocal shares outstanding without the Mesa block.

If a shareholder -- if all of the shares were tendered under the 50-million offer, the shareholders could expect one-third of the shares to be taken up. If the Mesa shares were included, then something under 30 percent, about 28 percent would be taken up, and I think that that situation, once the shares were prorated, I don't think that the proration could be taken back.

People would have paid out their stock, their stock would have been returned, and the formula would have been figured out.

I don't see any damage remedy to Mesa in not having its stock bought up would resolve that situation.

THE COURT: I don't understand the situation to be resolved. In other words, let's say shareholders who tender, I assume, would like as many of the tendered shares as possible to be accepted. So how would they be --

I am talking about tendering shareholders other than Mesa -- how would they be harmed if the offer were not enjoined?

MR. DIAMOND: If the Court later were to find that Mesa was entitled to have its stock taken up in the offer, then those shareholders would be subject to some

sort of a response, I assume, from Unocal.

I am looking at it not necessarily, your Honor, as a point of harm. If it was just Mesa, I agree. Mesa would be able to get its stock bought up.

But the nature of the shareholders of the company is going to change in a way that can't be rectified as a result of whichever way the Court goes on this, and it seems to me the question of irreparable harm doesn't necessarily go to damage which is done to Mesa in an irreparable way, but to a situation that will be created that can't be reversed.

If Mesa can't tender its stock, if they go ahead and buy up the stock with Mesa's block in there, and then the Court later finds they should have bought Mesa stock, it leaves the whole question of what happens to those extra shares in issue, and I don't think that is an issue which can be resolved after the fact.

I think it has to be resolved before they prorate rather than after.

THE COURT: All right. Thank you, Mr. Diamond.

Mr. Stratton.

MR. STRATTON: Yes, your Honor. Let me address myself to that last point.

Our tender offer is for 87,200,000 shares. Even if we take up 50 million shares without taking up the Mesa

stock, we have a cushion of 37,200,000 shares that we can take up, and that would include -- we could take up the Mesa stock at that time if they established a right at that time.

But, beyond that --

THE COURT: But presumably the offering period is going to close well before we get to a trial on the merits. Right?

MR. STRATTON: I would expect it will, yes, your Honor.

But beyond that there is nothing that can't be compensated here in dollars.

They haven't made any kind of a showing, they haven't made any kind of an attempt to show that $72 is not a fair price for the stock. If it is too lavish a price, they can get money damages. If it is too small a price, they have not been hurt.

So there is just absolutely no showing -- made no attempt to make a showing of irreparable harm. They made no showing that they have the right to appeal to the equity side of the Court at all.

And I might say parenthetically, your Honor, that they made no such attempt in Delaware when they were under Delaware law in testing the business judgment of the directors in that court.

The fact that there is no regulation in the Williams Act of this kind of a transaction doesn't mean that there is no law, no forum to which they can apply. They applied first to Delaware; they went to Delaware. The briefing schedule was completed last week, and they argued before Vice Chancellor Berger last Friday, as your Honor knows.

I might say that I have a colleague at the telephone in the other room in the lawyers' lounge waiting to hear from Delaware, and if a decision comes down, we will know about it within a few minutes.

Your Honor, I think that it probably warrants reviewing the entire situation at this juncture. As your Honor pointed out the other day, their claim is under Rule 13e-4, and under Section 14(e) of the '34 Act. I don't know how seriously they are pursuing the 14(e) claim because cases cited throughout our brief show that that section is intended to be a disclosure section entirely, and the other substantive provisions, the provisions that Mr. Diamond calls substantive, have to do with sinking in, time for the information that is to be disseminated to sink in amongst the shareholders.

Mesa Partners has moved for the preliminary injunction, as I say, without a showing of injury or a showing that damages won't suffice. And to underline that,

I might say that there are no affidavits and no declarations that have been submitted to this Court at all, whether they originate in this proceeding or whether they were filed in Delaware and refiled here.

There are no affidavits whatsoever for them to carry forth the burden of proof they have of showing irreparable injury in this proceeding.

As your Honor taught us last Friday afternoon from the citation of the Los Angeles Memorial Coliseum vs. the NFL and similar cases, they do have a burden to do that.

