45

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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

JOHN B. KELLY III

OPENING BRIEF OF PLAINTIFFS IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER

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Dated: April 24, 1985

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases	*Page*
Plaza Securities Co. v. Datapoint Corp., Del. Ch., C.A. No. 7932, Brown, C. (Mar. 5, 1985), aff'd, Del. Supr., No. 79,1985, Horsey, J. (Mar. 8, 1985)	25
Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971)	23, 27
Sinclair Oil Corp. v. Levien, Del. Supr., 230 A.2d 717 (1971)	21
Sterling v. Mayflower Hotel Corp., Del. Supr., 93 A.2d 107 (1952)	20
Weinberger v. UOP, Inc., Del. Supr., 457 A.2d 701 (1983)	20

Other Authority

NYSE Listed Company Manual, §311.03	14

NATURE AND STAGE OF THE PROCEEDINGS

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

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

On April 23, 1985, defendants issued a press release disclosing that they had amended the Original Debt Tender. That same day, plaintiffs moved for the entry of a temporary restraining order enjoining Unocal from proceeding with the Amended Debt Tender, from soliciting tenders pursuant thereto and from buying shares thereunder. Also on that same day, the Court held a scheduling conference with respect to plaintiffs' application and set its motion for a temporary restraining order down for a hearing on Friday, April 26, 1985, at 3:30 p.m.

This is the opening brief of plaintiffs in support of their motion for a temporary restraining order. In further support of their motion for a temporary restraining order, plaintiffs have filed herewith the Second Affidavit of Sidney Tassin and the Third Affidavit of Donald C. Carter. Also pursuant to the schedule set by the Court at its April 23, 1985 scheduling conference, plaintiffs are filing herewith their Second Amended Complaint, which has been verified. In addition plaintiffs rely on the record heretofore established in this action.

STATEMENT OF FACTS

A. Introduction.

As the facts of this case show, defendants will resort to virtually any tactic, no matter how illegal or inequitable, in order to further their purpose of defeating the tender offer made by the Partnership and Mesa Eastern (the "Offerors") to purchase a majority of the stock of Unocal for $54 per share in cash (the "Offer"), and to defeat the Partnership's ongoing proxy solicitation.

Defendants' most recent maneuver is thus but the latest chapter in the book of manipulation they have written.* This time, defendants seek to thwart plaintiffs by offering, in blatant violation of Delaware law, to purchase

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*As the Court is aware, defendants' manipulations commenced in December, 1984, with their program of threat and intimidation aimed at Mesa's bankers. Then, in rapid sequence after the Partnership announced its investment in Unocal on February 14, 1985, Unocal adopted the Notice Bylaws to deprive Unocal stockholders of fundamental rights of corporate governance by limiting their ability to vote for persons as directors and to consider and act upon stockholder proposals (February 25); sued one of Mesa's banks and surreptitiously sent copies of the complaint in that suit to other of Mesa's bankers (March 12); amended the bylaws of Unocal to change the quorum requirements for annual meetings of stockholders of Unocal (April 1); and sought to skew the Partnership's proxy solicitation by announcing to stockholders, less than 30 days before the Unocal annual meeting of stockholders, that since the Notice Bylaws required 30 days' notice of stockholder proposals or nominations, and since less than 30 days remained before the annual meeting, stockholder proposals or nominations not already made could not be considered at any adjournment of the annual meeting (April 7).

Unocal shares from everyone _except_ Mesa, the Offerors and any of their transferees. There is no conceivable justification for such a perversion of corporate stewardship. There is no authority under our law for a board of directors to favor one group of common stockholders over another in the manner defendants seek to accomplish here, particularly where, as here, such action amounts to a taking of the Offerors' property and a gift of that property to the members of Unocal's board, executive management and selected other stockholders. The Amended Debt Tender is not only illegal but grossly inequitable, and must be enjoined.

B. _The Original Debt Tender_.*

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

On April 16, 1985, Unocal announced that it would "commence" an illusory offer to exchange 87,200,000 shares of its common stock for a package of its debt securities

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*Since the Court is already familiar with many of the facts of this case from prior briefing and oral argument on plaintiffs' earlier motion for a temporary restraining order, plaintiffs will not burden the Court with repetition of those facts here. Rather, plaintiffs will address the critical issues surrounding the Original Debt Tender and the Amended Debt Tender, and refer the Court to our earlier papers for the background facts.

consisting, per Unocal common share, of (i) $20 principal amount of 14% Senior Secured Notes Due 1990, (ii) $32 principal amount of Floating Rate Senior Secured Notes Due 1991, and (iii) $20 principal amount of Senior Secured Extendible Notes Due 1997. The terms and conditions of this "offer" -- the Original Debt Tender -- were set forth in an Offer to Purchase dated April 17, 1985 (the "Original Offer to Purchase"). (Nolen Aff. Ex. A).

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

Secondly, the Original Debt Tender provided that Unocal would not accept for exchange, or issue securities in exchange for, any shares tendered by or on behalf of Mesa or the Offerors or any person controlling, controlled by, or under common control with them, nor any shares tendered by or on behalf of any other person that were transferred, directly or indirectly, after the date of the commencement of the Original Debt Tender to such person by Mesa or the Offerors or any person controlling, controlled by, or under common control with them. (Nolen Aff., Ex. A at p. 2). Thus, the Original Debt Tender purports to preclude some holders of common stock from participating in it, while permitting all other holders of common stock, including expressly the members of Unocal's board and management, to profit from it. Not only did the Original Debt Tender discriminate against some stockholders and favor others, but in fact it discriminated against plaintiffs and their transferees in favor of the very persons who stood as fiduciaries for them. A cruder breach of fiduciary duty is difficult to imagine.

Thirdly, defendants admitted in the Original Offer to Purchase that the Debt Tender was designed to thwart the Offer and to prevent or hinder the Offerors' financing. (Nolen Aff., Ex. A at p. 7). Thus, it was not designed primarily to afford an economic opportunity to all Unocal stockholders, or even some of them, but instead to prevent the Unocal stockholders from obtaining any enhancement of value for their shares because, if the primary goal of the Original Debt Tender -- defeat of the Offer -- were achieved, the Original Debt Tender would disappear by its own terms.

It is critical to understand what the defendants had put in motion by commencing the Original Debt Tender. It was, in fact, the ultimate entrenchment device because if it worked, the Offerors would have no choice but to withdraw the Offer. In concept it was simple: all the board had to do was put in place a device which could not be withdrawn by a majority stockholder and which would result in such an enormous debt burden for the company with such accompanying restrictions on cash flow and asset disposition that the company would be worth less than what the Offerors paid for it per share. This is precisely what the board tried to do.

The board made no effort to determine whether the Original Debt Tender was fair to the stockholders of Unocal as a whole or even whether the value of the securities offered in the Original Debt Tender was a fair price for Unocal shares. Indeed, they did not determine that Unocal was worth more than $47 per share, the liquidation value found by Unocal's investment bankers. All of this can be determined from the face of the Original Offer to Purchase itself. (Nolen Aff., Ex. A). Rather, defendants simply set the price "offered" in the Original Debt Tender with the idea in mind that it was so high that the threat of consummation of the Original Debt Tender would cause the Offerors to withdraw their Offer rather than risk buying into Unocal and by the very act of buying into it trigger the Original Debt Tender.

C. The Amended Debt Tender.

Defendants were not content to rely on the Original Debt Tender, as they had structured it, to defeat the Offer. Rather, on April 23, 1985, one day after the Court granted temporary injunctive relief to plaintiffs on their bylaw claims and plaintiffs filed their amended complaint in this Court challenging the Original Debt Tender, defendants announced that they had amended it to impose immediate harm on the Offerors whether or not they went forward with their Offer. Thus, in a press release issued on April 23, 1985, defendants announced that Unocal would "purchase 50 million shares of its common stock for $72 per share in senior secured notes whether or not the Mesa Group purchases 64 million shares pursuant to its April 8 tender offer," and that the remaining 37,200,000 shares subject to the Original Debt Tender would be purchased if the Offerors accepted for payment the shares sought in the Offer. That press release further disclosed that all of the terms and conditions of the Original Debt Tender would be made applicable to the Amended Debt Tender, except that under the Amended Debt Tender the purchase by Unocal of 50,000,000 of the

87,200,000 shares of Unocal common stock sought to be purchased was no longer conditioned on the consummation of the Offer. (Second Tassin Aff., Ex. A). Thus, the Amended Debt Tender retains the illegal and discriminatory terms of the Original Debt Tender which preclude the Partnership, Unocal's largest stockholder, from participating in it. As with the Original, under the Amended Debt Tender the members of Unocal's board and management stand to profit by it at the expense of those stockholders who they have disfavored and precluded from participation.

The purported rationale of the Original Debt Tender -- to provide Unocal stockholders an opportunity to exchange their remaining shares for a "fair" value if the Offer were consummated -- has now been abandoned. It cannot be advanced by the purchase of 50,000,000 shares under the Amended Debt Tender, because <u>now</u>, defendants have set Unocal upon a course by which it will purchase those shares regardless of whether the Offerors purchase shares under the Offer. Plaintiffs believe that the securities offered per share in the Amended Debt Tender are worth more per share than the Unocal stock for which they will be exchanged with the result that some Unocal stockholders, including the defendant directors, will profit at the expense of plaintiffs and any other Unocal stockholder who does not or can not tender. This is not just an idle expression of opinion or the opinion of some hired gun. Rather, plaintiffs are willing to put their money (over a billion dollars invested in Unocal) where their mouth is and tender into the Amended Debt Tender so as to participate on an equal footing with all other shareholders and with defendants in this corporate largess. (Second Tassin Aff. ¶8.)

Under the Amended Debt Tender, as under the Original, Mesa, the Offerors and their transferees are specifically denied the opportunity to obtain the securities offered in the Amended Debt Tender by tendering their shares. The effect of this discriminatory provision is that Mesa, the Offerors and their transferees will be irreparably harmed by any purchase of shares under the Amended Debt Tender because the value of the securities offered under the Amended Debt Tender is in excess of the value of the Unocal stock for which it is to be exchanged. Defendants evidently agree or else they would not recommend to their shareholders that they tender nor could they agree to do so themselves. Thus, the Partnership is not only deprived of the opportunity, extended to all of Unocal's other stockholders, to obtain such securities, but in addition the value of the Partnership's Unocal stock will be materially diminished. This is irreparable harm that only this Court can prevent.

Moreover, the Partnership is subject to further irreparable harm in that its proxy solicitation is being materially adversely affected by this illegal Amended Debt Tender. (Third Carter Aff. ¶7).

ARGUMENT

I. THE AMENDED DEBT TENDER UNLAWFULLY DISCRIMINATES AMONG UNOCAL STOCKHOLDERS.

As this Court has repeatedly held, in many different contexts, there is no place in our law for the discrimination among stockholders which the defendants have sought to accomplish in the Amended Debt Tender. The defendants have structured their offer so that it is open to all stockholders of Unocal except plaintiffs. Indeed, since among the plaintiffs, only the Partnership owns shares of Unocal, the Amended Debt Tender is designed to preclude only one stockholder from profiting by it, and is open to the remaining 76,899 Unocal stockholders. (Nolen Aff., Ex. A at p. 1). As so structured, the Amended Debt Tender is illegal under our law and must be enjoined.

A. This Case Is Controlled By Settled Precedent In This Court.

The invalidity of the Amended Debt Tender as the defendants have designed it is plain, and the issue it poses is directly controlled by _Fisher v. Moltz_, Del. Ch., C.A. No. 6068, Hartnett, V.C. (Dec. 28, 1979), _reprinted in_ 5 Del. J. Corp. L. 530 (1980), _reargument denied_, Del. Ch., C.A. No. 6068, Hartnett, V.C. (Feb. 21, 1980).* In _Fisher_, C.J. Lawrence & Co., Inc. ("Lawrence") made a tender offer for all the outstanding shares of its stock which were held by

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*Unreported opinions cited herein are attached hereto in alphabetical order.

former employees of a subsidiary of Lawrence, but excluded from the offer shares held by certain former employees who had left to engage in competition with it.

The stockholders excluded from the offer sought injunctive relief in this Court to compel the inclusion of their shares in the offer or, in the alternative, to enjoin the offer altogether. The Court succinctly set forth the issue posed by plaintiffs' application as follows:

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

5 Del. J. Corp. L. at 532.

In considering this question, the Court first carefully discussed the general proposition that a Delaware corporation may repurchase its shares for a proper corporate purpose and went so far as to presume that such a repurchase could be made from one or more persons without making a similar offer to all stockholders. However, the Court held that the burden of justifying such a discriminatory offer rested squarely on the defendants. The Court stated:

> The Delaware rule, however, that corporate directors owe a fiduciary duty to the stockholders of a Delaware corporation mandates that when a corporation makes an offer to purchase the corporation's stock from certain stockholders and excludes other stockholders from participation, a burden is imposed upon the corporation to show that there is a valid corporate purpose for limiting

> the offer and that in so doing it has not unduly favored one group over another.

5 Del. J. Corp. L. at 532 (citations omitted). Thus, the Court held, the burden is on the corporation and its board to meet both prongs of a two-part test: firstly, defendants must show that there is a valid corporate purpose for the discrimination, and secondly, they must show that even if there is a valid corporate purpose for it, it does not favor one group over the other. Moreover, defendants bear the further burden of demonstrating the fairness of the discriminatory offer. Fisher v. Moltz, Del. Ch., C.A. No. 6068, slip op. at 1, Hartnett, V.C. (Feb. 21, 1980). Of course, it hardly needs to be said that our law disfavors discrimination among stockholders. In many different contexts, such as in the payment of dividends, the redemption of stock and distributions upon liquidation, our courts have condemned such unequal treatment. Thus the holding of Fisher v. Moltz is not only controlling here, but expressive of a broader and more pervasive policy of our law.*

It is thus plain that under established Delaware law defendants must show a proper corporate purpose for the discrimination they seek to effect in the Amended Debt Tender, that

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*It is, of course, also consistent with the expressed policy of the New York Stock Exchange that "it is important that all shareholders of a company be given an opportunity to participate on equal terms in any tender offer made which may affect the rights or benefits of such shareholders." NYSE Listed Company Manual, §311.03.

the discrimination does not favor one group of stockholders -- all of Unocal's stockholders except the Partnership -- over the other, and that the Amended Debt Tender is fair. It is equally plain that defendants cannot make the necessary showing on a single one of these factors, much less all three.

1. <u>The Discrimination Effected by the Amended Debt Tender Is Not Designed to Serve A Valid Corporate Purpose.</u>

The only explanation given by defendants for their attempt to exclude the Partnership from participation in the Amended Debt Tender demonstrates on its face that no proper corporate purpose is served by the attempted discrimination. In the Original Offer to Purchase, defendants candidly revealed their reason for excluding the Partnership from participation: "The Company is not offering to purchase Mesa Shares pursuant to the Company Offer because such exchanges would limit its ability to offer such value for as many other Shares as possible." (Nolen Aff., Ex. A at p. 7).

Thus, the admitted purpose of the discrimination is to enhance the benefit of Unocal's offer to the holders of 86.4% of Unocal's stock <u>by depriving the holder of the remaining 13.6% of any benefit whatsoever</u>. Defendants seek to defraud one stockholder in favor of the others. There can be no proper corporate purpose for such a breach of trust. Indeed, the individual defendants have carefully ensured that the discrimination works in their personal favor, and have told their stockholders that the Amended Debt Tender is such a good deal that they themselves will tender into it.

The absence of any legitimate purpose for excluding the Partnership from the Amended Debt Tender is strikingly evident when compared with the reasons that have prompted other boards of directors selectively to repurchase stock. Such repurchases have been upheld only after corporations and their directors have demonstrated that the stock purchase was designed to eliminate a stockholder who "constituted a 'reasonable threat' to the continued existence of the corporation or its successful corporate policies, or at least to their continued existence in their then current form." Good v. Texaco, Inc., Del. Ch., C.A. No. 7501, Brown, C. (Feb. 19, 1985). See also, e.g., Cheff v. Mathes, Del. Supr., 199 A.2d 548, 556 (1964) (directors acted to eliminate a "reasonable threat to the continued existence of [the corporation]" posed by stockholder); Amsellem v. Shopwell Inc., Del. Ch., C.A. No. 5683, slip op. at 10, Hartnett, V.C. (Sept. 6, 1979, revised, Sept. 10, 1979) (the "right [to repurchase stock] may be used to purchase the shares of a troublesome minority in order to preserve or make more efficient the operations of the corporation"); Kaplan v. Goldsamt, Del. Ch., 380 A.2d 556, 568-69 (1977). This is because all stockholders benefit in such a situation. The majority benefits by the removal of the dissident and the dissident benefits by agreeing to the consideration offered and being paid that consideration for his shares.

The exclusion of the Partnership from the Amended Debt Tender is not claimed to, and does not, serve any such purpose. The repurchases in those cases were appropriately limited so as to eliminate a stockholder who posed a threat to the corporation. There was no unequal treatment because the corporation and the selling stockholder benefitted equally, on the basis of a bargain struck. In the present case, the discrimination implemented by the Amended Debt Tender is wholly unilateral and explained only by a desire to treat some stockholders more favorably than others.

Thus, the discrimination among stockholders sought to be effected by the Amended Debt Tender is justified by no valid corporate purpose. Rather, its admitted purpose is to provide the Unocal directors and the remaining Unocal stockholders a greater opportunity to reap the benefits offered by the Amended Debt Tender. This purpose, to enrich the majority at the expense of the minority, is contrary to both law and public policy. It must be enjoined.

