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.	§	

DEFENDANTS' ANSWERING BRIEF IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR INTERIM INJUNCTIVE RELIEF

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April 17, 1985

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PRELIMINARY STATEMENT

T. Boone Pickens, Jr. and Mesa, the company he controls, are familiar to the public and to this Court as leaders of the latest generation of corporate raiders. Pickens has admitted that he works for only "one crowd" -- Mesa and its stockholders -- notwithstanding his frequent trumpeting of a professed goal of "maximizing values" for the shareholders of the companies he is raiding. Indeed, Mr. Pickens has institutionalized the goal of "greenmailing" target companies by causing Mesa to adopt a compensation scheme rewarding Pickens (and his fellow Mesa officers) with up to 10 percent, or $40 million, of the booty to be gained through such tactics.

As the public record now discloses, Mesa first set its sights on Unocal in October of 1984. Long before then, of course, Unocal had advised its stockholders that its 1985 annual meeting would be held on April 29, the date fixed in its bylaws. Mesa did not announce its interest in Unocal, however, until February 14, 1985, at which time it said that it held such shares for purposes of "investment" only. Against a background of Pickens' lengthy track record, and the coercive tactics utilized by offerors in many hostile takeovers, Unocal's board acted at its regularly scheduled February 25 directors' meeting to adopt bylaw amendments, of a type under consideration prior to February 14, to regulate the tactics which could be employed to disrupt orderly procedures in connection with annual meetings.

True to form, Mesa announced on March 28, 1985 that it had acquired additional Unocal shares and was seeking to exercise control over Unocal, notwithstanding its earlier stated "investment" intent. At the same time, Mesa announced (in compliance with the bylaw amendments it now attacks) that it was soliciting proxies for a "non-proposal" to adjourn the April 29 annual meeting and postpone the election of directors until June 28. Mesa also announced that it was considering the unprecedented and plainly illegal step of soliciting proxies to defeat a quorum and thereby interfere with the right of stockholders to convene their annual meeting. Unocal's board responded to this inequitable strategem by lowering the quorum requirement from 1/2 to 1/3 of outstanding shares, thereby reducing the likelihood that a small minority of stockholders could act to deliberately obstruct the holding of the annual meeting required by 8 Del. C. § 211. Following the prompt action of Unocal's board to protect the franchise of its stockholders, Mesa apparently has now abandoned the boycott feature of its scheme.

To this moment Mesa has still not announced any proposal for shareholder action at the 1985 annual meeting, other than the "non-proposal" to adjourn. Against this background, Mesa asks this Court -- just eleven days before a meeting that has been scheduled literally for years -- to grant emergency relief with respect to bylaw amendments which Mesa has known about for over a month. Incredibly, what Mesa is in fact asking is to have this Court join in its scheme by enjoining enforcement of Unocal's bylaws to clear the way for it to spring a surprise attack upon Unocal and its stockholders at the April 29 meeting or an adjournment thereof.

NATURE AND STAGE OF THE PROCEEDINGS

By their motion filed last Friday, April 12, 1985, plaintiffs seek interim injunctive relief as to certain bylaw amendments adopted by the individual defendant directors of defendant Unocal Corporation ("Unocal"), a Delaware corporation. As described more fully below, the challenged bylaw amendments govern the procedures under which stockholder nominations and other proposals are presented.

This is defendants' brief in opposition to Mesa's motion for interim injunctive relief. Accompanying this brief are the affidavits of Sam A. Snyder, Esquire ("Snyder Aff."), Richard W. Cass, Esquire ("Cass Aff."), John J. Gavin ("Gavin Aff."), William Coats ("Coats Aff."), and Donald P. Jacobs ("Jacobs Aff.").

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* Abbreviations used herein also include:

PB - Opening Brief of Plaintiffs in Support of Their Motion for a Temporary Restraining Order;

Tassin Aff. - Affidavit of Sidney Tassin;

Carter Aff. - Affidavit of Donald C. Carter

STATEMENT OF FACTS

A. The Parties.

Plaintiff Mesa Partners II ("Mesa Partners") is a Texas general partnership which has acquired stock of Unocal. Compl. ¶ 5. Plaintiff Mesa Asset Co., a wholly-owned subsidiary of Mesa Petroleum Co., is the Managing Partner of Mesa Partners. Id. ¶ 3. Mesa Eastern, Inc. is a wholly-owned subsidiary of Mesa Partners. Id. ¶ 4. T. Boone Pickens, Jr., who is not a party to this action, controls Mesa Partners by virtue of his positions as President and Chairman of the Board of Directors of Mesa Petroleum Co. and President of Mesa Asset Co. Tassin Aff. Ex. O at A-4. Plaintiffs are referred to collectively as "Mesa."

Defendant Unocal Corporation ("Unocal") is a Delaware corporation engaged principally in petroleum, chemical, geothermal and metal operations. Tassin Aff. Ex. N at 7. Unocal has approximately 174 million shares of common stock outstanding, which are traded on the New York and other stock exchanges and are held by thousands of record stockholders. Id. at 6-8. The individual defendants are thirteen of the fourteen members of Unocal's Board of Directors. Compl. ¶ 7. Plaintiff does not challenge the independence of the majority of the members of Unocal's Board, except by alleging that they receive customary directors' fees. Compl. ¶¶ 7-9. The independent members of Unocal's board, all of whom are highly successful businessmen and professionals, include:

-- William Ballhaus, the retired President and Chief Executive Officer of Beckman Instruments, Inc.

-- Robert D. Campbell, retired Chairman of the Board of Newsweek, Inc.

-- William H. Doheny, a private investor

-- Richard K. Eamer, Chairman and Chief Executive Officer of National Medical Enterprises, Inc.

-- Donald P. Jacobs, Dean of the J.L. Kellogg Graduate School of Management of Northwestern University

-- Peter O'Malley, President of the Los Angeles Dodgers

-- Donn B. Tatum, Director and Former Chairman and Chief Executive Officer of Walt Disney Productions.

Compl. Ex. A.

B. Mesa's Acquisition Of Unocal Stock.

After making secretive purchases of Unocal stock for four months, on February 14, 1985, Mesa filed with the Securities and Exchange Commission a Schedule 13D which disclosed that it owned a total of 12,649,600 shares, or 7.3 percent of the shares outstanding, of Unocal. Mesa stated that it had acquired the shares of Unocal "solely for the purpose of investment." Tassin Aff. Ex. A. Mesa continued to acquire shares of Unocal, and on February 19, it disclosed that it owned approximately 8.5% of the Unocal shares outstanding. *Id*. Ex. B. By February 22, Mesa had acquired

9.7 percent of Unocal's outstanding shares. Id. Ex. C. Mesa still claimed in each of its amendments to its 13D Schedule that these purchases were for "investment."

C. Unocal's 1985 Annual Meeting.

At the time Mesa was acquiring its stake in Unocal, purportedly for the sole purpose of "investment," it was a matter of public record that Unocal's 1985 annual meeting of stockholders would be held on April 29, 1985, since that date was fixed by Unocal's bylaws and was also set forth in Unocal's 1984 Proxy Statement. Tassin Aff. Ex. I; Coats Aff. Ex. A. It was also a matter of public record that any stockholder wishing to present any proposals to stockholders would have to do so at the April 29 Annual Meeting because Unocal's Certificate of Incorporation, approved by Unocal's stockholders in 1983, does not permit stockholders to act by written consent or to call or convene special meetings of stockholders. Tassin Aff. Ex. J.

In accordance with Unocal's bylaws, the Executive Committee of Unocal's Board of Directors adopted a resolution on February 25, 1985 scheduling the 1985 Annual Meeting of Unocal's stockholders (the "Annual Meeting") for April 29, 1985, and authorizing the Executive Committee to set March 14, 1985 as the record date for that meeting. Snyder Aff. Ex. A. Notice of the meeting and a proxy statement were mailed on March 18, 1985 to all Unocal stockholders entitled to vote at the meeting; the agenda for the meeting as set forth in the notice was the election of three of the thirteen directors of the company. Coats Aff. Ex. A.

