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. 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.	Civil Action No. 7997

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

Charles F. Richards, Jr.
Samuel A. Nolen
Thomas A. Beck
C. Stephen Bigler
Daniel J. Kaufman
Richards, Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, DE 19899
Attorneys for Plaintiffs

Dated: April 16, 1985

TABLE OF CONTENTS

TABLE OF CITATIONS

NATURE AND STAGE OF THE PROCEEDINGS

This is an action for declaratory and injunctive relief with respect to the interpretation, application and enforcement of certain defensive bylaws purporting seriously to limit stockholder rights which were adopted by the incumbent directors of defendant Unocal Corporation, a Delaware corporation ("Unocal") and first disclosed to stockholders less than two months prior to the 1985 annual meeting of Unocal stockholders (the "Annual Meeting") scheduled to be held April 29, 1985. As discussed more fully below, those bylaws purport (i) to limit the manner and timing of stockholder nominations for election as directors and (ii) to limit the business which may be brought by stockholders before annual meetings of stockholders for stockholder consideration and action, in each case by, among other things, imposing the requirement that notice of nominations or proposals for stockholder action be given to Unocal 30 days prior to an annual meeting.

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.* The complaint names as defendants Unocal and 13 of the 14 members of its board of directors.

That same day, plaintiffs moved for the issuance of a temporary restraining order temporarily restraining defendants from (i) applying or enforcing or seeking to apply or enforce Article III, Sections 6 and 7 of the bylaws of Unocal (the "Notice Bylaws") and (ii) from taking any action to adopt, enforce or apply any other or further purported bylaw amendments in any way whatsoever or making any further changes in the bylaws or certificate of incorporation of Unocal prior to the Annual Meeting or, if such meeting is adjourned, the adjourned meeting. At a scheduling conference held the same day the Court set plaintiffs' motion for a temporary restraining order down for a hearing at 2:00 p.m., Thursday, April 18, 1985.

This is the opening brief of plaintiffs in support of their motion for a temporary restraining order. In further support of their motion plaintiffs have served and filed the affidavits of Sidney Tassin and Donald C. Carter.

---

*The partners of the Partnership are Mesa Asset, Cy-41, Inc., a Texas corporation, and Jack-41, Inc., a Texas corporation. The Partnership is the record or beneficial owner of 23,700,000 shares, or approximately 13.6%, of the outstanding common stock of Unocal and has been a stockholder of Unocal since at least October, 1984.

STATEMENT OF FACTS

1. Introduction.

As is shown more fully below, the board of directors of Unocal has embarked on a course of conduct characterized by threat, intimidation and outright abrogation of shareholder rights and powers vouchsafed to them under Delaware law in the board's efforts to thwart any proposal from being made by plaintiffs or considered by stockholders at the Annual Meeting. First, even before any disclosure that any of the plaintiffs were seeking to acquire shares of Unocal, defendants threatened one of plaintiffs' lenders should it choose to do business with plaintiffs. Second, when the Partnership disclosed its investment in Unocal on February 14, 1985, defendants quickly moved to limit the Partnership -- and any other Unocal stockholder -- in its right to nominate directors of Unocal or propose matters for stockholder consideration and action by adopting new bylaws out of whole cloth. To maximize the limiting effect of these bylaw amendments, defendants chose to delay even the public disclosure of the adoption of these manipulative amendments until March 7, 1985. Third, defendants determined to scare off plaintiffs' lenders by filing suit against one of them for doing business with Mesa and then, incredibly, by sending copies of that complaint in unmarked brown paper envelopes without return address or transmittal letters to the homes and offices of officers and directors of other banks with which Mesa had established banking relationships.

Defendants took these actions, moreover, at a time when neither the Partnership nor anyone associated with it had made any proposal of any sort to Unocal or its stockholders for stockholder action or otherwise. Defendants undertook these actions directly against plaintiffs, and at the expense of all of Unocal's other stockholders as well.

Nor were defendants content with the manipulations they had put in place. On April 1, 1985, in reaction to the Partnership's announcement on March 28, 1985, of its intention to solicit proxies to enable it to delay the Annual Meeting so that the stockholders could consider further proposals, defendants adopted yet another bylaw amendment -- this time to reduce the quorum requirement to the minimum possible so as to stymie the Partnership in its proxy contest. The adoption of this amendment less than thirty days prior to the Annual Meeting only highlights the inequity inflicted upon the stockholders by defendants in adopting the Notice Bylaws. Under those bylaws, the stockholders would purportedly be unable to take action at the Annual Meeting (or, indeed, until the 1986 annual meeting) with respect to the board's unilateral change of the rules in the middle of the game or for that matter with respect to any other action the board might take prior to the Annual Meeting.

If there were ever any doubt as to the true purpose harbored by the defendants, they laid that purpose bare in Unocal's April 7 letter to stockholders, which was first available on April 11, the day before this lawsuit was filed. There, they cast aside any pretense that the Notice Bylaws were designed for any purpose other than to thwart the Partnership, disclosing that their interpretation of the bylaws would preclude <u>any</u> stockholder proposal not made thirty days prior to April 29 <u>even if the Annual Meeting were adjourned to a later date and the proposal were made thirty days prior to the adjourned date</u>. The ostensible purpose of the thirty day provision -- to give stockholders and management a reasonable time to consider stockholder proposals -- is thus revealed as a sham.

The defendants' conduct is both illegal and inequitable. Their attempts to change the rules to give themselves an advantage over the stockholders they purport to represent cannot be countenanced by this Court and must be enjoined prior to the Annual Meeting to give plaintiffs and the stockholders of Unocal a full and fair opportunity to decide the issues before them.

2. The Partnership Invests In Unocal And Unocal Seeks To Cut Off Mesa's Financing By Threatening Mesa's Bankers.

Defendants' campaign to prevent Mesa or anyone associated with it from investing in Unocal commenced in earnest well before the Partnership even disclosed that it had made any investment at all in Unocal.* For instance, in December, 1984, representatives of Unocal met with the Chairman of Security Pacific National Bank ("Security Pacific"), one of Mesa's principal lenders, and threatened Security Pacific with the loss of business of Unocal and Union Oil Company of California, a wholly-owned California subsidiary of Unocal, unless Security Pacific agreed that it would not loan any funds or participate in any credit agreement whereby Mesa, Mesa Asset and/or the Partnership would obtain funds to purchase Unocal stock. (Tassin Aff. ¶ 4).** This resulted in a telephone call to Mesa by Security Pacific in January, 1985, in which Security Pacific advised Mesa that as a result of Unocal's position, Security Pacific could no longer do business with Mesa. Two weeks later, and again on March 15, 1985, Security Pacific, under "heavy pressure" from Unocal, again advised Mesa that it could

*The Partnership actually commenced purchases of Unocal stock in October, 1984. However, since these purchases were not required to be, and were not, disclosed to Unocal, Unocal was presumably unaware of them.

**References to the affidavits of Sidney Tassin and Donald C. Carter herein will be indicated by "Tassin Aff." and "Carter Aff." respectively, followed by the appropriate paragraph or exhibit number.

not participate in certain credit to Mesa despite the fact that its failure to participate would be a breach of contract. (Tassin Aff. ¶ 4).

3. The Partnership Discloses Its Investment And Unocal Reacts By Impinging On Stockholder Rights.

This scheme, made and carried through by Unocal notwithstanding that no investment had been disclosed by Mesa, the Partnership or anyone else associated with them, was not entirely successful. By February 14, 1985, the Partnership had acquired 12,649,600 shares, or approximately 7.3%, of the outstanding common stock of Unocal. On that day, the Partnership filed a statement on Schedule 13D with the Securities and Exchange Commission relating to and disclosing its investment in Unocal common stock. In its statement on Schedule 13D filed on February 14, 1985, Item 4, p. 15, the Partnership disclosed, among other things, that it "has acquired the Shares [of common stock of Unocal] held by it solely for the purpose of investment and has no present intention of seeking to obtain control of [Unocal] or to participate in the formulation, determination or direction of the basic business decisions of [Unocal]." The Partnership also stated that based on its observation of the enhancement in values of the shares of other oil and gas companies which resulted from their participation in the ongoing restructuring process in the oil and gas industry and the fact that Unocal had not participated in this restructuring process, the Partnership believed that a potential existed for substantial appreciation in the market value of Unocal shares. However, the Partnership also stated that it had no present intention of seeking to effect or cause Unocal to effect any restructuring transaction, although it reserved the right to change its purpose with respect to its investment and to take such actions as it deemed appropriate in light of the circumstances existing at the time. (Tassin Aff. ¶¶ 2-3).

Faced with the disclosure of the Partnership's investment in Unocal, and despite the Partnership's disavowal of any current control proposals or plans, the defendants hastily acted to deprive the Partnership -- and, indeed, all stockholders of Unocal -- of fundamental stockholder rights which Unocal stockholders had enjoyed up to that time. First, the directors quickly amended Article III, Section 6 of Unocal's bylaws, which provided that a nomination for election as director of Unocal "shall be accepted, and votes cast for a nominee shall be counted by the inspectors of election" if Unocal was given 24 hours before the meeting a statement by the nominee that he consented to serve and would do so if elected. (Tassin Aff. ¶¶ 5-6, Exs. H, J). As amended by the defendants on February 25, however, Article III, Section 6 purports to prohibit stockholder consideration of nominations for election as director (and to invalidate stockholder votes for any such nominee) unless not less than thirty days prior to an annual meeting the materials specified in the bylaws are submitted to Unocal's Secretary.* (Tassin Aff. ¶ 5, Ex. H).

At the same time, defendants also adopted as an entirely new bylaw Article III, Section 7, which purports to prohibit stockholder consideration of business otherwise proper to be brought before stockholders at an annual meeting unless not less than thirty days prior to the annual meeting

---

*Article III, Section 6, as purportedly amended on February 25, 1985, reads as follows:

> 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 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 proposed business and certain other information is submitted to Unocal's Secretary.* (Tassin Aff. ¶5, Ex. H). Prior to the adoption of this new bylaw, Unocal's bylaws had provided, at Article III, Sections 1 and 5, that "[a]ll

---

*Article III, Section 7 as purportedly adopted by defendants provides as follows:

> 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, (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.

shareholders meetings shall be conducted in accordance with ordinary parliamentary usage and common practice" and that annual meetings shall be held "for the purpose of electing directors ... and for the transaction of any other business which is within the powers of the shareholders." (Tassin Aff. ¶ 6, Ex. I). Apart from the foregoing, nothing in the bylaws or certificate of incorporation of Unocal purported to regulate or limit the manner by which stockholders might bring matters proper for stockholder action before an annual meeting for consideration and action by the stockholders. (Tassin Aff., Exs. I, J).

On March 12, 1985, shortly after disclosing the adoption of the Notice Bylaws, Unocal and Union Oil carried through with their earlier threats and filed suit in the Superior Court of the State of California for the County of Los Angeles against Security Pacific seeking actual and punitive damages against Security Pacific in excess of $550,000,000 because Security Pacific loaned Mesa $50 million. Apparently to enhance the in terrorem effect of this lawsuit on other existing or potential lenders of plaintiffs, Unocal immediately publicized the filing of the suit by press release and caused copies of the Unocal suit to be delivered to the homes and offices of several officers and directors of Mesa's banks in plain brown paper envelopes without return address or transmittal letters. These copies were delivered to officers and directors of at least Texas Commerce Bank, Mellon Bank and Mercantile Bank, all of which have established banking relationships with Mesa.* (Tassin Aff. ¶ 7).

Of course, at the time Unocal amended Article III, Sections 6 and 7 of its bylaws and commenced its campaign of threats and litigation against Mesa's lenders, neither

---

*As more fully described in Exhibit O, p. 3 of the Tassin Affidavit, Mesa and Mesa Asset have filed suit in the California Superior Court against Unocal and others alleging, among other things, that Unocal's conduct toward Mesa's lenders constitutes wrongful interference with Mesa's banking relationships (Mesa Petroleum Co., et al. v. Unocal Corporation, et al., Case No. C539633 (filed March 21, 1985)). Unocal has filed a cross-complaint in that action. Unocal has also filed suit in the United States District Court for the Central District of California against T. Boone Pickens, the Partnership, its partners and others alleging violations of Section 13(d) of the Securities Exchange Act of 1934 (Unocal Corporation v. T. Boone Pickens, et al., No. CV-85 2179 (filed April 1, 1985)). See Tassin Aff. Ex. O, pp. 3-4. The named defendants in that suit have filed an answer denying the material allegations of the complaint and have counterclaimed alleging proxy violations on the part of Unocal under Section 14(a) of the Securities Exchange Act of 1934 in connection with various features of the April 7 letter of Mr. Hartley to Unocal's stockholders. Unocal has moved to amend its complaint in this action to allege, in addition, violations of Sections 14(a), (c) and (d) of the Securities Exchange Act.

Most recently, Unocal and Union Oil filed suit in the United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division, against Mesa, Mesa Asset, Mesa Eastern, the Partnership, its partners, Mr. Pickens and others alleging violations of the Sherman Antitrust Act (Unocal Corporation, et al. v. Mesa Petroleum Co., et al., Civil Action File No. C485-1004 (filed April 11, 1985)). Certain directors and officers of Unocal, as trustees for a Union Oil retirement plan, and others have also filed suit in the United States District Court for the Southern District of New York against Mesa and others alleging violations of the Investment Company Act of 1940 (Kenneth V. Zerda, et al. v. Mesa Petroleum Co., et al., 85 Civ. 2812 (CBM) (filed April 12, 1985)).

the Partnership nor anyone associated with it had made any proposal of any sort to Unocal or its stockholders for stockholder action or otherwise.