Your Honor, that would be half of my argument, but I am sure you are completely familiar with it. The other half would be moving on to the substance of their claim.

As I say, the 14(e) provision is one having to do with fraudulent, deceptive or manipulative acts. At one time I myself had thought that that went beyond disclosure, since I wrote the brief for Mobil Oil Company in Mobil vs. Marathon. The Sixth Circuit agreed with me there, but that decision has not fared well since.

And, in my own circuit, the Second Circuit, the Buffalo Forge case, and the Data Probe case that we cited on Page 13 of our brief has sharply criticized the Mobil-Marathon decision. And, even the Sixth Circuit itself has drawn back from the full scope of that decision.

As far as turning to 13(e) is concerned, I'm not sure that it is worth my getting into a discussion with the Court this afternoon as to the degree to which the Securities and Exchange Commission can add substantive law by promulgating rules and regulations.

I think the simple fact is that, having tried two trial balloons in this area, and having neither one of those trial balloons result in a substantive regulation requiring an offer of all provisions, that it is sufficient to say that there is no such regulation.

13(e) is a statute that grants the Commission the right to formulate rules to define acts which are fraudulent, deceptive or manipulative. And, having defined them, to prescribe such acts.

Have they defined an offer to less than all as fraudulent, deceptive or manipulative? No, they have not; much less have they prescribed an offer to less than all that is fraudulent, deceptive or manipulative.

The first time they sent up a trial balloon was in 1977, your Honor, when they proposed a Rule 13e-4, and in our Exhibit D, we cite to the section of their release which suggests a need for rule-making. Some of this is in the defendants' exhibit and some is not.

I think our quotation from the exhibit is somewhat broader, but the section on the need for rule-making

includes this sentence which is in both exhibits. It suggests, quote:

(Reading)

"By providing substantive regulation of issuer tender offers, the Commission seeks to prevent fraudulent, deceptive or manipulative acts or practices which may occur in the absence of such regulation."

That is, to my way of thinking, a clear indication that they do not have substantive regulation of issuer tender offers.

In this trial balloon, as I call it, they proposed to define fraudulent, deceptive or manipulative acts to include tender or exchange offers which unreasonably discriminate, and I am citing to Page 10 of our Exhibit D -- which unreasonably discriminate -- and then, as a trial balloon on what might be an unreasonable discrimination, they accepted odd lots, your Honor.

Now, that lay out in the public world for comment for a little under two years, and in a release which is our Exhibit C, they described the reasons they had not adopted the rule, and I read.

(Reading)

"Several commentators suggested that in a few limited contexts an issuer may

"have valid business reasons for excluding certain security holders from its tender offer. The Commission has decided not to adopt the explicit requirement proposed at this time."

Now, I suppose what they were thinking was how do we regulate in such a fashion as to define "valid business reasons." Is that regulation of "valid business reasons" a subject appropriate to federal regulation, or is that something that should continue to be handled in State Courts as it had been in the past.

Well, they sat on that for a few months, and then promulgated another proposed rule. That was in December of 1979, when they floated a proposed Rule 14e-4.

Now, we can go into that, but let me say at the outset that nothing has been heard of from that rule from December 1979 through April 29, 1985, and I must assume that it is something of a dead letter in the halls of the Commission.

In the introduction to the argument for proposing an equal or an offer-to-all provision in 14e-4, the Commission wrote that a common practice in making a tender offer is to extend the offer to all of the holders of the class of security which is the subject of the tender offer.

Exceptions to this practice have been limited

in nature, but I would say parenthetically, your Honor, that there have obviously been exceptions to the practice.

And, continuing the quotation, and have not been challenged by the Commission as a matter of policy.

Now, perhaps the Commission made an ad hoc determination as it went along that the particular exceptions that come across their desk from time to time either were not in some way contrary to the valid exercise of business judgment, or, if they were questionable in the eyes of the Commission, the Commission had no regulatory authority on which to proceed at all.

In any event, in December of 1979, they proposed a rule which would have exceptions again, and these exceptions included both odd lots -- an exception that had been previously proposed -- and a second exception which would permit issuer tender offers which are not made to officers, directors or affiliates.