2. The Amended Debt Tender Unduly And Inequitably Favors The Director Defendants And Other Unocal Stockholders At The Expense Of The Partnership.

The Amended Debt Tender is also invalid because it "unduly favor[s] one group [of stockholders] over another." Fisher v. Moltz, 5 Del. J. Corp. L. at 532. Indeed, it is hard to fathom a transaction that more unduly favors one group of stockholders over another than does the Amended Debt Tender.

As the defendants claim, and as is graphically evidenced by their stated intent to tender into the Amended Debt Tender and their recommendation to all stockholders to do so, the Amended Debt Tender offers Unocal stockholders an unparalleled value for their stock. Indeed, no further record need be made on this issue, because the defendants have admitted the critical fact: the values offered in the Amended Debt Tender to those whom the defendants have favored is greater because of the very fact that it is not being offered to the Partnership. Yet, if further evidence were necessary on this point, the Second Tassin Affidavit supplies it. As there stated, plaintiffs believe that the securities offered in the Amended Debt Tender exceed the value of the Unocal stock, and under the present circumstances, as plaintiffs understand the Amended Debt Tender, they would tender into it if given the opportunity. The individual defendants obviously agree because they are tendering themselves and recommending the Amended Debt Tender to all of their shareholders.

Thus, on its face, the Amended Debt Tender unduly favors the Unocal stockholders other than the Partnership. It permits all stockholders except the Partnership to reap the profits available under the Amended Debt Tender, but denies those profits to the Partnership. That discrimination is patently invalid.

Not only are the Unocal directors and other stockholders who tender into the Amended Debt Tender affirmatively benefited by so doing; the Partnership suffers a corresponding, immediate and drastic injury from that preferential treatment. The Partnership will remain the largest stockholder of Unocal after the Amended Debt Tender is consummated, but the value of its equity holding will have been slashed drastically. Value in excess of the fair value of Unocal's shares will have been paid from the corporate coffers to everyone but the Partnership, which will be left owning a stake in a corporation whose assets have been depleted and whose debt has skyrocketed. In these circumstances, defendants cannot demonstrate that the discrimination they seek to effect does not unduly favor one group of stockholders at the expense of another. Instead, that favored treatment is admitted.

3. Defendants Cannot Demonstrate The Fairness of The Amended Debt Tender.

Just as defendants can demonstrate neither a valid corporate purpose for the discrimination they have built into the Amended Debt Tender nor that it does not favor one group of stockholders over another, they cannot show that the Amended Debt Tender is fair to their stockholders as a whole. Instead, defendants would have the

Court look only to the "fairness" of the Amended Debt Tender to some of their stockholders -- the majority -- and ignore the fact that the Amended Debt Tender is unfair, and intentionally so, to the 13.6% minority which the Partnership constitutes. Such a stilted and limited inquiry would turn our law on its head. Such a concept of fairness would give free rein to management to impose with impunity a bill of attainder upon any stockholder it chose.

The Amended Debt Tender is unfair to the Partnership in the extreme, and the defendants have admitted as much. They have said it is a fabulous deal for the stockholders who can get it, and they have said it is so good that they intend to take it. Yet it is precisely this opportunity they deny to the Partnership. To deny a single, minority stockholder of the opportunity to accept such an offer simply does not comport with the concept of fairness our courts have consistently enforced. See, e.g., Weinberger v. UOP, Inc., Del. Supr., 457 A.2d 701 (1983).

Of course, the Defendant Directors must prove the intrinsic fairness of the Amended Debt Tender for a more fundamental reason, regardless of their obligation under Fisher v. Moltz. They stand on both sides of the transaction, having structured it in such a way that they can take advantage of it while denying that benefit to some of those for whom they stand as fiduciaries. See, e.g., Sterling v. Mayflower Hotel Corp., Del. Supr., 93

A.2d 107, 110 (1952) ("Since they stand on both sides of the transaction, they bear the burden of establishing its entire fairness, and it must pass the test of careful scrutiny by the courts"); Gottlieb v. Heyden Chemical Corp., Del. Supr., 90 A.2d 660, 663 (1952) ("the burden is upon the directors to prove not only that the transaction was in good faith, but also that its intrinsic fairness will withstand the most searching and objective analysis"); Sinclair Oil Corp. v. Levien, Del. Supr., 230 A.2d 717, 719-20 (1971).

The burden imposed on defendants is an impossible one for them to meet in this case. The Amended Debt Tender must be enjoined.

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

Less than 24 hours after this Court issued its opinion against an eleventh hour interpretation of Unocal's bylaws which this Court found would "impair Mesa's ongoing proxy solicitation efforts," the Unocal board has again taken action which would have a devastating impact on the Partnership's effort to solicit proxies for its adjournment proposals. The Amended Debt Tender, announced only six days before the Annual Meeting for which the Partnership is currently soliciting proxies, will greatly diminish the chances that the Partnership's proxy solicitation efforts will be successful. Their previous attempt to derail Mesa's proxy solicitation having failed, defendants have apparently decided to utilize exactly the type of eleventh hour device designed to "foment stockholder confusion" of which they self-righteously accused the Partnership in their previous papers in this action.

As this Court recognized in its opinion on the bylaw interpretation, handed down only days ago, under Delaware law shareholders have a "right to a full and fair proxy contest," American Pacific Corp. v. Super Food Services, Inc., Del. Ch., C.A. No. 7020, Longobardi, V.C. (Dec. 6, 1982) slip op. at 12, and actions taken by management, whether technically legal or not, which unfairly inhibit that right are void. Mesa Petroleum Co. v. Unocal

Corp., Del. Ch., C.A. No. 7997, Berger, V.C. (Apr. 22, 1985); Lerman v. Diagnostic Data, Inc., Del. Ch., 421 A.2d 906 (1980); Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971). The fact that management's actions were not intended to have the inhibiting effect is irrelevant if their actions have the proscribed effect. Lerman v. Diagnostic Data, Inc., 421 A.2d at 914.

Nor do plaintiffs need show that the Amended Debt Tender puts their proxy solicitation "out of business"; they need only show that it would "unfairly inhibit their ability" to mount a successful proxy solicitation. Lerman v. Diagnostic Data, Inc., 421 A.2d at 912. As the Third Carter Affidavit clearly demonstrates, the Amended Debt Tender will have just such a direct and adverse impact on the Partnership's proxy solicitation efforts.

III. PLAINTIFFS ARE ENTITLED TO INTERIM INJUNCTIVE RELIEF.

The standards for granting interim injunctive relief are well established and require that plaintiffs show only a probability of success on the merits and the threat of irreparable harm if injunctive relief is not granted. As the Court stated the questions to be considered in Gimbel v. Signal Companies, Del. Ch., 316 A.2d 599, aff'd, Del. Supr., 316 A.2d 619 (1974):

> Has the plaintiff satisfied the Court that there is a reasonable probability of his ultimate success on final hearing?
>
> * * *
>
> Has the plaintiff satisfied the Court that he will suffer irreparable injury if the Court fails to issue the requested preliminary injunction?

316 A.2d at 602. Those standards have been met here.

As demonstrated above, the defendants' conduct has been and continues to be both illegal and inequitable. They have singled out one of the stockholders to whom their fiduciary duties flow and have attempted despite that relationship to deprive that stockholder of the economic benefit they have made available to each of the remaining stockholders, including themselves. The effect of this exclusion is to reduce the value of the Partnership's stockholdings. As if that is not enough, the defendants have rigged the deal so that they can personally profit, and admittedly intend to do so, again to the detriment of the sole excluded stockholder. Such discrimination between stockholders, to the personal financial benefit of the directors who perpetrate the discrimination, is simply incapable of justification under Delaware law.

Moreover, plaintiffs and the other Unocal shareholders have been and will be irreparably harmed unless injunctive relief is granted. First, irreparable harm results from the exclusion of plaintiffs and their transferees from the Amended Debt Tender. If it were permitted to do so, the Partnership would tender into the first step of the Amended Debt Tender because plaintiffs believe the package of debt securities offered to be worth more than the Unocal stock for which the debt securities are being exchanged. (Second Tassin Aff. ¶8). Under the terms of the Amended Debt Tender, the proration and withdrawal periods end on April 30, 1985, with Unocal then able to purchase shares pursuant to its offer at that time. Once it does so, of course, the Partnership will be frozen out of participation in the offer and will be irreparably harmed.

As this Court held in <u>Plaza Securities Co. v. Datapoint Corp.</u>, Del. Ch., C.A. No. 7932, Brown, C. (Mar. 5, 1985), <u>aff'd</u>, Del. Supr., No. 79,1985, Horsey, J. (Mar. 8, 1985), and reaffirmed in its decision in this action just two days ago, slip op. at 8-9, irreparable harm is established where a clear legal right will be interfered with in the absence of injunctive relief and that interference does not appear to be compensable in money damages. Plaintiffs have a right not to be inequitably discriminated against, and the abrogation of that right gives rise to irreparable harm. See Fisher v. Moltz, 5 Del. J. Corp. L. at 532 ("injunctive relief is reasonably necessary for the preservation of the status quo, and protection of plaintiffs' rights or the prevention of irreparable harm"). Accordingly, for this reason alone, plaintiffs have established irreparable harm sufficient to justify the relief they seek.

In addition, the effect of the Amended Debt Tender will inevitably be to reduce greatly the value of the Partnership's stockholdings. The corporation remaining after the Amended Debt Tender will be burdened with greatly increased debt. Because in the absence of injunctive relief the Amended Debt Tender will proceed with no opportunity for plaintiffs to participate, they will be left with a major interest in a company whose capital structure has been drastically and negatively altered. Again, no likelihood exists that a monetary recovery of such magnitude as would remedy plaintiffs' injury will be forthcoming from the individual defendants.

Moreover, for the reasons stated in the Third Carter Affidavit, the Amended Debt Tender is currently impeding the ongoing proxy solicitation of the Partnership and will continue to do so unless enjoined. As this Court recognized in its April 22 Opinion, impairment of a proxy solicitation constitutes irreparable harm and in itself justifies interim injunctive relief. Slip op. at 9-10; see also Schnell v. Chris-Craft Industries, Inc., 285 A.2d at 439 (1971); Lerman v. Diagnostic Data, Inc., 421 A.2d at 908. As with their earlier attempt to dissuade Unocal stockholders from submitting their proxies to plaintiffs, defendants' current efforts to defeat the Partnership's proxy solicitation through coercion, confusion and misinformation must not be countenanced.

Finally, it is not only the plaintiffs who will be irreparably injured absent injunctive relief. All Unocal stockholders will be. The Unocal stockholders are now confronted with the dilemma of determining whether to tender into the Amended Debt Tender without the benefit of knowing whether the plaintiffs will also be able to tender. As a result, the Unocal stockholders have no means of knowing the extent to which their stock will be prorated in the Unocal offer or whether plaintiffs' offer may be withdrawn as a consequence of plaintiffs' determination to tender to Unocal. As this Court has recognized, such stockholder confusion with respect to fundamental decisions facing the stockholders itself constitutes irreparable harm. See, e.g., American Pacific Corp. v. Super Food Services, Inc., Del. Ch., C.A. No. 7020, Longobardi, V.C. (Dec. 6, 1982) slip op. at 9-12.

Thus, plaintiffs will suffer irreparable harm unless this Court enjoins the defendants from denying them the benefits it has offered the other Unocal stockholders. Indeed by virtue of the confusion created by defendants' actions, all Unocal stockholders have been and will continue to be irreparably injured. The Court must exercise its injunctive powers to put a stop to, and to prevent, these clear and irreparable injuries.

CONCLUSION

For all of the reasons advanced herein, plaintiffs respectfully request that they be granted injunctive relief in the form prayed for.

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Dated: April 24, 1985

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December 6, 1982

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Re: American Pacific Corporation and Bernard A. Egan v. Super Food Services, Inc., et al -- Civil Action No. 7020
Submitted -- December 2, 1982

Gentlemen:

Plaintiffs American Pacific Corporation ("AMPAC") and Bernard A. Egan ("Egan") seek to preliminarily enjoin Super Food Services, Inc. ("Super Food") against holding its annual stockholders' meeting on December 7, 1982.

Plaintiffs' complaint and motion are based on a series of actions taken by Super Food's present management at a director's meeting on August 25, 1982. What follows is a concise characterization of the minutes of that meeting.

The Chairman of the Board, Jack Twyman, proposed that the Corporation purchase 461,140 shares of its common stock owned by certain trusts. The motion carried. As a result, AMPAC's and Egan's holdings of corporate stock rose above 5%. Then, in a move to thwart unfriendly takeover possibilities, the Board adopted, subject to stockholder approval, a series of "supermajority" and "majority of minority" proposals, provisions for a classified Board and finally amendments to the by-laws which would complement the anti-takeover provisions. A more detailed explanation of the resolutions follows.

Without prior approval of the stockholders, the Board adopted an amendment to the by-laws captioned "Section 7.1 Amendments." This amendment would allow subsequent amendments of the by-laws only by majority vote of the Board except amendments to Section 3.3 and certain others would require the vote of 75% of the whole Board of Directors or 80% of the holders of outstanding shares of stock exclusive of all stockholders holding 5% or more of corporate stock. The Board also adopted, subject to stockholder approval, an amendment to Section 3.3. By this proposed amendment, the Corporation would have a classified Board with 1/3 of the Directors being elected annually. Further, the Board advised stockholders that approval of the amendment would require the "affirmative vote of the holders of at least a majority of the outstanding shares of voting stock of the Company entitled to vote at the meeting." (Emphasis added.) (Stockholders' Meeting - Defendants' Proxy Statement, at 3.)

Next, the Board adopted, subject to stockholder approval, a new Article Sixth to the Corporation's certificate of incorporation. Proposed Aritcle Sixth provides that any mergers or sale or exchange of a substantial part of the Corporation's assets would require the affirmative vote of 80% of the outstanding stock and a majority of the outstanding shares not beneficially owned by the 5%-or-more-shareholder proposing the sale or merger (the majority of minority provision).

Next, the Board adopted, subject to stockholder approval, an amendment to the certificate of incorporation captioned "Article Eighth." By the proposed amendment, it is clear that the Board intended to protect the anti-takeover provision in proposed Article Sixth. Proposed Article Eighth would require the affirmative vote of 80% of the holders of stock and a majority of the outstanding stock excluding all those stockholders who own 5% or more of corporate stock. (Emphasis added.) (It is to be noted at this juncture that the voting requirements of proposed Articles Sixth and Eighth are not the same. In Article Sixth, a merger or sale could be accomplished by an 80% vote and, if the merger were with a stockholder owning 5% or more, a majority of all other outstanding stock. Proposed Article Eighth would, in all circumstances, merger or not, require an 80% vote and a majority of all shares excluding the votes of all stockholders owning 5% or more of corporate stock.)

The Board, also by amendment of the by-laws, provided that the calling of special meetings by stockholders could be accomplished only by the call of the Chief Executive Officers of the Corporation or by a written motion of a majority of the Board. This amendment, in effect, removed the right of 10% of the stockholders, a right formerly enjoyed, from calling a special meeting.

All of these actions were either directly or indirectly passed on to the stockholders through Super Food's October 28, 1982 Proxy Statement. (Some by-law amendments were included in the attached corporate by-laws with no reference to their date of adoption.)

On November 10, 1982, Plaintiff AMPAC announced its opposition to Super Food's slate of directors and the by-law and charter amendments. On November 19, 1982, they filed suit in this Court challenging, among other things, the legality of the anti-takeover amendments under Delaware law. Thereafter, the Defendants, as if in response to the complaint, mailed to the stockholders an undated document captioned "Supplemental Information." (This was apparently mailed around November 24, 1982.) Super Food's Board noted that it might not have had authority to amend the by-laws by their new Section 7.1. They also noted an apparent error in their Proxy Statement relative to the vote necessary to enact Section 3.3 and advised stockholders that it could be adopted by a simple majority of the quorum of shares represented at the annual meeting. They did not note, however, the apparent contradiction between the supermajority requirement for the amendment of by-laws found in Section 7.1 and their statement that a majority of the quorum would suffice to amend by-law Section 3.3. Based on the affidavits of Dennis Mensch, an employee of The Carter Organization, a proxy solicitation expert, many of Super Food's stockholders will not receive this supplemental information, for whatever it is worth, in time enough to affect their votes at the annual meeting on December 7, 1982. The number of shares so affected is a staggering 43.66%.

Plaintiffs contend that proposed Article Eighth is illegal under Delaware law because it requires more than the supermajority prescribed in proposed Article Sixth to repeal proposed Article Sixth. Title 8, Section 242(c)(4) of the Delaware Code states ". . . the provision of the certificate of incorporation requiring such greater vote [i.e., a supermajority vote] shall not be altered, amended or repealed except by such greater vote." Plaintiffs insist that to exclude all stockholders owning 5% or more of Super Food from voting on any alteration of Article Sixth, which only excludes a 5% stockholder who is party to a merger, provides for a lesser vote (i.e., a more diminished voter pool) to effectuate a change. Additionally, they claim that disenfranchisement of any percentage of shareholders under either Article Sixth or Eighth is improper and the disenfranchisement under Article Eighth is especially offensive because it penalizes them for merely owning a certain percentage of shares even in the absence of an intent to "take-over" the Corporation.