4. The Partnership Reconsiders Its Purpose And Unocal Enacts Further Bylaw Amendments.

In view of defendants' actions and other factors, including public statements by Mr. Hartley, Unocal's Chairman, of his opposition to any participation by Unocal in the ongoing restructuring process in the oil and gas industry, the Partnership reviewed and reconsidered its intentions with respect to its investment in Unocal. On March 28, 1985, the Partnership filed Amendment No. 3 to its statement on Schedule 13D disclosing that it had acquired 23,700,000 shares, or 13.6%, of the outstanding common stock of Unocal and that it intended to present at the Annual Meeting the following two proposals (the "Adjournment Proposals"): (a) a proposal (the "First Proposal"), to be the first item of business brought before and acted upon after the convening of the Annual Meeting 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 Annual Meeting until 10:00 a.m. on June 28, 1985, and (ii) request the board of directors of Unocal to fix a new record date for determining stockholders entitled to notice of and entitled to vote at the adjourned meeting not more than sixty nor less than ten days before June 28, 1985; and (b) a proposal to rescind any action taken at the Annual Meeting on April 29, 1985, other than action taken with respect to the First Proposal in accordance with its terms. The Partnership further announced that it intended to solicit proxies in favor of the Adjournment Proposals and might take other action to postpone the conduct of the Annual Meeting, including using such proxies to seek to prevent the presence of a quorum at the Annual Meeting. (Tassin Aff. ¶ 8).

Initially, the purpose of the Adjournment Proposals was to give the stockholders of Unocal adequate time prior to voting with respect to the election of directors at the Annual Meeting to consider and evaluate any plan that the Partnership might formulate and submit to Unocal or its stockholders and to consider and evaluate the reaction of the Unocal board to such plan. The March 28, 1985 amendment to the Partnership's Schedule 13D stated among other things that such a plan could include, without limitation, a proposed transaction by the Partnership, either acting alone or in conjunction with others, to acquire Unocal or additional Unocal shares by means of a tender offer or otherwise, or to effect a proposed restructuring of Unocal which could include a repurchase of Unocal shares by Unocal, a recapitalization of Unocal and/or a sale or distribution of assets of Unocal. Although the Partnership believed the Notice Bylaws to be illegal, on March 28, 1985, the Partnership nevertheless delivered to the corporate Secretary of Unocal a statement as to the Adjournment Proposals purportedly required by Article III, Section 7.

Again hastily reacting to this information and the fact that the Partnership intended to solicit proxies with respect to the Adjournment Proposals, on April 1, 1985, less than thirty days before the scheduled date of the Annual Meeting, defendants adopted a third bylaw amendment. This time, the directors adopted a new bylaw purporting to reduce the number of shares which must be represented at meetings of stockholders to constitute a quorum for the transaction of business from a majority to one-third. This new amendment was disclosed by Unocal in a report on Form 8-K filed with the Securities and Exchange Commission on April 2, 1985, and provides as follows:

> Section 8. Quorum. The holders of one-third (1/3) of all of the shares of the stock entitled to vote at a meeting of stockholders, present in person or by proxy, shall constitute a quorum for the transaction of any business at such meeting.

(Tassin Aff. ¶ 10). The effect of this bylaw amendment is, of course, to permit an annual meeting of stockholders to go forward even if a majority of the stockholders of Unocal desire that no meeting take place and seek to implement that desire by declining to attend the meeting. It also enables a small minority of stockholders of Unocal to take stockholder action binding upon the majority of Unocal's stockholders.

The directors' intention in adopting this new bylaw amendment is clear. Indeed, as a press release issued by Unocal quite candidly admitted, the adoption of this bylaw was "in response to the announcement by Mesa Partners II that it plans to solicit proxies from Unocal shareholders and may use such proxies to prevent the presence of a quorum." (Tassin Aff. ¶ 10).

On April 8, 1985, the Partnership and Mesa Eastern commenced an offer to purchase for cash 64,000,000 shares of common stock of Unocal for $54 net per share (the "Offer"). The purpose of the Offer, as is stated in the Offer to Purchase dated April 8, 1985, is as follows:

> The purpose of the Offer is to acquire a number of Shares which, when added to the Shares presently owned by the Partnership, will constitute a majority of the Fully Diluted Shares (as hereinafter defined) as a step in obtaining control of the Company and ultimately acquiring the entire equity interest in the Company. If the Purchasers purchase an aggregate of 64,000,000 Shares pursuant to the Offer, the Purchasers intend to seek maximum representation on, and possibly control of, the Board of Directors of the Company. In addition, the Purchasers currently intend to propose a transaction or series of transactions in which the Shares not owned by the Purchasers would be acquired in exchange for securities having an aggregate market value, in the opinion of an independent investment banker selected by the Purchasers and on a fully distributed basis as of the time the terms of such securities

> are determined, of approximately $54 per Share.

(Tassin Aff., Ex. N at p. 1).

5. Unocal Belatedly Takes the Position that the Notice Bylaws Preclude the Consideration of Proposals Not Submitted Thirty Days Before April 29.

Only after the Offer commenced and the Offer to Purchase was disseminated were the Partnership and Unocal's other stockholders apprised of Unocal's latest interpretation of its defensive bylaws. That position was first stated in Mr. Hartley's letter to stockholders dated April 7, 1985, but not available until April 11, as follows:

> Your Board of Directors wants you to know that under the Company's Bylaws any nomination for director and any proposal to be presented to shareholders at an annual meeting must be submitted to the Corporate Secretary at least 30 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 30 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.

(Tassin Aff. ¶ 12). This most recent position of Unocal would, if upheld, prevent the Partnership or any other stockholder from making any proposal for stockholder action to be considered at the adjourned meeting. It is designed solely to prevent the shareholders from being able to consider the Partnership's proposals for more than a year. It would thus apply even if, prior to reconvening the adjourned meeting, the Partnership and Mesa Eastern acquire a majority of the outstanding common stock of Unocal as seems likely. Because Unocal has denied its stockholders the right to call special meetings or act by written consent, this new "amendment" would require that the Partnership and Mesa Eastern wait until the 1986 annual meeting even to present a proposal to the stockholders of Unocal for their action.

On April 12, 1985, the Partnership commenced its solicitation of proxies in favor of the Adjournment Proposals. In light of the Offer the Partnership's proxy statement states the purpose of the Adjournment Proposals as follows:

> The purpose of the Adjournment Proposals is to give the shareholders of Unocal adequate time, prior to the Meeting, to consider and evaluate (i) the cash tender offer for 64,000,000 shares of Common Stock, par value $1.00 per share, of Unocal (the "Shares") at $54 per Share commenced on April 8, 1985 by Mesa Partners II and Mesa Eastern, Inc., a wholly owned subsidiary of Mesa Partners II (the "Offer"), and (ii) the reaction of Unocal's Board of Directors to the Offer.

(Tassin Aff., Ex. O at p. 2). However, that solicitation will be substantially impeded by the most recent interpretation placed on the Notice Bylaws by Unocal. Unocal is telling its stockholders that a vote in favor of adjournment will be a futile act because they will be precluded from considering any proposal made to them at the reconvened meeting notwithstanding that notice of such proposal might be given thirty days prior to the date of that meeting. (Carter Aff. ¶¶ 4, 7).

These facts show but one thing, and they show it beyond cavil. The defendants' consistent course of conduct has been taken, not to protect Unocal or its stockholders, but to protect themselves, by denying the Partnership the opportunity to make, and the stockholders the opportunity to consider, proposals designed to enhance stockholder values. The defendants' amendments to the bylaws are illegal and their conduct has been inequitable. The offending bylaws must be declared invalid and the defendants enjoined from further manipulation prior to the Annual Meeting or any adjournment thereof.

ARGUMENT

I. DEFENDANTS' ACTIONS CONSTITUTE AN INVALID AND INEQUITABLE MANIPULATION OF UNOCAL'S CORPORATE MACHINERY.

A. The Defendants' Manipulations Here Are Precisely Those Condemned In Schnell And In Lerman.

As shown below, the Notice Bylaws are illegal as a matter of law. However, the Court need not even reach the question of illegality because the conduct of the defendants here is so manipulative and inequitable -- and transparently so -- that it must be enjoined even were it otherwise in compliance with the law.

It is well established under Delaware law that where, as here, the corporate machinery is manipulated by management for the purpose or with the effect of perpetuating itself in office and frustrating the legitimate rights of shareholders, that manipulation is invalid even if it is legally possible. Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971); Lerman v. Diagnostic Data, Inc., Del. Ch., 421 A.2d 906 (1980). Thus, as the Supreme Court has most recently held in Giuricich v. Emtrol Corp., Del. Supr., 449 A.2d 232 (1982):

> The Courts of this State will not allow the wrongful subversion of corporate democracy by manipulation of the corporate machinery or by machinations under the cloak of Delaware law. Schnell v. Chris-Craft Industries, Del. Supr., 285 A.2d 437 (1971). Accordingly, careful judicial scrutiny will be given a situation in which the right to vote for the election of successor directors

> has been effectively frustrated and denied by the willful perpetuation of a shareholder deadlock and the resulting entrenched board of directors.

449 A.2d at 239. See also Telvest, Inc. v. Olson, Del. Ch., C.A. No. 5789, Brown, C. (Mar. 8, 1979), slip op. at 15-16.* Indeed, the defendants' conduct here is even more egregious than that condemned in Schnell and Lerman.

In Schnell, the incumbent board, in technical compliance with Delaware law, amended the bylaws to accelerate the date of the annual meeting, thereby cutting the time available for management's opponents to wage their proxy contest. Yet, the plaintiff still had almost seven weeks to engage in the proxy contest, unfettered by any prohibitive bylaws such as those of Unocal. The Supreme Court did not hesitate to invalidate the bylaw, regardless of its technical propriety, stating:

> In our view, those conclusions [that the board's action had impeded the insurgent's chance to wage a successful proxy contest] amount to a finding that management has attempted to utilize the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office, and, to that end, for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management. These are inequitable purposes, contrary to established principles of corporate democracy.
>
> * * *

---

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

> Management contends that it has complied strictly with the provisions of the new Delaware Corporation Law in changing the by-law date. The answer to that contention, of course, is that inequitable action does not become permissible simply because it is legally possible.

285 A.2d at 439.

Likewise, in Lerman, the board, after having been put on notice of the plaintiff's intention to wage a proxy contest, altered the corporation's bylaws. The first change did away with an established annually-recurring meeting date in favor of a provision which permitted the board to set the date at any time it saw fit. The second change involved adoption of a bylaw requiring that nonmanagement nominees for director positions be submitted to the board no less than 70 days prior to the scheduled date for the annual meeting. On April 30, 1980, Lerman was advised of this change in the bylaws in a personal letter. All shareholders were advised of the change on May 9, 1980.

The board met on August 1, 1980, and fixed the annual meeting date for October 3, 1980, 63 days from the date of the board meeting at which it was established. As the Court recognized, "[t]he action taken by the board in fixing the date thus made it impossible for Lerman or any other shareholder to comply with the 70-day requirement of the bylaws subsequent to that time." 421 A.2d at 911.

Chancellor Brown held that the actions of the defendants were "invalid and cannot be permitted to stand so as to prevent the plaintiff and his group from placing the names of their candidates in nomination." 421 A.2d at 914. The Court rejected the defendant's argument that the plaintiff "had plenty of time to have acted so as to avoid the terminal effect of the establishment of the meeting date resulting from the bylaw amendment." 421 A.2d at 913. The Court stated:

> I read that result [Schnell] to mean [that] even though one desiring to engage in a proxy contest had ample time to do so and could have avoided the deleterious effect of a by-law amendment by management by acting sooner, it cannot serve to excuse the conduct of management if that 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.

421 A.2d at 914 (emphasis added).

In this case the defendants have engaged in precisely the activity proscribed in Schnell and Lerman. Firstly, of course, the effect of the defendants' actions here is precisely that condemned in Schnell and Lerman. By advancing the date by which nominations or proposals for stockholder action must be submitted from April 29 to March 28 (and not making these bylaw amendments public until 10 days after they were adopted), defendants cut the Partnership's time to formulate and present its proposals to only three weeks. The effect is the same as if they had advanced the date of the meeting itself. As the Supreme Court held in Schnell, "[w]hen the by-laws of a corporation designate the date of the annual meeting of stockholders, it is to be expected that those who intend to contest the reelection of incumbent management will gear their campaign to the by-law date. It is not to be expected that management will attempt to advance that date in order to obtain an inequitable advantage in the contest." 285 A.2d at 439. Similarly, as the Court held in Lerman, "a by-law amendment authorizing a change in a fixed-annual meeting date to a date to be established by management cannot be put into operation in such a manner that those wishing to wage a proxy fight are required to be in a state of 'shelf-readiness' in order to meet a sudden advancement of the date." 421 A.2d at 914.

Defendants have demanded that the Partnership be in just such a state of shelf-readiness here. They cannot hide behind the fact that they have not changed the meeting date itself; the effect of what they have done is precisely the same as that which this Court and the Supreme Court have said cannot be done.

Secondly, defendants have now placed themselves squarely within Lerman by interpreting Unocal's bylaws in such a fashion as to make compliance with them impossible. By letter dated April 7 -- less than the thirty days prior to the deadline set in the Notice Bylaws -- defendants took the position that proposals for consideration at any reconvened meeting were required to be submitted prior to March 29th. This interpretation, of course, makes it literally impossible to present any such proposals since less than thirty days remain before the original meeting date in which to submit any such proposals. As this Court held in Lerman, however, such actions making opposition literally impossible cannot stand:

> [H]ow can the implementation of such a by-law change be upheld if the fixing of the date, when coupled with a by-law such as the 70-day requirement here, has the effect, not so much of giving management an inequitable advantage, but of removing the insurgents from the contest altogether even if they had been "shelf-ready"? I fail to see how this could be, even if management understandably lacked knowledge of all the facts and had no intention of thwarting a potential proxy contest in so doing.
>
> * * *
>
> I hold only that under the facts of this case the act of DDI's board, in fixing the date for the annual meeting at a time 63 days in the future, in the face of a by-law which required the plaintiff Lerman and his group to submit the names of their nominees, together with information concerning them, to the corporation at least 70 days in advance of the date of the annual meeting of shareholders, is invalid and cannot be permitted to stand so as to prevent the plaintiff and his group from placing the names of their candidates in nomination.

421 A.2d at 914. Just as our courts struck down the manipulations in Schnell and Lerman, defendants' essentially similar manipulations here must be struck down.

B. The Defendants' Interpretation Of The Notice Bylaws Is Unnecessary And Serves No Valid Purpose Other Than To Entrench Management And To Preclude Shareholder Consideration Of The Partnership's Proposals.

There can be no question that the defendants' conduct here has been inequitable, as the Court put it in Lerman, "in the sense of being unnecessary under the circumstances." 421 A.2d at 914. Moreover, the inequity of defendants' actions goes far beyond merely being inequitable in that sense. Their purpose was to deprive their shareholders of the opportunity to consider proposals to be made at the Annual Meeting, and if possible, to preclude the Partnership from ever bringing its proposals before Unocal's shareholders for a vote. Such a purpose is clearly improper.