D. Unocal's Board of Directors Adopts Bylaw Amendments.

At a regularly scheduled Board Meeting held on February 25, 1985 (not one convened "hastily," as plaintiffs imply without record support, PB 8), the Board of Directors of Unocal adopted two new bylaws (the "bylaw amendments") designed to ensure that stockholders, a vast majority of whom traditionally vote by proxy rather than in person (Snyder Aff. ¶ 9), have a full opportunity to consider nominations for directors and stockholder proposals to be considered at annual meetings, including the response of management to such nominations or proposals. The first provision amended Article III Section 6 of Unocal's bylaws (the "Nomination Provision") to require that proposed nominees for director furnish certain information to the Secretary of the Company at least 30 days prior to the meeting at which the election will occur.* The second provision,

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* The Nomination Provision states:

> Section 6. Voting. Directors shall be divided into three classes with each Director serving a three-year term. At each annual meeting, all Directors of one class shall be elected in accordance with the provisions of Article Seventh of the Company's Certificate of Incorporation by the holders of shares entitled to vote in the election. A nomination shall be accepted, and votes cast

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contained in Article III Section 7 of the Bylaws (the "Notice Provision") requires that any stockholder wishing to bring business other than the nomination of directors before an annual meeting must provide the Secretary of the Company with written notice and certain required information at least 30 days prior to the meeting.*

(Footnote continued from previous page)

> 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, names of business entities in which the proposed nominee owns a 10 percent or more equity interest, listing of any criminal convictions, including federal or state securities violations, and all other information required by the federal proxy rules in effect at the time the proposed nominee submits said statement.

* The Notice Provision states:

> 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

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The desirability of a bylaw amendment governing stockholder nominations was discussed among Unocal representatives in January 1985, before they were even aware that Mesa was acquiring Unocal stock. Snyder Aff. ¶ 3. Both bylaw amendments were discussed at the February 25, 1985 Board of Unocal's Directors. Sam Snyder, Assistant General Counsel of a subsidiary of Unocal, made a presentation to the Board advising it that the proposed bylaw amendments would have the beneficial effects of promoting the orderly conduct of stockholders' meetings by preventing surprise nominations and stockholder proposals. Id. ¶¶ 5-6. In addition, he advised the Board that the bylaw amendments would permit Unocal to formulate a recommendation concerning

(Footnote continued from previous page)

> 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, (b) the name and address, as they appear on the Corporation's books, of the shareholder proposing such business, (c) the class and number of shares of the Corporation which are beneficially owned by the shareholder, and (d) any material interest of the shareholder in such business. 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.

stockholders' nominees and proposals, and to communicate such recommendations to stockholders. Id. ¶ 6. He further advised the Board that most stockholders do not attend stockholders' meetings in person, and the bylaw amendments would therefore permit all stockholders to know in advance, and to formulate a position with respect to, matters which would be presented at stockholders' meetings. Id. Finally, he advised the Board that the bylaw amendments would not preclude stockholders from making particular nominations or proposals, and thus would not be detrimental to or impair stockholders' rights. Id.

In the course of Mr. Snyder's presentation, there was a discussion among those present at the meeting regarding the benefits that could be realized by requiring reasonable notice to the Board of stockholder nominations and proposals. Id. ¶ 7. In particular, some board members expressed concern that Mesa's disclosed intent in acquiring Unocal's shares -- that it wanted them for investment only -- might not be its true intent and, in any event, might change suddenly, and that Mesa might attempt to propose action at the 1985 Annual Meeting which neither management nor stockholders had a fair opportunity to consider. Id. It was pointed out that the bylaw amendments would prevent Mesa from seeking to gain unfair advantage by any such surprise action, but would not limit in any way the persons which Mesa could nominate or the proposals it could make (provided only that it complied with the notice requirements of the bylaw amendments). Id.

After a complete discussion of the matters described above, the Board (with all members except Peter O'Malley present) unanimously agreed to adopt the bylaw amendments. Id. ¶ 8; Ex. A.

E. Mesa's Adjournment Scheme To Postpone The Election Of Unocal's Directors.

T. Boone Pickens, Jr., who controls Mesa, has admitted that Mesa learned of the bylaw amendments by March 11, 1985. Coats Aff. Ex. F. After learning of the bylaw amendments, Mesa continued to purchase Unocal stock, acquiring an additional 6,700,000 shares on March 27, 1984. Tassin Aff. Ex. D. On that date, Mesa also filed an amendment to its Schedule 13D disclosing that it had increased its ownership of Unocal stock to 23,700,000 shares, or 13.6 percent of the outstanding shares, and that it "may seek to obtain control of [Unocal] or to participate in the formulation, determination or direction of the basic business decisions of [Unocal]." Mesa's Schedule 13D explicitly stated, however, that "[Mesa] has not reached a decision to pursue any particular transaction and there can be no assurance that any transaction will be formulated or submitted to the Company or its shareholders." Id. The Schedule 13D also disclosed that Mesa "may solicit proxies to elect its nominees to the Board of Directors of the Company," but that Mesa has "no present plans or proposals" to do any of the above. Id.

By a letter dated March 28, 1985, Mesa notified Unocal of its intention to make two proposals (the "Proposals") at Unocal's 1985 Annual Meeting scheduled to be held on April 29, 1985. The Proposals are designed to postpone Unocal's Annual Meeting for two months, until June 28, 1985.* Coats Aff. Ex. D.

Mesa's March 28 Letter also disclosed Mesa's intention to solicit proxies from Unocal's stockholders in

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* As set forth in the March 28 letter, the Proposals were:

> (a) A proposal (the "First Proposal"), to be the first item of business brought before and acted upon after the convening of such Annual Meeting on April 29, 1985 and, if adopted, the only item of business brought before and acted upon until the reconvening of the adjourned Annual Meeting on June 28, 1985, to (i) postpone the election of directors and, in connection therewith, to adjourn the Company's 1985 Annual Meeting of Shareholders until 10:00 A.M., Pacific Daylight Time, on June 28, 1985, and (ii) request the Company's Board of Directors to fix a new record date for determining holders of Shares entitled to notice of and to vote at the adjourned 1985 Annual Meeting not more than sixty nor less than ten days before June 28, 1985.
>
> (b) A proposal to rescind any action taken at such Annual Meeting on April 29, 1985 other than action taken with respect to the First Proposal in accordance with its terms.

favor of its adjournment proposals.* Mesa also stated in the March 28 Letter that it might use such proxies "to seek to prevent the presence of a quorum" at the Annual Meeting.** Id.

F. Litigation Relating To Mesa's Acquisition Of Unocal Stock.

On April 1, 1985, Unocal filed an action in federal district court in the Central District of California alleging that the schedules filed by Mesa pursuant to Section 13(d) of the Exchange Act, 15 U.S.C. § 78m(d) and Regulation 13D-G by Mesa were false and misleading in material respects. Subsequent events are rapidly confirming the truth of these allegations. Tassin Aff. Ex. O at 3-4. Unocal has filed an amended complaint alleging additional violations of securities laws and the Hart-Scott-Rodino Act. Mesa has recently filed an amended answer and counterclaims in this action.***

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* The parties do not dispute that the March 28 letter complied with the Notice Provision of Unocal's bylaws, although the letter states that it should not be construed as an admission of the bylaw's validity.

** How Mesa might have done so is unclear, in light of settled case law that "it is the duty of those holding proxies to attend the meeting as well as to vote the stock they represent." Duffy v. Loft, Inc., Del. Supr., 152 A. 849, 853 (1930).

*** There were also two California State court actions filed revolving around Security Pacific National Bank ("SPNB"). SPNB was allegedly in possession of extensive confidential financial and proprietary information

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Unocal has also filed an antitrust action in Louisiana, and the independent trustee and retirement plan committee of the Union Oil retirement plan have filed an action in New York against Mesa Petroleum Co. and other related parties alleging violation of the Investment Company Act of 1940, the Investment Advisors Act of 1940, and regulations thereunder. Coats Aff. ¶ 2.

F. Adoption Of The Quorum Bylaw.

Following receipt of Mesa's March 28 Letter, Unocal's Board of Directors met on April 1 to determine what response, if any, Unocal should make to Mesa's threat to perpetrate an adjournment by seeking to prevent the presence of a quorum. The Board discussed the importance of holding the stockholders' meeting at the time and date provided in the bylaws and of preventing inconvenience to stockholders who might make plans to travel long distances to attend the meeting in person. Jacobs Aff. ¶ 11. The Board also discussed that while the 50% quorum had always been met in the past, a substantial number of shares are never present at meetings. Thus, a holder of less than a majority of

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of Unocal. Unocal learned that SPNB had joined a group of banks who were to loan money to Mesa to enable it to acquire Unocal. Unocal sued SPNB for breach of fiduciary duty, misuse of trade secrets, and other claims. Mesa has sued Unocal regarding this matter under various tort theories. Coats Aff. ¶ 4.

shares might defeat a quorum and thwart the ability of the remaining stockholders -- who might far outnumber those blocking the quorum -- from conducting an annual meeting. Id. The Board also discussed that Mesa's scheme to prevent a quorum, if successful, would interfere with the normal operations of Unocal and would leave corporate matters in limbo. Id.