Now, Mesa's counsel argued with me about what an affiliate is. I think the correct answer as to what an affiliate is is that it is a matter of fact determination as to whether, in a case of a large company with widely dispersed stock holdings, a holder of 14 percent -- roughly 14 percent of the stock might be deemed to be an affiliate.

We really don't have to dance on the head of that pin because, as I say, this rule was not adopted.

Now, they say that affiliates are clearly people related to management. I don't know that that is so because in this proposed exception to the rule, there is a sentence that says that the affiliates' abstention would generally be volitional.

To say that their abstention would be generally volitional would be to suggest that there may be occasions when their abstention is not volitional, and I would say that if Mesa is indeed an affiliate of Unocal with its 13.7 percent holding, their abstention in this case is clearly not volitional.

But we are again talking about what might be the case if we had a rule, and we don't have a rule.

The introduction to this rule again said current tender offer practice thus reflects a common understanding that implicit in the Williams Act is the requirement that a tender offer be made to all security holders.

Well, I don't know that it is a common understanding, your Honor, because we have quoted two leading authorities in the field -- Mr. Lipton and Professor Louis Loss.

(Brief interruption)

Your Honor, we have a report from Delaware. I don't know what it is.

(Brief pause)

The Court entered an order restraining Unocal from proceeding with the exchange offer as amended unless Mesa is permitted to participate.

We don't have the order yet, your Honor.

That takes something of the wind out of my sails.

(Laughter)

I'll lumber ahead, however.

As I say, Mr. Lipton and Professor Loss do not agree, and I could hand up a two-page violation of the Copyright Act, which is a Xerox copy of the pertinent pages in Mr. Lipton's work, and I am sure your Honor has access to Professor Law's work which underlines that point.

In any event, your Honor, in conclusion I would say that there is no statute on which this application can rest. There is no rule that the -- no federal rule that the matter was left to the states. The report is that we have -- it proves that amply -- and in this court certainly there has been no showing of irreparable harm.

Thank you, your Honor.

THE COURT: All right. Thank you.

MR. DIAMOND: Just back again on the irreparable harm part again, your Honor, and I'd like to address the situation as we see it now briefly.

Irreparable harm, I think, is that there will be a change in the shareholding mix of Unocal.

As I said, I think when I was up here the first time, somewhat inarticulately, Mesa is seeking control of Unocal. Unocal will, by going ahead and exchanging and excluding Mesa, change the shareholders and put out debt in the company in a way that obviously is intended to make it more difficult for Mesa to get control of the company.

I can't sit here today or stand here today and tell you exactly how the harm is going to result, but the change they are making is an irreversible one, and one that will certainly have an impact on how Mesa's tender offer will proceed if we accept it.

In light of Mr. Stratton's report from Delaware, I think I would just point the Court to the argument we made in our reply papers, that if this Court --

Our argument there was that if this Court found, and apparently the Delaware Court has now found, that Unocal cannot proceed with its offer in this fashion, that if I can get to the more traditional Williams Act arguments, the Unocal tender offer has now become leading for two reasons.

Its obvious intention was to make it more difficult for Mesa to get control of Unocal, express as well as implied; what impact will this decision have on that effort.

I don't know, but certainly the shareholders

don't know either. And, also, their difference in proration rate between an offer to which Mesa can tender an offer and to which Mesa cannot, we would submit is material for shareholders because of calculations as to how many shares might be taken up -- goes to the value of the offer.

So we would submit, and I recognize I have not briefed the issues as far as the Delaware Court is concerned, the position we took in our papers was that if this Court found, as a matter of the Williams Act, the discriminatory offer was illegal, it should, in addition to requiring that they not so exclude Mesa, force them to extend the offer for a reasonable period of time.

It is our belief that in light of the Delaware decision, that second result would be called for in any event.

THE COURT: Just a minute. Don't think you know --

You know the rules much better than I do, but let's assume the Delaware ruling is as Mr. Stratton reports, and that it stands.

When is the offer supposed to expire now?

MR. DIAMOND: Tomorrow at midnight.

THE COURT: Doesn't it require an amendment and automatically defer the required extension?

MR. DIAMOND: There has been a lot of discussion

and some, but not a whole lot of litigation, on the question of when an offer becomes a new offer so as to require an extension and amendments under the rules.

And there are specifics, for example, if the price changes or someone else comes in with an offer it is required.