Nor can defendants claim that their newly-announced intention to interpret the Notice Bylaws so as to preclude the Partnership from bringing new proposals before Unocal's shareholders at any reconvened meeting is necessary to any proper corporate purpose. To the contrary, even if the Notice Bylaws were adopted to provide shareholders with thirty days to consider any proposals (which it seems apparent they were not, because they apply only to shareholder nominations and proposals and not those made by management) defendants' announced interpretation of the Notice Bylaws is inconsistent with that purpose. It is, of course, not readily apparent why thirty days notice is adequate unless a meeting is adjourned, in which case, according to defendants, as applied here ninety days notice is required. There is no reason to interpret the Notice Bylaws, even were they valid, so as to bar the Partnership from bringing forward new business at a reconvened meeting so long as shareholders have notice thirty days before the meeting reconvenes of what business or director nominations the Partnership plans to propose at the reconvened meeting.

Defendants are trying to twist a bylaw ostensibly requiring thirty days notice into one requiring impossible notice. Under Lerman, of course, it is enough that the directors have made it impossible to oppose them, regardless of their motivation. As the Court declared in Lerman:

> Here, the action taken by DDI's board, whether designedly inequitable or not, has had a terminal effect on the aspirations of Lerman and his group.

421 A.2d at 912 (emphasis added). Thus, although on these facts the conclusion is inescapable that the defendants' motivation is to prevent a contest and any challenge to their control, such a finding is unnecessary to hold the Notice Bylaws as interpreted by defendants invalid.

In sum, through their enactment and interpretation of the Notice Bylaws, defendants have used every effort to deprive their shareholders of their right to consider and act upon legitimate proposals for stockholder action.

That shareholders have a right to do so is beyond dispute. As the Court said in Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255 (2d Cir. 1984):

> Our most important duty is to protect the fundamental structure of corporate governance. While the day-to-day affairs of a company are to be managed by its officers under the supervision of directors, decisions affecting a corporation's ultimate destiny are for the shareholders to make in accordance with democratic procedures.

744 F.2d at 258; accord Conoco, Inc. v. Seagram Co., 517 F. Supp. 1299, 1303 (S.D.N.Y. 1981). Defendants seek to prevent their shareholders from exercising their franchise. The board's conduct should be enjoined and the bylaws or defendants' construction of them declared invalid.

C. The Defendants' Actions Have The Dual Effect Of Thwarting Shareholder Opposition To Management And Perpetuating Management In Office.

There can be no question that the effect of defendants' action in interpreting the Notice Bylaws so as to preclude shareholder consideration of new business at the reconvened meeting, if permitted to stand, will be to thwart the Partnership's proxy contest and to perpetuate management in office. Indeed, defendants' announced interpretation of the Notice Bylaws will preclude Unocal's shareholders from having the opportunity to consider the Partnership's proposals altogether.

Defendants cannot be heard to argue that the Partnership had sufficient time to avoid the effect of the Notice Bylaws and that the problem is of the Partnership's own making. Such an argument is no more than a call for the very "shelf-readiness" which our courts have held stockholders need not have. Moreover, any such delay, even if it existed, "cannot serve to excuse the conduct of management" where, as here, "that conduct was both inequitable . . and had the accompanying dual effect of thwarting shareholder opposition and perpetuating management in office." Lerman v. Diagnostic Data, Inc., 421 A.2d at 914.

Moreover, and more critically, the Partnership had no opportunity to avoid the effect of the defendants' interpretation of the Notice Bylaws as banning new business even at a reconvened meeting. That interpretation was not announced until 22 days before the Annual Meeting, and although the Partnership tried to comply with the Notice Bylaws by submitting a proposal to adjourn the Annual Meeting in timely fashion, it was literally impossible to comply with the new interpretation placed on the Notice Bylaws by the defendants. The timing of this announcement, like the timing of the actions by the defendants in Schnell and Lerman, has potentially left the Partnership with nothing to gain by conducting its proxy contest because, even if the Partnership is successful in adjourning the meeting, the clear implication of the April 7 letter is that defendants will refuse to recognize any new proposals at the reconvened meeting.

In Holly Sugar Corp. v. Buchsbaum, [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶98,366 (D. Colo. Oct. 28, 1981), the Court was faced with a similar management maneuver to preserve their control by artful bylaw amendment. There, management obtained a preliminary injunction against the use of proxies solicited by the insurgents in connection with the corporation's annual meeting. Because these proxies could not be voted at the annual meeting, management was unable to muster a quorum for the election of directors. The insurgents announced their intention to solicit new proxies to call a special meeting to oust the holdover directors and elect their own slate. In response, management amended the corporation's bylaws to bar the calling of a special meeting by the insurgents and to deprive stockholders of the right to transact certain business at any special meeting even were one called. The insurgents sought injunctive relief enjoining enforcement of these bylaw amendments on the grounds that they effectively denied the insurgents the right to take their case to the stockholders, and the Court granted the relief. The Court stated:

> The evidence indicates a likelihood that present management has improperly employed the corporate machinery and by-laws to the advantage of incumbent management and to the disadvantage of the defendants.

* * *

> The obvious and intended effect of these actions has been to deprive Holly shareholders of their valid right to vote in an election of directors in 1981, and, further, to preclude the defendants from soliciting shareholder support for their candidates. Such behavior by fiduciaries is per se wrongful. E.g., Schnell v. Chris-Craft, supra; Lerman v. Diagnostic Data Inc., supra.

¶98,366 at p. 92,238.

Defendants have changed the rules in the middle of the game and by sleight of hand have tried effectively to eliminate the Partnership's opportunity to conduct its proxy solicitation. Defendants' action in the present case has had exactly the same effect as that condemned in Schnell and Lerman and they must be enjoined.*

D. The Notice Bylaws Inequitably Discriminate Between Stockholder And Board Nominations And Proposals.

Even aside from the inequitable effect of defendants' adoption and interpretation of the Notice Bylaws, the Bylaws themselves are inequitable because they discriminate between stockholder nominations and proposals and board nominations and proposals. Indeed this, too, demonstrates their true purpose. They are designed merely to shift the balance in any contest to the incumbent directors.

---

*See also Coalition To Advocate Public Utility Responsibility, Inc. v. Engels, 364 F. Supp. 1202 (D. Minn. 1973), where the Court relied on Schnell in enjoining enforcement of certain eleventh-hour bylaw amendments which had the effect of thwarting a minority stockholder's chances of success in her planned proxy contest.

Under the Notice Bylaws, stockholders must notify management 30 days in advance of any business they wish to propose at an annual meeting. No such obligation is imposed on management itself. To the contrary, the board may bring business before the meeting regardless of whether the stockholders have been given notice of it. Of course, had defendants' motivation in enacting the Notice Bylaws been legitimate and evenhanded, they would presumably have adopted a neutral bylaw which provided that notice of all business to be conducted was to be provided to shareholders in advance.* Here, defendants have simply given themselves 30 days to respond to any perceived threat to their incumbency by stockholders. Stockholders, on the other hand, have not been afforded a similar opportunity to respond to management's entrenchment maneuvers.

Indeed, this inequality is best illustrated by the facts of this case. Here, the Partnership in good faith notified Unocal of its intentions concerning the Annual Meeting, and yet under defendants' view is completely precluded from reacting to defendants' response.

Such one-sided action constitutes manipulation and cannot be countenanced. Our courts have consistently condemned actions by incumbent directors which are intended

---

*As discussed below, however, even such a neutral bylaw would conflict with 8 Del.C. §211 and, therefore, be void. The fact that such a course was not chosen reveals defendants' motivation in adopting the Notice Bylaws.

to prevent shareholders from exercising their ultimate right of control. See Giuricich v. Emtrol Corp., 449 A.2d at 239. See also Martin Marietta Corp. v. The Bendix Corp., Del. Supr., No. 298, 1982, Quillen, J. (Sept. 21, 1982) (ORDER); Condec Corp. v. The Lunkenheimer Co., Del. Ch., 230 A.2d 769, 777 (1967); Canada Southern Oils, Ltd. v. Manabi Exploration Co., Del. Ch., 96 A.2d 810 (1953).

The Notice Bylaws are one-sided and on their face are designed to obstruct the ability of Unocal stockholders to challenge incumbent management. Because they give the board a one-sided advantage at the expense of their own stockholders, the Notice Bylaws are inequitable and should be struck down.

Moreover, the Notice Bylaws unlawfully restrict shareholder voting rights. They specifically invalidate shareholder votes cast for director candidates who have not notified management of their candidacy thirty days before an annual meeting. Similarly, they limit the business which can properly be the subject of a shareholder vote at an annual meeting to matters which have been submitted to management thirty days before the meeting date. By reducing the universe of matters which may properly be brought before shareholders at the Annual Meeting, and by invalidating shareholder votes cast for director candidates who have not been cleared with management, the Notice Bylaws fundamentally limit the voting rights of Unocal stockholders.

It is well established under Delaware law that voting rights are among the most important rights of shareholders. Giuricich v. Emtrol Corp., 449 A.2d at 239; Holly Sugar Corp. v. Buchsbaum, ¶98,366 at 92,236. A board of directors may not artificially restrict voting power "on the theory that such action is needed to curtail a threat to corporate existence presented by a large concentration of stock in one shareholder." Telvest, Inc. v. Olson, slip op. at 15. Unilateral board action cannot be permitted to prohibit shareholders from exercising their voting franchise to its fullest extent; such interference with stockholder's voting rights through manipulation of the corporate machinery will not be tolerated. Giuricich v. Emtrol Corp., 449 A.2d at 239.

II. <u>THE NOTICE BYLAWS BOTH CONFLICT WITH AND ARE INCONSISTENT WITH 8 DEL.C. §211.</u>

Article III, Section 7 of of Unocal's bylaws conflicts directly with 8 <u>Del.C.</u> §211(b). That section provides:

> An annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided in the bylaws. <u>Any other proper business may be transacted at the annual meeting</u>.

(Emphasis added). Insofar as this bylaw purports to limit the business which may be transacted at annual meetings of Unocal stockholders, it is invalid on its face.

Section 211(b) is a direct statutory authorization of the types of business that may be conducted at annual meetings. It expressly authorizes stockholders to transact <u>any</u> business proper for stockholder action at the annual meeting, in addition to electing directors. <u>See</u> E. Folk, <u>The Delaware General Corporation Law: A Commentary and Analysis</u>, §211 p. 204 (1972). Unocal's newly minted bylaw expressly abrogates this statutory right by purporting to limit the stockholders' ability to entertain business otherwise properly before them. Such a provision is contrary to the plain meaning of the statute.

The legislative history of Section 211(b) demonstrates beyond question that this aspect of the Notice Bylaws, insofar as it purports to require stockholders to notify Unocal of any business they wish to propose at an annual meeting, violates the legislative policy behind the statute. As originally enacted in 1967, Section 211(b) read as follows:

> An annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided in the bylaws. Any other proper business, notice of which was given in the notice of meeting, may be transacted at the annual meeting.

(Emphasis added). This would have given directors the broad power to determine -- and to limit -- the business to be conducted at annual meetings. The very next year, however, Section 211(b) was amended to eliminate the power to limit the matters stockholders could consider by deleting the words "notice of which was given in the notice of the meeting."

As the Supreme Court has only recently held in Giuricich v. Emtrol Corp.:

> "When a legislative body ... amends its prior enactment by a material change of language, the rule of statutory construction presumes that a change in meaning was intended." Daniel D. Rappa, Inc. v. Englehardt, Del. Supr., 256 A.2d 744, 746 (1969); accord Chrysler Corporation v. State of Delaware, Del. Supr., 163 A.2d 239 (1960).

449 A.2d at 237. The General Assembly's amendment of Section 211(b) to delete the limitation on business which might be conducted at annual meetings is conclusive on the subject. Section 211(b) specifically precludes the notice requirement which Unocal has purported to impose with its new bylaw.

That this Notice Bylaw violates the statutory scheme is further illustrated by reading Section 211(b) in conjunction with 8 Del.C. §222(a). Section 222(a) provides:

> Whenever stockholders are required or permitted to take any action at a meeting, a written notice of the meeting shall be given which shall state the place, date and hour of the meeting, <u>and, in the case of a special meeting, the purpose or purposes for which the meeting is called.</u>

(Emphasis added). To the extent Section 222(a) specifically requires notice of the purpose or purposes of a special meeting, it by necessary inference suggests that notice of such purpose or purposes is not required at an annual meeting. As the Supreme Court has held:

> [W]here a provision is expressly included in one section of a statute, but is omitted from another, it is reasonable to assume that the Legislature was aware of the omission and intended it. The courts may not engraft upon a statute language which has been clearly excluded therefrom by the Legislature. <u>See</u> <u>Wilmington Trust Co. v. Barry</u>, Del. Super., 338 A.2d 575, 578 (1975), <u>aff'd</u>, 359 A.2d 664 (1976).

<u>Giuricich v. Emtrol Corp.</u>, 449 A.2d at 238. When the present Section 211(b) is read in conjunction with Section 222(a), it is quite clear that the statute does not contemplate any requirement that notice of the business to be conducted at an annual meeting be given in advance of the meeting.

This interpretation is the only interpretation consistent with the policy behind the requirement that annual meetings be held. After all, this is the only opportunity available to the Unocal shareholders to express their will. They cannot call special meetings; they cannot act by consent; and now management wishes to deprive them of their only opportunity to act on proposals which may be placed before them.

This interpretation finds support in another context in Vice Chancellor Longobardi's finding in Shay v. Morlan International, Inc., Del. Ch., C.A. No. 7243, Longobardi, V.C. (July 29, 1983), quoting Vice Chancellor Hartnett's finding in Algeran, Inc. v. Connolly, Del. Ch., C.A. No. 6557, Hartnett, V.C. (Oct. 5, 1981):

> "The annual meeting of stockholders for the purpose of electing directors is one of the few avenues available to a corporate stockholder to enable him to have a say in the destiny of his corporation." Algeran, Inc. v. Connolly, Del. Ch., C.A. No. 6557 at 2, Hartnett, V.C. (Oct. 5, 1981).

Slip op. at 7.