Accordingly, the Board adopted a bylaw stating that the presence of 1/3 of Unocal's stock, in person or by proxy, would constitute a quorum to transact business at any stockholders' meeting. Id. ¶ 12. Plaintiffs' complaint does not seek to set aside or enjoin implementation of that bylaw quorum provision, and they have apparently abandoned their manipulative proposal to delay action at the Annual Meeting by the stratagem of seeking to induce stockholders not to attend in person or by proxy (see Tassin Aff. Exh. N).

H. Mesa's Tender Offer.

Despite Mesa's announced intention on March 28 to solicit proxies to present its adjournment scheme at the April 29 Annual Meeting, Mesa did not disseminate a proxy statement until April 12, 1985. Tassin Aff. Ex. D; Coats Aff. Ex. C. On April 8, 1985, however, it commenced an unfinanced two-tier tender offer designed to gain control of Unocal by purchasing 36.5% of its shares for $54 in cash, and subsequently acquiring the remaining 49.9% from the remaining public stockholders in an unspecified transaction or series of transactions in exchange for unspecified securities purportedly having an aggregate market value of $54 per share. Tassin Aff. Ex. N.

In its April 8, 1985 Offer to Purchase issued before it learned of Unocal's position on the matter,* Mesa recognized that even if it succeeded in adjourning the April 29 meeting it might not be able to make any additional proposals at the reconvened meeting. Mesa's Offer to Purchase (Tassin Aff. Ex. 9) advised Unocal's stockholders (p. 21, emphasis added):

> The Purchasers [Mesa] intend to take the position that, in the event the Adjournment Proposals are adopted by stockholders of the Company and the Stockholders' Meeting is postponed for more than thirty days, the Purchasers may deliver notice to the Company thirty days in advance of such reconvened Stockholders' Meeting and present one or more proposals at the reconvened Stockholders' Meeting. <u>However, there can be no assurance that the Company will not challenge the Partnership's ability, under the Company's recently enacted Bylaw Amendment purporting to require thirty days' notice to bring matters before annual meetings, to bring any such proposal before any reconvened Stockholders' Meeting or that the Partnership will be able to present any proposals at the reconvened Stockholders' Meeting.</u>

Apparently, Mesa perceived Unocal's reading of the bylaws from the face of the bylaws themselves. Thus, contrary to

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* Mesa admits that it first learned of Unocal's position on April 11, 1985 (PB 5, 17).

the implication which plaintiffs seek to create in their brief on this motion, it is clear that Unocal's interpretation of the February 25 bylaw amendments was not a surprise to Mesa, and that Mesa was not lulled into inaction by anything that Unocal did.

Unocal disseminated supplemental proxy materials to its stockholders recommending that they vote against Mesa's proposals to adjourn the April 29 meeting. Those materials included a letter dated April 7, 1985 to Unocal's stockholders from Fred L. Hartley, Unocal's Chairman and President, stating Unocal's legal position concerning the effect of Mesa's adjournment scheme:

> Your Board of Directors believes that Mesa's attempt to delay the Company's annual meeting is NOT in your best interests and strongly urges that it be REJECTED. Your Board of Directors wants you to know that under the Company's Bylaws any nomination for director and any proposal to be directed to shareholders at an annual meeting must be submitted to the Corporate Secretary at least thirty days prior to the meeting. Mesa has not submitted any nomination or proposal (other than proposals to adjourn the meeting and rescind any other action taken) and since it is now less than thirty days until April 29, the Company's position is that no further nominations or proposals could be submitted for shareholder action even if the meeting were adjourned.

Mesa and its proxy solicitor assert that Unocal is thereby "telling its stockholders that a vote in favor of adjournment will be a futile act . . . ." PB 18; Carter Aff. ¶ 7. This grossly misreads Unocal's disclosure. Unocal has simply disclosed its legal position, leaving stockholders free to draw their own legal conclusion as to futility. In all events, it taxes credulity to assert, as Mesa and its proxy solicitor do, that stockholders who genuinely support Mesa's adjournment scheme and who are willing to postpone the stockholders' meeting in hope of receiving Mesa's as yet unarticulated proposals at an adjourned session will be deterred from making the minor effort to sign and return a proxy to Mesa simply because Unocal's legal position that such proposals cannot then be presented might prove correct. Mesa has advanced no evidence that a single vote or potential vote for their scheme has been so "chilled." Certainly no stockholder has communicated any such effect to Unocal's proxy solicitor (Gavin Aff. ¶ 4), and it is his opinion that the "chilling effect" asserted by Mesa is unsupported by experience and is purely speculative. Id. ¶ 5.

Moreover, even if some stockholders were discouraged by Unocal's statement of position from voting for Mesa's adjournment scheme, the record is utterly devoid of any facts to support plaintiffs' contention such disclosure of Unocal's legal position was intended to have a "chilling effect" on Mesa's solicitation of proxies for its adjournment scheme. To the contrary, this position was not in the preliminary proxy materials which Unocal submitted to the Securities and Exchange Commission and was disclosed at the behest of the staff of the Securities and Exchange Commission which, after reviewing Unocal's preliminary letter to stockholders, specifically requested that Unocal apprise its stockholders of its legal position concerning the interpretation of Unocal's bylaws. Cass Aff. ¶¶ 3-4. The specific language stating Unocal's position and criticized by Mesa was accepted by the SEC staff prior to its dissemination to stockholders. Id. ¶ 5.

On April 12, 1985, Mesa mailed its proxy materials to Unocal's stockholders, including a letter which advised the stockholders of Mesa's view that postponing the Annual Meeting will benefit Unocal's stockholders since

> It will provide you with adequate time to consider the proposals that we might present at the June meeting which may facilitate our acquisition of Unocal on the terms stated in our Offer. Contrary to Unocal's position, we believe that we may properly bring any such proposals before the June meeting and will take all steps necessary to protect your right to consider our proposals.

(Coats Aff. Ex. C, emphasis added). Mesa repeated this statement in full page advertisements in the Wall Street Journal and other newspapers. Id. Ex. E.

Notwithstanding such references to unspecified proposals that Mesa "might" present at an adjourned session, Mesa did not identify any proposal which it would seek to present to Unocal's stockholders if it were to succeed in adjourning the April 29 meeting. Even now, in its brief, Mesa talks glibly about "proposals designed to enhance stockholder values" (PB 19), but it is still apparently not prepared to say what any such proposals are.

ARGUMENT

I. PLAINTIFFS HAVE NOT SATISFIED THE ESSENTIAL PREREQUISITES FOR THE EXTRAORDINARY RELIEF THEY SEEK.

An injunction is extraordinary relief which may be granted only if plaintiff demonstrates (i) that plaintiff has a probability of ultimate success on the merits at a final hearing, (ii) that the failure to issue an injunction will result in immediate and irreparable injury, and (iii) that the balance of hardships weighs in plaintiff's favor. Weinberger v. United Financial Corp., Del. Ch., 405 A.2d 134, 137 (1979); Sandler v. Schenley Industries, Inc., Del. Ch., 79 A.2d 606, 610 (1951); Allied Chemical & Dye Corp. v. Steel & Tube Co., Del. Ch., 122 A. 142 (1923).

The heavy burden of establishing these prerequisites rests squarely on plaintiff. Cascella v. GDV, Inc., Del. Ch., C.A. No. 5899, Brown, V.C. (June 21, 1979).* That burden cannot be satisfied merely by showing that there exists a dispute and that plaintiff or others might be injured; rather, each of the required elements must be clearly established by plaintiff, and injunctive relief "will never be granted unless earned." Lenahan v. National Computer Analysts Corp., Del. Ch., 310 A.2d 661, 664 (1973); Gimbel v. Signal Cos., Del. Ch., 316 A.2d 599, 603, aff'd, Del. Supr., 316 A.2d 619 (1974). Indeed, even where the

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* Copies of all unreported opinions referred to herein are attached hereto.

Court is not persuaded by the arguments of a defendant, injunctive relief must be denied unless plaintiff can demonstrate his entitlement to relief. National Education Corp. v. Bell & Howell Co., Del. Ch., C.A. No. 7278, Brown, C. (Aug. 25, 1983).