The Defendants' response is that Section 242(c)(4) merely codifies the rule of Sellers v. Joseph Bancroft & Sons Co., Del.Ch., 2 A.2d 108, 111-12 (1938) which held protection offered to minority stockholders by a supermajority vote provision only works if that provision cannot be struck down by a lesser vote. Article Eighth, they say, does this by making it more difficult for holders of large stock blocks to amend the supermajority provision out of existence. This may be true, yet, it is troubling that Article Eighth accomplished that by excluding, indeed disregarding, the vote of people who own 5% or more of corporate stock. At the least, in this particular context, such a proposition appears unjust.

Employing a "majority of the minority" provision, as in Weinberger v. UOP, Del.Ch., 409 A.2d 1262 (1979), insulates the minority from the unfair pressure of a majority stockholder. To silence stockholders who are not actively seeking acquisition of the company seems to be to offer too much protection at too great a cost. Although the general purpose of Section 242(c)(4) may be served by a supermajority

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December 6, 1982
Page Eight

provision, I do not see it as condoning wholesale disenfranchisement. Moreover, I tend to agree with Plaintiffs that, as it stands, Article Eighth would technically violate Section 242(c)(4) by allowing a numerically smaller number of stockholders, because of the blanket disqualifications therein, to alter a provision requiring a supermajority vote.

Furthermore, at least by implication, Defendants' Supplemental Information letter acknowledges the illegal adoption of Section 7.1 because it was not submitted to the stockholders for approval. Based on this, Plaintiffs have demonstrated a probability of success on these issues.

AMPAC and Egan also claim irreparable injury due to the confusion of voters caused by inconsistencies or omission in the Super Food proxy.

The proxy implies that Article Eighth can be rejected and Article Sixth accepted by separate votes when actually the form of proxy presents them together to the stockholders. There is no way to cast a separate vote on Article Eighth.

Furthermore, the proxy statement advised stockholders that Section 3.3 had to be approved by a majority of outstanding corporate voting stock. Their Supplemental Information letter indicates that was wrong and only a simple majority of a quorum will be required. Yet, Section 7.1 of the by-laws requires something even more than that.

Super Food concedes the possibility of Section 7.1 being illegal and advised the stockholders that if they disapprove Article Eighth, they will nullify Section 7.1. And this points up the jeopardy of Plaintiffs' position. The issue is not whether stockholders will vote to support or reject anti-takevoer provisions. And certainly it is not critical at this procedural juncture to be concerned with how the votes will be tallied. What is important, what is crucial is that this may be Plaintiffs only real opportunity for a proxy fight. Their right to that battle cannot be diminished by an uninformed or misguided electorate. In Schnell v. Chris-Craft Industries, Inc., Del.Supr., 285 A.2d 437 (1971) the Supreme Court held that advancement of a stockholder meeting date in an attempt to undermine a dissident stockholder's ability to wage a proxy contest required injunctive relief. Should we do less in this case when that right is diminished by an admittedly ill advised and inadequately informed electorate.

And I think the harm is irreparable. Defendants contend that if we allow the annual meeting to proceed, we can "unscramble" the problems if the Court decides such relief is necessary. The problem with that proposition is once one thinks specifically of the number of proposals being submitted to the stockholders, the questions arise in an almost geometric progression. What arguments will we hear about the "will of the stockholders." If we strike down one provision as illegal, what portion of the stockholders' meeting shall be voided or should all of it be nullified. How, for instance, do we deal with the election of directors. Are they tied in any way to the vote on Article Eighth. And, if a challenge is lodged against the validity of Article Eighth (if it indeed would be approved) how is this Court to strike this Article alone. Articles Sixth and Eighth will have been voted on together by the stockholders without a clear delineation in the vote as to which provisions they preferred or if they supported both with equal vigor. A declaration of Article Eighth's invalidity may be to eliminate the "preferred" provision and could result in allowing Article Sixth to stand when that Article alone could not have garnered sufficient votes for passage. Moreover, if Section 7.1 is declared invalid, can it honestly be said that the stockholders had sufficient information before voting to fairly assess the fairness or business competence of the incumbent Board? I think not. Certainly, this type of information could be crucial to a stockholder's vote on directors. See 5 Fletchers Cyclopedia of Corporations §2071 (1976). While the vote on the Directors could be nullified, then the stockholders may well be confused with this result. If a winning incumbent slate is erased, all that most stockholders will appreciate is that individuals they have supported were prevented from being reelected due to the actions of the Plaintiffs. The stigma which Plaintiffs would suffer in any subsequent proxy fight would be substantial and irreparable. "Stockholder bewilderment", a legitimate consideration when balancing the harms included in these cases, would work to the Plaintiffs' detriment. See Levin v. Metro-Goldwyn-Mayer, Inc., Del.Ch., 221 A.2d 499, 505 (1966); Cf. Campbell v. Lowe's, Incorporated, Del.Ch., 134 A.2d 565, 567 (1957).

In Gimbel v. Signal Companies, Inc., Del.Ch., 316 A.2d 599 (1974), aff'd, Del.Supr., 316 A.2d 619 (1974), the court found that though injury which would occur from a sale of stock may have been irreparable, the "various obstacles to such a remedy" helped make injunctive relief appropriate. In this case, while the vote on the anti-takeover provisions can be reversed or the provisions themselves declared invalid, the effect of reversing any exercise of "the will of the stockholder", even for their own benefit, is to create an insurmountable obstacle of confusion and antipathy. The Plaintiffs will not be able to achieve the real remedy, i.e., a fair proxy contest with an informed electorate. This disadvantage in waging a subsequent contest substantially tips the "balance of harms" in favor of the Plaintiffs. Gimbel v. Signal Companies, Inc., Id. at 602; Petty v. Penntech Papers, Inc., Del.Ch., 347 A.2d 140 (1975). Just these ruminations have sparked the imagination. What more will be provided by the ingenuousness of corporate counsel.

Weighing the equities of the situation, I am convinced that staying the meeting at this juncture preserves Plaintiffs' right to a full and fair proxy contest. Defendants will suffer the inconveniences and expense of another try but I find that insignificant when compared to Plaintiffs' right to this proxy contest.

The preliminary injunction shall issue subject to Plaintiffs' posting a $200,000 bond without surety.

IT IS SO ORDERED.

Very truly yours,

JJL/ab

cc: Register in Chancery

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JACQUES ANSELLEM and SOCIETE MONEGASQUE DES MAGASINS PRINTANIA, individually and on behalf of Shopwell, Inc., Plaintiffs,	*	
v.	*	Civil Action No. 5683
SHOPWELL, INC., HERBERT B. DAITCH, MARTIN ROSENGARTEN, SEYMOUR D. SIMPSON, WALTER FELDESMAN, SYDENY S. BARON, ARTHUR I. MEYER, FRED K. SIEGEL, JOHN L. PROCOPE, MILTON H. FARBER, JUDIANNE DENSEN-GERBER, and TED PETRILLO, Defendants.	*	

MEMORANDUM (UNREPORTED) OPINION

ON APPLICATION TO APPROVE SETTLEMENT OF STOCKHOLDER DERIVATIVE SUIT: APPROVED

SUBMITTED: August 17, 1979
DECIDED: September 6, 1979
REVISED COVER PAGE: September 10, 1979

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Richard J. Abrams, Esquire, RICHARDS, LAYTON & FINGER, P. O. Box 551, Wilmington, DE 19899, Attorney for defendant, Shopwell, Inc.

Michael D. Goldman, Esquire, POTTER, ANDERSON & CORROON, P. O. Box 951, Wilmington, DE 19899, Attorney for individual defendants.

Joseph Rosenthal, Esquire, MORRIS & ROSENTHAL, P. O. Box 1070, Wilmington, DE 19899, Attorney for Norte & Co., Galdi Securities Corporation and Sheldon Barr.

Januar D. Bove, Jr., Esquire and Arthur G. Connolly, Jr., Esquire, CONNOLLY, BOVE & LODGE, P. O. Box 2207, Wilmington, DE 198[illegible] and Edward M. Dunham, Jr., Esquire and J. Baur Whittlesey, Esquire, SPECTOR, COHEN, HUNT & ROSEN, 29th Floor, IVB Building, 1700 Market Street, Philadelphia, PA 19103, Attorneys for Simkins Industries.

HARTNETT, Vice Chancellor

This is my decision approving the settlement of this action and denying a stay to allow discovery.

This suit was brought as a stockholder's derivative action by Jacques Amsellem (Amsellem) and Societe Monegasque des Magasins Printania (Societe), owners of about 15.8% of the outstanding shares of Shopwell, Inc. (Shopwell), against Shopwell, the nominal defendant, and each of the members of Shopwell's board of directors, who together own about 36.3% of Shopwell's outstanding shares. The original complaint sought to enjoin an exchange offer announced by Shopwell, to set aside certain amendments to Shopwell's certificate of incorporation adopted by Shopwell's stockholders at the 1978 annual meeting, and damages. The certificate of incorporation amendments altered the method of election and term of office of the members of the board of directors of Shopwell and required an 80% supermajority stockholder vote to approve certain corporate transactions. Plaintiffs alleged that these actions were taken only to further the self-interest of the individual defendants and charged violations of both Delaware corporation law and the individual defendants' fiduciary duties to Shopwell and its stockholders.

As a result of the original complaint Shopwell withdrew the exchange offer and petitioned the Court for an order voiding the charter amendment requiring a supermajority vote. The petition was granted and an order to that effect issued on September 13, 1978.

Plaintiffs then filed an amended complaint on October 10, 1978, realleging the claim for damages and challenging the charter amendment as it related to the method of election and term of members of the board of directors of Shopwell. The amended complaint also contained an additional claim for damages purportedly arising from corporate mismanagement and waste. The additional claim was supported by allegations of excessive salaries and perquisites, corporate payment of personal expenses, and other improper expenditures. Shopwell and the individual defendants denied all wrongdoing, raised certain affirmative defenses, and counterclaimed.

Defendants moved to dismiss the action for lack of personal jurisdiction over the individual defendants and for failure to join indispensable parties. Plaintiffs responded by filing an action in the United States District Court for the Southern District of New York. The federal action was subsequently stayed by order of the District Court following an agreement by the defendants to withdraw their motion to dismiss the present action and to submit to the jurisdiction of this Court.

Plaintiffs undertook extensive discovery relevant to the amended complaint. This discovery involved the production of thousands of documents and the voluminous depositions of the individual defendants. Defendants claim that the magnitude of the discovery hindered their ability to carry out their duties in the day-to-day operation of Shopwell. Eventually the parties agreed that an agreement of compromise would be mutually beneficial. A compromise was reached between the parties and embodied in a Settlement Agreement dated July 10, 1979. On July 13, 1979, a settlement hearing was scheduled for August 17, 1979, with notice to all Shopwell stockholders.

Eight stockholders objected to the proposed settlement agreement. Of these, Norte & Co. (Norte), Galdi Securities Corporation (Galdi), Sheldon Barr (Barr), and Simkins Industries (Simkins) were represented by counsel. Counsel for Norte, Galdi and Barr requested and were granted access to the pleadings, depositions, and plaintiffs' discovery file relating to the action and the proposed settlément agreement. Simpkins did not request access to these documents from the plaintiffs nor did it attempt to undertake any discovery of its own. It was, however, offered the results of the investigation of Norte, Galdi and Barr but never undertook to obtain any of the information.

After a comprehensive review of the documents, Norte, Galdi and Barr voiced specific objections to the agreement and proposed certain changes designed to eliminate or mitigate those objections. Significant and lengthy negotiations between the three objectors and the parties to this suit resulted in an amended agreement of compromise with which Norte, Galdi, Barr and the parties were in accord. Norte, Galdi and Barr subsequently withdrew their objections to the settlement and submitted affidavits in support of the amended agreement.

Simkins continues to object to the settlement. It has filed an objection with supporting memorandum and has moved for a stay of sixty or ninety days in which to conduct discovery or review the documents it deems pertinent to the action and the amended agreement of settlement.

For the reasons set forth below, I deny Simkins' request for more time in which to conduct discovery and approve the settlement in the amended form as filed on August 16, 1979.

I

The voluntary settlement of disputes is favored in the law. William v. First National Bank of Pauls Valley, 216 U.S. 582, 595 (1910); Neponsit Investment Co. v. Abramson, Del. Supr., C.A. No. 202, ___ A.2d ___ (July 10, 1979); Rome v. Archer, Del. Supr., 197 A.2d 49, 53 (1964); In re Ortiz's Estate, Del. Ch., 27 A.2d 368, 374 (1942). Settlement is particularly appropriate in complex litigation because it promotes judicial economy. In a derivative suit such as this one, however, the Court must ensure that the interests of the class are represented within the agreement in accordance with the fiduciary duties of the plaintiffs to the remainder of the class. Rome v. Archer, supra; Steigman v. Beery, Del. Ch., 203 A.2d 463, 466 (1964).

The Court's duty in reviewing settlement agreements pursuant to Chancery Court Rule 23.1 is set forth in Rome v. Archer, supra. It must consider the nature of the claim, the possible defenses to it, the legal and factual obstacles facing the plaintiff in the event of trial, and whether in the Court's own business judgment the settlement appears reasonable. See also, Neponsit Investment Co. v. Abramson, supra; Krinsky v. Helfland, Del. Supr., 156 A.2d 90, 94 (1959); Gladstone v. Bennett, Del. Supr., 153 A.2d 577, 583 (1959); Brown v. Fleming - Hall Tobacco Co., Del. Supr., 92 A.2d 302, 309-310 (1952); Perrine v. Pennroad Corp., Del. Supr., 47 A.2d 479, 487-488 (1946); In re Ortiz's Estate, supra. On the other hand, it is inappropriate for the Court to try the issues or merits of the case or to allow counsel to do so in the settlement hearing, since the benefits to judicial economy would thereby be lost. Neponsit Investment Co. v. Abramson, supra, and cases cited therein.

Both the original settlement agreement and the amended settlement agreement provided for Shopwell to take certain action with respect to the wrongdoing alleged in the complaint. As part of this settlement Shopwell agreed to obtain an opinion from an independent financial advisor selected by its outside directors as to the fairness of any tender to be made by it for its equity securities within the five-year period following the date of the agreement. This is intended to resolve the underlying dispute occasioned by an abandoned 1978 exchange offer.

Shopwell agrees to establish certain oversight and control committees and monitoring systems to prevent any activity such as that alleged by plaintiffs to be mismanagement and waste. An audit committee composed of outside directors is to be established in the bylaws with specified broad oversight powers and duties. The bylaws are also to reflect the establishment of a Compensation Committee to determine from time to time the propriety of the salaries and bonuses of the principal officers and directors of the corporation. The majority of this committee are to be outside directors. In addition, the corporation agrees to centralize responsibility for and control over corporate disbursements for business-related expenses, use of company property, and certain perquisites, and to adopt a statement defining the corporation's policy on potential conflicts of interest, including disclosure of potential conflicts of interest.

The original settlement also provided for the purchase of plaintiffs' Shopwell common stock by Shopwell at $6-5/8 per share, amounting to $1,706,600. This is the troublesome part of the sett ment. The parties urge that this provision was intended to put an end to the discord resulting from plaintiffs' ownership of a large block of Shopwell common stock and their attempts to alter company policies and operations unrelated to those alleged to have been breaches of fiduciary duty. It is also claimed that it is to the advantage of Shopwell for it to acquire undervalued stock for investment purposes, to maintain a pool of shares for use in potentia employee stock plans or acquisitions, and, in the event the purchased shares are retired, to increase the remaining stockholders pro rata share of the corporation. The purchase of plaintiffs shares was to be financed by internally generated cash, bank borrowings including letters of credit, and the sale of up to $2,133,000 of new 12% subordinated debentures falling due in 1989, in a privat placement.

Finally, the original settlement agreement provided for the payment by Shopwell of $300,000 toward plaintiffs' counsel fees and expenses in bringing the suit for the benefit of Shopwell and the stockholders.

The amended agreement negotiated between the parties to this suit and objectors Norte, Galdi and Barr provides certain benefits not present in the original agreement. The amended agreement maintains the nonpecuniary aspects of the original agreement, but [illegible] the price at which plaintiffs' Shopwell common stock is to be purchased and provides for a public exchange offer involving shares not held by plaintiffs or Shopwell's directors, officers, their families, or associates. Plaintiffs' shares are to be purchased at

$6 per share rather than $6-5/8 per share, resulting in a reduction of the purchase price of $161,000. The benefit to Shopwell of this amendment is obvious.

The public exchange offer provides for an exchange of one $7.50 12% subordinated debenture due in 1989 for one share of Shopwell common, to a limit of 175,000 shares. The entire issue of these shares is to be subject to redemption at any time, or any part of the issue may be redeemed from time to time at the principal amount beginning one year after the date of issue. The outstanding debentures will be prepaid to the extent of 10% of their principal amount each year from the sixth through the ninth years from the date of issue, inclusive. If more than 175,000 shares are tendered in the exchange offer, shares are to be accepted on a pro rata basis.

Finally, the new agreement provides for a payment by Shopwell of $90,000 to counsel for Norte, Galdi and Barr, plus expenses not to exceed $1,000, all of which is to be divided among counsel as they deem appropriate. This is in addition to the counsel fees provided for in the original settlement agreement.

Plaintiffs' primary claims in this action were based on management activities considered by plaintiffs to be improper and detrimental to the corporation. These activities were alleged to involve excessive salaries and perquisites, corporate payment of personal expenses, and other improper expenditures. Each of these is subject to control through internal monitoring, but each is obviously difficult to prove in a lawsuit. Because of the nature of this type of claim, and the attendant difficulty in proof, the relief sought on a claim such as this may well be prospectively prophylactic rather than retroactively compensatory. The relief embodied in the settlement agreement as it relates to the issues of mismanagement and waste is therefore both typical of and appropriate to this type of case. It is not so burdensome as to be overly expensive or difficult to implement, yet provides considerable protection against the evils of which plaintiffs complained.