It is clear that the legislative policy behind the deletion of the notice requirement for business to be considered at annual meetings was to permit the shareholders at their one plenary opportunity to influence the affairs of their corporation to bring up any proper matter. The 1968 amendment of Section 211 made clear to all that once a year shareholders must have an opportunity to bring up any matter proper for their consideration without advance notice and certainly without restriction by their board of directors. It was intended to give importance and authority to annual meetings, the one time each year that a majority of the shareholders or their proxies are assembled to consider the affairs of their corporation.

Indeed, in a situation such as here, where management has misinformed its shareholders as to the meaning and validity of the corporation's bylaws, the courts have gone even further than we ask this Court to do and have enjoined meetings until corrective disclosures can be made so that the shareholders' "only real opportunity for a proxy fight" can be preserved:

> The issue is not whether stockholders will vote to support or reject anti-takeover 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....

American Pacific Corp. v. Super Food Services, Inc., Del. Ch., C.A. No. 7020, Longobardi, V.C. (Dec. 6, 1982) (emphasis added). Certainly an interpretation of a bylaw that would unfairly deprive shareholders of their "only real opportunity" to consider proper shareholder proposals must be set aside.

It is of course well established that a bylaw which conflicts with the statutory scheme is void.* See Kerbs v. California Eastern Airways, Inc., Del. Supr., 90 A.2d 652 (1952); Loew's Theatres, Inc. v. Commercial Credit Co., Del. Ch., 243 A.2d 78 (1968); Lawson v. Household Finance Corp., Del. Supr., 152 A. 723 (1930); State ex rel. Brumley v. Jessup & Moore Paper Co., Del. Supr., 77 A. 16 (1910). To the extent that Article III, Section 7 prevents stockholder consideration of matters properly within the power of the stockholders to act upon, it conflicts with the broad and explicit policy embodied in Section 211(b).

This conclusion is also compelled by the recent opinion in 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)(ruling from the Bench). There, this Court struck down a bylaw which it found to be inconsistent with the legislative policy of the General Corporation Law. The Court stated:

---

*See, e.g., 8 Del.C. §109(b), which provides in pertinent part that:

> The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.

(Emphasis added).

> 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.

Slip op. at 14. In affirming the Chancellor's opinion, the Supreme Court found no error of law and "conclude[d], as [the Chancellor] did, that the bylaw is contrary to the statute, 228, and is unreasonable, given the statute's purpose."

Sections 211(b) and 222(a) reflect a legislative policy that no notice is required of business to be brought before stockholders at the Annual Meeting. Here the General Assembly did not include in the statute any power to impose the restriction sought to be imposed by Unocal in the bylaw. The General Assembly did not say "unless otherwise provided in the certificate of incorporation or in the bylaws, any other proper business may be transacted at the annual meeting." Rather, only the underscored language appears in Section 211(b). To the extent that Unocal's bylaw is inconsistent with that policy it, like the Datapoint bylaw, must be struck down.

III. PLAINTIFFS ARE ENTITLED TO INTERIM INJUNCTIVE RELIEF.

The standards for granting preliminary injunctive relief are well established and require that plaintiff 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, defendants' conduct has been and continues to be both inequitable and illegal. They have used their powers not to benefit and protect Unocal and its shareholders, but to serve their own interests. Moreover, the Notice Bylaws they hastily adopted are illegal, and thus void and unenforceable, because they conflict with Section 211 by restricting stockholder consideration at annual meetings of matters otherwise proper for stockholder action.

More importantly, however, these bylaws and the interpretation placed on them by defendants serve one purpose and one purpose only: to preclude the plaintiffs from making any proposal to Unocal's stockholders -- for whom the members of Unocal's board act as fiduciaries -- and thereby to perpetuate themselves in office at plaintiffs' and the Unocal stockholders' expense. Plaintiffs have shown a probability of success on the ultimate merits more than sufficient to warrant the entry of injunctive relief.

Moreover, plaintiffs and the other Unocal shareholders except defendants have been and will be irreparably injured unless injunctive relief is granted. Defendants' manipulation of Unocal's corporate machinery, designed to deprive the Partnership of a fair chance to wage a balanced proxy contest, will not only prevent the Partnership from addressing its proposals to Unocal's stockholders, but will prevent those stockholders from even considering for over a year, if at all, transactions which could maximize the value of their investments.

Defendants' interpretation of the Notice Bylaws will cause real, direct and immediate harm to the plaintiffs and to the stockholders of Unocal. As demonstrated above, it is impossible to comply with the Notice Bylaws as interpreted by defendants. The Notice Bylaws inevitably restrict the Partnership from exercising its right to conduct a proxy contest and to bring business before Unocal's shareholders for their consideration at the Annual Meeting, and thereby tip the scales unfairly toward management in the proxy contest. (Carter Aff. ¶¶6, 7).

Where, as here, management has manipulated the corporate machinery so as to "obstruct[] the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management," injunctive relief is appropriate. Schnell v. Chris-Craft Industries, Inc., 285 A.2d at 439; Lerman v. Diagnostic Data, Inc., 421 A.2d at 908. Indeed, inequitable interference with shareholder voting rights in and of itself constitutes irreparable injury. See, e.g., Giuricich v. Emtrol Corp., 449 A.2d at 239 ("[t]he Courts of this State will not allow the wrongful subversion of corporate democracy by manipulation of the corporate machinery.... [C]areful judicial scrutiny will be given a situation in which the right to vote ... has been effectively frustrated and denied" (emphasis added)); Holly Sugar Corp. v. Buchsbaum, ¶98,366 at p. 92,236 (the insurgent stockholders "have been frustrated in their attempts to exercise their franchise").

Defendants' actions, whether by design or not, have the effect of hindering the Partnership's ability to carry out its proxy contest. As Vice Chancellor Longobardi held in American Pacific Corp. v. Super Food Services, Inc., the denial of a fair proxy contest is itself irreparable injury:

> 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).

Slip op. at 12. Indeed, if the defendants' actions are allowed to stand, the proxy contest will be pointless because the purpose of the contest -- to give shareholders time to consider the Partnership's proposals -- will have been completely subverted. Defendants have taken action to stack the deck in their favor at the eleventh hour and have, as the Court stated in Coalition To Advocate Public Utility Responsibility, Inc. v. Engels, 364 F. Supp. at 1206, "change[d] the rules in the middle of the game." Their conduct is illegal and inequitable, entrenches incumbent management and stifles shareholder democracy. Unless injunctive relief is granted, plaintiffs and all Unocal stockholders will be irreparably harmed. In these circumstances injunctive relief is not only appropriate but imperative.

CONCLUSION

For the foregoing reasons, plaintiffs Mesa Petroleum Co., Mesa Asset Co., Mesa Eastern, Inc. and Mesa Partners II respectfully request that their motion for a temporary restraining order be granted.

CHARLES F. RICHARDS, JR.

Charles F. Richards, Jr.
Samuel A. Nolen
Thomas A. Beck
C. Stephen Bigler
Daniel J. Kaufman
Richards, Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, DE 19899
Attorneys for Plaintiffs

Dated: April 16, 1985

EXHIBIT A

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

MAURICE A HARTNETT, III
VICE-CHANCELLOR

October 5, 1981

COURT HOUSE
DOVER, DELAWARE
GEORGETOWN, DELAWARE
WILMINGTON, DELAWARE

R. Franklin Balotti, Esquire
Samuel A. Nolen, Esquire
RICHARDS, LAYTON & FINGER
P. O. Box 551
Wilmington, DE 19899

Thomas D. Whittington, Jr., Esquire
WILSON & WHITTINGTON, P.A.
P. O. Box 1266
Wilmington, DE 19899

RE: Algeran, Inc., et al v. John J. Connolly, et al
Civil Action #6557 (1981) - New Castle County
Date submitted: September 18, 1981
DECISION AFTER TRIAL: FOR PLAINTIFFS

Gentlemen:

Plaintiffs brought this action alleging that the Certificate of Incorporation of defendant-Cordon International Corporation ("Cordon") had been revoked for failure to pay taxes owing to the State of Delaware. It is also alleged that the last meeting of the stockholders of Cordon for the election of directors was held on December 28, 1978, in violation of 8 Del. C. §211.

At the trial held on September 18, 1981, defendants showed that the Certificate of Incorporation had been reinstated and the corporation is now in good standing.

At the trial plaintiffs established that there has been no meeting of Cordon for a long period of time——certainly in excess of 13 months. Indeed, defendants did not dispute that there should be a stockholders' meeting of Cordon. They, however, requested the Court to hold a subsequent hearing on the issue of when the stockholders meeting should be held because they argued that the financial resources of Cordon do not now permit it to have prepared certain financial records which it will need to submit to the Securities and Exchange Commission if the present management of Cordon is to be permitted to solicit proxies for the stockholders meeting. Defendants also allege that plaintiffs are engaged in some sort of conspiracy to prevent Cordon from having sufficient assets in order to prepare its financial records. Defendants' application for a further hearing is denied. It is so ordered.

After a review of the materials submitted by defendant, I am convinced that defendant has not made any allegations which, if true, would refute the prima facie case which plaintiffs have made. Nor am I convinced that there are any facts which would justify a substantial delay in the calling of an annual meeting of the stockholders. The annual meeting of stockholders for the purpose of electing directors is one of the few avenues available to a corporate stockholder to enable him to have a say in the destiny of his corporation. An election to select directors should be held annually and if Cordon's finances are such that it is unable to hold an annual meeting, then perhaps it should seek the appointment of a receiver.

A proceeding seeking an order to compel an annual meeting to elect directors where no such meeting has been held for over 13 months is a summary one. It is not the proper forum to litigate charges and counter-charges between conflicting groups of stockholders. Coxial Communications v. CNA Financial Corp., Del. Supr., 367 A.2d 994 (1976); Tweedy, Brown & Knapp v. Cambridge Fund, Inc., Del. Ch., 318 A.2d 635 (1974); Prickett v. American Steel and Pump Corporation, Del. Ch., 251 A.2d 576 (1969), Aff'd., Del. Supr. 1969.

Plaintiffs at trial also requested a further hearing on the question of whether a Master should be appointed to conduct the election. Plaintiffs failed to adduce at the hearing sufficient evidence as would justify the appointment of a Master. That application is therefore denied. It is so ordered.

Because of the unusual facts existing in this matter and because I am not convinced that there is any dire need for an immediate stockholders meeting, I direct that defendants hold a stockholders meeting for the purpose of electing directors not later than December 15, 1981. It is so ordered.

Yours truly,

MAH/sdw

cc: Register in Chancery

Honorable William Marvel
Honorable Grover C. Brown
File

EXHIBIT B

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOSEPH J. LONGOBARDI
VICE-CHANCELLOR

COURT HOUSE
WILMINGTON, DELAWARE 19801

December 6, 1982

William Prickett, Esquire
John H. Small, Esquire
Michael Hanrahan, Esquire
Elizabeth M. McGeever, Esquire
Prickett, Jones, Elliott, Kristol
& Schnee
P. O. Box 1328
Wilmington, Delaware 19899

Edward P. Welch, Esquire
Andrew J. Turezen, Esquire
Skadden, Arps, Slate, Meagher
& Flom
P. O. Box 636
Wilmington, Delaware 19899

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 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

EXHIBIT C

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DATAPOINT CORPORATION, a Delaware Corporation,

Defendant Below - Appellant,

v.

PLAZA SECURITIES COMPANY, ARBITRAGE SECURITIES COMPANY,

Plaintiffs Below - Appellees.

No. 79, 1985

\- - -

RULING OF THE COURT

\- - -

JUSTICE HORSEY: Ladies and gentlemen, the Court appreciates your bearing with us. We know this is an important question heard on expedited appeal, and we have reached a decision.

The Court's ruling on this interlocutory appeal is that the Court will affirm the Chancellor's grant of a preliminary injunction. We find no abuse of discretion by the Chancellor. We find no error of law. We conclude, as he did, that the bylaw is contrary to the statute, 228, and is unreasonable, given the statute's purpose.

In view of the importance that this decision be rendered immediately, the mandate will issue forthwith, and an opinion will follow; not as quickly.

I think that's all that has to be said at this point.

MR. BALOTTI: Thank you very much.

- - -

EXHIBIT D

In view of the foregoing, the case is remanded to the district court. We decide only that Baurer has standing to sue under the Securities Acts and express no view as to whether he is entitled to recover from the Kramers and 475 H Street, Inc., under either or both of those Acts or common law. These determinations must await further proceedings and rulings in the district court defining the relationships among the various parties and the representations made in the course of those relationships.

Remanded.

[¶ 98,366] Holly Sugar Corporation v. Buchsbaum, et al.

United States District Court, District of Colorado. No. 81-C-743. October 28, 1981. Opinion in full text.

Exchange Act—Proxies—Injunctions.—Although shareholders had been enjoined from voting proxies obtained through misleading proxy materials, they could not later be subjected to a broad injunction preventing them from soliciting new proxies when the shareholders had no intention of using the offensive proxies and no new claims had been made against them. The issuer's contention that a resolicitation of truthful proxies could lead to dismissal of its lawsuit against the shareholders was not a "cognizable harm" since management should not spend the company's funds in a litigation unless a majority of shareholders so desire.

See ¶ 24,001, "Exchange Act—Proxies" division, Volume 3.

Exchange Act—Proxies—Injunctions—Elections.—Exchange Act Rule 14a-4(e), which requires a representation in the proxy statement that "shares represented by the proxy will be voted," did not require that proxies enjoined from being voted by a federal court be presented and counted for quorum purposes at an annual meeting.

See ¶ 24,008, "Exchange Act—Proxies" division, Volume 3.

Exchange Act—Injunctions—Reports.—An issuer failed to obtain an injunction against shareholders for alleged false filings under Schedule 13D because the issuer failed to show a substantial probability of success on the merits of its § 13(d) claim. *Inter alia,* the issuer probably had no standing to assert the claim.

See ¶ 23,651, "Exchange Act—Registration; Reports" division, Volume 2.

White & Case, New York, N. Y.; Coghill & Goodspeed, Denver, Colo.; and Holme, Roberts & Owens, Denver, Colo., for plaintiffs.

Skadden, Arps, Slate, Meagher & Flom, Stuart L. Shapiro, New York, N. Y.; Ireland, Stapleton & Pryor, James E. Nesland and John Evans, Denver, Colo.; and Squadron, Ellenoff, Plesent & Lehrer, Neal M. Goldman, New York, N. Y., for defendants.