As shown below, plaintiffs can show none of the essential prerequisites to injunctive relief. The bylaw provisions, and defendants' construction of them, are valid, and plaintiffs have demonstrated no probability of succeeding on the merits of their claims to the contrary. Even if they had, they have failed to articulate any concrete proposals that the bylaws prevent them from presenting. That failure in itself negates any claim of immediate harm, let alone harm that could not be remedied upon final hearing. Taken together with plaintiffs' inexcusable delay in applying to this Court, the foregoing deficiencies in their application for injunctive relief require that it be denied.

II. PLAINTIFFS HAVE FAILED TO ESTABLISH A PROBABILITY OF SUCCESS ON THE MERITS.

A. The Business Judgment Rule Validates The Determination By Unocal's Board Of Directors To Adopt The Bylaw Amendments.

1. The Business Judgment Rule Applies to the Actions of the Unocal Directors.

The business judgment rule mandates that decisions of a board of directors be upheld if the directors' actions were undertaken in good faith and can be attributed to "any rational business purpose." Sinclair Oil Corp. v. Levien, Del. Supr., 280 A.2d 717, 720 (1971) (emphasis added). The business judgment rule is a "presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson v. Lewis, Del. Supr., 473 A.2d 805, 812 (1984). "The rule, in effect, creates a presumption which places upon the one attacking the action of the Board, the burden of demonstrating bad faith." Moran v. Household International, Inc., Del. Ch., C.A. No. 7730, Walsh, V.C., slip op. at 32 (Jan. 29, 1985), appeal pending, Del. Supr., No. 47, 1985.

The business judgment rule applies with particular force in the present case. Despite plaintiffs' speculative argument that the bylaw amendments may prevent the plaintiffs or other stockholders from taking some unspecified actions, it is undisputed that those amendments (i) do not prevent a stockholder from nominating candidates to the Unocal's Board of Directors, (ii) do not limit the proposals which stockholders may present at an annual meeting, and (iii) do not prevent, or encumber in any way, the acquisition of stock (including majority control) by means of a tender offer or otherwise. Compare Moran v. Household International, Inc., supra, slip op. at 30, 49 (upholding under the business judgment rule a "poison pill" preferred stock which the Court found would "limit[] the ability of a hostile acquiror to secure control by fragmentary acquisition of shares" and would "deter" certain proxy efforts). The bylaw amendments at issue are simply not calculated to entrench management.

Also, where plaintiff alleges that directors have acted improperly to preserve themselves in office, the presumption of good faith afforded by the business judgment rule is heightened if, as here, "a majority of the directors are independent or outside directors receiving no income [from the company] other than usual directors' fees." Moran v. Household International, Inc., supra, slip op. at 32; Panter v. Marshall Field & Co., 646 F.2d 271, 294 (7th Cir.), cert. denied, 454 U.S. 1092 (1981).

Thus, the bylaw amendments approved by the Unocal directors are entitled, particularly at this stage of the proceedings, to all the presumptive protection of the business judgment rule. And, even at trial, regardless of whether or not the defendants would have the burden of going forward to demonstrate the reasonableness of their response to Mesa's acquisition of stock, plaintiffs would bear the ultimate burden of persuading the Court that the Board's decision was outside the scope of the business judgment rule. Moran v. Household International, Inc., supra, slip op. at 37.

As next shown, plaintiffs have failed to carry that burden.

2. The Directors' Adoption of the Bylaw Amendments was Valid Under the Business Judgment Rule.

Plaintiffs attempt to rebut the presumptive validity of the Board's adoption of the bylaw amendments by arguing that the Board acted solely to inhibit Mesa's announced intentions, including its proxy solicitation and tender offer, and thereby to "entrench" themselves in office. The fallacies of plaintiffs' contentions are manifest.

a. Unocal's Board could not possibly have acted to "inhibit Mesa's announced intentions."

As a threshold matter, the Board of Directors could not possibly have adopted the bylaw amendments "to inhibit [Mesa's] announced intentions," as plaintiffs allege in their Complaint (¶ 22). The bylaw amendments were adopted on February 25, 1985. At that time, Mesa's "announced intention" was to hold its Unocal stock for the sole purpose of investment, as disclosed in its then-current Schedule 13D (emphasis added):

> The partnership has acquired the Shares held by it solely for the purpose of investment and has no present intention of seeking to obtain control of the Company or to participate in the formulation, determination or direction of the basic business decisions of the Company.

The bylaw amendments thus in no way "inhibited" Mesa's "announced intention" at the time they were adopted.

b. Unocal's Board was properly apprehensive about Mesa's acquisition of stock.

Notwithstanding Mesa's disclaimers, its past record justifiably caused the Board to be apprehensive about Mesa's intentions. After making similar disclaimers, Mesa made hostile takeover offers for Cities Service Company, General American Oil Company of Texas, Gulf Corporation, and Phillips Petroleum Company, among others.* In each of the foregoing transactions, Mesa acquired a large block of stock and proposed to gain control by a two-tier tender offer. However, Mesa never purchased a single share of stock in any of those tender offers. Instead, having gained leverage over the target companies, Mesa either sold its shares to a

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* In 1984, the Securities and Exchange Commission filed suit against Mesa Petroleum Co. alleging that it had failed properly to disclose that it was taking steps to commence a tender offer for Gulf Company. Mesa subsequently consented to the entry of a judgment obligating it to comply with Section 13(d) of the Securities Exchange Act of 1934. SEC v. Mesa Petroleum Co., [1984 Transfer Binder] Fed. Sec. L Rep. (CCH) ¶ 91, 426 (S.D. Tex. 1984).

third party or to the target company at a substantial profit.* The Board thus justifiably feared that Mesa might resort, as it had in the past, to coercive or inequitable tactics to pry control of Unocal away from its public stockholders or to attempt to pressure the company into paying Mesa greermail.

On.y months ago Mesa staged such a raid on Phillips Petroleum Company in which it eventually sold its shares back to Phillips at a profit aggregating almost $90 million. <u>See</u> <u>Edelman v. Phillips Petroleum Co.</u>, Del. Ch., C.A. No. 7899, Walsh, V.C. (Feb. 12, 1985). This Court found in the <u>Edelman</u> case that Phillips' management and its directors were clearly justified in their belief "that Mesa, whose principal, T. Boone Pickens, possessed impressive credentials as a corporate acquiror, did not have the best interests of all its shareholders in mind" in proposing a two-tier takeover of Phillips.** <u>Id</u>., slip op. at 12.

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* Pickens personally stands to gain millions of dollars if Unocal -- or any of Mesa's other targets -- submits to greenmail. In November, he caused Mesa Petroleum Co. (without stockholder approval) to approve an "incentive" plan in which Pickens and other executives will share up to $40 million of Mesa's greenmail profits. Tassin Aff. Ex. N at 12-14; Coats Aff. Ex. B.

** Pickens has admitted publicly that, in corporate raids such as his present raid on Unocal, he seeks to benefit <u>Mesa</u> stockholders, not the stockholders of the target corporation:

> "I just work for one crowd, that's the Mesa stockholders." [cite]

Complaint Ex. A.

Given Pickens' history as a raider, this Court found that "the conduct of Phillips management and directors during the period when it resisted the Mesa takeover effort is clearly the most defensible aspect of its reaction." Id. at 11.

Moreover, Pickens' history readily supports a concern that he might use an eleventh hour proxy blitz as a device to foment stockholder confusion. The "Saturday night special" proxy contest is a now familiar tactic in the raider's arsenal:

> The "Saturday night special" approach has the advantage of preventing management from defending by issuing stock to friendly persons or communicating its defense against the insurgents' arguments to its shareholders.
>
> Critics of the surprise attack charge that it may "disenfranchise" many shareholders if the insurgents surface just over 10 days before the annual shareholders meeting. As explained above, if a proxy contest begins more than 10 days before the meeting, brokers may not make discretionary proxy decisions on behalf of their clients under the rules of the major stock exchanges. However, if a contest were commenced say 12 days before the meeting, management may be unable to contact shareholders, respond to the criticisms of the insurgents, and get its proxies returned in the short time remaining before the meeting. Whether the SEC will heed arguments urging it to set a deadline after which a proxy fight cannot be begun is uncertain.

Moody and Bagley, Proxy Contests, Bureau of National Affairs Corporate Practice Series (1983) at A-14 (emphasis added).

c. The bylaw amendments are reasonably designed for the protection of Unocal's stockholders.