The provision of the agreement by which Shopwell agrees to purchase plaintiffs' shares of Shopwell common at a slight premium over the market price is hotly contested. Objector Simkins contends that the practical effect of the purchase will be to increase the control of the individual defendants, who have been charged with serious wrongdoing, over the corporation at no cost to them personally, and to rid the defendants of the divisive shareholders who have sought to prosecute them by this action. Simkins also contends strongly that the plaintiffs will be unjustly enriched by the purchase of their 15.8% block at a premium over market, impoverishing the remaining stockholders while conferring no benefit on the corporation.

Shopwell asserts, to the contrary, that the purchase of plaintiffs' stock is a good faith business judgment exercised on a reasonable factual basis in the context of an overall settlement and designed to aid the company financially both by the purchase of a good investment sought by Shopwell for many years and by ending the disputes occasioned by plaintiffs' attempts to impose business and operational theories on the corporation. The individual defendants assert that the purchase will increase the value of all remaining shares pro rata; enable Shopwell to acquire shares it has sought for proper corporate purposes for the past five years;

and eliminate the threat by Amsellem to change corporate policy and the market orientation of the corporate defendant.

Simkins' objections to the purchase of plaintiffs' Shopwell common as they relate to the increased control of the incumbent management rest on an assumption that the management intends to or will operate the business with a lack of good faith, and that the purchase is intended to aid them in this pernicious endeavor. Assumptions of bad faith on the part of management are not recognized by the Court in this type of proceeding. Wayne v. Utilities and Industries Corp., Del. Ch., C.A. No. 5733 (1979). Indeed, the presumption is that the directors acted in good faith in arriving at their decision, absent evidence to the contrary. Kaplan v. Goldsamt, Del. Ch., 380 A.2d 556, 568 (1977); Kors v. Carey, Del. Ch., 158 A.2d 136, 141-142 (1960). The record of this case reveals no such contrary evidence.

Simkins' second objection, involving the elimination and unjust enrichment of the plaintiffs, is also without merit. A corporation has the right to purchase its own stock for any proper corporate purpose. 8 Del. C. §160(a). This right may be used to purchase the shares of a troublesome minority in order to preserve or make more efficient the operations of the corporation. Cheff v. Mathes, Del. Supr., 199 A.2d 548 (1964); Kors v. Carey, supra. In order to effect the purchase, a premium may be paid for the stock purchased, and the premium so paid need not be offered to the corporation's other stockholders. Martin v. American Potash and Chemical Corp., Del. Supr., 92 A.2d 295, 302 (1952); Kaplan v. Goldsamt, supra, at 569. It is not improper per se that the corporation agrees in this case to purchase plaintiffs' stock in settlement of the derivative suit. The benefits to Shopwell in doing so outweigh the suspicions aroused when a plaintiff ends up by having his stock purchased by nominal defendant at a slight premium.

Simkins takes objection to the price to be paid for plaintiffs' stock as being excessive and constituting unjust enrichment. It is apparent from the facts, however, that the premium to be paid for the substantial 15.8% block of Shopwell common is slight at most. It is normal for a large block of stock to carry a somewhat higher price than the sum of its individual components because of the factor of control the block contains. In the present case the control factor of plaintiffs' stock has been used in a manner characterized by Shopwell and the individual defendants as disputatious and troublesome.

The valuation of the block together with its control factor is within the discretion of the directors of the corporation so long as they exercise good faith and act on a business-oriented motive. Kaplan v. Goldsamt, supra. As Martin v. American Potash and Chemical Corp., supra, makes clear, it is unreasonable to believe that the corporation could expect or be expected to avoid paying for the control factor, since any other purchaser would be required to do so in the marketplace.

The premium being paid for the 15.8% block in this case is only about 8.3% over the current market price. Far larger premiums have been accepted by this Court as fair and reasonable, and I find the present premium to be well within the range of discretion allowed directors in purchasing the corporation's stock on its behalf.

Simkins also maintains that the purchase of plaintiffs' stock will unduly burden the corporation with debt. This burden, it is alleged, will hinder Shopwell's financial integrity. All of the evidence before the Court indicates that this is simply not so. In fact, apart from the contentions of the parties themselves, Shopwell's independent financial consultants have rendered an opinion that both the purchase of plaintiffs' shares and the method of financing it are fair to Shopwell and its stockholders. Simkins has failed to controvert this opinion.

Any doubts this Court may have had concerning the purchase of plaintiffs' shares at $6 per share have been further alleviated by Shopwell's agreement to conduct a public exchange offer for 175,000 of its own shares, offering one $7.50 12% subordinated debenture due in 1989 for each share of Shopwell common tendered. While it is entirely proper for a corporation to buy the shares of one stockholder at a premium without offering the premium to the remaining investors under certain circumstances, in the context of a settlement agreement terminating a derivative action such an offer appears to be a derogation of the entire benefit of the litigation to the one bringing it rather than to the class he represents.

The public exchange offer ensures that those stockholders who continue to object can terminate their investment in Shopwell for a sum likely to be in excess of that paid to the plaintiffs. The affidavit of Galdi, a certified public accountant, investment advisor and investor in his own right, indicates that Shopwell's current $100 10% debenture without sinking fund trades at 80% of its face value, and that the proposed $7.50 12% subordinated debenture due in 1989 would trade at between 90% and 95% of face, or between

$6.75 and $7.125. If the $7.50 12% debenture were to trade no better than the $100 10% debenture, a return of $6 could still be expected. Any Shopwell stockholder eligible to participate in the public exchange offer may therefore acquire at least as much as plaintiffs and probably between $.75 and $1.125 more on a share for share basis.

Finally, with regard to the terms of the agreement, Simkins asserts that plaintiffs' and objectors' counsel fees should not be awarded because there is no monetary recovery or tangible benefit to the corporation.

A monetary recovery by the corporation is not necessary to support an award of counsel fees, so long as the litigation confers some benefit on the corporation. Chrysler Corp. v. Dann, Del. Supr., 223 A.2d 384 (1966); Baron v. Allied Artists Pictures Corp., Del. Ch., C.A. Nos. 4445, 4678 (November 28, 1978); Lewis v. Great Western United Corp., Del. Ch., C.A. No. 5397 (March 28, 1978). This applies to settlements as well as final adjudications. Chrysler Corp. v. Dann, supra; Rosenthal v. Burry Biscuit Corp., Del. Ch., 209 A.2d 459 (1949).

Plaintiffs concede that although the complaint contained a demand for damages, any recovery thereunder would have been slight at most, that damages would have been extremely hard to prove, and that they would probably have been offset by Shopwell's costs of defending the claim. The benefits of the action would probably have been nonpecuniary and prophylactic in any event, so that the lack of a pecuniary recovery by Shopwell under the agreement is of little significance. The agreement provides specific long-term benefits to the corporation (the prophylactic relief and the elimination of Amsellem as a vociferous and disruptive minority) as well as immediate benefits to the present stockholders (convertibility of Shopwell common into market-able debentures). Where such benefits obtain, it is not inappropriate to award counsel fees. It is also apparent that plaintiffs acted diligently in the face of considerable legal obstacles in pursuing this action and that former objectors Norte, Galdi and Barr acted in the best interests of the class for whose benefit the action was brought.

I therefore find that the agreement as amended is both reason-able from a business standpoint and fair to the holders of Shopwell common in whose interest it was brought. The agreement is therefore approved. ~~So ordered.~~ (see amendment)

II

Objector Simkins has moved for additional time in which to conduct discovery and has asserted its position with vigor in its memorandum objecting to the settlement. While discovery is favored and is usually allowed to proceed where the party seeking it spec-ifies material areas to be investigated, in this case I decline to grant Simkins the additional time it requests. It is apparent that Simkins has failed to use the time available to it in any way except to prepare motions for more time. In sharp contrast are the former objectors who gained access to and reviewed voluminous files cover-ing both the original agreement and the underlying cause of action. This time was sufficient for them not only to fully learn of the un-derlying facts but to formulate and negotiate specific proposals for an amendment to the settlement agreement. Simkins was invited to participate in the review undertaken by Norte, Galdi and Barr, was offered the results of that review, and could have participated in the negotiations but declined to do so. A proposed settlement of a lawsuit necessarily requires objectors to the settlement to move with the utmost promptness. It would chill the settlement of lawsuits if the approval of the settlement were to be routinely postponed for months. This Court is well aware how much discovery can take place in a short period of time if the one seeking discovery is highly motivated. In this case Simkins undertook no discovery and has not shown a single area where further discovery would be likely to lead to any information which would influence the approval of this settlement.

Simkins' use of Girsh v. Jepson, 521 F.2d 153, 157 (3rd Cir. 1975) is inapposite. In that case, the objector made every effort to undertake discovery, but was unable to complete it prior to the settlement hearing. The parties to the agreement argued that the plaintiff had reviewed the documents requested so that it was therefore unnecessary for the objector to do so. The Court held, however, that the parties to the agreement stood in an adversary position vis-a-vis the objector, so that plaintiff's review was of no benefit to the objector.

There are two fundamental differences between that situation and this one. First, objector Simkins has not undertaken discovery at all as did the objector in Girsh. Second, the issue here is not whether plaintiff's review of the requested documents is binding on the objector, but whether the objector who failed to review documents available to it should be allowed to delay the present proceeding. In view of my findings that Simkins has failed to undertake discovery with diligence, has failed to specify what discovery it needs, and that the amended agreement is intrinsically fair to all Shopwell stockholders, including Simkins, I deny Simkins' application to delay this proceeding in order to conduct discovery which could have been completed prior to the August 17, 1979, hearing with the exercise of reasonable diligence.

~~So ordered.~~ (see amendment)

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

MAURICE A. HARTNETT, III
VICE-CHANCELLOR

September 17, 1979

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RE: Amsellem et al v. Shopwell, Inc. et al
Civil Action No. 5683 - New Castle County

Gentlemen:

The Memorandum (Unreported) Opinion dated September 6, 197[illegible], in the above Civil Action is hereby amended by striking therefrom the words "So ordered" as they appear on page 14 and page 16 of the Opinion.

The purpose of this amendment to the opinion is to make clear that the time for appealing will not commence to run until a final order is entered.

Yours truly,

MAH:jds

CC: Register in Chancery
The Honorable William Marvel
The Honorable Grover C. Brown

FISHER v. MOLTZ

No. 6068

Court of Chancery of the State of Delaware, New Castle

December 28, 1979

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

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

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

2. Corporations 174, 316(1)

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

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

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

4. Injunctions 132, 136(3)

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

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

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

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

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

HARTNETT, *Vice-Chancellor*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VALHI, INC. v. PSA, INC.

No. 5730

Court of Chancery of the State of Delaware, New Castle

March 6, 1980

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

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MAURICE A. HARTNETT, III
VICE-CHANCELLOR

21 February 1980

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

Gentlemen:

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

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

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

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

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

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

In equity and good conscience this action should proceed among the parties before the Court and not be dismissed because of the absence of the six former employees of Cyrus J. Lawrence Incorporated who were the recipients of the unconsummated tender offer. WRIGHT & MILLER, Federal Rules of Practice & Procedure, Civil §1611. Chancery Rule 19(b).

Yours truly,

MAH/sdw

cc: Register in Chancery
File

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HOWARD GOOD, ROBERT BAGBEY, ROBERT and LOIS KREBS, WILLIAM STEINER, SYLVIA MARTIN FOUNDATION, INC., LEONARD BARKAN, PATRICIA J. DOYLE, HENRY BLUM, ELEANOR McLAUGHLIN, BARNETT STEPAK, STANLEY A. SEIDLE, EDWARD P. SUMERS, MOSES WEISS and DORA WEISS, ABRAHAM H. LUBOWITZ and SIDNEY J. SILVER,

Plaintiffs,

v.

TEXACO, INC., WILLARD C. BUTCHER, FRANK T. CARY, ALFRED C. DeCRANE, JR., SIR ARTHUR PATRICK M. FORBES, JAMES W. KINNEAR, ELVIS L. MASON, JOHN K. McKINLEY, THOMAS H. MOORER, THOMAS S. MURPHY, GEORGE PARKER, JR., LORENE L. ROGERS, ROBERT V. ROOSA, THOMAS A. VANDERSLICE, WILLIAM WRIGLEY, BASS BROTHERS ENTERPRISES, INC., BASS BROTHERS DEVELOPMENT CO., PERRY R. BASS, INC., SID RICHARDSON CARBON & GASOLINE CO., WESLEY GUYLAY CAPITAL MANAGEMENT, PERRY R. BASS, SID R. BASS, E. P. BASS, ROBERT M. BASS, LEE M. BASS, RICHARD E. RAINWATER, ALFRED A CHECCHI, THOMAS M. TAYLOR, WESLEY RICHARD GUYLAY, EARL OF GRANARD and BASS FINANCIAL SERVICES GENERAL PARTNERSHIP,

Defendants.

CONSOLIDATED
Civil Action No.
7501

(Unreported Opinion)

Submitted: January 10, 1985
Decided: February 19, 1985

Joseph A. Rosenthal, Esquire, of Morris and Rosenthal, Wilmington, and Michael Fuchs, Esquire, of Wolf Popper Ross Wolf & Jones, New York, New York, and Stuart H. Savett, Esquire, of Kohn, Savett, Marion & Graf, Philadelphia, Pennsylvania, for the Plaintiffs

William O. LaMotte, III, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, and Charles F. Kazlauskas, Jr., Esquire, of New York, New York, for the Defendant Texaco, Inc.

Rodman Ward, Esquire, and Stephen E. Jenkins, Esquire, of Skadden, Arps, Slate, Meagher & Flom, Wilmington, and Eric M. Roth, Esquire, of Wachtell, Lipton, Rosen & Katz, New York, New York, for the Texaco Director Defendants

Gregory P. Williams, Esquire, of Richards, Layton & Finger, Wilmington, and Roy L. Reardon, Esquire, George M. Newcombe, Esquire, and Mary Elizabeth McGarry, Esquire, of Simpson Thacher & Bartlett, New York, New York, for the Defendants Bass Brothers

Pamela S. Tikellis, Esquire, of Biggs & Battaglia, Wilmington, and Sidney B. Silverman, Esquire, and Joan Harnes, Esquire, of Silverman & Harnes, New York, New York, and William C. Garrett, Esquire, Dallas, Texas, for the Objectors Seagoing Uniform Corporation and Mollie G. Pin, respectively

Peter M. Sieglaff, Esquire, of Potter, Anderson & Corroon, Wilmington, and H. Miles Jaffe, Esquire, of Raggio, Jaffe & Kayser, New York, New York, for the Objectors Gelband

Thomas G. Hughes, Esquire, of O'Donnell & Hughes, Wilmington, for the Objectors Polk Trustees

Marshall Patner, Esquire, of Orlikoff, Flamm and Patner, Chicago, Illinois, for the Objector Mandel, Lipton & Stevenson, Ltd.

David C. Vladeck, Esquire, Washington, D.C., for Objector Reuben B. Robertson, III

BROWN, Chancellor

This is a decision on the proposed settlement and dismissal of a shareholders' class action and derivative suit. Numerous shareholders have written directly to the Court indicating their objection to either the settlement or to the amount of counsel fees requested by the attorneys for the plaintiffs, or both. Several shareholders have appeared through counsel to object to the proposal. One group of shareholders seeks to intervene as plaintiffs for the purpose of prosecuting the case to a conclusion on its merits. More than 1,400 shareholders have elected to opt out of the class certified for the purposes of settlement. In short, the proposed settlement lacks universal shareholder appeal.

The proposed settlement is also unusual in that, if it is approved by the Court, nothing of consequence will happen other than the dismissal of the suit and the payment of counsel fees. The benefit to the corporation and its shareholders on which the proposed settlement and dismissal of the action is premised has already occurred, albeit after the suit was filed, and, in all probability, as a direct result of a ruling made by the Court on a preliminary motion. Moreover, the spectre of "greenmail" lies at the root of the shareholder discontent that does exist. The situation is as follows.

I.

The corporation involved is, of course, Texaco, Inc. ("Texaco"), a Delaware corporation and one of the world's largest petroleum companies. It has more than 350,000 shareholders. Named as defendants along with Texaco are the persons who constituted its board of directors at the time of the events complained of by the plaintiffs together with some dozen or more individuals, partnerships and corporations constituting an investment group which, for ease of reference, will be referred to hereafter as the "Bass Brothers" in recognition of the apparent dominant influence within the group of certain members of the Bass family. The plaintiffs, who are now seventeen in number in this consolidated action, are all alleged to have been shareholders of Texaco at the time of the events which gave rise to this suit. As gleaned from the record developed through the time of the settlement hearing, the suit arises from what appears to be the following undisputed facts and sequence of events.

I I

The Bass Brothers began acquiring Texaco stock in 1982. By the end of 1983 they owned slightly less than 5% of the corporation's stock. On several occasions during this period one of the Bass Brothers had met with or contacted the chairman of the board of Texaco with the suggestion that under existing market conditions it would be in Texaco's best interests to make a self-tender for a substantial amount of its own stock or to acquire quantities of its own stock through open-market purchases. Because of other corporate priorities Texaco's management was not receptive to this suggestion of such a large-scale use of corporate funds and thus it was rejected. However, the relationship between the Bass Brothers and Texaco's management remained cordial, with the Bass Brothers being supportive of management and threatening no action because of this difference in viewpoint between them and management. There is no indication that the Bass Brothers were attempting to pressure Texaco into purchasing their shares at the time. Rather, they sought only to tender or sell a proportionate amount of their holdings in the event that Texaco should be receptive to their suggested plan for a general repurchase of a quantity of its own stock.