I don't claim to have any knowledge of a rule which would require extension under the circumstances when one is essentially a condition -- that is, the offer was made to all shareholders other than Mesa.

I think Unocal could take the position that under the current rules they are now making a new offer just because they now have to make it to Mesa, to Mesa shareholders.

I cannot say to the Court, I am not familiar with rules which require extension under these circumstances. I would say, however, in our submission, it should be done under the guise of making sure the shareholders again have the full story before it.

THE COURT: All right, thank you.

Mr. Stratton, do you have a view on that?

MR. STRATTON: Well, yes, your Honor.

I'm afraid that probably information will have to go out to the shareholders. And I am just looking at a timetable here.

I would suppose, since a new offer can be begun and finished to the end of the withdrawal period at the end of 10 days, I am just looking at the time period here, and if additional information were to get out within the next couple of days, that 10-day period would end in the middle of the week of May 13.

THE COURT: Well, the only thing I am getting at is this: Is it your position that you are required to put out a new offer now?

MR. STRATTON: Not required to put out a new offer. But I think probably more conservative if not the required course would be to extend the withdrawal date so that the shareholders who have entered, or who are considering tendering sometime before midnight tomorrow night have that information.

THE COURT: Well, assuming the Delaware rule stands that you are required to make your offer.

MR. STRATTON: Yes, your Honor.

THE COURT: Is it your position that you are required to make the offer?

MR. STRATTON: Yes.

THE COURT: Then is it your position, whether or not you are required to by the SEC, is it your position that upon amending your offer that you would wait 10 days or you would extend the withdrawal deadlines 10 days anyway?

Or are you not in a position to make a representation?

MR. STRATTON: I'm really not in a position to make a representation.

I think all the facts require is that we extend the time period for some time so that the information may be absorbed by the market.

I think the maximum extension that would reasonably be called for would be 10 days, because we could start a whole new offering and complete it in 10 days.

So it is something between five and ten days, your Honor.

THE COURT: All right. Thank you.

MR. DIAMOND: Your Honor, may I just make one comment:

The withdrawal rights in the partial offer are only half the story. The proration pool has to be extended or else it will close and people will be under the gun to get their shares in, regardless of whether they are going to withdraw them.

MR. STRATTON: It is the same thing, your Honor, that if we extend the withdrawal date we will extend the other date.

THE COURT: You will keep those dates as being --

MR. STRATTON: We will keep those dates to the same day.

LOS ANGELES, CALIFORNIA; MONDAY, APRIL 29, 1985

THE COURT: I guess that is an interesting development, but it is a separate obligation under the Williams Act under federal law.

This is the motion of the counterclaimant I guess on behalf of itself and on behalf of the persons in the investing group who now hold Unocal shares -- a motion for a preliminary injunction to enjoin -- I am not sure of the precise form -- to enjoin the condition of the Unocal offer that shares cannot be tendered by the Mesa entities on the contention that that offer, that type of offer is in violation of Sections 13(e) and 14(e) of the Securities and Exchange Act, as amended by the Williams Act.

In other words, that the statute itself implies that an offer has to be -- a tender offer has to be an offer to all shareholders of that class and can't be discriminatory except perhaps in certain business reasons not concerned with, shall we say, the odd lot tender.

I am going to deny the motion for preliminary injunction for violation of federal law for these reasons:

I don't find it within the plain language of the statute, Sections 13 and 14, that this type of offer would be prohibited. To me it is not apparent from the legislative history. There are some scatter comments, but, you know, we'll say it is hard to tell, for instance,

when you get a comment from a witness, although a responsible witness such as Emanuel Cohen, who was at that time the chairman of the Commission, and whether that reflects the intent of the legislature or not. To me it is not fair enough.

I don't think the legislative history is strong enough to indicate an intent by Congress that the Williams Act prohibits discriminatory offers in that sense.

The SEC obviously does not itself, has not itself attempted to regulate that area of tender offers. It's been well briefed and argued today.

Twice it has promulgated proposed regulations which, in one form or another, would have required, at least in certain circumstances, a nondiscriminatory tender offer, that an offer made to any -- well, that an offer may be extended to all shareholders in that class, but never adopted such a rule.