The bylaw amendments which plaintiffs challenge deal head-on and in a measured way with the threat of a "Saturday night special" proxy solicitation. They provide merely that Unocal be furnished thirty days prior to its annual meeting (the date of which is a matter of public record) certain information concerning (i) proposed nominees to the board (Article III, Section 6) and (ii) stockholder proposals (Article III, Section 7). The bylaw amendments do not preclude stockholders from proposing any particular nominees for election to the Company's Board or proposing any particular transactions at an annual meeting; they merely provide a brief advance notice requirement for doing so.

The bylaw amendments are designed to promote a more effective exercise of the corporate franchise by ensuring that the stockholders will have an opportunity to receive management's views concerning any stockholder nomination or proposal, and that stockholders' meetings are conducted in an orderly manner. See Snyder Aff. ¶¶ 6-7. Shareholders of a large, publicly held company like Unocal have an especial need for advance notice of proposals. Of the approximately 154,397,000 shares voted at the 1984 annual meeting, only 1.2% were voted in person, and the remainder were voted by proxy. Snyder Aff. ¶ 9. Advance notice of Stockholder nominees or proposals obviously aids informed voting where the vast majority of stockholders do not attend meetings in person.

Thus, far from unreasonably restricting the voting rights of stockholders, the bylaw amendments guarantee that stockholders will be presented, in a timely fashion, with the names of those individuals to be nominated by others and by management so that stockholders can make reasoned and informed decisions. See Shay v. Morlan, Del. Ch., C.A. No. 7343, Longobardi, V.C. (July 29, 1983), slip op. at 7-8 (recognizing, in scheduling a meeting under 8 Del. C. § 211, that stockholders should be fully informed before voting); compare American Pacific Corporation v. Super Food Services, Inc., Del. Ch., C.A. No. 7020, Longobardi, V.C. (Dec. 2, 1982) (injunction granted where defendant corporation had acted in a manner which effectively denied stockholders adequate information and adequate time to receive such information).

The reasonableness and salutary effect of bylaw provisions like the ones here in issue have long been recognized by the courts. In In re Hamilton, N.J. Supr., 137 A. 843 (1927), the New Jersey Supreme Court held that a bylaw provision of a building and loan association requiring that all nominations for officers be made at the monthly meeting preceding the association's annual meeting disallowed the election of a write-in candidate who received more than three times as many votes as the candidate who had been properly nominated. The Court rejected the write-in candidate's argument that the bylaw requiring nominations be made in advance of the meeting improperly deprived voters of the right to cast a ballot for the candidate of their choice:

> We think the position taken on behalf of the petitioner is untenable. It seems to us that [the bylaw] was clearly within the exercise of the corporate power of the association; namely, to regulate the time when its officers shall be nominated and the time when they are to be voted for. It is obvious that the requirement that nominations be made at a regular monthly meeting preceding the annual meeting is in the interest of the shareholders, so as to give them an opportunity to investigate the character and competency of the nominee and to bring about an orderly management of the business of the association. It does not deprive the shareholders of the right to vote for a candidate for office duly nominated according to the laws of the association.

Id. at 44 (emphasis added).

Bylaw provisions similarly requiring advance notice of stockholder nominations have been upheld repeatedly by other courts. See, e.g., In re O'Shea, N.Y. App. Div., 269 N.Y.S. 840 (1934) (finding not only reasonable but necessary a membership corporation's bylaw requiring five days advance notice of director nominations); In re Flushing Hospital and Dispensary, N.Y. Ct. App., 41 N.E.2d 917 (1942), modified, 43 N.E.2d 356 (upholding a bylaw requiring that nominations be made and filed at least two weeks before an annual meeting in order to give shareholders an opportunity to reject candidates of whom they did not approve); Stuberfield v. The Long Island City Savings & Loan Association, N.Y. Sup., 235 N.Y.S.2d 908 (1962) (sustaining a bylaw requiring that independent nominations be filed with the secretary of the association at least ten days prior to the date of the annual meeting because such advance notice was essential to orderly procedure in internal management). And most recently, in Moran v. Household International, Inc., supra, the Court upheld bylaw amendments regulating the nature of the business to be conducted at stockholders meetings, finding that they appeared "reasonably suited to corporate needs" (slip op. at 6, 42). The staff of the Securities and Exchange Commission has reached a similar conclusion. See Division of Corporate Finance, Securities and Exchange Commission, Staff Report on Corporate Accountability, 106 (Sept. 4, 1980) (apparently conceding the validity of the Pennsylvania law providing that if articles or bylaws of a corporation provide a "fair and reasonable" procedure for nomination of candidates, only candidates nominated in accordance with such procedure shall be eligible for election).

Unocal's directors had particular reason to seek to protect Unocal's stockholders in the present case. Mesa's long record of corporate coercion suggested that it might well resort to an eleventh hour proxy contest in an effort to deprive the company and its stockholders of a fair opportunity to determine and express their views on Mesa's proposals, or might simply seek to disrupt the April 29 Annual Meeting as a method of "buying time" if that became advantageous. Accordingly, the directors sought to provide a reasonable mechanism to insure that the April 29 meeting, and future meetings, would be conducted in a fair and orderly manner. The directors' concerns have already been corroborated by Mesa's subsequent conduct: Mesa at one point embarked on a scheme to delay the meeting by gathering proxies to stay away and defeat a quorum (hardly conduct befitting one now piously claiming to seek to protect the franchise),* and even now still seeks to reserve to itself the ability to begin a proxy contest on little or no advance notice.

Plaintiffs claim, however, that Unocal's construction of its bylaws is inconsistent with their purpose as articulated above. PB 26-27. Specifically, plaintiffs say that if 30 days notice before an annual meeting is sufficient, it should also be sufficient notice before adjourned sessions of annual meetings. This point is erroneous in at least two respects. First, even if the bylaw happened to apply in limited situations where its purposes were not served, that would not mean that it is unreasonable or improperly motivated. More to the present point, however, there are in fact sound policy reasons for the requirement that notice of all proposals be given in advance of the original session. That requirement eliminates incentive on

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* Such conduct would have clearly been illegal under Delaware law, Duffy v. Loft, Inc., supra, and Mesa's plan to pursue it has apparently been abandoned.

the part of stockholders to withhold proposals for stockholder action and break up in piecemeal fashion, over the original and one, two or more adjourned sessions, the business to be conducted at stockholder meetings -- a procedure that would require the corporation to incur the expense of multiple proxy solicitations in connection with a single annual meeting and would in all likelihood leave stockholders in a state of confusion or ignorance. Indeed, it is common knowledge that stockholders frequently only execute the first proxy received from the faction they favor and assume that subsequent proxies from the same factions are identical. To encourage a procedure whereby proxies with different matters on the ballot would be solicited for adjourned meetings could well result in significant disenfranchisement. Moreover, since the quorum present at an original session applies at all adjourned sessions (<u>Atterbury v. Consolidated Coppermines Corp.</u>, Del. Ch., 20 A.2d 743 (1941)) and written notice to stockholders of a reconvened meeting may not always be feasible, it is altogether reasonable to require that all proposals be in hand prior to the original session to assure that as many stockholders as possible have an opportunity to be informed and to act.

3. The Bylaw Requiring Prior Notice of Matters to Be Brought Before the Annual Meeting is Consistent With Section 211(b) and Public Policy.

The law generally recognizes the utility of establishing ground rules and regulations for the conduct of stockholders' meetings and the authority of a company's board to establish such regulations. See 5 Fletcher's Cyclopedia of Corporation Law § 2012, p. 71 (1984 rev. ed.) ("subject to any applicable statutes, the method of conducting corporate elections may be regulated by the corporation's bylaws, provided the bylaws are reasonable and not inconsistent with the charter or certificate of incorporation . . ."); Duffy v. Loft, Inc., supra.

The bylaw procedures for presenting business to the annual meeting of stockholders in this case do not, as plaintiffs suggest, violate any statutory provision or policy. 8 Del. C. § 211(b), to which plaintiffs refer (PB 35-41), first provides that one type of business to be conducted at an annual meeting is the election of directors, and then provides that "any other proper business may be transacted at the annual meeting." Section 211(b) thus regulates the types of business which may be brought before an annual meeting. In Mesa's words, it "is a direct statutory authorization of the types of business that may be conducted at annual meetings." PB 35 (emphasis added).

Section 211(b) is silent, however, as to questions of <u>timing or procedure</u> for bringing permissible types of business before an annual meeting, and therefore does not preclude a board from imposing reasonable procedures. The bylaw amendments which Mesa attacks do not restrict in any way the persons who may be nominated, or the subjects or types of stockholder proposals which may be made, at annual meetings, and thus do not violate Section 211(b).*

Section 211(b) speaks of two types of business which may be transacted at annual meetings: the election of directors and "other proper business." Mesa does not contend that the nomination bylaw violates Section 211(b), and thus recognizes that the board may adopt reasonable procedures governing the nomination and election of directors. <u>See</u> pp. 26-29, <u>supra</u>. But, just as Unocal may lawfully regulate the procedure for director nominations, it may also lawfully regulate the procedures for proposing other business to be transacted at the meeting.