Thereafter, in early January, 1984, Texaco, in a dramatic move which itself has prompted substantial litigation in this Court and elsewhere, managed to consummate an agreement to acquire complete ownership of Getty Oil Company ("Getty") and, by so going, to defeat at the eleventh hour the announced intention of Pennzoil Corporation to acquire a substantial interest in Getty. The cost of this acquisition to Texaco was in excess of $10 billion, and, despite the fact that this coup greatly benefited Texaco by enabling it to double its domestic oil reserves among other things, it also generated significant administrative complexities when viewed from the standpoint of management. As of January and February, 1984 government and shareholder approval of the proposed transaction was still required. Moreover, Texaco needed to sell off expendable assets as well as to refinance the debt incurred in the Getty acquisition, and there was the immediate need to integrate the worldwide operations of two major oil companies. And, of course, there was also the ongoing litigation resulting from the acquisition of Getty.

In the midst of these developments surrounding Texaco's acquisition of Getty, the Bass Brothers promptly began large-scale open-market purchases of Texaco stock. By January 30, 1984 they had increased their holdings to 9.9% of Texaco's outstanding shares. In addition, they persisted in recommending to Texaco's management that a stock repurchase program was still a good idea for Texaco despite the fact that Texaco had just spent $10 billion to acquire Getty. During February, 1984 the Bass Brothers indicated to Texaco that they might be inclined to purchase still additional shares of Texaco on the open market if Texaco did not undertake a repurchase program of its own shares. They stated that they might acquire as much as 20% and hinted that they might proceed to do so through a tender offer. At about this time the financial news media reported rumors that the Bass Brothers were planning to join forces with Pennzoil to break up Texaco and force the divestiture of Getty. Despite this, Texaco's management still held to its view that a self-tender or stock repurchase program was inconsistent with Texaco's long-range business plans and thus the suggestion of the Bass Brothers was again rejected.

Understandably, however, the rapid enlargement of their shareholdings by the Bass Brothers in the face of all else that was going on at the time was a cause for concern on the part of Texaco's management. Although Texaco was a giant corporation with considerable financial means, the circumstances had caused its flank to be exposed somewhat. Because of the Getty acquisition the time and energy of its management personnel was being consumed in large part by the need to complete the details of that transaction. Management was not in an ideal position to defend against the possible disruption that might be fostered by a dissident shareholder group and, although the Bass Brothers were professing to be openly pleased with the Getty acquisition and supportive of corporate policy even though they did not totally agree with it, Texaco's management obviously suspicioned, as did probably anyone else who read the financial pages, that the Bass Brothers were getting into position to do something. The next development came on February 28, 1984.

On that date representatives of the Bass Brothers proposed a joint venture between themselves and Texaco.

The proposal contemplated that the Bass Brothers would contribute their Texaco shares and some real estate assets, and Texaco would contribute certain oil reserves, to the venture. Texaco studied this proposal, but as a result viewed it as little more than a means whereby the Bass Brothers sought to realize the equivalent of $68 per share for their Texaco stock, a figure which was far above Texaco's trading value and which management viewed to be excessive. The joint venture proposal was also rejected. By this time, however, Texaco's management was fearful that the rejection of the joint venture proposal might trigger some hostile action by the Bass Brothers which, in the existing context of things, would detract seriously from the ongoing task of integrating Getty into Texaco's operations.

Texaco's management sought advice from The First Boston Corporation, the company's investment banker, and from the experienced corporate law firms that were representing it. The conclusion reached by all was that the Bass Brothers posed a substantial immediate threat to Texaco's best interests and that the only reasonable course of action under the circumstances was to attempt to repurchase their shares. Texaco's chairman thereupon advised the Bass Brothers that the corporation was prepared to purchase their shares at a reasonable price. The Bass Brothers were receptive to the idea.

In the ensuing negotiations which commenced on March 5, 1984 the Bass Brothers initially sought $68 per share and eventually took the position that they would not take less than $55 per share. Texaco's financial advisors suggested prices at $55 per share and above. However, Texaco's chairman, John K. McKinley, took the position that Texaco would pay no more than $50 per share. Eventually, McKinley won out and on the evening of Monday, March 5, 1984 an agreement in principle was reached at the price of $50 per share. The market price for Texaco shares on the previous Friday, March 2, 1984, had been $48-3/8 per share.

The repurchase was ultimately structured so that the Bass Brothers received payment of approximately one-half of the purchase price in cash and the remainder in the form of a new issue of preferred stock of Texaco. For tax reasons and in order to assure marketability, the Bass Brothers insisted that the new preferred stock have voting rights similar to those of the common stock, although they had no particular desire to vote them. Texaco's management naturally did not want them to vote this new preferred stock since the obvious goal sought by the repurchase was to prevent the Bass Brothers from using their potential voting power to disrupt the implementation of the long-range policies which management had concluded to be in the best interests of Texaco and its shareholders. To resolve this point, and after the price to be paid for their shares had already been determined, the Bass Brothers proposed that they agree to vote the preferred shares in accordance with the wishes of the Texaco board of directors. The final terms of the repurchase agreement included this feature.

On the following day, March 6, 1984, the proposal was submitted to the Texaco board of directors. The company's investment banker, First Boston, advised that at $50 per share the premium that would be paid over the $48-3/8 market price of March 2 was reasonable and at the low end of the range of premiums over market paid by other companies for large blocks of stock. First Boston also advised that in its view $50 per share was consistent with the intrinsic value of the stock over the long term. The board was also advised by the corporate law firms representing the company that under Delaware law it was within the power of the board to make such a repurchase and that the decision to do so would be protected by the business judgment rule. After several hours of consideration the board approved the repurchase proposal unanimously and the transaction was promptly consummated.

As a result Texaco purchased the entire 9.9% common stock interest owned by the Bass Brothers, such interest aggregating approximately 25.6 million shares. Under the terms of the agreement the Bass Brothers received in return approximately $650 million in cash and 12.6 million shares of newly issued voting preferred stock with a stated value of $50 per share. Each share of the preferred stock carried with it voting rights equal to the voting rights of a share of common stock of Texaco. Thus, once issued, the new preferred stock constituted approximately 5% of the total voting power of all of Texaco's outstanding shares. The agreement provided further that the Bass Brothers would acquire no more shares of Texaco for a period of ten years and that during that time they would vote their Texaco preferred stock in accordance with the recommendation of Texaco's board of directors.

III

On March 7, 1984 the plaintiff Howard Good filed this suit. It was the first of 21 actions filed in this Court and elsewhere attacking the repurchase of the Bass Brothers' shares. The 15 actions that were filed in this Court were eventually consolidated into the present action.

The consolidated complaint charges that the price paid by Texaco to repurchase the Bass Brothers' shares was grossly excessive, that the transaction constituted a gift of corporate assets, that it served no legitimate corporate purpose of Texaco, and that it amounted to an illegal vote-buying scheme. Also, in view of the fact that the repurchase was accomplished in the face of the upcoming annual meeting of Texaco shareholders at which management was proposing that 80% supermajority voting provisions be adopted with regard to shareholder approval of certain business combinations not approved in advance by management as well as to any attempt to remove one or all members of the board of directors, it was alleged that the repurchase of the Bass Brothers' shares was part of an illegal scheme to entrench Texaco's board of directors and to increase the shareholder voting power of its individual members. It was alleged also that the repurchase constituted an illegal partial liquidating dividend awarded to the Bass Brothers to the exclusion of Texaco's other shareholders, and that all of the foregoing constituted a breach of fiduciary duty on the part of the Texaco directors in the perpetration of which they were aided and abetted by the Bass Brothers.

The consolidated complaint sought rescission of the repurchase agreement, an injunction against the holding of the annual shareholders meeting or the setting aside of the vote taken at such meeting, an injunction against the use of the voting power of the new preferred stock that was acquired through the repurchase agreement, money damages, an award of attorneys' fees and the reimbursement of litigation expenses. Texaco and the individual director defendants have since denied that the action of the Texaco board was illegal in any way and have asserted various affirmative defenses. The issue of service of process over the Bass Brothe.- is far from resolved. However, they have agreed to enter an appearance in the case for the purpose of settlement and dismissal of the action only.

I V

The circumstances which have led to the proposed settlement and dismissal of the action occurred shortly after the initial complaint of the plaintiff Good was filed. Needless to say, with the complaint being filed on the day following the approval of the repurchase agreement by the Texaco board, it was filed derivatively without a demand first being made upon the Texaco board to take corrective action on behalf of the corporation as contemplated by Chancery Rule 23.1. Under the recent decision in Aronson v. Lewis, Del.Supr., 473 A.2d 805 (1984) the Texaco defendants moved immediately to dismiss the action because of the failure of the plaintiff to have first made a demand on the board of directors. This was accompanied by a motion to stay all future discovery by the plaintiff and to vacate the expedited discovery already authorized.

Thereafter, by a decision dated May 14, 1984 the motion to dismiss was denied. Aronson v. Lewis, supra, held that such a motion under Rule 23.1 must be judged upon the factual allegations of the complaint and that in order for the requirement of a prior demand upon a board of directors to be deemed unnecessary it must appear that there is a reasonable doubt that the board of directors was protected by the business judgment rule in taking or approving the action complained of. Aronson further held, however, that if it appeared from the factual allegations of the complaint that the board of directors was not disinterested with regard to the transaction being attacked, then the inquiry need go no further since in that situation the complaint itself would demonstrate at least for the purposes of the motion to dismiss that the protection of the business judgment rule did not apply and that a demand on the board prior to the filing of the suit would have been futile. Because the complaint here alleged facts which indicated that the defendant Texaco directors had acquired the contractual right to control the vote of 5% of Texaco's outstanding stock as a result of the repurchase of the Bass Brothers 9.9% interest with corporate funds and assets, I concluded that the Texaco board was not disinterested within the meaning of Aronson, and accordingly the motion to dismiss the derivative claims for failure to make a demand was denied and discovery by the plaintiff was authorized to go forward.

Three days later, on May 17, 1984, Texaco and the Bass Brothers entered into a modification of the repurchase agreement. Under that modification it is provided that henceforth the vote of the Bass Brothers' shares will not be controlled by the recommendation of the Texaco board of directors but rather the 12.6 million preferred shares will be voted proportionately to all other votes cast by Texaco's common shareholders. This modification of the repurchase agreement effectively mooted the allegations of the complaint relating to the annual meeting and the proposed supermajority voting provisions, and as a consequence plaintiffs agreed not to seek an injunction of the stockholder vote at the annual meeting.

V

Thereafter counsel for the plaintiffs conducted discovery into the remaining allegations of the various lawsuits sought to be concluded in this proceeding. The discovery included the examination of thousands of documents produced voluntarily or without objection by the defendants, the review of publicly available information and the depositions of various persons. Among those deposed were Mr Mckinley, Texaco's Chairman; Alfred C. DeCrane, Jr., the President of Texaco; Richard G. Brinkman, Vice President of Finance and Treasurer of Texaco; Admiral (Ret'd) Thomas H. Moorer, a former Chairman of the Joint Chiefs of Staff and an outside director of Texaco; John P. Hellstrom, Jr., a managing director of First Boston; and Sid R. Bass, who acted as representative of the Bass Brothers in the negotiations for the repurchase of their shares. It is undisputed that much of the plaintiffs' discovery focused on the motivation of Texaco and its board of directors for the repurchase.

As a result of this substantial discovery effort plaintiffs and their attorneys reached the conclusion that by going to trial they would be unlikely to obtain any relief beyond the modification of the voting rights attached to the Bass Brothers' preferred stock that had already been achieved. This conclusion was prompted by an established line of Delaware case precedents which hold that a decision by a board of directors to use corporate funds to repurchase shares from a dissident shareholder in order to eliminate what appears to be a clear threat to the best interests of the corporation is a decision protected by the business judgment rule and one which can be overcome only by a conclusive showing of fraud or other misconduct. See generally, Cheff v. Mathes, Del.Supr., 199 A.2d 548 (1964); Bennett v. Propp, Del.Supr., 187 A.2d 405 (1962); Kors v. Carey, Del.Ch., 158 A.2d 136 (1960); Kaplan v. Goldsamt, Del.Ch., 380 A.2d 556 (1977). See also, 8 Del.C. § 160. Counsel for the plaintiffs have represented that in their professional opinion after a full investigation of the matter they do not believe that they could overcome the defense of the business judgment rule if the case was taken to trial on the remaining issues related to the propriety of the repurchase of the Bass Brothers' shares.

The Texaco defendants go further, and view the deposition testimony and the documents produced in discovery as establishing a consistent record of uncontroverted evidence that the Texaco board, after having been fully advised, approved Texaco's entry into the repurchase agreement with the Bass Brothers solely to advance the best interests of Texaco and its remaining shareholders and not to promote the self-interests of the individual board members in any way. The Audit Committee of the Texaco board also retained independent counsel and the investment banking firm of Dillon, Read & Co., a firm which had done no work for Texaco for a number of years, to investigate the matter on its behalf, and based upon that investigation the report of the Audit Committee concluded, in keeping with the plaintiffs' analysis, that there was no evidence that either Texaco's management or its board of directors acted in any manner inconsistent with the best interests of the corporation or for any improper or impermissible motive even though the net result of the action taken was to selectively purchase the shares of a small group of shareholders at a premium over the existing market price and at a cost to Texaco of some $1.2 billion.

VI

Based upon the foregoing scenario the parties have entered into a written stipulation whereby they propose that the consolidated suit in this Court, as well as related suits in the Supreme Court of New York and the United States District Court for the Eastern District of Pennsylvania (subject to the approval of those Courts, of course) be compromised, settled and dismissed with prejudice based upon that which has taken place already as a result of the filing of the initial Good action, namely, the modification of the repurchase agreement which removed the contractual right of the Texaco board to direct the vote of the 5% voting power represented by the Bass Brothers preferred shares in favor of permitting those shares to be voted hereafter in direct proportion to the votes cast by Texaco's common stockholders. As a further term of the proposed settlement the defendants agreed to provide Texaco's shareholders and members of the class as determined for the purpose of the proposed settlement with all information relevant to the issues in the various suits proposed to be terminated by disclosing the details of the plaintiffs' investigation and discovery. It is represented that this has been done in the notice of the proposed settlement sent to all current and former Texaco shareholders who qualify for membership in the class.

As a part of the proposed compromise and settlement the plaintiffs' attorneys agreed to seek an award of attorneys fees not in excess of $700,000 plus their out-of-pocket litigation expenses. Defendants have agreed not to oppose that fee application and have further represented that they believe that an award not in excess of $700,000 would be fair and reasonable. As to any fees and expenses awarded by the Court, it is proposed and agreed that the Bass Brothers will pay 21.43% of the fee award and that the individual director defendants will pay 78.57% of the fee award and all of the awarded litigation expenses. These three features, i.e., the already-accomplished modification of the repurchase agreement, the disclosure to the shareholders of the findings of the plaintiffs' investigation, and the agreement concerning the counsel fees and expenses, constitute the sum and substance of the settlement proposal.

VII

Plaintiffs contend that the modification of the repurchase agreement has conferred a substantial benefit on the common shareholders of Texaco since it has eliminated any benefit to the Texaco board of directors obtained through that which the plaintiffs viewed as an illegal vote-buying scheme. To this extent plaintiffs feel that they have enhanced the previously existing voting power of the Texaco shareholders by having effectively eliminated the 5% voting power initially represented by the preferred shares issued to the Bass Brothers. Plaintiffs contend that they have further benefited the common shareholders by having made available to them a full disclosure of the basis on which the Texaco board acted in electing to repurchase the Bass Brothers' stock interest. They argue that this will enable the common shareholders to better evaluate the performance of their board and to move to make changes in it through the election process if they are not satisfied.

Plaintiffs further point out—and correctly so on the record, I think—that no objector has challenged the diligence or thoroughness of their investigation into the causes of action alleged in the various suits which they now ask to have dismissed through the proposed compromise and settlement. Nor has any objector materially disputed the accuracy of their factual findings and conclusions resulting therefrom. On the facts thus uncovered, plaintiffs feel that they are completely stymied by the rule of Cheff v. Mathes, supra, and the similar Delaware case precedents since all factors point to the conclusion that the defendant Texaco directors, in approving the repurchase of the Bass Brothers' shares, were not acting to entrench themselves but rather, after being fully advised in the matter, and particularly in light of the then status of the company deriving from the Getty acquisition, they acted only out of a reasonably justifiable, subjective belief that the repurchase of the Bass Brothers' shares was completely legal and that it was the appropriate thing to do at the time in the best interests of the company and its remaining common shareholders.

Plaintiffs estimate that for them to continue to pursue a claim against the Texaco directors, which they feel that they have no realistic hope of winning under existing law, could well result in as much as an additional $2 million to Texaco in legal fees and expenses, not to mention the accompanying disruption to the mangerial personnel of Texaco at a time when their skills and services are more urgently needed for the running of corporate affairs. The attorneys for the plaintiffs say that as counsel for both the derivative plaintiffs and for the representatives of the class they have a duty to both the Court and their clients to get off trail and terminate the litigation when it appears obvious that they can gain nothing by way of relief beyond that which they have already achieved.