It is hard for me to infer from the failure to adopt a regulation that it is the position of the agency that that is embodied in the statute.

I would also add, just as a note, that the Commission, I have to assume, is well aware of this offer, and has taken no position in this litigation as it sometimes does when it takes matters of moment to its regulatory charter on an issue.

The second, obviously, is reflected by the ruling of the Delaware Court. It is clearly a subject of state corporate law from state to state. So that, plus the fact that, you know, all of the other provisions of the Williams Act appear to be, I think, generally true of the Securities and Exchange Act, and we'll call that procedural -- and require disclosure, governing timing, and matters of that nature, really don't go to the substance, you know, of we'll say, for instance, of a fair consideration, a fair price -- things of that nature -- that generally reflect a lack of intent to enact a federal substantive securities regulation and matters such as, we'll say, Rule 10b-13 are clearly, I think, understood as an exception to that rule.

I think the only authority that supports the kind of interpretation that the Williams Act intended for the counterclaimants would be Mobil vs. Marathon, but I think it is pretty well recognized now that that case is generally met with disfavor, the interpretation it would place upon the Securities Act, and, you know, I share that feeling about that case, so I am not going to rely on that.

Now, further, you know this is just something in the back of my mind that counsel can think about, if you pursue this aspect of the case. But I have a vague -- all I can say is I have a vague feeling that there may be some -- I don't know how to characterize it -- there may

be a standing problem on the part of a competing offeror to invoke the protection of the Williams Act, you know, against a competing offer.

I don't know, but for some reason it bothers me, and I can't quite put my finger on it, but obviously I do not have to rule on that today.

Finally, I think it is at least highly questionable whether or not there is any irreparable harm. I would at least be curious to see the reasoning of the Vice Chancellor in the Chancery Court in Delaware. I recall from her prior opinion that that is a requirement under Delaware law, but it seems to me, first, with respect to Mesa itself, there is clearly an adequate remedy at law in the sense of damages that you know how much money you are losing by not being able to tender into the pool and get your pro rata share, at least you are fairly close.

With respect to the mix of outstanding shares, I don't see how in competing offers on the table how -- I still haven't gotten it straightened out -- how Mesa would be harmed if its shares, if it could otherwise tender and have its shares accepted, how it could be harmed by still having those shares in its possession; that escapes me.

So I can't see, aside from the value lost, the money lost in not being able to tender its pro rata portion

into the $72 pool, how Mesa is harmed.

There might be a change in the mix in the outstanding holding of Mesa and others, you know, management versus dissidents, or however you want to characterize it. But those changes, I can't see how they would harm Mesa in terms of whatever may happen in the future of this case.

So, for all of those reasons, I deny the motion for preliminary injunction.

There is no other business today, is there?

MR. DIAMOND: Your Honor, I would just like to raise a question. Is it the Court's view that we have not made a motion directed toward --

THE COURT: You mean misleading?

MR. DIAMOND: -- directed toward -- that the offer is now misleading as a result of the Delaware decision?

THE COURT: Yes. You have not made a motion.

And, secondly, I believe not only that, but I think there is time to make a motion because I think, no doubt, that there is going to have to be some extension -- some minimal extension offered, but not imposed as now indicated.

MR. DIAMOND: I don't think Mr. Stratton represented what is going to happen, I don't know.

But I do want to be sure that the Court has not denied the motion on those grounds.

THE COURT: No, I am not denying it on those grounds. I don't regard that as being before me.

I think, you know, you might be able to make out some kind of a case, and it might be mooted by any action Unocal might take now upon receipt of the ruling of the Chancellor Court in Delaware.

On the other hand, who knows. That might get vacated before a higher court before the offering period expires. I don't know.

The answer is I don't regard it as being before me. If the ruling is still extant, I assume there will be -- seems to me there has to be some minimal extension of the withdrawal period and, as you say, the proration period deadline, and that would give you enough time, I think, if you believe it necessary under those circumstances to ask for relief on that basis. All right.

MR. DIAMOND: Yes, thank you.

THE COURT: So the answer is it is certainly not denied on the merits.

MR. DIAMOND: Fine, thank you.

THE COURT: Thank you. We stand in recess.

(Proceedings concluded at 2:15 p.m.)

