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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,

vs.) C. A. 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. MC CONNOR, PETER O'MALLEY, RICHARD J. STEGMEIER and DONN B. TATUM,

DEFENDANTS.

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Superior Courtroom No. 302
Public Building
Wilmington, Delaware
Friday, April 26, 1985
3:30 p.m.

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BEFORE: HON. CAROLYN BERGER, Vice Chancellor

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PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

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APPEARANCES:

CHARLES F. RICHARDS, JR., ESQ.,
SAMUEL A. NOLEN, ESQ.,
THOMAS A. BECK, ESQ.,
GREGORY P. WILLIAMS, ESQ.,
C. STEPHEN BIGLER, ESQ. and
DANIEL J. KAUFMAN, ESQ.
Richards, Layton & Finger
for Plaintiffs

LEWIS S. BLACK, JR., ESQ.
A. GILCHRIST SPARKS, ESQ. and
KENNETH J. NACHBAR, ESQ.
Morris, Nichols, Arsht & Tunnell
-and-
JAMES R. MARTIN, ESQ.,
WILLIAM S. COATS, ESQ. and
MITCHELL A. KARLAN, ESQ., of the New York Bar
Gibson, Dunn & Crutcher
-and-
GEORGE C. BOND, ESQ., of the California Bar
Vice President and General Counsel - Union Oil
for Defendants

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P R O C E E D I N G S

MR. SPARKS: Before we begin, I would like to introduce two out of state counsel at the counsel table with me.

In the middle standing is James Martin of Gibson, Dunn & Crutcher, a member of the California Bar.

THE COURT: Good afternoon.

MR. MARTIN: Good afternoon, Your Honor.

MR. SPARKS: At the far right of counsel table is Mr. George Bond, general counsel of Unocal.

THE COURT: Good afternoon. You are welcome.

MR. BOND: Good afternoon, Your Honor.

MR. SPARKS: Thank you.

MR. RICHARDS: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. RICHARDS: This is the time set for the presentation of our motion for temporary restraining order with respect to what we refer to as the amended debt tender offer made by Unocal. Before

I begin my argument, I think it's probably in order, although I don't know that it has any direct bearing on these proceedings or the matter before Your Honor, to in effect give Your Honor a news bulletin on some of the matters referred to in the Unocal papers.

There was a hearing, so I understand, before Judge Tashima this morning on the question of remedy with respect to his findings in the California action, and I think his findings were made a part of the record by Unocal in one of their affidavits.

It's my understanding that at that hearing Judge Tashima did essentially three things. First, he adjourned the annual meeting of Unocal until the later of two weeks after they send out corrective proxy disclosures or May 13th, whichever date is later, and he specified to them, it's my understanding, certain corrective disclosures that they had to make to correct their proxy misdisclosures, or nondisclosures.

Secondly, it's my understanding that he has directed Mesa to file a new 13D in effect reflecting his findings with respect to our intent back in February and on the occasions of the various

amendments before we disclosed an intent to effect a restructuring, I think, on March 27th. And he also ordered us in accordance with the ruling that was attached to make corrective disclosures with respect to our tender offer, and those related, as the ruling indicated, with respect to our financing plans for the back end and the effect of our plans for restructuring the company that might be on our tender offer. And it's my understanding that he directed us to extend the date on which we can buy or keep our offer open -- I'm not sure which -- but he extended our date with respect to our tender offer to three weeks from the date on which we make such corrective disclosures with respect to certainly the 14D and whether the 13D disclosures are also triggered in that three-week extension I'm not sure.

THE COURT: Mr. Richards, if I may, to your knowledge, are there any proceedings in any other court involving the exchange offer that is at issue here today, seeking to enjoin it under federal law, for example?

MR. RICHARDS: Yes, Your Honor, I think there is an application before Judge Tashima. I am not aware of the current status of that. As of yesterday I believe that was set down for a hearing on Monday before Judge Tashima, but that was limited to violations of the Williams Act.

THE COURT: Thank you.

MR. RICHARDS: Turning, then, to the matters that bring us before the Court this afternoon, defendants here have attempted to do something here that no one has ever attempted before, and for very good reason. In making the discriminatory tender offer which they seek to support before this Court, they run counter to the main tenet, indeed, the principal tenet of our corporation law: That shareholders must be treated equally and fairly.