Plaintiffs and their attorneys feel that they have, through their collective efforts, produced a substantial result and benefit for those whom they represent after having put forth a considerable professional effort under expedited conditions and with no guarantee of compensation as of the time that they commenced the effort. In light of this, they urge that a fee of $700,000 plus expenses, spread among all of the various plaintiffs' attorneys who have participated, is fair and reasonable under the circumstances.

V I I I

As noted earlier, several shareholders appeared through counsel at the settlement hearing and objected to the proposed settlement. Certain of their number also sought to intervene as plaintiffs. I make no effort to state each of their positions with particularity. In general, the contentions of these objecting shareholders may be summarized as follows.

First, it is contended that because of the feature which initially permitted the Texaco board to direct the vote of the preferred shares issued to the Bass Brothers, the repurchase agreement consituted an illegal vote-buying contract and, as such, the entire repurchase agreement was void from its inception. Accordingly, it is argued that the repurchase agreement could not be given life as a legal document by the subsequent modification which transferred the voting power of the preferred shares to Texaco's common shareholders on a proportionate basis. Thus, it is contended that a cause of action exists to rescind the repurchase agreement and to recover from the individual defendants on behalf of the corporation the entire consideration paid to the Bass Brothers.

Secondly, it is argued that the rule of <u>Cheff v. Mathes</u>, supra, is wrong because it sanctions the practice currently referred to as "greenmail," i.e., the accumulation of a significant amount of stock by a shareholder, or group of shareholders acting in concert, for the purpose of intimidating a board of directors into causing the corporation to repurchase such shares at a substantial premium over their realistic market price in order to assure the ongoing status of the corporation and the continuation of its existing business policies as established by the board. It is argued that to the extent that it authorizes such practice the continued viability of the Cheff v. Mathes rule should be tested in the light of current developments in the market place, and that it is improper for the plaintiffs, as class and derivative representatives, to attempt to dismiss the case without doing so. Certain shareholders making this argument seek to intervene so as to be able to carry on this battle.

Thirdly, it is argued by some that actually the rule of Cheff v. Mathes does not pose an obstacle to the continued prosecution of this action since there is no evidence in the record of any actual threat of intended action by the Bass Brothers which would have served to disrupt the operations of Texaco or to have harmed the corporation and its shareholders. No tender offer or sale of shares to a third party was proposed, nor was any public filing made indicating an intention to seek control. As a matter of fact, the

Form 13D filed by the Bass Brothers in connection with their expeditious January acquisition of large amounts of Texaco stock stated that they were doing so for the purpose of "investment" only, and the plaintiffs, after having investigated the situation through extensive discovery, have indicated for purposes of settlement that they have no reasonable grounds for believing that the Bass Brothers were guilty of misrepresentation in taking such a public position. From this it is suggested that something is wrong, i.e., if the Bass Brothers' representation of their position was true, then there was no reasonable basis for the Texaco board to consider the size of their holdings as a threat to the welfare of the corporation. In that situation, it is argued, Cheff v. Mathes does not justify the action taken by the board, and thus a provable cause of action on behalf of the corporation exists.

Finally, there is the objection of Seagoing Uniform Corporation ("Seagoing"), the owner of 2,000 shares of Texaco common stock purchased on February 29, 1984. Seagoing brought its own suit in the United States District Court for the Southern District of New York as a result of Texaco's repurhcase of the Bass Brothers' shares. Seagoing filed its action derivatively on behalf of Texaco and as a class action on behalf of all persons other than the Bass Brothers defendants who purchased their Texaco shares between January 18, 1984 and March 5, 1984. In its complaint in that action Seagoing seeks to recover money damages against the Bass Brothers on the theory of a "fraud on the market" arising out of an alleged deliberate violation of the rules and regulations of the Securities and Exchange Commission. Specifically, Seagoing charges that the Form 13D filed by the Bass Brothers describing their purchase of Texaco shares as for "investment" purposes only was false and misleading in that it failed to reveal that their acquisition was in reality intended to implement a power play whereby they planned to either acquire control of Texaco, either alone or with others, or to sell their holdings in Texaco either to Texaco or to a third party at a premium over market. Seagoing alleges that the result of this purported misrepresentation by the Bass Brothers was to cause members of the Seagoing class to be deceived into purchasing Texaco shares within the designated time period at artifically high prices and to cause Texaco to be harmed by repurchasing the Bass Brothers' shares at a premium over an artifically high market price.

The Seagoing complaint in the New York Federal action was filed on March 12, 1984. On May 23, 1984, another Texaco shareholder represented by the group of attorneys who also represent the plaintiff Good in this consolidated action, filed a complaint in the United States District Court for the Eastern District of Pennsylvania which——according to

Seagoing and undisputed by the parties here---alleges the same essential violations of the Federal securities laws as those already asserted in Seagoing's New York complaint. (That suit is referred to hereafter as "the Seidle action.") The complaint in the Seidle action relies on a "fraud on the market" claim under the Federal statutes and regulations, and also seeks recovery based upon common law claims of fraud and misrepresentation attributed to the Bass Brothers.

As a part of the proposed settlement of this action the parties, by their stipulation, have agreed that the common law fraud and misrepresentation claims in the Seidle action will also be dismissed, with prejudice, subject to the order of the Pennsylvania Federal Court based upon approval of the proposed settlement by this Court, if given. However, the proposed settlement does not purport to dismiss the Federal claims of the Seidle action based upon the "fraud on the market" theory. In fact, they are specifically excluded from the literal parameters of the proposal settlement. At the same time, the notice to shareholders of the settlement hearing in this Court states that if this Court approves the settlement the Seagoing action in New York, plus two other actions brought by shareholder plaintiffs who have not joined in the stipulation of settlement, "may also be subject to dismissal on grounds of res judicata."

Seagoing opposes the settlement here. It insinuates that the instigation of the later Seidle action by the attorneys for the plaintiff in a jurisdiction which has absolutely no nexus to the parties or events in issue, and the subsequent proposal to dismiss the common law claims of that action as a part of a settlement in which the Bass Brothers have agreed to pay a portion of the plaintiffs' attorneys fees, is nothing more than an attempt to undercut and terminate Seagoing's action in New York on the technical grounds of res judicata. Seagoing suggests that this Court lacks the power to take any action which would adversely affect its Federal claims since it has no jurisdiction over an alleged violation of the Federal securities laws. Seagoing further suggests that the true motivation behind this ploy is to enable the attorneys for the plaintiffs here to realize the substantial attorneys fees that have been tacitly agreed to by the defendants in return for abandoning what Seagoing views to be viable claims against the defendants which exist in this action. In a severely strained effort to coin what might best be described as a legal neologism, Seagoing suggests that plaintiffs and their attorneys are guilty of "feemail."

The other objectors also seem greatly offended by the realization that the settlement, as proposed, will result in no direct monetary compensation to either Texaco or its shareholders, but will result in the payment of a substantial sum of money to the group of attorneys representing the plaintiffs. One shareholder, while not opposing the settlement and dismissal of the suits, feels that the requested attorneys fees are out of line for the results achieved. He asks that the Court award a far lesser amount than the $700,000 figure and then direct that the Texaco director defendants and the Bass Brothers pay the difference to Texaco as an offset against its legal fees.

While various other points of objection were raised, the foregoing constitutes those which I feel it sufficient to note for the purpose of the decision herein.

I X

The function of this Court in passing upon the proposed compromise and dismissal of a representative class or derivative action is well established. In the first place, the law favors the voluntary settlement of contested issues, Rome v. Archer, Del.Supr., 197 A.2d 49 (1964), and accordingly I approach the issue with this principle in mind. However, because of the fiduciary character of a class or derivative suit, the Court is required to participate in the consummation of the settlement of such an action to the extent of determining its fairness to the rights of the parties whose interests will be thereby affected. In passing upon the intrinsic fairness of the settlement the Court does not sit as though it were trying the case on the merits.

Nor is its function that of affording the parties a rehearsal of a trial since to do so sould defeat the basic purpose behind the settlement of litigation. Rather, the Court is called upon to exercise its own independent business judgment in reviewing the fairness of the settlement proposal in light of the existing circumstances. Abuse of discretion, in turn, is the standard for reviewing the Court's exercise of that independent judgment. See, Neponsit Investment Co. v. Abramson, Del.Supr., 405 A.2d 97 (1979); Rome v. Archer, supra; Gladstone v. Bennett, Del.Supr., 153 A.2d 577 (1959); Braun v. Fleming-Hall Tobacco Company, Del.Supr., 92 A.2d 302 (1952).

The components of the judicial involvement at the trial court level are set forth as follows in Rome v. Archer, supra, at 197 A.2d 53:

> "Approval of a class action settlement requires more than a cursory scrutiny by the court of the issues presented. The function of the court is discharged, however, when the nature of the claim, the possible defenses to it, the legal and factual obstacles facing the plaintiff in the event of a trial are weighed and considered. If, in the light of these matters, the court approves the settlement as reasonable through the exercise of sound business judgment, its function as the so-called third party to the settlement has been discharged."

With this in mind I turn to the fairness of the proposed settlement and the objections to it.

X

The nature of the claim is a significant consideration here since the key to the settlement proposal is the outright dismissal of the cause of action that remains in the case now that the portion of the suit which concerned the right of the Texaco board to control the vote of the preferred shares has been rendered moot by the voluntary action of the defendants. Regardless of whether it be characterized as an act of entrenchment by the Texaco board, as a gift of assets because of the allegedly excessive price paid for the Bass Brothers' shares, or as a breach of fiduciary duty by the Texaco board because the decision allegedly served no legitimate purpose of the corporation, the claim that remains reduces itself to one basic proposition, namely, that it was wrong under the circumstances for the Texaco directors to have caused the corporation to repurchase the substantial block of shares owned by the Bass Brothers at a significant premium over their unaffected fair market value. That is all that is left in the consolidated action, and that is the derivative claim (and the class action claim to the extent that one exists under State law) that will be terminated if the settlement is approved.

The possible defense to this remaining claim is that the Texaco director defendants will be able to establish on the evidence that their decision to repurchase the Bass Brothers' shares was not motivated by a personal desire to continue in office as directors, but rather that it was a decision made for what they sincerely believed, with adequate justification, to be the best interests of the corporation and the vast majority of its shareholders, and that accordingly it is a decision protected from shareholder attack by the business judgment rule.

The legal obstacles facing any effort by the plaintiffs to overcome this possible defense are embodied in the Delaware case precedents mentioned previously. To begin with, 8 Del.C. § 160 permits a Delaware corporation to repurchase its own capital stock. Kors v. Carey, supra, a decision after trial, held that under the authority fo § 160 it was permissible for a corporation to have purchased the shares of a seemingly ill-intentioned shareholder, and at a premium over market, where the evidence convincingly established that the repurchase was not motivated by the self-interest of the directors but rather was motivated by their honest and reasonably justifiable belief that such action was necessary to protect the corporation's business reputation and its existing successful business policies, and also to protect it against involvement in possible antitrust litigation. In Bennett v. Propp, supra, the Supreme Court cited the Kors v. Carey decision with approval as an example of an exception to the general rule which holds it improper for directors to use corporate funds to purchase the stock of their corporation where the intent in so doing is to procure or maintain their control of the corporation.

In Cheff v. Mathes, supra, the Supreme Court reversed the decision of the Court of Chancery after trial and held that it was proper for the board of directors to have caused the corporation to purchase at a premium a large concentration of stock accumulated by a single shareholder because on the facts the directors had reasonable grounds to believe that a danger to long-standing corporate policy and effectiveness existed by the presence of that particular shareholder's interest in the corporation. And this decision was made in the face of the Vice Chancellor's finding that the shareholder had made no actual threat to take action which could have been viewed as potentially detrimental to the corporation. As stated by the Supreme Court at 199 A.2d 556:

> "Accordingly, we are of the opinion that the evidence presented in the court below leads inevitably to the conclusion that the board of directors, based upon direct investigation, receipt of professional advice and personal observation of the contradictory action of [the shareholder] and his explanation of corporate purpose, believed, with justification, that there was a reasonable threat to the continued existence of [the corporation], or at least existence in its present form, by the plan of [the shareholder] to continue building up his stockholdings."

Cheff v. Mathes also approved the repurchase at a price per share in excess of that prevailing in the market, recognizing that the holder of a substantial block of stock would expect to receive a "control premium" as part of his selling price, regardless whether he was selling it to the corporation or to a third party. 199 A.2d 555.

The legal impact of these three decisions (the "unholy trio" as plaintiffs would brand them) is that where a corporation is caused to repurchase a substantial number of shares from a single shareholder, or group of shareholders, at a premium over market, and where such a repurchase necessarily serves to remove the specter of a threat to the existing board's control of the corporation, the burden is cast upon the board of directors to justify the repurchase as being primarily in the corporate interest. <u>Bennett v. Propp</u>, <u>supra</u>, at 187 A.2d 409; <u>Cheff v. Mathes</u>, <u>supra</u>, at 199 A.2d 554. However, the board can sustain this burden through proof which establishes that the board had a reasonable justification at the time for believing that such a concentration of stock in that particular shareholder, or group of shareholders, constituted a "reasonable threat" to the continued existence of the corporation or its successful corporate policies, or at least to their continued existence in their then current form. In making such a determination, the directors are entitled to rely on their own investigation and observations as well as upon professional advice received from others. If their judgment appears to have been reasonable at the time, they will not be penalized for their decision even if later events indicate that they were mistaken. The test for such a decision to repurchase corporate shares would appear to be good faith, reasonable investigation and arguable justification. See also, Kaplan v. Goldsamt, supra. Such would appear to be the present status of our law on the subject.

As to the contention made by some objectors that the vote-buying aspect of the original repurchase agreement served to void the entire repurchase, I take note that the relatively recent decision of this Court in Schreiber v. Carney, Del.Ch., 447 A.2d 17 (1982) dispels the notion that all agreements which can be construed literally as vote-buying agreements are void *per se*. In that case it was held that "under our present law, an agreement involving the transfer of stock voting rights without the transfer of ownership is not necessarily illegal and each arrangement must be examined in light of its object or purpose." 447 A.2d 25.

The factual obstacles facing the plaintiffs may be highlighted as follows. Of Texaco's thirteen directors ten were outsiders who held no employment positions with the company. These directors are all apparently well-to-do in their own right and they would not appear to be dependent in any way on the fees paid to them for serving as directors even though such compensation might seem substantial to the average layman. Of the three directors who held management positions, one, McKinley, the Chairman of the Board and Chief Executive Officer, had planned to retire, and might have been retired at the time of the events complained of but for the Getty acquisition and the request of the board and management that he not leave the company until the Getty operation had been integrated with that of Texaco and the business and administrative complications brought about by the acquisition ironed out.

Perhaps because of the above factors, the substantial discovery effort of the plaintiffs has apparently produced no convincing evidence that the decision of the Texaco board to repurchase the Bass Brothers' shares was motivated by a desire on the part of the Texaco directors to protect their personal positions on the board. Also, the Bass Brothers are well known for their financial ability and involvement in the oil industry (even the Court had heard of them before this case) and their reputation as shrewd businessmen was undoubtedly known to the members of the Texaco board. Finally, it would seem that testimony could be readily adduced to establish that from the standpoint of its internal operations the thing that Texaco needed the least during the early months of 1984 was the disruption of a hostile tender offer or take-over effort by persons interested in their own short-term investment possibilities as opposed to the well-being of the company itself. The magnitude and timing of the Getty acquisition in relation to the events of this case cannot be lightly cast aside.

In making their decision to repurchase the Bass Brothers' shares, the Texaco board received advice from its investment banker, First Boston, and a recommendation that a prompt repurchase of the shares would be in the best interests of Texaco. It also received advice and, apparently, the same recommendation from the two law firms that were representing it, both of which firms have favorable national reputations and considerable experience in the field of corporate takeovers and acquisitions. (In this regard I note that the recent decision in Smith v. Van Gorkam, Del. Supr., ___ A.2d ___ (1985) has held that in an appropriate factual context a proper exercise of business judgment may include, as one of its aspects, reasonable reliance upon the advice of counsel, this being wholly outside the statutory protection of 8 Del.C. § 141(e) which permits directors, in making their decisions, to rely upon the reports of corporate officers, the advice of experts and the books and records of the company. See Slip Opinion of January 29, 1985 at page 45, footnote 22.)

Finally, concerning the vote-buying allegations, it would seem that it can be established from the undisputed facts developed to date that the right given initially to the Texaco board to control the vote of the preferred shares that were issued to the Bass Brothers in no way entered into negotiations for a purchase price at which the Bass Brothers would be willing to sell and the corporation would be willing to buy their common shares. Rather, it appears that the evidence will show that the question of voting rights for preferred shares came up only after the $50 per share purchase price had been agreed upon and after the Bass Brothers had agreed to accept payment for one-half of their common shares in the form of a new series of preferred stock having a value of $50 per share. It appears that the evidence would indicate that it was at this after-the-fact stage that the Bass Brothers first raised the prospect of voting rights for the preferred for their own economic reasons and that it was the Bass Brothers who finally suggested that they agree to vote the preferred shares as directed by the Texaco board in order to bring about a satisfactory accommodation to both sides (i.e., marketability and tax advantages to the Bass Brothers versus the assurance sought by the board that the Bass Brothers would not use their stock position to the possible detriment of Texaco and its long-range business policies in the process of furthering their personal investment goals.) Such facts, if established, would tend to undercut any thought that the motivation of the Texaco board was to purchase the shares in order to secure their continued control of corporate affairs.