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* Mesa's reliance on <u>Plaza Securities Co. v. O'Kelley</u>, Del. Ch., C.A. No. 7932 (Mar. 5, 1985), <u>aff'd</u>, Del. Supr., No. 79, 1985, Horsey, J. (Mar. 8, 1985) is therefore misplaced. The bylaw amendments there in issue purported to regulate the timing and procedure of action by stockholder consent. The Court found, however, that such matters were the very subject of 8 <u>Del. C.</u> § 228, and found in that statute a policy permitting stockholders, absent a contrary charter provision, to take <u>immediate</u> action by writing consent without prior notice, a meeting or a vote. The relevant statute in this case, § 211(b), does <u>not</u> regulate timing or procedure for bringing stockholder proposals, and those matters are, therefore, proper subjects of a reasonable bylaw provision.

Mesa's imaginative attempts to conjure up a legislative policy to support its contrary position are unavailing. As adopted in 1967, Section 211(b) provided that "any other proper business, notice of which was given in the notice of the meeting, may be transacted at the annual meeting." A "technical amendment" in 1968 deleted the underscored language. 56 Del. Laws Ch. 186, § 12. Mesa speculates that this amendment was made to "eliminate the power [of directors] to limit [through their control of what is in the notice to stockholders] matters which stockholders could consider," and that the amendment evidences a legislative policy against requiring advance notice of stockholder proposals at annual meetings. PB 36-37. This speculation -- and it *is* speculation -- is misguided. It is true, as Mesa contends, that under Section 211 the types of business to be raised at an annual meeting are no longer required to be specified in management's formal notice of such meeting. It is simply a non sequitur, however, to conclude that a bylaw which is entirely neutral with respect to the subject matter of a proposal and requires only that stockholders advise a corporation in advance of a meeting of proposals that they intend to raise at the meeting are therefore prohibited.*

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* Mesa reads far too much into the 1968 amendment to Section 211. That amendment was made to correct an apparent error whereby the statute, as drafted, "appeared to forbid conduct of any business other than that duly recited in the notice of meeting." *See*

(Continued)

Whatever Section 211 may or may not require in a formal notice of meeting, nothing in that statute (currently or previously), bears on <u>how</u> proposals should be presented for stockholder deliberation. The bylaw amendments do not purport to reinstate the requirement, deleted in 1968, that the formal notice of annual meetings state all business to be conducted. This is demonstrated by the fact that Mesa's timely adjournment proposals are not prohibited by the proposal bylaw, notwithstanding that they first surfaced more than two weeks <u>after</u> Section 222 notice of the annual meeting was sent to stockholders. In short, the proposal bylaw does not eliminate the right of stockholders to propose any <u>types of business</u> and is, therefore, entirely consistent with the provisions of Section 211(b).

4. <u>The Bylaw Amendments Are Not Discriminatory.</u>

Plaintiffs contend further that the bylaws are inequitable because they do not require the Board of Directors to comply with any prior notice requirements. Plaintiffs are wrong, however, in suggesting that the directors

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(Footnote continued from previous page)

E. Folk, <u>Amendments To The Delaware General Corporation Law</u> (Effective July 15, 1969) and <u>Technical Amendments Act</u> (Effective January 2, 1968), p. 13 (1969). Thus, by reason of the 1968 amendment, an inadvertent limitation on the <u>type</u> of proper business that might be brought before an annual meeting was eliminated. There is no evidence whatsoever that the 1968 amendment was intended to restrict management's ability to adopt bylaws reasonably governing the procedures for presenting business at an annual meeting.

can conceal their nominees and proposals until the last minute before disseminating them to stockholders. Delaware law requires management to give notice of annual meetings not less than 10 days in advance. 8 Del. C. § 222(b). In turn, the rules of the New York Stock Exchange, on which Unocal's shares are listed, provide that listed companies should notify it at least 10 days before the record date (i.e., at least 20 days in advance of the meeting) of the calling of the meeting and of the "matters to be voted on at the meeting." New York Stock Exchange Listed Company Manual § 401.02. Moreover, the New York Stock Exchange further recommends to listed companies that "a minimum of 30 days be allowed between the record and meeting dates so as to give ample time for the solicitation of proxies." Id. § 401.03. The Exchange also recommends that listed companies submit proxy solicitation material to brokers 30 days before the meeting "to allow the firms ample time to mail the material to beneficial owners and receive replies from them." Id. § 402.05. Thus, the New York Stock Exchange itself has recognized that informed stockholder deliberation is enhanced by 30-day advance notice of the matters to be considered at a stockholder meeting.

Consistent with these rules and policies, Unocal has historically mailed its notice and proxy materials to its stockholders, as it did this year, more than thirty days prior to its noticed annual meeting date, thereby informing all stockholders of matters it plans to bring before the meeting well in advance of the annual meeting and earlier than the prior notice requirement of the bylaw at issue. See Unocal's Notice to Stockholders, 1982-1985; Coats Aff. Ex. A. Plaintiffs have no basis, therefore, to claim that the bylaw at issue is a device to afford Unocal management an advantage enabling it to conceal until the eleventh hour proposals to be put forth at the annual meeting. To the contrary, the bylaw simply requires stockholders to afford the company and the other stockholders the same level of notice of proposals that the company itself affords under Delaware law and the rules of the New York Stock Exchange.

5. The Bylaw Amendments Do Not Constitute Manipulation of the Corporate Machinery to Perpetuate Control.

In light of the foregoing, plaintiffs' primary challenge to the bylaw amendments -- that they are manipulations of the corporate machinery to perpetuate management's control (PB 20-31) -- falls flat. The bylaw amendments stand on an entirely different footing than those at issue in Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971), and Lerman v. Diagnostic Data, Inc., Del. Ch., 421 A.2d 907 (1980).

In Schnell the Court relied on this Court's rejection, as a matter of fact, of the business reasons for advancing an annual meeting date. Id., 285 A.2d at 438. Here, the meeting date has not been moved. Moreover, unlike the case in Schnell, the bylaw amendments have not curtailed by even one minute the time available to plaintiffs to solicit proxies. Plaintiffs' "shelf-readiness" arguments drawn from Schnell and Lerman which are premised upon a shortening or elimination of the time provided to conduct a proxy contest, are entirely inapposite. Further, unlike the action taken in Schnell, the Unocal bylaw amendments are supported by the patently reasonable desires to enhance informed stockholder deliberation and prevent manipulation of the annual meeting proxies, by last-minute, Saturday night special proxy contests. In further contrast, the directors in Schnell acted in the face of, and to frustrate, an existing proxy contest. Id. at 439. The Unocal directors, on the other hand, adopted the bylaw amendments while Mesa was still professedly a mere passive investor, not while some dissident stockholder was attempting to unseat them.

Lerman is likewise inapposite. There the directors did not simply adopt a requirement of advance notice of nominations. In fact, Chancellor Brown described that sort of requirement, standing alone, as one of "certain factors on [defendants'] side," in part because the notice requirement would "allow management to screen the previously unknown nominees and to possibly permit some accommodation between competing factions . . . ." Id., 421 A.2d at 912-913. Where defendants in Lerman erred, however, was in setting the meeting date at a time when the nominations notice deadline had already passed, and in the face of known dissident opposition.

In the present case, the bylaw amendments never prevented Mesa from submitting "proposals" in a timely fashion. Had plaintiffs genuinely intended to submit "proposals" on April 29 (other than those to delay any vote at the meeting), one would expect that they would be able to articulate such proposals by now. They have not. Moreover, it is all but impossible to believe that Mesa could have ever intended to solicit proxies on proposals at the April 29 meeting without having developed them in time to comply with the bylaws' advance notice requirement. The time necessary to develop and clear proxy materials with the SEC alone requires several weeks' advance effort before the meeting.*

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* The time needed for the solicitation of proxies must be calculated. This usually is at least several weeks. The date on which the first solicitation material will be mailed to the stockholders will be chosen. The time necessary to have the solicitation material processed by the SEC will be estimated. The regulations of the SEC require that preliminary proxy material be filed at least five days and the proxy statement ten days before the proposed mailing. If changes are required, as almost invariably is the case, as much as another seven days may be needed. Subsequent additional material must be filed at least two days before the proposed mailing.