REPORTER'S CERTIFICATE

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPTION FROM THE STENOGRAPHIC RECORD OF THESE PROCEEDINGS.

Dated: April 29, 1985

M. Lenoir Eddy

M. LENOIR EDDY, CSR
Official Reporter

Following Document's is Photo Copy's Also Best That AVAILABLE

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

MAURICE A. HARTNETT, III
VICE-CHANCELLOR

COURT HOUSE
OF NEW CASTLE
GEORGETOWN, DELAWARE
WILMINGTON, DELAWARE

28 December 1979

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RE: Civil Action #6068 (1979) - New Castle County
Fischer et al v. Moltz et al
Date Submitted: December 27, 1979
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION: GRANTED.

Gentlemen:

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 [illegible] 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.

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 to 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.

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, the burden is placed 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 plaintffs here.

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).

I am also convinced that injunctive 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).

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, [illegible] 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 shares made by C. J. Lawrence & Company, Inc. upon plaintiffs posting an appropriate bond in the sum of $10,000.

Yours truly,

MAH/sdw

cc: Register in Chancery
Honorable William Marvel
Honorable Grover C. Brown
File

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PFIZER INC., a corporation of the State of Delaware, Plaintiff Below, Appellant,	§	
v.	§	No. 328, 1984
ICI AMERICAS INC., a corporation of the State of Delaware, and DR. CHARLES LAUDADIO, an individual, Defendants Below, Appellees.	§	

Submitted: November 28, 1984
Decided: November 29, 1984

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

ORDER

This 29th day of November, 1984, it appearing that:

1) In this trade secret case involving an interpretation of the Uniform Trade Secrets Act, (6 Del. C. §§2001-2009), the Chancellor by Order dated November 28, 1984, has certified this interlocutory appeal to us pursuant to Supreme Court Rule 42;

2) In his certification the Chancellor concluded that a substantial issue has been determined by the decision denying Pfizer's application for a preliminary injunction. He also found that the denial of this injunction established a legal right within the meaning of Rule 42(b);

3) On our review of the papers filed by the appellant in accordance with Rule 42(d), we are satisfied that the interlocutory appeal certified to us determines a substantial issue, establishes a legal right and relates to the construction or application of a statute of this State which has not been, but

should be, settled by this Court. Moreover, we conclude that a review of the interlocutory order may otherwise serve considerations of justice;

NOW, THEREFORE, IT IS ORDERED that the within interlocutory appeal, certified by the Court of Chancery be, and the same hereby is, ACCEPTED.

BY THE COURT:

Justice

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DATAPOINT CORPORATION, a Delaware corporation, Defendant Below - Appellant, v. PLAZA SECURITIES COMPANY and ARBITRAGE SECURITIES COMPANY, Plaintiffs Below - Appellees.	§	No. 79, 1985

Submitted: March 6, 1985
Decided: March 6, 1985

Before HORSEY, MOORE, and CHRISTIE, Justices.

ORDER

This 6th day of March, 1985, it appearing that:

1) The Court of Chancery has certified this interlocutory appeal to us, pursuant to Rule 42, following the entry of a preliminary injunction, issued this date, enjoining the defendants from enforcing a bylaw which would interfere with the free exercise by shareholders of Datapoint Corporation of the power to take corporate action by written consent pursuant to 8 Del.C. §228.

2) The appellant, Datapoint Corporation, has presented three applications to us: (a) an application for acceptance of the interlocutory appeal; (b) a motion for expedited treatment of the appeal; and (c) a petition under Rule 32(a) to stay the Court of Chancery injunction pending appeal.

3) The appellees advised the Court that they have no objection to the acceptance of the appeal or its treatment on an expedited basis. However, they oppose the entry of any stay pending appeal.

4) Upon a review of the documents filed by the appellant the Court is satisfied that important and urgent reasons exist for an immediate determination by this Court of the interlocutory appeal. The decision of the Court of Chancery determines a substantial issue and establishes a legal right. The question of law presented is one of first instance in this State relating to the construction or application of a statute of this State which has not been, but should be, settled by the Court.

NOW, THEREFORE, IT IS ORDERED pursuant to Rule 42 that the within interlocutory appeal be, and the same hereby is, ACCEPTED.

BY THE COURT:

Justice