CARRIGAN, District Judge: THIS MATTER is before the Court on cross motions for preliminary injunctions filed by the defendants, Michael Buchsbaum and Arcanum 1 Partners, and the plaintiff, Holly Sugar Corporation. Defendants seek an injunction ordering Holly to hold a valid shareholders meeting for the purpose of electing directors. Holly seeks to enjoin the defendants from soliciting proxies pending a final disposition of this case after trial on the merits.

On September 22, 1981, extensive legal arguments were heard. Prior to that hearing, a vast array of briefs, affidavits, depositions and other supporting documents had been submitted. Since that argument both sides have submitted extensive additional documents. Unfortunately sufficient time is not available to permit writing the quality of opinion I would like to provide. This memorandum constitutes my findings of fact, conclusions of law and order. Findings here stated are based on non-contested allegations of pleadings, depositions, affidavits or other submitted evidence.

Plaintiff, Holly Sugar Corporation ("Holly"), is a New York corporation with its principal executive offices in Colorado. As of May 11, 1981, Holly had issued an outstanding 1,583,140 shares of common stock. (Second Amended and Supplemental Complaint ¶ 1; Bushnell Aff. ¶ 71).

Defendant Michael Buchsbaum ("Buchsbaum") resides in Mamaroneck, New York. Until December 24, 1980, Buchsbaum was employed at the New York stock brokerage firm of Ladenburg Thalmann & Company, Inc. ("Ladenburg").

Defendant Arcanum 1 Partners ("Arcanum") is a New York limited partnership. Buchsbaum is its general partner. This partnership was formed after Buchsbaum left Ladenburg.

Buchsbaum and Arcanum own over 86,900 shares, representing approximately 5.5 percent of Holly's outstanding common stock. (Bushnell Aff. Exh. F at 8).

The Arcanum Committee (the "Committee") was formed to conduct a proxy contest at Holly's annual meeting scheduled for June 26, 1981. The Committee members include the defendants and Messrs. John Evans, John L. Bushnell, J. E. A. Rich, Richard G. Marcus, Geoffrey P. Pickett, and Leo Seaman, all of whom, along with Buchsbaum, were the Committee nominees for election to the Holly Board of Directors. Evans, Bushnell and Rich are former Holly employees. (Evans Aff. Exhs. X, Z).

Prior to the June annual meeting, Holly commenced this litigation. Holly has twice amended its complaint, and its counsel stated at the September 22, 1981 hearing that it intends to amend its complaint again to add new claims under the Williams Act. Defendants have represented in their brief and at the hearing that, upon receipt of the Third Amended Complaint, they intend to move to dismiss all counts of that complaint.

Prior to its June annual meeting, Holly moved for a preliminary injunction asserting violations by the defendants of sections 14(a) and 13(d) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U. S. C. §§77n(a) and 78m(d), and seeking an order enjoining the defendants from: (a) further solicitation of proxies from Holly shareholders pending trial (b) voting their own Holly shares; (c) exercising proxies solicited by them; and (d) manipulating Holly's stock. No specific relief was sought at that hearing with respect to the defendants' Schedule 13(d) filings.

A hearing, with live testimony, was held on June 23 and 24, by Judge Zita L. Weinshienk of this Court. She granted Holly's request for a preliminary injunction barring use at the June 26, 1981 annual meeting of the proxies solicited prior to that hearing. Her order was based on her narrow finding that Holly had shown that it would probably succeed in proving at a trial on the merits that the defendants' proxy solicitation material was misleading and thus violated section 14(a). She did not, however, find that Holly had shown a probability of success on any of its other claims.

Judge Weinshienk did not have before her the issue of whether the defendants had violated sections 9 and 10 of the 1934 Act by manipulating the market in Holly stock, and she made no finding with respect to that allegation. Sections 14(a) and 13(d), the two provisions invoked in Holly's motion before Judge Weinshienk, are disclosure sections and do not regulate manipulation as that term is used in the 1934 Act.

Thus, the net effect of Judge Weinshienk's preliminary injunction order was to bar the defendants, pending a trial on the merits, from voting proxies they had solicited before June 25, 1981. She denied the other relief requested by Holly.

On June 26, 1981, Holly convened its annual meeting. Despite repeated requests from shareholders, the chairman refused to have the Inspectors of Election determine whether there was a quorum present.

The annual meeting agenda was followed and the chairman took votes on the agenda items including election of directors. The polls were then closed and the chairman adjourned the meeting, stating that it would "be reconvened solely for the purpose of receiving the final report of the inspectors which shall be rendered after the final adjudication of the litigation now pending in the federal court in Denver, but not later than 20 days thereafter."

Proxies or ballots for only about 342,451 of the outstanding 1,583,140 Holly shares were filed with the Inspectors of Election at the annual meeting. (Bloom Depos. 6).

Holly management must have known at the time of the annual meeting, or shortly thereafter, that there was not a quorum present. (Bloom Depos. 8, 27, 28). The proxies had been mailed directly to management. (Bloom Depos. 21-22). Consequently, management had to know that they had far fewer proxies than needed to constitute a quorum. The proxies for the 342,451 shares filed with the Inspectors of Election at the annual meeting represent only about 22 percent of the outstanding shares entitled to vote. New York Law (N. Y. Bus. Corp. Law, Section 608), and Holly's By-Laws, Act. III, Section 4, require that a majority of the outstanding shares entitled to vote be present in order to transact any business except adjournment.

Despite their apparent awareness that the election of directors and other business had been transacted without a quorum present, Holly management has not rescheduled another meeting or election. Moreover, Holly management failed to notify the Holly shareholders of the absence of a quorum. The Inspectors of Election, following the Chairman's statements during the meeting, "left it with Holly management . . . that we would not release any figures until the court action was settled in Denver." (Bloom Depos. 29-30; Bushnell Aff. Exh. B at 78-79). Nothing in Judge Weinshienk's order required or justified these actions by Holly management. The practical effect of the chairman's adjournment *sine die* was to grant Holly the very preliminary injunctive relief that Judge Weinshienk had expressly denied—prohibiting the defendants from soliciting and voting new proxies. (Opinion at 11, 12, 13; Bushnell Aff. Exh. A at 7, 12).

Since the adjournment, Holly has persisted in denying its shareholders a new opportunity to vote on the election of the directors. Bushnell, a Committee member, filed a petition in New York Supreme Court seeking a determination that no quorum was present at the annual meeting and requesting a prompt rescheduling of that meeting. Holly resisted that petition and the New York court stayed that action, finding that the matter ought more appropriately be raised in this Court. (Bushnell Aff. Exh. D).

The day after that decision, on July 28, 1981, the defendants filed a Schedule 13D amendment, received by Holly, indicating an intention to solicit proxies to call a special shareholders meeting to elect directors pursuant to Article III, Section 2 of Holly's By-Laws. (Bushnell Aff. Exh. F at 7). Nothing in Judge Weinshienk's order precluded such a solicitation. She later stated:

> "[T]here is certainly nothing in my injunction or anything in any law that I am aware of which would prevent your resoliciting and properly resoliciting proxies." (Bushnell Aff. Exh. A, at 7).

Following the defendants' filing of the Schedule 13D amendments, on August 12, 1981, Holly's Board of Directors amended Article III, Section 2 of Holly's By-Laws to provide that special meetings "may not be called at the request of any stockholder or by any person acting in concert with or at the behest of such stockholder, who has been enjoined from voting shares at a previous meeting of stockholders and with respect to whom court proceedings regarding the right to vote and/or solicit proxies are still pending." The amendment apparently was intended to prevent the defendants' calling a special meeting of shareholders to elect directors. (Bushnell Aff. ¶ 19-20 and Exhs. G-I).

This By-Law amendment also purports to bar *any* Holly shareholder from calling a special meeting "to vote on any matters voted on at a prior meeting the result of which is or may be dependent upon the outcome of court proceedings." (Bushnell Aff. Exh. G). Thus the amendment attempts to preclude *any* shareholders from calling a special meeting to elect directors because the election of directors was a matter voted on at the June 26 annual meeting.

Defendants assert that through the indefinite adjournment of the meeting, and the By-Law amendment, Holly management has unilaterally changed the status quo existing after Judge Weinshienk entered her preliminary injunction. That injunction was intended only to protect against use of invalid proxy materials to elect directors. The Court there sought only to insure shareholders an opportunity to validly elect directors. Defendants claim that Holly management has now frustrated Judge Weinshienk's intent. (Opinion at 12-13, 17; Bushnell Aff. Exh. A at 7, 13).

Holly conceded at the instant hearing, as well as in its brief and in correspondence, that the meeting adjournment and By-Law amendment were intended to prevent the defendants' seeking election of the Committee's slate of director nominees until after final disposition of this case. (Bushnell Aff. Exhs. G, H; Holly Br. 35).

Absent an election, present Holly management will continue in office, able to utilize the corporation's funds to pursue this litigation and to enjoy advantages of incumbent management to defeat the efforts of the Committee or any other shareholders to change the Board. Thus, the defendants contend, the present management may frustrate corporate democracy by delaying an election indefinitely.

Holly management attempts to excuse or explain its amendment of the By-Laws to delay a new election of directors by arguing that: (1) elections are expensive, and (2) if, after trial, Holly obtains the order it seeks, barring the defendants from soliciting proxies for two years, that election expense can be avoided. Holly further argues that, if such an order were obtained only after the deefndants had already been elected by the shareholders in a new election, the company's management would be disrupted by the necessity of removing the defendants from office. Holly management also argues that, if the defendants are permitted an election now, they may win and dismiss this lawsuit.

I find that the predicted future harm relied upon by Holly is too speculative to entitle Holly to the injunctive relief it here seeks. I further find that it cannot justify the amendment to the company by-laws made to delay an election.

Defendants, on the other hand, claim immediate and actual legal harm to themselves and all other Holly shareholders is resulting from Holly's actions. Defendants, who under general law and Judge Weinshienk's order, are permitted to take their case to the shareholders and to seek their votes in an election, have been denied this important legal right by incumbent Holly management's acts. Thus, the defendants, who own 5.5 percent of the shares, have been frustrated in their attempts to exercise their franchise. (*See* Bushnell Aff. ¶ 11, Evans Aff. Exh. X at 8-9). The incumbent management group, with only nominal holdings of Holly shares, remains in office and apparently intends to prevent any election until after the ultimate determination of this lawsuit. (Evans Aff. Exh. 2 at 3).

Holly shareholders have been denied the annual meeting and election guaranteed them by law. N. Y. Bus. Corp. Law § 602 (b). Each day they are denied that right, they are further injured. Numerous courts have recognized that voting rights are among the most important rights of shareholders. *See e. g., Mills v. Electric Auto-Lite Co.*, 396 U. S. 375, 381 (1970); *J. I. Case Co. v. Borak*, 377 U. S. 426, 431 (1964); *Studebaker Corp. v. Allied Products Corp.*, 256 F. Supp. 173, 189 (W. D. Mich. 1966).

Holly contends that Judge Weinshienk found that the possibility that this lawsuit might be dismissed, if the defendants were voted into control, constituted irreparable injury. Judge Weinshienk, however, made no such finding. She merely found that there would be irreparable injury if a board elected by proxies obtained through false proxy solicitation material were to dismiss the lawsuit. (Opinion at 11). She did not preclude new proxy solicitation, based on truthful information, seeking a new election. In fact, that is what she contemplated.

The imbalance of hardship or irreparable injury in this case is apparent. The Holly shareholders and the defendants are suffering real, direct and immediate harm. On the Holly side of the scale, the asserted harm is speculative. Unless after a trial this Court were to grant Holly an injunction preventing some stockholders from exercising their franchise to solicit other shareholders' proxies, there most likely will be a resolicitation. Waiting until after trial would merely postpone, not eliminate, the expense of a contested election of directors.

Finally, Holly's suggestion that the defendants might win the election and dismiss this lawsuit, while speculative, may prove true. In that case, the deposed management group would have to decide whether they are willing to invest their personal funds, rather than Holly's funds, in litigating this case. That is not harm cognizable under the law. Present Holly management has no vested right of access to the corporate treasury. That decision is for the shareholders, not present management or this Court.

As mentioned above, Holly responded to the defendants' preliminary injunction motion by a cross motion asking this Court to enjoin further proxy solicitations by the defendants until after trial on the merits in this case. Holly asserts that even though the proxy materials found to be misleading by Judge Weinshienk will not be used in the new solicitation, such solicitation should be enjoined until Holly can be given an opportunity to prove, at trial, its other claims, including its claim of stock manipulation by Buchsbaum and its claim that the defendants intend to liquidate the company.

Judge Weinshienk did find that "defendant Buchsbaum's activities, in 1979 at least, were instrumental in creating a substantial rise in the market price of [Holly's] stock." (Opinion at 2). She required that certain disclosures be made in that regard. She made no finding, however, that any of those activities were illegal, or constituted market manipulation or deception. Nor did she find that Holly had standing to raise any claim that such activities were illegal under sections 9 or 10 of the 1934 Act. Moreover she did not find that such activities caused any injury suffered by Holly today, in 1981, except, of course, injuries that can be remedied by truthful proxy statement disclosures. She only found that the defendants' proxy statement "omitted to indicate that defendant Buchbaum took part in activities during 1979 which were instrumental in creating a substantial rise in the market price of [Holly] stock" (Opinion at 4), and further found that such nondisclosure would be material to investors. (Opinion at 8-9).

Judge Weinshienk refused to disturb the ruling of Judge Okin of the New York Supreme Court that Buchsbaum had no intent to liquidate Holly in 1981. (Opinion at 2). No new evidence has been presented to this Court, which was not presented to Judge Weinshienk, on which I can base a finding that Buchsbaum intends, in 1981, to liquidate Holly. He has repeatedly stated, in his Schedule 13D filings, in statements to the press, and in sworn testimony, that he does not now intend a liquidation. (Evans Aff. Exh. W at 5-6, X at 5-6, DD; Buchsbaum April 7, 1981 Depos. 19-30; Pl. Exhs. 47, 48).