X I

I make no factual finding as to any of the foregoing matters, since that is not the function of the Court in passing upon the proposed settlement of a class and derivative action. I do take note, however, that in the event of a trial it would appear more than likely that the factual matters outlined herein could be established. I say this because there appears to be no material dispute as to any such facts between the parties and the objectors now. Rather, the difference of opinion that fuels the opposition of the objectors stems more from a disagreement as to the legal implications to be drawn from such factors, or a disagreement as to what the law controlling the situation should be as opposed to accepting the law as it now exists.

Consequently, in the event of a trial, it appears to me that the Texaco director defendants would stand a better than even chance of establishing that their decision to repurchase the Bass Brothers' shares was reasonably justifiable for corporate reasons, that it did not amount to a gift of assets under the circumstances, and that it was not a decision motivated by a desire on their part to perpetuate themselves and incumbent management personnel in office. Correspondingly, in view of the potential legal and factual obstacles facing them, I think that in all likelihood the plaintiffs would be faced with an extremely difficult task in attempting to overcome the defense of the business judgment rule.

When these evident probabilities are weighed against the cost and expense to the corporation that would be required by the defense of the action, the prolonged time which which would be required for a trial, the involvement of key managerial personnel whose time could be better devoted to the management of the corporation's business affairs, and the notoriety and possible adverse publicity that such a trial would generate, it seems to me that the settlement and dismissal of the consolidated action would be in the best interests of Texaco and its shareholders. At least that is my business judgment.

Furthermore, for the same reason, I find no basis for granting the intervention sought by certain of the objecting shareholders. To the extent that these shareholders feel that the rule embodied in Cheff v. Mathes, supra, should be reconsidered, this Court has no power to do so since that decision, as well as Bennett v. Propp, supra, are decisions of our Supreme Court which this Court lacks the power to overturn. If these shareholders, as objectors to the proposed settlement, wish to seek appellate review of this Court's decision to approve the settlement and dismissal of the consolidated action for whatever their reasons, they are presumably free to do so. At least it has been done many times before.

Accordingly, it is my decision to approve the proposed settlement and dismissal of the consolidated action based upon the result already achieved by the plaintiffs and their attorneys with regard to the modification of the voting rights attached to the preferred shares. I stress that in so doing I am not ruling on either the merits of the plaintiffs' remaining cause of action or on the legal propriety of the conduct of the defendants as such.

XII

As to the requested attorneys fees, I acknowledge that a request for a fee of $700,000 seems somewhat staggering. It is indeed a large sum. At the same time I feel that the plaintiffs and their attorneys have obtained a very favorable result even though it cannot be measured in terms of dollars recovered for either the corporation or its shareholders as a class.

Texaco is a large company and, as noted at the outset, it has a vast number of shareholders. In such a large, publicly-held company, 12.6 million votes, or 5% of the outstanding voting power, can play a large role in corporate shareholder decisions. The consolidated action by the plaintiff shareholders here has removed that 5% voting power as a factor in shareholder decisions for a period of time and has removed it from the control of the board of directors altogether. Stated another way, shareholders who may wish to vote against management proposals hereafter, or against management itself, will have 12.6 million less votes to overcome (as became the case at the 1984 annual meeting of shareholders as a result of plaintiffs' efforts). I think that this obviously constitutes a benefit to the corporation and its common shareholders since it permits the shareholders, as they should, to make shareholder decisions without being confronted with the knowledge that management has the advantage of a 5% headstart with regard to any particular proposition. It also enhances the voting power of the common shareholders to a degree since it means that a 5% voting power, which potentially could be used to thwart the wishes of a majority of their number if in the hands of another, will not come into play at all, at least through the period prescribed by the repurchase agreement.

I note again that there appears to be no serious dispute as to the thoroughness or sincerity of effort put forth by plaintiffs' attorneys in this matter, and in general they are all experienced in shareholder litigation and are well known to the Court. It has been contended by some that if the price of Texaco shares immediately prior to the January acquisitions of the Bass Brothers is used as the measure, the total premium actually paid to the Bass Brothers for the repurchase of their 9.9% interest in Texaco was in the vicinity of $400 million. Knowing many of the attorneys representing the plaintiffs from past experience in this Court, I cannot believe that they would be proposing to settle and dismiss this case based upon a fee request of $700,000 for what they have already done and accomplished without having fully investigated and explored every possible avenue of their case. I am satisfied that if there was even the remotest smell of a possible recovery of $400 million or any substantial part thereof, with a potential fee to be based on the size of such a recovery, one or more of their number would have broken ranks long ago. In short, I do not view the proposed settlement as being a case of "feemail."

While numerous shareholders have written to protest the fee request in addition to the objections put forth at the settlement hearing, these protests derive generally from a sense of shareholder outrage based upon an understanding that the attorneys will be paid $700,000 while the corporation and its shareholders will get nothing at all out of the litigation. This, of course, is an erroneous assumption since a benefit for the corporation and its shareholders has already been obtained as indicated, even though it is not reflected in the form of a monetary recovery. Other shareholders object to the plaintiffs' attorneys being paid for agreeing to dismiss a "greenmail" suit without prosecuting it to a conclusion. They say that if the plaintiffs did not have a case to begin with, they should not be rewarded for dismissing it. I would agree with this if the suit had only addressed itself to the "greenmail" aspect of the repurchase agreement and if it had neither sought nor accomplished any additional relief. Of course, that is not the situation.

All factors considered, I am persuaded to approve the fee request even though it may seem high. Given the magnitude of the case, the obstacles facing the plaintiffs at the outset (not the least of which was their decision to not make a demand on the board of directors prior to filing suit and to overcome a motion to dismiss because of their failure to do so in order to keep the suit alive), the expertise of counsel, the contingent nature of the fee prospects facing them at the outset,, the effort put forth and the result achieved, I cannot say that the requested fee is excessive. Moreover, it probably compares favorably to the fees normally paid to investment bankers for their participation in such transactions.

XIII

The approval of the proposed settlement and the allowance of the requested counsel fees will, however, be subject to the following caveat, namely, that by approving the settlement I in no way intend to bring about the termination of Seagoing's Federal claims in the Southern District of New York on grounds of <u>res judicata</u>. I realize that any decision on this point will have to be given by the Federal Court in the event that such a defense is raised in that action, and that I have no power to decide the issue in advance here. However, I wish to make my position clear for whatever it may be worth hereafter.

The focus of this consolidated action, and indeed the focus of the objectors to the settlement, is almost exclusively on the conduct of the defendant board of directors. The wrong charged to the Bass Brothers is that of aiding and abetting the board of directors in all of its alleged wrongdoing despite the obvious fact that it was the Bass Brothers who precipitated the repurchase decision of the board by deliberately buying up large amounts of Texaco shares at a time when Texaco and its management were heavily embroiled in the tangles of the Getty acquisition.

As I read it, Seagoing's complaint in the Federal action in the Southern District of New York charges that the Bass Brothers did this with the intent, among other things, to drive up the price of Texaco shares on the market and to pressure Texaco's board into repurchasing their shares at a large premium over their true value. This is alleged to have been a wrong to the corporation itself as well as to a class of Texaco's other shareholders. This wrong is alleged to be made actionable by the failure of the Bass Brothers to disclose this intention in the Form 13D filed by them, and thus by their violation of the rules and regulations of the Securities and Exchange Commission.

I do not view these Federal allegations to be subsumed or included within the allegations of the complaint in the consolidated action here, nor would I think them to be covered by the common law charges of fraud and misrepresentation alleged in the Seidle action, at least not as they have been explained and argued in this proceeding. If Seagoing has a class and/or derivative action against the Bass Brothers under the Federal securities law, I do not mean to dispose of it by approving the dismissal of an action brought under state law based upon alleged breaches of fiduciary duty by the Texaco board of directors, nor has it been represented to me by counsel for the parties that I will be doing so.

X I V

An appropriate form of order implementing this decision may be submitted. The order should specifically address the denial of the various objections and motions to intervene so as to enable those appearing shareholders to perfect an appeal of this decision if they are so inclined.

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

CAROLYN BERGER
VICE-CHANCELLOR

COURT HOUSE
WILMINGTON, DELAWARE 19801

April 22, 1985

Charles F. Richards, Jr., Esquire
Richards, Layton & Finger
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Wilmington, Delaware 19899

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

Dear Gentlemen:

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

The facts, for the most part, are undisputed. On February 14, 1985, Mesa disclosed in a Schedule 13D that it had acquired approximately 12.6 million shares or 7.3 percent of the common stock of Unocal. According to that filing, Mesa acquired the stock solely for the purpose of investment. By February 22, 1985, Mesa had increased its stake to 9.7 percent, still for the stated purpose of investment only.

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

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

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

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

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

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

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

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

To round out the chronology of events relating to Mesa's takeover attempt, it should be noted that on April 17, 1985 Unocal responded to Mesa's tender offer by commencing an exchange offer for up to 87.2 million shares of its stock. Pursuant to the Unocal offer, which is conditioned, among other things, on Mesa consummating its tender offer, each share of Unocal stock would be exchanged for a package of debt securities having an aggregate principal amount of $72. Unocal's offering circular states that its board unanimously authorized the exchange offer in order to provide Unocal's shareholders an opportunity to obtain fair value for their shares following the Mesa tender offer and to make it more difficult for Mesa to complete its tender offer, which the Unocal board determined is grossly inadequate.

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

It is settled law that preliminary injunctive relief will not be granted unless plaintiffs establish both a probability of success on the merits and the threat of imminent irreparable harm. Bayard v. Martin, Del. Supr., 101 A.2d 329 (1953). In support of its claim on the merits, Mesa argues that the bylaws should be struck down for any of three reasons. First, they conflict with 8 Del. C. §211(b) by limiting the shareholder-generated business which may be transacted at an annual meeting to those matters which were properly noticed thirty days in advance. Second, the bylaws operate inequitably by, among other things, imposing the notice restrictions on shareholders but not management. Finally, the bylaws allegedly were adopted for the improper purpose of thwarting Mesa's takeover bid and thereby entrenching management in office.

On the issue of irreparable harm Mesa argues that Unocal's interpretation of the bylaws notice requirements as applied to an adjourned meeting is having an immediate chilling effect on Mesa's ongoing proxy solicitation. Simply stated, if no shareholder proposals may be presented at an adjourned meeting, there is no reason to vote in favor of adjournment. In addition, Mesa contends that the bylaws' interference with the corporate franchise provide an independent basis for a finding of irreparable harm.

Unocal responds that there is insufficient evidence from which to conclude that its adjournment interpretation is having a chilling effect on Mesa's proxy solicitation.

An executive of the proxy solication firm retained by Mesa provided an affidavit stating his opinion that Unocal's bylaws interpretation will have a significant chilling effect on Mesa's proxy solicitation whereas an executive of Unocal's proxy solicitation firm submitted an affidavit expressing the opposite view.

As to Mesa's second claim of irreparable harm, Unocal points out that there is no evidence that Mesa or any other shareholder has been prevented from presenting a proposal because of the thirty day notice requirement. Mesa's adjournment proposals were noticed in accordance with the bylaws and, presumably, will be presented at the annual meeting. Based upon the present record, Mesa apparently has no interest in presenting any other proposals on April 29th and its present intent to present proposals at an adjourned meeting date are contingent not only upon the annual meeting, in fact, being adjourned, but also on the success of its tender offer. Accordingly, Unocal argues that any harm Mesa may suffer is purely speculative at this point.

In the recent case of <u>Plaza Securities Company v. Datapoint Corporation</u>, Del. Ch., C. A. No. 7932, Brown, C. (March 5, 1985), <u>aff'd.</u>, Del. Supr., No. 79, 1985, Horsey, J. (March 8, 1985), Chancellor Brown found that "[w]here the irreparable injury requirement is satisfied, the legal right granted by the law appears to be clear, where interference with that legal right will necessarily occur in the absence of injunctive protection by the Court, and where it reasonably appears that money damages cannot adequately compensate for the interference with that legal right...." Slip Op. at 15. In Datapoint, plaintiffs announced their intention to solicit consents pursuant to 8 Del. C. §228 to remove and replace the Datapoint board of directors. The company responded by adopting a bylaw which would delay the effectiveness of such a consent procedure for at least forty five days after the consents had been obtained. The Court found, among other things, that plaintiffs "undoubtedly" would be impeded in their consent solicitation effort if the Datapoint bylaw were allowed to remain in effect pending final disposition of the claim. Slip Op. at 16.

I find the analysis in Datapoint to be controlling as to both aspects of the claimed irreparable injury in this case. Notwithstanding Unocal's opinion evidence to the contrary, I am convinced that its adjournment interpretation of the bylaws will impair Mesa's ongoing proxy solicitation efforts and will cause irreparable harm if no preliminary determination is made as to the merits of Mesa's position. Undoubtedly, there are Unocal shareholders who will vote against adjournment for the sole reason that they believe that no shareholder proposals could be presented at an adjourned meeting. If that belief is misplaced, the harm to Mesa will not be adequately compensable in money damages. Thus, I find that Mesa has met its burden of demonstrating immediate irreparable harm on the claim that the bylaws are invalid as applied to a greater than thirty day adjournment of the annual meeting.

However, the same factors are not present with respect to the overall validity of the bylaws. If plaintiffs prevail as to the adjournment issue and they obtain the necessary votes to adjourn the meeting, it appears that they will have an opportunity to give the notice required by the bylaws and present at the adjourned meeting any shareholder proposal they wish to make. Even assuming that, pursuant to 8 Del. C. §211(b), Mesa has an unfettered right to present any proper business at an annual meeting without any advance notice, there is no showing on the present record that the bylaws necessarily will interfere with that right. Until such time as Mesa or another shareholder seeks to present a proposal that cannot be presented in accordance with the bylaws, there is only a hypothetical threat of injury. Based upon my finding that there is no threat of immediate irreparable rm as to this portion of Mesa's claim, I will not address the merits for to do so under these facts would be tantamount to an advisory opinion. Cf. FMC Corporation v. R. P. Scherer Corporation, Del. Ch., C.A. No. 6889, Longobardi, V. C. (August 6, 1982).

Turning to the merits of the adjournment claim, Mesa relies primarily on the decisions in Lerman v. Diagnostic Data, Inc., Del. Ch., 421 A.2d 907 (1980) and Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971) in support of its position that the adjournment interpretation is inequitable and thus invalid. In Schnell the Delaware Supreme Court held that management may not use corporate machinery for an improper purpose even if the action taken is legally permissible. Defendants there advanced the shareholder meeting date for the purpose of thwarting a proxy contest and in order to perpetuate management in office.

The Schnell holding was based upon a finding of improper purpose. In Lerman, however, certain bylaw amendments were struck down without regard to defendants' motives because of the inequitable effect of those amendments. The Lerman defendants adopted a bylaw requiring shareholders to submit their nominations for the board of directors at least seventy days in advance of the annual meeting. The annual meeting date, which was to be set by the board, was fixed sixty three days after its announcement, thus making it impossible for a shareholder to comply with the seventy day notice requirement. The Court invalidated defendants actions based upon a finding that their "conduct was both inequitable (in the sense of being unnecessary under the circumstances) and had the accompanying dual effect of thwarting shareholder opposition and perpetuating management in office." Lerman v. Diagnostic Data, Inc., Del. Ch., 421 A.2d 907, 914 (1980).

Mesa argues that the Lerman holding is directly on point. Unocal's adjournment interpretation was not announced until April 7, 1985, thereby making it impossible for Mesa to comply with the thirty day notice requirement. The adjournment interpretation is inequitable because it is unnecessary to the stated purpose of the notice bylaws. If thirty days advance notice is sufficient to allow the shareholders and the company to evaluate and respond to any proposals or nominees, then it would seem that thirty days notice before the adjourned meeting date would accomplish that purpose. Instead, under Unocal's interpretation, ninety days advance notice is being required under the facts of this case. Finally, as in Lerman, the adjournment interpretation is impeding Mesa's takeover attempt and thereby helping to perpetuate management.

Unocal strenuously objects to this characterization. The bylaws were adopted on February 25, 1985 at a time when Mesa purportedly was a passive investor. There were no bylaw amendments adopted or other board actions taken on April 7, 1985. All that happened was that Unocal disclosed its interpretation of the bylaws — an interpretation that Mesa clearly anticipated and that, in Unocal's view, is mandated by Delaware law. Thus, Unocal did nothing to make it impossible to comply with the thirty day notice requirement and to the extent that Mesa now finds itself in a difficult position, it is a problem of its own making.

However, Unocal's efforts to distinguish Lerman do not address the equitable principles applied there and equally applicable here. The notice bylaws do not expressly provide how they are to operate in the case of an adjournment and there is no settled Delaware law from which Unocal's interpretation could have been determined with any reasonable certainty. Although there is authority for the proposition that an adjourned meeting is considered a continuation of the original meeting, Atterbury v. Consolidated Copper Mine Corp., Del. Ch., 20 A.2d 743 (1941), there is also a statutory requirement that new notice be given for an adjourned meeting if the adjournment is for more than thirty days. 8 Del. C. §222(c). Thus, there was a reasonable basis for either interpretation of the new notice bylaws. Under these circumstances, and with the knowledge that Mesa believed it would be possible to present a shareholder proposal before the adjourned meeting, Unocal's failure to announce its interpretation of the bylaws until after the thirty day notice period had run was inequitable. Nor does it matter that on April 7th there was only an announcement as opposed to some board action. The effect of that announcement was the same as if Unocal had adopted a new bylaw amendment governing the notice requirements for adjourned meetings.