Aranow and Einhorn, Proxy Contests for Corporate Control (2d ed. 1968) at 16.

Indeed, Mesa took over two weeks from the time it announced (let alone formulated) its adjournment "non-proposals" to finally disseminate its proxy materials.

In short, plaintiffs' complaint that the bylaws have deprived them of an opportunity to promote proposals cannot be accepted since they have not shown that they were ever prepared to do so or that they could not have done so in compliance with the bylaws. Clearly, plaintiffs have simply failed to "gear their campaign to the bylaw date" for the 1985 annual meeting, as Schnell requires. Id., 285 A.2d at 439. See also American Hardware Corp. v. Savage Arms Corp., Del. Supr., 136 A.2d 690, 693 (1957). (Refusal to grant injunctive relief postponing annual meeting so as to clear the way for plaintiff to conduct a proxy contest).

Plaintiffs further claim that "defendants' action in interpreting the Notice Bylaws so as to preclude shareholder consideration of new business at the reconvened meeting" is also an inequitable manipulation in violation of the doctrines of Schnell and Lerman. PB 28. It is unclear, however, what "action" plantiffs are complaining of. Clearly, they cannot complain that Unocal's disclosure of its legal position on April 7, 1985 was misleading.* Disclosing one's legal position on a contested material issue satisfies any disclosure obligations, and such disclosure is not misleading even if that position is ultimately found to be

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* Unocal's statement was made at the instance of, and in text approved by, the SEC.

incorrect. See Edelman v. Phillips Petroleum Co., supra, slip op. at 24; Fisher v. United Technologies Corp., Del. Ch., C.A. No. 5847, Hartnett, V.C. (May 2, 1981), slip op. at 8-9.

Mesa's apparent complaint is that Unocal somehow hid its interpretation until it was too late for Mesa to meet the deadline, and thereby "changed the rules in the middle of the game." PB 29-31. This is sophistry. The bylaw amendments themselves were adopted and disclosed well before the notice deadline (contrast Lerman), at a time when Mesa publicly claimed to be a passive investor. Likewise, Mesa cannot show that its understanding of the bylaws regarding notice for adjourned sessions of the annual meeting changed in the middle of the game as the result of any action by Unocal. That understanding necessary rests on language of the bylaws as adopted in February and on settled principles of Delaware law -- not on any subsequent "interpretation" by Unocal. It is apparent that Mesa knew what Unocal's construction of the bylaws would be well before Unocal's April 7 statement of position, which Mesa admits it did not receive until April 11 (PB 17). Indeed, Mesa's April 8 Offer to Purchase anticipated the existence of Unocal's construction. (See pp. 14-15, supra). Unocal's public statement of position changed no "rules" and announced no interpretation, which Mesa had not previously anticipated.

Third, Mesa had every reason to anticipate Unocal's view as it did, simply because that view rests on the natural reading of the bylaw amendments and on settled principles of Delaware law. See Burr v. Burr Corp., Del. Ch., 291 A.2d 409, 412 (1972) (persons familiar with Delaware law are presumably aware that bylaw terms have the meaning ascribed to them by "well-settled law of Delaware.") The bylaw amendments require that notice of stockholder proposals to be "brought before an annual meeting" be submitted to the corporate secretary at least thirty days "prior to the meeting." The natural construction of the bylaw would require 30 days notice prior to "the" annual meeting in question -- a single meeting, a single deadline. As Mesa would have them construed, however, the bylaws would have to read (with Mesa's contemplated construction in brackets) that 30 days notice of a proposal to be brought before an annual meeting must be given "prior to [the session, original or adjourned, of] the meeting [at which session it is to be presented]." There is no basis for imposing such a tortured, unnatural construction on the bylaw. See Hibbert v. Hollywood Park, Inc., Del. Supr., 457 A.2d 339, 343 (1983).

Apart from creating complexity where none exists, Mesa's construction of the bylaw implies that an adjourned session of an annual meeting must be viewed as a new, separate meeting with its own new advance notice deadline. That implication, however, squarely contravenes the settled rule under the Delaware General Corporation Law that the reconvening of a stockholder meeting following adjournment is considered a continuation of the original meeting, and not a new meeting.

As this Court has held with respect to adjourned meetings, "[a]ll sessions were but part of the same meeting." Atterbury v. Consolidated Coppermines Corp., supra, 20 A.2d at 749; accord, E. Folk, The Delaware General Corporation Law, p. 260 (1972) (an adjourned meeting is "simply a continuation of the original meeting").

The principle that a reconvened meeting is merely a continuation of the original meeting is a corollary of the rule that, if a quorum is present at a meeting which is adjourned, no new quorum need be established when the meeting is reconvened. Atterbury v. Consolidated Coppermines Corp., supra. It is also reflected in Section 213(c) of the Delaware General Corporation Law, which provides that, absent board action, the record date for "determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting." By allowing such continuation of the record date, these provisions plainly regard reconvened meetings as continuations of adjourned meetings, and not as new meetings.

It is thus clear that Delaware law regards reconvened meetings as continuations of the original meeting which was adjourned. Therefore, interpreting the bylaw amendments consistently with well settled Delaware law, as is appropriate, Burr v. Burr Corp., supra, notice of nominations and stockholder proposals must be given thirty days prior to the date upon which the meeting is originally convened, and not thirty days prior to its reconvening following an adjournment.

For the foregoing reasons it is apparent that Unocal has not changed the rules in the middle of the game. The bylaw amendments at issue have been in place since February, and the interpretation of which Mesa complains has the force of some 50 years of Delaware corporate jurisprudence behind it. Schnell and Lerman are simply not this case.

III. PLAINTIFFS CANNOT CARRY THEIR BURDEN OF DEMONSTRATING IMMINENT IRREPARABLE INJURY.

Plaintiffs have not demonstrated, and cannot demonstrate, that they or anyone else would be irreparably harmed were their application for injunctive relief to be denied.

The fundamental prerequisite for the entry of preliminary injunctive relief is a demonstration of imminent irreparable injury. Sandler v. Schenley Industries, Inc., supra, 79 A.2d at 610; Allied Chemical & Dye Corp. v. Steel Tube Co., supra. Thus, "[a]n injunction, being the 'strong arm of equity,' should never be granted except in a clear case of irreparable injury, and with full conviction on the part of the court of its urgent necessity." State v. Delaware State Education Ass'n, Del. Ch., 326 A.2d 868, 872 (1974), quoting 1 J. High, High on Injunctions § 22 (4th ed. 1905).

Even where, unlike here, substantial injury can be shown, that alone will not suffice; an "injunction will never issue merely because there is a threat of very great injury." Bayard v. Martin, Del. Supr., 101 A.2d 329, 334 (1953), cert. denied, 347 U.S. 944 (1954). Rather, preliminary injunctive relief "should not be granted unless truly irreparable injury would be suffered by the party seeking such relief . . . ." Thomas C. Marshall, Inc. v. Holiday Inn, Inc., Del. Ch., 174 A.2d 27, 28 (1961) (emphasis supplied). When the plaintiff "can point to no immediate threat of irreparable and immediate injury," the injunction must be denied. Levin v. Metro-Goldwyn-Mayer, Inc., Del. Ch., 221 A.2d 499, 505 (1966). No harm can be demonstrated here, much less irreparable harm justifying injunctive relief.

A. Plaintiffs' Alleged Inability To Present Hypothetical Proposals Does Not Constitute Specific, Imminent Irreparable Harm.

Plaintiffs claim that the nomination and proposal bylaws cause them and the other Unocal stockholders irreparable harm by depriving them of the opportunity to submit and consider what plaintiffs repeatedly but vaguely call "proposals." PB 19, 28, 43, 45. To date, the only "proposal" that plaintiffs have sought to have the Unocal stockholders consider at the meeting is their adjournment scheme. Conspicuously, plaintiffs have not even alleged, let alone proven, that but for the challenged bylaw provisions they would present any other proposals at the Annual Meeting, either on April 29 or at any adjourned session, nor have they even articulated any such proposal. They have never stated an intention to propose nominees for the three director positions up for election at the April 29 meeting. All plaintiffs can bring themselves to say at this point is that the bylaw provisions at issue prevent them "from proposing, and the stockholders of Unocal from considering, proposals [not specified] which but for defendants' conduct _might_ be presented at the Annual Meeting . . . ." Complaint ¶ 36 (emphasis added). Far from demonstrating irreparable injury, all that plaintiffs have succeeded in doing is to highlight that the injunctive relief they seek would only facilitate the very type of sneak attack at the April 29 meeting which the bylaws were reasonably designed to prevent.