In looking at the facts here, there is little wonder that defendants are recommending the tender to all of their shareholders and tendering

themselves, because they are offering their shareholders securities with a face value of $72 at a time when the market value for Unocal stock closed yesterday at 46 and a fraction. And yet they say under those circumstances the exclusion of Mesa is perfectly fair.

They say in their affidavits that the Unocal stock is worth at least $60 and might -- and I underscore "might" -- be worth $70 to $75 under the circumstances as they explain it. That is the Sachs affidavit, Paragraph 34, Page 17. But they don't explain that Mesa could not realize on those values unless it obtained control and unless it could do away with the restrictions and covenants designed to prevent it from either obtaining control or, if it obtains control, from selling any of the assets, which they are, of course, simultaneously insisting on in the very same debt instruments.

Thirdly, I think it is noteworthy that in neither of the investment bankers' opinions and in all the work they labored to do no opinion is offered by either of them , indeed, anybody on behalf of Unocal that the offer is fair to Mesa. They restrict themselves to expressions of opinion

that it would be fair to the shareholders receiving the consideration, and it is easy to understand why.

Next I think it is important to note that the only hard numbers presented in all the many, many pages of self-serving affidavits appear in Exhibit A to the Sachs affidavit. And I think it is noteworthy that of the 28 values that are shown there, 23 of them come up with a value that is lower than $72, and the mean-median is $62 and $68 of implied value. And in comparison to the two integrated oil company acquisitions, the only ones that are comparable, the mid-values are $59 for the median and $57 for the mean. And all of those values are below the $72 stated value of their debt.

Now, they try to say that Mesa has somehow admitted that the value exceeds $72. This is arrant nonsense. As the Coats affidavit reveals in Exhibit A, there is a Mesa in-house view of a value or suggested value at $64 a share. But this is before recognition of deferred taxes of some $1.3 billion and not $86 a share, as I think is really inappropriately suggested in their brief at Page 10.

Neither Goldman Sachs nor Dillon Read rely on John S. Herold values, and neither do we.

And the Tassin affidavit makes it plain why nobody would. And if you reviewed their legal secretaries' notes of the statement in which Mr. Pickens is supposed to have adopted John S. Herold's value, you will see that even disregarding the hearsay nature of that evidence, that Mr. Pickens doesn't say he believes that is the value either.

Then when you stop and turn for a moment to the market value information -- and this is reviewed in the third Tassin affidavit in Paragraph 11 -- the all-time high for this stock was $56 in 1980, and it was $41 before we started buying. And yet they say the exclusion of us from a $72 offer is fair.

Now, Fisher vs. Moltz is the controlling precedent here. And Fisher vs. Moltz says that the burden is on the defendants to show, 1, a valid corporate business; 2, that they have not unduly favored one group over another; and 3, that it is fair to all shareholders. And as we will see, they can make none of these showings.

And Fisher vs. Moltz is not some aberrational case but rather a case that is similar to the other decisions and the controlling principles

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Now, I think their numbers are really

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. RICHARDS: No. I think that is a

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

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

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

I don't know whether that is clear.

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

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

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

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

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

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

Also, I seem to be getting conflicting

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

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

THE COURT: Thank you.

MR. RICHARDS: Thank you.

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Brief pause)

Any luck?

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

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question of where it is.

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

THE COURT: Thank you.

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

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

"Following Mr. Blamey's

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

standard set forth in Fisher.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In short, Your Honor, there is no

probability of success on this claim.

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

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

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

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

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

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

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

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

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

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

of their investment bankers in response to the Sachs affidavit and in response to the Hobbs affidavit and in response to the determinations of the board of directors, in response to the Blamey analysis, in response to Mr. Pickens' public statements. They haven't said it because they can't say it. 372 has to be accepted at this stage of these proceedings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And then the second thing in Fisher,

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

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

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

equally means.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Thank you.

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

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

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

and that is inconsistent."

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

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

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

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

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

Mr. Tassin says in Paragraph 2, "Such

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

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

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

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

MR. RICHARDS: Thank you.

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

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

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

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

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

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

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

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

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

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

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

Thank you.

THE COURT: Thank you.

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

THE COURT: In that case we'll stand in

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

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

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C E R T I F I C A T E

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

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

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

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

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Typed by:
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