Based upon the foregoing, I find that Mesa has established a likelihood of success on the merits on its claim that the adjournment interpretation of the bylaw amendments is invalid. As noted earlier, I also find that Mesa is threatened with immediate irreparable harm as a result of the adverse impact that Unocal's adjournment interpretation is having and will continue to have on Mesa's proxy solicitation. A temporary restraining order will issue upon the posting of a bond in the amount of $10,000. I request that Mesa submit a form of order in accordance with this opinion, on notice, as promptly as possible.

Very truly yours,

Carolyn Berger

CB:rsb

Xc: Register in Chancery

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PLAZA SECURITIES COMPANY and ARBITRAGE SECURITIES COMPANY, Plaintiffs, v. HAROLD E. O'KELLEY and DATAPOINT CORPORATION, a Delaware corporation, Defendants. DATAPOINT CORPORATION, a Delaware corporation, Counterclaim-Plaintiff, v. PLAZA SECURITIES COMPANY, ARBITRAGE SECURITIES COMPANY and ASHER B. EDELMAN, Counterclaim-Defendants.	Civil Action No. 7932

(Unreported Opinion)

Submitted: February 28, 1985
Decided: March 5, 1985

William T. Quillen, Esquire, James F. Burnett, Esquire, and W. Harding Drane, Jr., Esquire, of Potter, Anderson & Corroon, Wilmington, and Stuart Shapiro, Esquire, Peter E. Greene, Esquire, and Ronald S. Oppenheimer, Esquire, of Skadden, Arps, Slate, Meagher & Flom, New York, for Plaintiffs Plaza Securities Company and Arbitrage Securities Company.

R. Franklin Balotti, Esquire, Jesse A. Finkelstein, Esquire, and Gregory P. Williams, Esquire, of Richards, Layton & Finger, Wilmington, and Michael W. Schwartz, Esquire, Robert B. Mazur, Esquire, and Barbara Robbins, Esquire, of Wachtell, Lipton, Rosen & Katz, New York, and John N. McCamish, Jr., Esquire and Jonathan David Pauerstein, Esquire, of McCamish, Ingram, Martin & Brown, Texas, for Defendants Harold E. O'Kelley and Datapoint Corporation.

BROWN, Chancellor

This is a preliminary injunction application in which the plaintiffs seek literal enforcement of that portion of the Delaware General Corporation Law which authorizes corporate action to be taken by the written consent of a specified number of the shareholders of a corporation in the absence of a meeting, without a formal vote of the shareholders and without notice in advance to all shareholders. Plaintiffs also seek preliminary injunctive relief on the grounds that the board of directors of the defendant corporation is attempting to manipulate the corporate machinery in an inequitable manner so as to entrench themselves and to thereby improperly frustrate the right of the plaintiff shareholders to seek a change in the composition of the board of directors. I find that the plaintiffs have failed to demonstrate convincingly the likelihood that they will be able to succeed on the merits of this latter argument upon a final hearing. However, I find it unnecessary to address the factual aspects of this latter argument since I am convinced that the plaintiffs have established their entitlement to preliminary injunctive relief on the basis of a literal reading of the statute in issue.

I.

The statute under scrutiny is 8 Del.C. §228. In relevant part it reads as follows:

"(a) Unless otherwise provided in the certificate of incorporation, any action required by this chapter to be taken at any annual or special meeting of stockholders of a corporation, or any action which may be taken at any annual or special meeting of such stockholders, may be taken without a meeting, without prior notice and without a vote, if a consent in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum numbe: of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted.

* * *

(c) Prompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to those stockholders...who have not consented in writing. * * *"

(Emphasis added.)

This statute which authorizes corporate action to be taken by written shareholder consent in lieu of a vote of shareholders must be read in light of 8 Del.C. §213, that being the provision of the General Corporation Law which prescribes the method for fixing a date to determine those persons and entities who are the shareholders of record for the purpose of taking corporate action or receiving corporate benefits. Insofar as §213 deals with fixing a record date for the purpose of determining those shareholders who may take action by written consent, it reads in relevant part as follows:

"(a) In order that the corporation may determine the stockholders entitled... *to express consent* to corporate action in writing without a meeting...*the board of directors may fix, in advance, a record date, which shall not be* more than 60 nor less than 10 days before the date of such meeting, nor *more than 60 days prior to any other action.*

* * *

(b) *If no record date is fixed*:

* * *

(2) *The record date for determining stockholders entitled to express consent to corporate action in writing without a meeting*, when no prior action by the board of directors is necessary, *shall be the day on which the first written consent is expressed*." (Emphasis added.)

Thus, read literally, 8 *Del.C.* §228 operates in conjunction with 8 *Del.C.* §213 to provide that unless the certificate of incorporation specifically prohibits the shareholders from taking action by written consent pursuant to §228, a written consent signed by shareholders of record as determined on the record date fixed by the board of directors for such purpose (or on the date on which the first written consent was expressed if no record date has been fixed in advance by the board of directors), which written consent represents at least the minimum number of votes which would be required to take shareholder action if all shareholders of the corporation were present at a meeting and were voting, is effective to take any action which could otherwise be taken by shareholder vote at an annual or special meeting of shareholders. Reading §228 literally, it is (1) the signing by shareholders of record (2) who possess the requisite number of votes (3) of a document which expresses their consent to the action described in the document which (4) evidences the corporate action taken and which (5) thereby makes it legally effective. All that the statute requires thereafter is that the shareholders who did not give their consent in writing be notified promptly of the corporate action so taken.

It is without question that an election of directors, or the removal of directors with or without cause, constitutes one form of shareholder action which can be taken at an annual or special meeting of shareholders. 8 Del.C. §§211, 141(k). Against this backdrop I turn to the relevant undisputed facts of this case as established by the record as of the time of the preliminary injunction hearing.

II.

The plaintiffs, Plaza Securities Company and Arbitrage Securities Company, are two New York limited partnerships which own together a total of 3.85% of the outstanding stock of the defendant, Datapoint Corporation, a Delaware corporation. One Asher B. Edelman is the general partner of each of the plaintiffs and for federal reporting purposes he owns beneficially in excess of 10% of the 20.5 million shares of Datapoint's outstanding common stock. (For ease of judicial description, Mr. Edelman will be referred to hereafter as if he were the named plaintiff.)

Datapoint is an electronics and computer firm with its principal place of business in San Antonio, Texas. Its common stock is traded on the New York Stock Exchange. The defendant O'Kelley is Datapoint's chairman and chief executive officer. At this point the reason he has been named as the sole individual defendant in this action is not altogether clear.

The long and the short of this matter is that Datapoint is in financial difficulty and its board of directors is ostensibly looking for a purchaser for the company. Edelman has made known his interest in acquiring control of Datapoint, but Datapoint's board of directors, at least to the extent that the defendant O'Kelley may be expressing its views, is openly opposed to any acquisition of the company by Edelman. Initial overtures by Edelman were rejected by Datapoint, as a consequence of which Edelman, in mid-January, disclosed an intention to solicit consents from Datapoint's shareholders for the purpose of taking action pursuant to §228 to remove Datapoint's six-member board of directors and to replace them with directors of his own choosing. It is Edelman's position that if he and his slate of directors can be placed in office quickly enough, they can do a better job of selling Datapoint than can its present board and thereby provide a greater benefit to Datapoint's shareholders.

In direct response to this announced intention by Edelman, Datapoint's board adopted a bylaw on January 28, 1985 which was designed to establish a procedure to govern any attempt to take corporate action on Datapoint's behalf by written shareholder consent. Datapoint's certificate of incorporation does not prohibit action by written share-holder consent as otherwise authorized by §228. Datapoint's board, however, takes the position that this fact does not mean that it is powerless to adopt bylaws to regulate the use of such consents so as to assure an orderly, informed and meaningful expression of shareholder will on the issue of corporate governance thus being created by Edelman. On the contrary, it is argued on Datapoint's behalf that its board owed a duty to its shareholders to assume such a responsibility.

Edelman responded by filing this suit in which he sought to preliminarily and permanently enjoin the enforcement of such bylaw by Datapoint. Thereafter, on February 12 Datapoint's board amended the bylaw so as to alter and remove certain of its initial provisions. Edelman still views the bylaw to be illegal, however, even in its amended form and thus on the eve of his planned campaign to solicit consents in favor of his effort to replace Datapoint's board he has pressed for a preliminary injunction to enjoin its enforcement.

These general background facts will suffice for present purposes.

III.

Turning to the bylaw itself, it has three separate but interrelated features which come into play for the purpose of this proceeding. Because of its length I shall not set forth the bylaw verbatim. Rather, I shall simply summarize its provisions and potential effect as follows.

The bylaw in its presently amended form provides that on the 45th day following the record date for action to be taken by consent, the Secretary of the corporation, after conducting such investigation as may be necessary, shall determine whether the proposed action has been validly consented to by the holders of outstanding stock of the corporation having the requisite voting power to authorize such action. The bylaw provides that if the Secretary determines that the consents are valid, that fact shall be certified on the records of the corporation and the consents will be filed in the corporate records, at which time the action to be taken by shareholder consent shall become effective. This duty of certification by the Secretary is made subject, however, to the express provision that if any proceedings have been commenced in this Court or any other court of competent jurisdiction raising legal issues incident to the validity of the consents, the Secretary shall not make his certification, and the action to be taken by shareholder consent shall not become effective, until the final termination of such judicial proceedings — unless the court in which the litigation is pending determines in the interim that such proceedings are not being pursued expeditiously and in good faith.

The bylaw further provides that where the action sought to be taken by consent relates to the removal, replacement or election of one or more members of the board of directors, the Secretary of the corporation shall not be the person who determines and passes upon the validity of the consents, but rather the Secretary shall in such case appoint two persons as inspectors for the purpose of discharging the certification duties otherwise imposed on him under the bylaw. These inspectors may not be members of the board of directors or officers or employees of the corporation.

Thus, as applied to the present situation, what the bylaw purports to do is to prevent Edelman from taking action by shareholder consent to remove Datapoint's present board of directors and to replace them with his own directors for a period of 45 days after the record date (in this case Edelman has requested, and the board has fixed, March 4 as the record date), subject even then to an initial determination by two inspectors appointed by the corporate Secretary that the consents are sufficiently valid to accomplish such purpose, and subject to the further condition that no suit has been instituted by anyone during that 45-day period which raises a legal issue incidental to the validity of the consents.

IV.

Datapoint denies that the bylaw was intended by its board as an entrenchment device or that it was designed to work against Edelman in particular as opposed to anyone else who might desire to seek a change in the board of directors through a solicitation of written shareholder consents. It suggests that where consents are being solicited in an effort to garner sufficient voting power to take shareholder action which is openly disfavored by an incumbent board and management, it amounts to the same thing as a proxy contest and that in such a situation an orderly procedure is required so as to insure that both sides have sufficient time and opportunity to put their positions before the shareholders and to afford shareholders who might choose to do so a means to revoke consents previously given. Datapoint says that the contested nature of such a solicitation and the possibility of revocations of consents previously given necessarily gives rise to the need for some official tally of consents and revocations at some defined point in time in order that all shareholders of the corporation can be sure of the legality of contested action purportedly taken on the corporation's behalf without the formality of a shareholders' meeting. It says that its bylaw does nothing more than address this obvious need.

Datapoint relies on 8 Del.C. §109(b) which holds that bylaws may contain any provision 'not inconsistent with law or with the certificate of incorporation" which relates to the conduct of the business and affairs of the corporation and which also relates, among other things, to "the rights and powers of its stockholders." See generally, Gow v. Consolidated Coppermines Corp., Del. Ch., 165 A. 136 (1933). Datapoint says that there is nothing in the bylaw which is inconsistent with any right or power given to the shareholders under §228. It points out that the bylaw does not prohibit them from taking action by written consent, but only fills in where the statute is silent by setting up a procedure for the exercise of that right which is fair and protective to all Datapoint shareholders.

In further support of its position Datapoint points to the decision in Pabst Brewing Co. v. Jacobs, 549 F.Supp. 1068 (D. Del.), aff'd, 707 F.2d 1394 (3d Cir. 1982), a federal case construing §228, which held that "[t]he policies underlying a proxy contest, where the shareholders must decide on what persons are to serve as directors, are equally applicable to a contest by consents, where the shareholders must make the same decision." 549 F.Supp. 1077. See also, Calumet Industries, Inc. v. MacClure, 464 F.Supp. 19 (N.D. Ill. 1978). Datapoint offers other justifications based upon federal securities regulations and the rules of the New York Stock Exchange. However, the urgency of the situation does not afford the luxury of further elaboration at this stage of the proceedings.

V.

Suffice it to say that Datapoint's rationale is obviously based upon general policy considerations and, as such, much of what it says makes sense. I think, however, that a court is required to take a statute as it finds it when its meaning and purpose is clearly expressed, and on this basis I am persuaded that Edelman has the better of it insofar as §228 is concerned.

Simply stated, the statute gives shareholders the right to take immediate action by written consent provided that they have at a given point in time obtained a written expression of authority on behalf of shares representing sufficient votes to take such action. By its terms the statute contemplates no waiting period once the necessary written consent is in hand, and it contemplates no review by corporate officials or others as a condition to the shareholder action becoming effective. Nor does it leave room for a board of directors to declare a postponement of the effective date of such consent action pending the final outcome of litigation which challenges it.

I am persuaded that Edelman has made a clear and reasonable showing here of the likelihood that the Datapoint bylaw directly conflicts with this statutory grant of power to the shareholders. The bylaw purports to delay action by consent until the 45th day after a record date despite the always practical possibility that the requisite written consent can be obtained prior to the expiration of that time period. The language of the statute does not permit such delay. The bylaw requires in the present factual context that inspectors appointed by the corporation pass upon the validity of such written shareholder consent and certify to the validity of the action taken before the consent becomes effective. The language of the statute affords no basis for a construction that a written shareholder consent is not effective until after some ministerial employee of the corporation first passes upon the standing of the participating shareholders to take such action, or upon the propriety of the manner in which they have done so.

The provision of the bylaw which would purport to postpone the effectiveness of action taken by written shareholder consent indefinitely until the final termination of any litigation brought to challenge it, or until a judicial ruling that such litigation was not being pursued expeditiously and in good faith, is particularly noteworthy since, as Edelman points out, it would serve in its effect to permit Datapoint's board to grant itself a preliminary injunction against the implementation of the shareholder consent action by the simple expedient of filing suit to challenge it. Given that the language of the statute clearly indicates that the shareholder action is taken upon the signing of a written consent by shareholders representing the minimum voting power required to authorize such action, subject only to the ministerial duty of someone — possibly the corporation — to promptly notify the other shareholders of the action that has been taken, it seems apparent that the intent and purpose of the bylaw is totally at odds with the statutory right given to shareholders by §228 no matter how laudable its objective might be.

In short, the opening language of §228 — "[u]nless otherwise provided in the certificate of incorporation" — would seem to bear out Edelman's argument that no restriction can be placed upon the right of shareholders to take action by written consent in the direct and immediate manner authorized by the balance of the statute unless it is accomplished in the certificate of incorporation itself. The statute would seem to reflect a legislative policy that if you have the votes you can act immediately without first seeking to ascertain how the other shareholders might be inclined to vote on the action being taken.

For these reasons, I am convinced that Edelman has demonstrated that he will likely succeed on the merits of his statutory position upon a final hearing, and that he has thus met his burden as to this aspect of preliminary injunctive relief. Gropper v. North Cent. Tex. Oil Co., Del. Ch., 114 A.2d 231 (1955).

VI.

As to the correlative obligation to demonstrate a likelihood of immediate irreparable harm in the event that preliminary injunctive relief is not granted, I find that Edelman has also made the necessary showing. Where the legal right granted by the law appears to be clear, where interference with that legal right will necessarily occur in the absence of injunctive protection by the Court, and where it reasonably appears that money damages cannot adequately compensate for the interference with that legal right, the irreparable injury requirement is considered to be satisfied. State v. Delaware State Educational Association, Del. Ch., 326 A.2d 868 (1974); Richard Paul, Inc. v. Union Improvement Co., Del. Ch., 86 A.2d 744 (1952), modified on other grounds, Del. Supr., 91 A.2d 49 (1952).

Here, Edelman, regardless of the merits of his motivation, seeks to solicit consents in an effort to expeditiously remove Datapoint's present board of directors before it can bring about a sale of the corporation or its assets. Such a solicitation of consents is apparently permitted by the General Corporation Law. 8 Del.C. §212(b(); Pabst Brewing Co. v. Jacobs, supra. If the bylaw is permitted to remain in force pending a final determination of the case, and if D point is thus permitted to rely on its current efficacy in dealing with Datapoint's other share-holders, Edelman will undoubtedly be impeded in his efforts to solicit the necessary consents and to use them promptly in the event that he is successful. The injury that he would suffer in the event that Datapoint is permitted to rely on the bylaw for purposes of delay and to thereby defeat his effort to obtain control before Datapoint is sold or liquidated would not seem to be measurable realistically in money damages.

On the other hand, should Edelman obtain the necessary consents and purport to take action pursuant to §228, it would seem that Datapoint's current board of directors or a shareholder supportive of their position could always defend the bylaw and the policy considerations offered in support of it in a summary proceeding brought pursuant to 8 Del.C. §225 to challenge the right of Edelman's slate of directors to hold office. In that event, it would be the Court that would determine the directors who would be in charge of the corporation pending a decision on the validity of the bylaw as opposed to permitting the current directors of Datapoint to unilaterally designate that function to themselves by means of the very bylaw in dispute.

On balance, I conclude that the preliminary injunction will issue upon the plaintiffs posting bond in the sum of $10,000, with surety. A form of order may be submitted.

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