At this stage, plaintiffs have at best demonstrated some abstract interest in presenting "further proposals." This abstract interest does not even approach an "immediate threat of irreparable and immediate injury" of the sort required to justify preliminary injunctive relief. _Levin v. Metro-Goldwyn-Mayer, Inc._, _supra_, 222 A.2d at 505. To the contrary, plaintiffs' claims of harm on the present record are purely speculative and cannot form the basis for injunctive relief. _See_ _Valhi, Inc. v. PSA, Inc._, C.A. No. 5730, Marvel, C. (Nov. 17, 1978), slip op. at 2 (denying a preliminary injunction on grounds that any threat of irreparable injury was "speculative" where plaintiff sought to establish that allegedly entrenching bylaw and charter provisions would deter unidentified suitors from purchasing stock in the defendant corporation).

To the extent plaintiffs claim irreparable harm in being prevented from presenting yet unarticulated proposals at an _adjourned_ session of the April 29 meeting, their claims of irreparable harm are one step further into the realm of the hypothetical. The question they seek to have the Court expound upon -- whether nominations and proposals can be presented under the bylaws up until thirty days before any adjourned session of the 1985 Annual Meeting -- would be moot if plaintiffs' adjournment proposal did not succeed. Under these circumstances, plaintiffs impermissibly seek an advisory opinion -- indeed, a preliminary advisory opinion -- on an issue which the unfolding of events may well moot.

The decision of the Delaware Supreme Court rejecting an interlocutory appeal in Edelman v. Phillips Petroleum Company, Del. Supr., No. 55, 1985 (Feb. 16, 1985) (Order), squarely prohibits such advisory relief. In that case, plaintiff sought to enjoin preliminarily a meeting of stockholders to vote on a proposed recapitalization. This Court denied the application, and plaintiff sought to take an interlocutory appeal raising the issue, *inter alia*, of whether the structure of the challenged recapitalization was permissible as a technical matter under the Delaware General Corporation Law. Noting that "the issue may rendered moot by the stockholder vote," the Supreme Court rejected the appeal, ruling that "under such circumstances this Court would be rendering an impermissible advisory opinion." *Id.* at 4.* Likewise here, if plaintiffs' adjournment scheme

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* The benefits of such judicial restraint became apparent in the Phillips litigation, since the stockholders in fact voted down the challenged recapitalization.

fails, the question of whether Unocal's bylaws would permit plaintiffs to submit nominations or proposals more than thirty days in advance of an adjourned session of the meeting will simply not arise.

B. Preliminary Injunctive Relief Is Unwarranted Since Relief Is Available Upon Final Hearing That Is Fully Adequate To Remedy Any Harm Plaintiffs Can Establish.

Even if any of plaintiffs' claims on the merits were valid, and assuming further that plaintiffs could point to some harm flowing from some wrongdoing by defendants, plaintiffs' application for preliminary injunctive relief must fail because by ordering a new meeting after trial this Court could afford plaintiffs full and adequate relief. See FMC Corp. v. R. P. Scherer Corp., Del. Ch., C.A. No. 6889, Longobardi, V.C. (Aug. 6, 1982), slip op. at 12; Bertoglio v. Texas International Co., D. Del., 472 F. Supp. 1017, 1021 (1979) (". . . it is well within the equitable power of the Court to void the results of a shareholders' vote and require both a new solicitation of proxies and a second shareholder vote. TI has not shown that any action taken by the shareholders at their May 31st meeting will be beyond rectification if a new solicitation of proxies and shareholders' meeting is ordered after a final hearing by this Court."); Elgin National Industries, Inc. v. Chemetron Corp., D. Del., 299 F. Supp. 367, 374 (1969) (". . . if the meeting is held and the proposals of the management carried and the Court finds on final hearing that the management proxies were improperly solicited and voted the situation would be within the power of the Court to cure in some manner.").

If the bylaws at issue are invalid, as plaintiffs contend, and plaintiffs are being wrongfully deprived of an opportunity to submit some proposal at the April 29 Annual Meeting, it is plainly within the power of the Court upon final hearing to direct that a new meeting be held at which plaintiffs will have an opportunity to present proposals free of any restraint imposed by the challenged bylaw. Likewise, if any wrongful conduct by defendants has impaired plaintiffs' efforts to extend the Annual Meeting, a new meeting could be held to correct any such impairment. Finally, if plaintiffs' adjournment proposals prevail, a timely final determination can be had, prior to the June 28 date sought by plaintiffs for their adjourned meeting, as to whether the bylaws, if valid, permit plaintiffs to present proposals at such an adjourned session upon thirty days notice in advance of that session.* The Court's power to order a new stockholder meeting to afford plaintiffs the opportunity of which they claim the bylaws deprive them thus

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* Plaintiffs cite <u>Lerman v. Diagnostic Data, Inc.</u> for the proposition that injunctive relief is appropriate. (PB 44). They overlook the fact, however, that <u>Lerman</u> was decided <u>after a trial</u> and that it gave plaintiff full relief <u>by permitting</u> him to follow through with the proxy contest that the challenged bylaw changes had threatened to abort.

obviates any present harm plaintiffs could conceivably assert -- particularly where, as here, plaintiffs have no current, specific proposals they can point to and in all events do not seek to present any proposals until what they hope will be an adjourned session of the annual meeting on June 28, some two and one-half months from now.

In view of the foregoing, plaintiffs have failed to establish any irreparable harm and cannot be entitled to a preliminary injunction, even apart from the unlikelihood of their succeeding on their claims on the merits.

IV. PLAINTIFFS' OWN DELAY AND MANIPULATION BAR THEIR CLAIMS FOR INJUNCTIVE RELIEF.

In balancing the conveniences of the parties to an application for interim injunctive relief, unreasonable delay by the applicant must be weighed. Methodist Mission and Church Extension Society, Inc. v. Dep't of Elections of New Castle County, Del. Ch., C.A. No. 7813, Brown, C. (Nov. 2, 1984). In the present case such considerations underscore plaintiffs' lack of entitlement to injunctive relief.

It has been a matter of public record from the time of its reincorporation in Delaware in 1983 that Unocal's charter and bylaws provide for a staggered board of directors and preclude stockholders from taking action by written consent and calling special meetings of stockholders. Thus, from the time of their first purchase of Unocal stock, plaintiffs knew or should have known that any proposal for stockholder action, to unseat present directors or otherwise, had to be presented at an annual meeting of stockholders. And, since the Unocal bylaws have long provided that the Annual Meeting is to be held the last Monday in April, and since Unocal's proxy statement from last year explicitly stated when the 1985 Annual Meeting would take place, plaintiffs knew or should have known from the outset of their acquisition program last October that this year's Annual Meeting would take place on April 29. Finally, from March 10, when plaintiffs learned of the adoption of the nomination and proposal bylaw amendments, they knew that unless challenged such bylaws would prevent them from nominating an opposition slate or submitting any other proposal unless upon notice thirty days in advance of the April 29 meeting.

Thus, there is no justification for plaintiffs' delay of over a month in challenging those bylaws, including some two and one-half weeks after March 27 when plaintiffs publicly took the position that they were no longer passive investors but might seek control of Unocal. Presumably for their own tactical reasons plaintiffs chose to let the bylaws go unchallenged for weeks, while thousands of stockholders traded millions of shares without the judicial intervention plaintiffs now protest is urgently needed. PB 45.

In light of such delay, plaintiffs cannot equitably apply to have this Court bail them out of the consequences of their own failure to develop and present in a timely fashion their still unarticulated proposals for the 1985 Annual Meeting. See American Hardware Corp. v. Savage Arms Corp., Del. Supr., 136 A.2d 690, 693 (1957). To the contrary, to grant plaintiffs' present application would bless their transparent tactic of seeking to bolster their acquisition proposal by efforts to manipulate and delay the completion of the annual meeting and to keep the marketplace in an extended state of uncertainty. See Bacine v. Scharffenberger, Del. Ch., C.A. No. 7862, Brown, C. (Dec. 11, 1984), slip op. at 9-10; National Education Corp. v. Bell & Howell Co., supra, slip op. at 4. Plaintiffs desperately seek to preserve their ability to make a surprise proxy solicitation on proposals they still have not yet formulated, let alone revealed, and this Court should not sanction their effort to preserve their ability to embark upon such a manipulation.

CONCLUSION

For the foregoing reasons, plaintiffs' application for interim injunctive relief must be denied.

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