Holly has presented no new evidence that any of Buchsbaum's 1979 activities are causually related to any harm to Holly in 1981. Virtually all the market professionals cited by Holly in its brief sold out their positions in the stock before the 1981 annual meeting. The investors Holly points to who still own Holly shares, few of whom are professionals, nearly all bought in 1980 or 1981, well after the alleged market manipulation of November-December 1979. (Lasker Dep. 13-14, 18-19, 32, 51 & Exh. 3; Nye Dep. 8, 43 & Exh. 3; Ruggles Dep. 5, 7-11, 23-25, 30-31, 47, 55-56; Lambert Dep. 6, 10, 22-23; Gruss Dep. 12, 14-15, 17, 19-21, 23-25, 35-37, 45, 47-48 & Exhs. 2, 3; Bodkin Dep. 7, 15-17, 24; Kellner Dep. 6-8, 30-31, 38-40, 45-46, 61-63; Goldner Dep. 6, 22-23, 29-30, 32-33, 35, 42-44, 48-50 & Exh. 2; Goodstein Dep. 14-15 27-28, 41-43, 46-47, 49, 51; R. Berger Dep. 9-10, 22-24, 28, 31-32; S. Berger Dep. 9, 16, 19-26). None has testified that he vested for the Arcanum Committee nominees in hope that Holly would be liquidated if they were elected.

Plaintiff has not demonstrated a probability of success in proving its allegation that the present Holly shareholders bought the stock expecting a liquidation, and are holding the stock in expectation of voting Buchsbaum into control of the company and having him liquidate it. (*See* citations above, and Muldoon Dep. 40-41; Gould Dep. 5-6, 11-14, 22, 46-49, 52; Storch Dep. 52, 55, 57-58; Moore Dep. 12-13, 20-22, 29-31, 37-38).

Judge Weinshienk did not make any finding as to whether any of Buchsbaum's comments in 1979 concerning the value of Holly stock were deceptive, or were not his true opinion. There is testimony in the record, however, that other expert investors believed Holly's liquidation value might be in a range approaching $100. (Jacobs SEC 57; Ruggles Dep. 12, 13).

Holly was fully cognizant in November, 1979 of the salient facts which give rise to its present claim of market manipulation. (Evans Aff. Exh. BB; Bunker Dep. 28-31, 36-39, 48-52 & Exh. E). Buchsbaum has changed his position during the period of Holly's delay. (Evans Aff. Exhs. Y, X at 4).

Amendment No. 5 to Buchsbaum's Schedule 13D, filed on July 28, 1981, and Amendment No. 1 to Arcanum Committee's Schedule 13D, filed on August 5, 1981, describe the preliminary injunction entered by Judge Weinshienk, and a copy of Judge Weinshienk's bench opinion was attached thereto. (Evans Aff. Exhs. W, X).

Defendants have announced their intention—through the statement of counsel in open court—not to use the proxy solicitation materials which Judge Weinshienk found were probably false and misleading and not to vote any proxies obtained from those materials.

Holly has not alleged in its complaint that it was either a purchaser or seller of its stock or that it suffered direct injury from any of the defendants' allegedly unlawful acts.

Holly management is not precluded from communicating to Holly's stockholders its own complaints about Buchsbaum, including its views of his character and past conduct, so long as such statements are not materially false or misleading.

Conclusions of Law

To obtain a preliminary injunction the moving party must demonstrate (1) that it has a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest. *Lundgrin v. Claytor*, 619 F. 2d 61 (10th Cir. 1980); *Valdez v. Applegate*, 616 F. 2d 570 (10th Cir. 1980).

I conclude that the defendants have established these four elements, but that Holly has not.

Defendants have shown a substantial probability that they will prevail in a full trial on the merits. The evidence indicates a likelihood that present management has improperly employed the corporate machinery and by-laws to the advantage of incumbent management and to the disadvantage of the defendants, the Committee, and Holly shareholders. The evidence of the manner in which the June 26 annual meeting was conducted and adjourned, the evidence of failure to advise shareholders that no quorum was present, and the evidence of expedient amendment of by-laws to deny the defendants and all other shareholders the right of calling a special meeting to validly elect directors, all tend to indicate a probability that the defendants ultimately will prevail at trial. *See Lerman v. Diagnostic Data Inc.*, 421 A. 2d 906 (Del. Ch. 1980); *Coalition to Advocate Public Utility Responsibility, Inc. v. Engels*, 364 F. Supp. 1202 (D. Minn. 1973); *Schnell v. Chris-Craft Indus., Inc.*, 285 A. 2d 437 (Del. 1971); *cf. Tanzer Economic Assoc., Inc. Profit Sharing Plan v. Universal Food Specialities, Inc.*, 87 Misc. 2d 167; 176, 383 N. Y. S. 2d 472, 479 (N. Y. Sup. Ct. 1976); *Condec Corp. v. Lukenheimer Co.*, 230 A. 2d 769 (Del. Ch. 1967). Moreover, this same evidence justifies my concluding, and I do conclude, that there is a reasonable probabilty that the defendants will be entitled to the specific relief here sought, an injunction.

I cannot conclude that the present Holly management's actions were motivated or intended solely to avoid corporate expense and disruption. The obvious and intended effect of these actions has been to deprive Holly shareholders of their valid right to vote in an election of directors in 1981, and, further, to preclude the defendants from soliciting shareholder support for their candidates. Such behavior by fiduciaries is *per se* wrongful. *E. g., Schnell v. Chris-Craft supra; Lerman v. Diagnostic Data Inc., supra.*

Holly management has invoked the business judgment rule to defend its actions, claiming that their purpose was not to entrench themselves in office. That rule does not insulate such acts.

Holly management advances two additional arguments in defense of the defendants' motion attacking the adjournment of the annual meeting. First, Holly says that the defendants, by not filing at the annual meeting the proxies which Judge Weinshienk enjoined them from voting, and by not voting their own shares, procurred the absence of a quorum. Holly asserts that under New York law, the defendants are thus barred from attacking actions taken at the meeting. None of the cases cited by Holly, however, supports that proposition.

Nor can I find any indication in Judge Weinshienk's opinion or order that the defendants were required to file these proxies for quorum purposes. Quite the opposite was indicated. Judge Weinshienk stated at page 17 of her decision:

> ". . . if there are let's say, a substantial number of people *who vote for Holly, enough to establish a quorum,* then at least you have an election. If there is not enough, then there is no quorum and it has to be redone anyway." (Emphasis added).

To accept Holly's argument would be to permit incumbent management to be elected by 22 percent of the shares by forcing the remaining shareholders, who wished to vote against management, to have their shares counted for quorum purposes only. Thus the defendants would be forced to procure the election of directors they wanted to vote against. Equity should not countenance such a strained and unjust result. *See e. g., In re P. F. Keogh, Inc.*, 192 App. Div. 624, 183 N. Y. S. 408, 413 (1st Dept. 1920).

I find equally unpersuasive Holly's attempt to utilize Proxy Rule 14a-4(e), 17

C. F. R. Section 240.14a-4(e). That rule at most requires a representation in the proxy statement or form of proxy "that the shares represented by the proxy will be voted." Here Judge Weinshienk's order prevented voting them. Under these circumstances it cannot be said that the rule cited required presenting these non-votable proxies to be counted for quorum purposes.

Finally, Holly has argued that because Judge Weinshienk enjoined the defendants from exercising proxies, the shares represented by the proxies were not "entitled to vote." Judge Weinshienk did not so rule. In fact she invited the shareholders owning those shares to either come to Colorado Springs personally and vote them or submit new proxies. (Opinion at 15). The underlying shares were clearly "entitled to vote." N. Y. Bus. Corp. Law § 608. Holly's claim that the 342,000 shares constituted a quorum cannot be floated on this thin reed.

Holly has not urged, and the Court cannot find, any substantial harm to the public interest if the defendants' motion for preliminary injunction is granted. The only harm suggested by incumbent Holly management is to itself and is speculative. That the shareholders might turn present management out of office is not legally cognizable harm to Holly Sugar Corporation.

I conclude that the harm to Holly shareholders and to the defendants is real, immediate and irreparable. They are being denied their right to vote for directors.

Holly's cross-motion for preliminary injunctive relief is likewise subject to the standards of *Lundgrin v. Claytor, supra.*

Although Holly's motion for a preliminary injunction does not set forth any statute or case law upon which Holly premises its asserted right to the relief sought, I conclude that Holly's motion is premised on its claims that one or more of the defendants violated sections 14(a) and 13(d) of the 1934 Act, 15 U. S. C. §§ 78n(a) and 78m(d). Sections 14(a) and 13(d) require full disclosure and are satisfied if such disclosure is made. Holly's factual presentation has been devoted primarily to its allegations of "manipulation" which, even if shown, would not by itself involve violation of sections 14(a) or 13(d). Holly does not now seek relief based upon the allegations in Count III of its complaint that the defendants have engaged in market manipulation in violation of sections 9 and 10 of the 1934 Act, 15 U. S. C. §§ 78i and j.

For several reasons, I conclude that Holly his not shown a reasonable probability of success on the merits of its section 14(a) claim. First, Holly's section 14(a) claim is moot. There are not before me for decision any claimed violations by the defendants of section 4(a). No proxy materials are extant at this time, and the defendants have represented to this Court that they have no intention of utilizing either the proxy materials found by Judge Weinshienk to be defective or the proxies obtained through them. *Cohen v. Ahers,* 449 F. Supp. 298, 315 (N. D. Ill. 1978), *aff'd,* 596 F. 2d 733 (7th Cir. 1979).

Second, if Holly has a justiciable claim against the defendants under section 14(a), it cannot show a probability that it will ultimately be entitled to the relief sought. No new claims have been presented with respect to the defendants' prior proxy materials, nor has there been any new evidence to warrant this Court reversing Judge Weinshienk's decision not to grant Holly the broad relief it again seeks here. Judge Weinshienk has already enjoined use of the offensive proxy materials and voting of proxies obtained through them. I cannot see how Holly could be entitled to greater relief on its section 14(a) claim. *See General Aircraft Corp. v. Lampert,* 556 F. 2d 90 (1st Cir. 1977); *Cohen v. Ayers,* 449 F. Supp. 298 (N. D. Ill. 1978), *aff'd* 596 F. 2d 733 (7th Cir. 1979); *Dillon v. Berg,* 326 F. Supp. 1214 (D. Del. 1971), *aff'd* 453 F. 2d 876 (3d Cir. 1971). Moreover, it seems unlikely that Holly could prove entitlement to the ultimate relief it seeks on the section 14(a) violations, *i. e.,* an injunction restraining the defendants for *two years* from soliciting proxies or voting their Holly shares. No authority for such relief has been cited.

I further conclude that Holly has not shown a substantial probability of succeeding on the merits of its section 13(d) claim. First, Holly probably has no standing to assert this claim. *American Bakeries v. Pro-Met Trading,* [Current] FED. SEC. L. REP. (CCH) ¶ 97, 925 (N. D. Ill. 1981); *Sta-Rite Industries v. Nortek,* 494 F. Supp. 358 E. D. Wis. 1980); *Gateway Industries v. Agency Rent-A-Car,* 495 F. Supp. 92 (N. D. Ill. 1980).

Second, Holly is probably collateraly estopped from claiming that the defendants' Scheduled 13D filings falsely disclaimed defendant Buchsbaum's intent to liquidate Holly since, as found by Judge Weinshienk, that issue was determined by the Supreme Court of the State of New York when it granted Buchsbaum's petition to inspect Holly's shareholder list in a proceeding contested by Holly. Judge Weinshienk refused to disturb the New York court's finding and Holly has not offered any evidence in addition to that on which she based her decision.

Moreover, I conclude that Holly has failed to demonstrate irreparable injury to it as a result of the defendants' conduct. Holly's claim that an election now will waste time and money is too speculative to satisfy the requirements for preliminary injunctive relief. The alleged harm is made all the more speculative in view of my conclusion that Holly has failed to demonstrate a probability of success on its manipulation and other claims.

The only other harm Holly claims will occur if the relief it seeks is not granted, is that the defendant, following resolicitation with truthful proxy materials, could obtain control of Holly and dismiss this lawsuit. This is not a cognizable harm. Management should neither continue their stewardship of Holly's affairs, nor spend Holly's funds in this litigation unless the majority of shareholders so desire.

By contrast, if Holly's motion is granted, the harm to the defendants and other stockholders will be great. Their right to corporate suffrage and to elect Holly's directors will have been further abrogated. *Studebaker Corp. v. Allied Products Corp.*, 256 F. Supp. 173, 189-90 (W. D. Mich. 1966). Holly's shareholders will have been forced to continue financing, from the corporate treasury, this costly lawsuit without any opportunity to vote on the question whether Holly management should be retained and permitted to continue this litigation.

Defendants will also be irreparably injured by the continued denial of their right to take their case to the Holly shareholders in a proper corporate election.

Finally, I conclude that Holly has failed to show that the injunction it seeks, if issued, would not be adverse to the public interest recognized in section 14(a). That section is intended to promote shareholders' rights to fair and effective corporate suffrage. *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375, 381 (1970). That salutary public policy would be disserved by granting Holly a preliminary injunction.

Order

In accordance with the above findings and conclusions it is:

ORDERED that the defendants' motion for a preliminary injunction is granted pending completion of a trial on the merits of this lawsuit.

It is further ORDERED that Holly Sugar Corporation and the Counterclaim Defendants shall notice a shareholders meeting of the Holly Sugar Corporation to be convened on or before December 10, 1981, for the purpose of electing directors and conducting such other business as may properly be presented at that meeting.

It is further ORDERED that Holly Sugar Corporation and the Counterclaim Defendants are preliminarily enjoined, pending a trial on the merits, from enforcing the amendment of Article III, Section 2 of the Holly Sugar Corporation's By-Laws enacted by the plaintiff's board of directors on or about August 12, 1981, which purports to limit the rights of Holly shareholders to call special meetings of shareholders.

It is further ORDERED that the defendants shall post security in the amount of $10,000 pursuant to Rule 65(c) of the Federal Rules of Civil Procedure.

It is further ORDERED that the plaintiff's cross motion for preliminary injunction is denied.

[¶ 98,367] Furer, et al. v. Paine Webber, Jackson & Curtis, Inc.

United States District Court, Central District of California. No. CV-81-4944. November 24, 1981. Opinion in full text.

Exchange Act—Margin Rules—Private Right of Action.—There is no implied private right of action in favor of a customer against a broker for violations of the margin requirements of Regulation T issued pursuant to Section 7(c) of the Exchange Act. Statutory amendments placing the duty to observe the margin requirements on both the broker and the customer compelled the conclusion that Section 7 is no longer in-

EXHIBIT E

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARTIN MARIETTA CORPORATION, a Maryland corporation, Plaintiff Below, Appellant, v. THE BENDIX CORPORATION, a Delaware corporation, WILLIAM M. AGEE, WILBUR J. COHEN, COY G. EKLUND, JOHN C. FONTAINE, PAUL F. HARTZ, JEWEL S. LAFONTANT, ALONZO L. McDONALD, WILLIAM C. PURPLE, DONALD H. RUMSFELD, JONATHAN L. SCOTT, FREDERICK W. SEARBY, THOMAS P. STAFFORD, and WILLIAM P. TAVOULAREAS, and HUGO E. R. UYTERHOEVEN, Defendants Below, Appellees.	§	No. 298, 1982

Submitted: September 21, 1982
Decided: September 21, 1982

Before McNEILLY, QUILLEN and MOORE, Justices.

O R D E R

This 21st day of September, 1982,

Upon consideration of the record and oral argument before the Court, it appears to the Court that:

1. This is an interlocutory appeal from an order of the Chancellor denying an application for a preliminary injunction. The plaintiff sought either to enjoin a special shareholder meeting called to consider certain anti-takeover

amendments to the certificate of incorporation of The Bendix Corporation, a Delaware corporation, or to enjoin the effectuation of the amendments. Because of time urgencies, we assume, without deciding, that an interlocutory appeal lies under the governing criteria. Supreme Court Rule 42; Gimbel v. The Signal Companies, Inc., Del.Supr., 316 A.2d 619 (1974).

2. In this interlocutory appeal, the scope of review is whether the Chancellor abused his discretion. Gimbel v. The Signal Companies, Inc., Del.Supr., 316 A.2d 619 (1974).

3. By its tender offer, Bendix has become the majority stockholder of Martin Marietta Corporation as of midnight, September 16, 1982. Due to the peculiarities of Maryland law, however, Bendix will not be able to formally effectuate its control of Martin until September 27, 1982 at the earliest.

4. Since Martin may be able to obtain control of Bendix as of midnight, September 22, 1982, the incumbent Martin Board of Directors can, under Delaware law, 8 Del.C. § 228, in its capacity as the majority stockholder of Bendix, effectuate its own control of the Board of Bendix prior to September 27, 1982.

5. If the Martin Board so acts after September 16, 1982 to gain control of the Bendix Board, it will do so in violation of a moral duty to its majority stockholder, Bendix. While this may be an enforceable duty under Maryland law

[illegible] Theatre Circuit, Inc., Md.Ct. of

App., 204 A.2d 795 (1964)], even if it is not, it is a proper consideration as to whether a Delaware equity court will intervene on Martin's behalf. Bodley v. Jones, Del.Supr., 59 A.2d 463 (1947).

7. In seeking preliminary relief below, Martin is in effect asking the Court of Chancery to assist it in a violation of a duty to its own majority stockholder, Bendix. As the Chancellor noted:

> "Not to be overlooked in the overall picture is the fact that Martin Marietta is intending to use Delaware law, § 228, to circumvent the position obtained by Bendix, the result of which, if successful, will serve to perpetuate Martin Marietta's management in office before Bendix can lawfully remove it under Maryland law."

In light of this fact, there was no abuse of discretion in denying the application for preliminary relief. In this regard it is also clear that Martin's position here is not as a representative of Bendix shareholders but that of a personal combatant.

8. The Court expresses no opinion as to: (1) the legality of the proposed anti-takeover amendments; (2) the procedure used by the Bendix Board in recommending the amendmer to the stockholders; and (3) the asserted impropriety as to the solicitation of shares held by the employees' trust. In short we do not sanction any behavior because, given our basis

of decision and the limited record before us, it is neither necessary nor desirable for us to do so.

The interlocutory order of the Court of Chancery denying the motion for a preliminary injunction is

AFFIRMED.

BY THE COURT:

William T. Quillen

Justice

EXHIBIT F

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.

Civil Action No. 7932

DATAPOINT CORPORATION, a Delaware corporation,

Counterclaim-Plaintiff,

v.

PLAZA SECURITIES COMPANY, ARBITRAGE SECURITIES COMPANY and ASHER B. EDELMAN,

Counterclaim-Defendants.

(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 number 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 shareholder 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 Datapoint is thus permitted to rely on its current efficacy in dealing with Datapoint's other shareholders, 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.

EXHIBIT G

THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ROBERT M. SHAY,	)	
Plaintiff,	)	
vs.	)	Civil Action No. 7243
MORLAN INTERNATIONAL, INC., a corporation of the State of Delaware,	)	
Defendant.	)	

Submitted: July 27, 1983
Decided: July 29, 1983

Upon Plaintiff's application for a Stockholders Meeting. Granted.

William Prickett of Prickett, Jones, Elliott, Kristol & Schnee, Wilmington, for Plaintiff.

Martin P. Tully, Thomas Reed Hunt, Jr. and Peter W. Laberee of Morris, Nichols, Arsht & Tunnell, Wilmington, for Defendant.

LONGOBARDI, V.C.

The Plaintiff seeks an order of this Court pursuant to 8 Del.C. §211 compelling the Defendant corporation to schedule and hold an annual meeting for stockholders during the week of August 8, 1983.

The complaint indicates that the Plaintiff is a common stockholder and director of the Defendant corporation and that the Defendant held its last annual meeting on February 24, 1982. The answer admits these allegations but also alleges three affirmative defenses. In these affirmative defenses, the Defendant contends (1) that this action is moot because the Board of Directors has already scheduled an annual meeting for October 31, 1983; (2) that Plaintiff should be "barred from equitable relief" because he, as a director, acquiesced in any delay in setting the time for an annual meeting; and (3) that Plaintiff has unclean hands and should be denied "equitable relief."

Trial on this matter was concluded Thursday, July 21, 1983. The parties requested an opportunity for summation by letter memoranda and the Court agreed to an accelerated schedule by which the last memorandum was to be received by the Court on Wednesday, July 27, 1983.

It appears that Morlan International, Inc. ("Morlan") is a public corporation registered with the Securities and Exchange Commission and has approximately 650 shareholders spread throughout the United States. Morlan is the owner and operator of a number of cemeteries in various states and is required to maintain one or more trust funds for the perpetual care of those cemeteries. Those trust funds were valued as of September 30, 1980, at approximately 13.4 million dollars. Plaintiff, Robert M. Shay ("Shay"), is a stockholder, director and former chief executive officer of Morlan. He and his family own or have voting powers over 30% to 40% of the outstanding shares of Morlan. After his resignation as chief executive officer, the corporation retained special counsel to conduct an investigation of allegations of directorial improprieties that had been leveled against Shay and others. At the April 27, 1983, Board of Directors meeting, the Board, having received special counsel's report and the advice of independent counsel for litigation, authorized the filing of a complaint against Shay in the Federal District Court for the Eastern District of Pennsylvania ("the federal action"). The allegations of that complaint accuse Shay and an associate of serious misconduct but, it is important to note at this stage and for these proceedings that the federal action's allegations are merely accusations against Shay which have not been proven. The important fact for the purposes of this action is that there is a legal dispute between the corporation and Shay and a claim by Shay against the corporation.

At a Board of Directors meeting on March 25, 1983, Shay, together with all other Directors who were then present, voted unanimously against setting a date for an annual meeting. Subsequently, Shay never formally requested the Board to schedule an annual meeting date. Shay did testify, however, he "raised the question with Mr. Demchick, . . . chairman of the executive committee, on a number of occasions and made it very clear that [he] thought the shareholders meeting should be held." (Transcript, p. 41 ["T-41"].) (The quotation leaves something to be desired if it were meant to convey that he demanded an annual meeting.) Finally, Shay filed this suit on July 11, 1983. On July 15, 1983, the Board of Directors convened by telephone and, among other things, scheduled an annual meeting of shareholders for October 31, 1983.

Defendant's first contention is that this action is moot and should, therefore, be dismissed. This contention is without merit. The thrust of the argument is that the Board of Directors has already scheduled a meeting and, therefore, the Plaintiff has gotten all that 8 Del.C. §211 can provide. Defendant suggests that since the Board has fixed a date for the annual meeting, this Court has been ousted of its jurisdiction to fix the time, place and circumstances under which the meeting is to be held. Such a proposition is untenable and is specifically rejected.

The Defendant next contends that the meeting should not be scheduled for the week of August 8, 1983, because of Shay's unclean hands and his inequitable conduct. The unclean hands argument rests on the contention that

Shay, at an earlier date, acquiesced in postponement of the annual meeting by the Board and should not now be allowed to demand a meeting. This argument is rejected. The Court cannot ascertain any prejudice to the corporation by Shay now demanding a meeting under section 211, particularly since control of the time frame and conditions for the meeting lie within the discretion of this Court. See 8 Del.C. §211; Tweedy, Browne & Knapp v. Cambridge Fund, Inc., Del.Ch., 318 A.2d 635 (1974). Furthermore, the proposition that a director may not change his mind about the necessity of an annual meeting and is forever bound by his participation in a delay is without merit. There may be situations when this could occur but that is not this case.

The claim of inequitable conduct is directed at what Morlan supposes is Shay's plan of attack; that is, that Shay will gain control of the corporation if an immediate annual meeting is held quickly because few shareholders will be present by proxy or otherwise to outvote the combined votes he controls. Once in control of the corporation, they fear he will dismiss the federal action. During the trial, Shay would only say that, in this regard, he would be guided by the advice of counsel and his duties as a director. In other words, there is the possibility that this would happen and there is also the possibility it would not happen.

Lurking somewhere in between the unclean hands allegations and the "inequitable conduct" that is anticipated is the more fundamental concern by Morlan that if an annual meeting were scheduled within the next ten days, the shareholders would not be adequately apprised of all the facts necessary to vote in an informed way. Shay contends that the shareholders were informed of the existence of the federal action when the annual report was mailed to them in April, 1983. Morlan contends that the shareholder list has changed since April, 1983, that there has been an amended complaint filed and that other motions have been filed in the federal action, of which the shareholders have no knowledge. In addition, Morlan contends the information mailed with the annual report was exceedingly sparse. Morlan insists that to allow a stockholders meeting to be scheduled during the second week of August, 1983, would amount to an "ambush" tactic (a catch phrase that has gained some popularity of late because it triggers immediate thoughts of unfair conduct.) As will be demonstrated, the Court shares this concern.

Title 8, Section 211 of the Delaware Code provides as follows:

> (c) A failure to hold the annual meeting at the designated time or to elect a sufficient number of directors to conduct the business of the corporation shall not affect otherwise valid corporate acts or work a forfeiture or dissolution of the corporation except as may be otherwise specifically provided in this chapter. If the annual meeting for election of directors is not held on the date designated therefor, the directors shall cause the meeting to be held as soon thereafter as convenient. If there be a failure to hold the annual meeting for a period of 30 days after the date designated therefor, or if no

> date has been designated, for a period of 13 months after the organization of the corporation or after its last annual meeting, the Court of Chancery may summarily order a meeting to be held upon the application of any stockholder or director. The shares of stock represented at such meeting, either in person or by proxy, and entitled to vote thereat, shall constitute a quorum for the purpose of such meeting, notwithstanding any provision of the certificate of incorporation or bylaws to the contrary. The Court of Chancery may issue such orders as may be appropriate, including, without limitation, orders designating the time and place of such meeting, the record date for determination of stockholders entitled to vote, and the form of notice of such meeting.

The idea that the shareholders should be fully informed before they are called upon to vote is not new to this Court. Compare Schnell v. Chris-Craft Industries, Inc., Del.Supr., 285 A.2d 437 (1971); American Pacific Corporation v. Super Foods Services, Inc., Del.Ch., C.A. No. 7020, Longobardi, V.C. (Dec. 6, 1982).[1]

The statute allows the Court a measure of discretion in fixing the time, place and conditions for the annual meeting. Savin Business Mach. Corp. v. Rapifax Corp., Del.Ch., 375 A.2d 469 (1977); Tweedy, Browne & Knapp v. Cambridge Fund, Inc., 318.A.2d 635. Because the Court is concerned with an informed electorate, the Court believes such a consideration is appropriate when exercising its

[1] In American Pacific Corporation v. Super Foods Services, Inc., C.A. No. 7020, the Court stayed a stockholders' meeting because conflicting proxy statements had created such confusion that the stockholders could not have been adequately informed. Their vote under those circumstances would have been meaningless.

discretion in fixing the date and conditions of a shareholders meeting under section 211.

The Court cannot and must not, however, become embroiled in a tug of war between these litigants. The merits of their disputes can best be resolved in the federal forum and by the shareholders at their annual meeting. Having said this, the solution becomes eminently clear. Of course, the details of the parties' disputes should not be made part of this litigation. They are, after all, only allegations. But certainly, the stockholders should have some knowledge of the scope of the dispute so that the casting of their votes does not become a hollow exercise of a treasured right. "The annual meeting of stockholders for the purpose of electing directors is one of the few avenues available to a corporate stockholder to enable him to have a say in the destiny of his corporation." Algeran, Inc. v. Connolly, Del.Ch., C.A. No. 6557 at 2, Hartnett, V.C. (Oct. 5, 1981).[2] It is not the merits of the dispute that become the operative factors in this proceeding but the fact that there is a dispute.

---

[2] In Algeran, Inc. v. Connolly, C.A. No. 6557, the plaintiff requested relief under 8 Del.C. §211. The defendant requested time in which to raise money to prepare financial statements and proxy material for the annual meeting. The defendant contended the plaintiff had conspired to prevent the accumulation of assets for these purposes and hence the reason for the delay in fixing the time for an annual meeting. The court granted the relief requested.

Cf. Bertoglio v. Texas Intern. Co., 488 F.Supp. 630 (D.Del. 1980).[3]

The Court is faced with the counteracting demands of the language of 8 Del.C. §211 which provides for "summary relief" and the case law suggesting that the Court issue "appropriate" orders designed to protect the reasonable expectations of the parties and the corporate electorate. The Court declines to decide the issue in the vacuum of the language found in 8 Del.C. §211 suggesting summary disposition. The totality of circumstances surrounding this particular application must be weighed and balanced. Savin Business Mach. Corp. v. Rapifax Corp., 375 A.2d 469. And in this case, the scale does not tip in favor of having an annual meeting scheduled within two weeks. The customary time for notice of such annual meeting has been at least thirty days. The by-laws allow from ten to fifty days. An experienced director suggests a minimum of forty-five days because of mailing and the problems caused by stock held in "street names." The Court, in this case, accepts the parameters of those limitations as a beginning point. As previously noted, to allow the meeting to be scheduled without allowing time for preparation of proxy materials would,

[3] While the Court is aware that Bertoglio v. Texas Intern. Co., 488 F.Supp. 630, involved questions of federal securities law, the philosophy of an informed corporate electorate is just as appropriate in this case.

in this case, not adequately consider the rights and interests of the shareholders. Witnesses testified to a variety of times needed for Securities and Exchange Commission clearance of proxy materials. It ranged from a low of ten days to forty-five days. Under these circumstances, scheduling the meeting no later than seventy days from the date of this opinion serves the purpose of 8 Del.C. §211 and the needs of the shareholders to be adequately informed of the current affairs of the corporation.[4] It is a time limitation that takes into consideration that the Plaintiff, only three and one-half months prior to filing his complaint, had voted affirmatively not to schedule an annual meeting. In addition, there was no evidence during the course of the trial that indicated the corporation was in any dire straits that would be exacerbated by delaying the annual meeting seventy days. It also provides an opportunity for the Plaintiff, in light of the fact that no meeting will be held immediately, to prepare proxy materials on his own behalf.

Lest this amount of time be construed as extraordinary, the Court has made references to at least two rather current cases in which the Court acknowledged the necessity for scheduling an annual meeting promptly and then allowed

---

[4] It should be noted that the claim for the necessity of delay in order to have proxy materials cleared by the Securities and Exchange Commission may not be successful in all section 211 cases.

between sixty and seventy-one days. Cf. Algeran, Inc. v. Connolly, C.A. No. 6557;[5] J. P. Griffin Holding Corporation v. Mediatrics, Inc., Del.Ch., C.A. No. 4065, Marvel, V.C. (Jan. 30, 1973).[6]

The Defendants will be required to forthwith prepare and promptly file with the Securities and Exchange Commission whatever proxy material that can be readily prepared. Jurisdiction by the Court is retained so that the time for the meeting may be modified if circumstances suggest that modification is warranted due to, among other things, clearance being obtained from the Securities and Exchange Commission before the expiration of forty-five days. Defendants should note that the possibility of modification is not an invitation to delay.

At the meeting, the quorum requirement in Article II, Section 8 of the corporation by-laws shall be applicable. The record date for determining shareholders entitled to notice and to vote at said meeting shall be at the close of business on September 15, 1983, and the notice for the meeting shall issue no later than September 16, 1983.

IT IS SO ORDERED.

---

[5] See footnote 2, page 7 for factual background on this unreported decision.

[6] The defense in this 8 Del.C. §211 case was that the defendant needed time to raise cash to pay auditors and attorneys to prepare financial statements and other proxy materials. The sale of an asset was imminent and the defendant wanted the court to wait for the consummation of that sale. The action was filed in November, 1972, and a decision granting the relief requested was rendered in January, 1973.

EXHIBIT H

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

TELVEST, INC., a Delaware corporation,

Plaintiff,

v.

RICHARD H. OLSON, CANTON O'DONNELL, JR., ASKEL NEILSEN, RICHARD W. WRIGHT, JOHN E. ORICK, C.M. BISHOP, JR., GEORGE W. FENIMORE, CHARLES C. GATES and MAURICE B. MITHCELL,

Defendants.

and

OUTDOOR SPORTS INDUSTRIES, INC., a Delaware corporation,

Defendant, Counterclaimant and Third-Party Plaintiff,

v.

TELCO MARKETING SERVICES, INC., a Delaware corporation and LIBCO CORPORATION, a Delaware corporation,

Third-Party Defendants.

Civil Action No. 5798

(MEMORANDUM OPINION)

Submitted: March 5, 1979
Decided: March 8, 1979

Edward B. Maxwell, II, Esquire, Jack B. Jacobs, Esquire, and David C. McBride, Esquire, of Young, Conaway, Stargatt & Taylor, Wilmington, for Plaintiff

Steven J. Rothschild, Esquire, David B. Ripsom, Esquire, and Edward P. Welch, Esquire, of Prickett, Ward, Burt & Sanders, Wilmington, for Defendants

BROWN, Vice Chancellor

At the present stage of this proceeding the plaintiff, Telvest, Inc. ("Telvest") seeks a preliminary injunction against the defendant, Outdoor Sports Industries, Inc. ("OSI") and its board of directors. Telvest is currently the owner of 20 per cent of the outstanding common stock of OSI. It has acquired its 20 per cent holdings through the gradual market purchases of OSI stock commencing during 1978. OSI has concluded that Telvest is acquiring stock with a view toward bringing about a merger, liquidation or sale of assets of OSI.

Telvest is said to be the instrument of one Clyde Engle and others who are referred to by OSI as "the Engle group." OSI has evaluated other recent corporate acquisitions by the Engle group, and it does not like that which it sees. OSI has concluded that in the other transactions the Engle group has gradually got itself into a position through market purchases wherein it was able to take control of the target corporations, with the accompanying result being that the acquired companies were looted and the public stockholders eliminated on less than favorable terms. In OSI's view (disputed by Telvest), the Engle group, through Telvest, is in the process of now attempting a similar quiet raid on OSI.

OSI has been engaging in certain defensive tactics to counteract this supposed take-over attempt by Telvest since the fall of 1978. It has initiated federal litigation in Chicago in an effort to divest Telvest of its OSI holdings and also to prevent Telvest from voting its OSI stock in the interim. To date, it has been unsuccessful in this attempt, although the federal litigation is ongoing.

In January OSI gave indication that it would call a February meeting of stockholders to consider proposed amendments to OSI's certificate of incorporation. These amendments were designed to create supermajority voting requirements for the approval of mergers, a liquidation, a sale of assets and the like. Under OSI's present certificate of incorporation, and in conformity with the various minimum requirements of the applicable Delaware statutes, these transactions are subject to approval by a simple majority vote of all outstanding voting shares.

Telvest then sought a list of stockholders from OSI with regard to the proposed February meeting of stockholders. Whether for this reason or for others, OSI thereafter elected to forego the stockholders meeting. At the same time, its board of directors proceeded to meet and to adopt a resolution which created a series of stock, designated as preferred stock, which carried with it, in certain situations, the right to vote on mergers, consolidations, sales of assets, etc. The voting rights created by this so-called preferred stock provide for a supermajority vote of 80 per cent in order to approve any business combination or transaction with any party who, at the time, is the owner of 20 per cent or more of the outstanding voting stock of OSI.

Telvest views this as action directed solely at Telvest since it is the only owner of 20 per cent of OSI's stock. OSI does not dispute this, but rather defends this action as being necessary to insure the survival of the corporation and to protect its shareholders other than Telvest from the "scorched earth" policy which OSI feels the Engle group has exhibited in its recent acquisition victories.

Telvest has filed this action, both individually and derivatively, to enjoin the distribution of the preferred stock. It contends that the action by OSI's board of directors is self-serving and improperly motivated, and that in addition the attempt to impose supermajority voting requirements through the issuance of preferred stock by means of a resolution of the board of directors is in violation of the Delaware Corporation Law, and therefore illegal. Telvest contends that if the preferred stock is permitted to be distributed, and thus turned loose in the market place, it will constitute irreparable injury to OSI. In order to understand the problem, it is first necessary to briefly consider the action taken by OSI's board and the obviously-intended ramifications thereof.

By its resolution, the board of directors, acting "pursuant to the authority of the Restated Amended Certificate of Incorporation" has purported to create a series of 145,000 shares of "Series Preferred Stock" at a par value of $1.00 per share. The issuance of such shares has been declared as a stock dividend to be delivered to those persons who were the holders of record of the common stock of OSI as of February 15, 1979 "at a rate of one share of First Series Preferred for each ten shares of Common Stock held of record by such date (with each such holder to receive the next highest whole number of shares)." The resolution further calls for a transfer from surplus to the capital account of the corporation of an amount equal to the aggregate par value of the First Series Preferred declared as the dividend.

The preferences attributed to the First Series Preferred by the director's resolution may be summarized as follows. (1) Prior to declaring any dividends on the common stock, the board of directors must first declare a dividend on the First Series Preferred "which on a per share basis is the same on that to be declared on the Common Stock." (2) No dividends on the common stock can be paid until their identical dividend has either been paid, or provision for payment has been made, with regard to the First Series Preferred. (3) In the event of a liquidation, dissolution or winding up of the corporation, the holders of the First Series Preferred must receive payment for their shares prior to payment to the holders of the common stock, although the amount to be received for the First Series Preferred in such event will be "an amount equal to the amount of (remaining) net assets multiplied by a fraction the numerator of which is one and the denominator of which is the sum of the number of outstanding shares of Common Stock <u>and</u> First Series Preferred." Beyond this, the First Series Preferred has no other dividend rights, no rights of redemption and no rights of conversion.

The other purported preferences stem from the following voting rights. It is these supermajority voting rights that form the basis for this suit. The resolution provides that although they shall be entitled to no vote on any other matter, the holders of the First Series Preferred shall be entitled to vote as a class on, among other things, any merger or consolidation of the corporation with or into a "Related Person;" upon any sale, lease, exchange, transfer or other disposition of all or substantially all assets either to or from a "Related Person;" upon the issuance of any securities of the corporation, or any subsidiary, to a "Related Person;" and upon the acquisition by the corporation, or any subsidiary, of securities from a "Related Person."

The term "Related Person" is defined as any individual, corporation, partnership or other entity, and each member of any "person" as the term is defined in Section 13-(d)(3) of the Securities Exchange Act of 1934 which, together with affiliates and associates "is the Beneficial Owner of in the aggregate <u>20% or more</u> of the outstanding shares of voting stock of the corporation."

Furthermore, in any such proposed transaction involving a Related Person wherein the holders of the First Series Preferred become entitled to vote as a class, it is provided that "the affirmative vote of the holders of <u>not less than 80%</u> of the outstanding First Series Preferred ... which shall include the affirmative vote of <u>at least 50%</u> of the outstanding shares of First Series Preferred held by stockholders other than a Related Person" shall be required for the approval or authorization of any business combination previously set forth herein in which the Related Person is involved.

Finally, the resolution provides nonetheless that the aforesaid voting requirements for 80 per cent approval by the holders of the First Series Preferred shall not be applicable if the board of directors of the corporation, by two-thirds vote, has (1) "given prior approval to the acquisition by the Related Person involved ... of the shares which increase his ownership to more than 20% of the outstanding shares of the voting stock" or has (2) "approved the Business Combination prior to the Related Person involved in the Business Combination having become a Related Person." Additionally, approval by the vote of the First Series Preferred holders is not necessary (i.e., they have no vote) if the Related Person "acquired pursuant to a tender offer for all the Corporation's outstanding Voting Stock at least 75% of the shares of Voting Stock held by persons other than such Related Person."

While the foregoing compilations by no means lists all the events which would either trigger the required vote of the holders of this First Series Preferred or abrogate their right to vote on a transaction involving a Related Person, it is sufficient for the purpose of this decision to highlight the area of dispute. Reduced to simpler terms, what has the action of the board of directors purported to accomplish through the authorization and arguable issuance of the First Series Preferred stock?

As I see it, through the declaration of a purported stock dividend, OSI's board has attempted to convert the voting rights of those same stockholders who would have had the power to approve or disapprove certain business combinations by majority vote——i.e., the holders of the common stock——into the power, in certain situations, to permit less than a majority of the present common stockholders to vote down a merger, sale of assets, etc. when it is being proposed by the owner of 20 per cent or more of the outstanding common stock. The board, by resolution, has attempted to set up a check valve in a situation wherein, without the prior blessing of the board, and without having first acquired 75 per cent or more of all outstanding common shares not owned by such person or corporation through a tender offer for all such other shares, a person or corporation has nonetheless acquired 20 per cent or more of OSI's outstanding common stock through other means. In such a situation, wherein the holder of 20 per cent or more of the common stock seeks to bring about some transaction or combination with OSI which the board opposes on behalf of the corporation, the board seeks to confine stockholder approval of the transaction to a majority of the voting stockholders other than the stockholder owing 20 per cent or more of the common stock and, in addition, to require that the total vote of the remaining stockholders, when coupled with the vote of the 20 per cent or more stockholder, amount to at least 80 per cent of all outstanding shares having the right to vote on the matter. I say that, in effect, this brings about an alteration of the voting powers of the common stock because the First Series Preferred, being issued in piggy-back fashion as a common stock dividend at a one for ten ratio to the common, reflects a proportionate voting power almost identical to that previously held by the owners of the common stock. The difference is that the voting power of a 20 per cent or more stockholder who is opposed by OSI's board will not be as strong as it would have been prior to the proportionate issuance of the First Series Preferred as a stock dividend, while the voting powers of the remaining stockholders will become stronger, at least insofar as merger, consolidation, etc. are concerned.

OSI suggests that this procedure assures the shareholders other than a 20 per cent or more shareholder of the independent ability to determine whether a proposed combination with the 20 per cent shareholder, which is opposed by OSI's board, is in their best interests as shareholders. However, the interests of the shareholders is not so easily divided into two groups. This is true because the same supermajority requirements which will prevent a 20 per cent or more shareholder from benefiting from a simple majority vote will also prevent other shareholders, who might also favor the proposed merger or other transaction, from benefiting from the former requirement of only a majority vote.

Thus, I think it clear that the action taken by the board in creating the First Series Preferred and declaring it as a common stock dividend will, if permitted to stand, alter the previously existing voting rights granted to OSI's common shareholders by OSI's certificate of incorporation. Telvest concedes that under the Delaware Corporation Law the voting rights of the common stock can be altered in this fashion by means of an amendment to the certificate of incorporation. The question here is whether this same change can be accomplished by resolution of the board of directors in the absence of shareholder approval.

OSI justifies its action in issuing the Series Preferred Stock in the following manner. At Paragraph 4F of OSI's certificate of incorporation it is provided as follows:

> "[T]he Board of Directors of the corporation is hereby expressly granted authority to fix, by resolution duly adopted prior to the issuance of any shares of a particular series of preferred stock so designated by the Board of Directors, the voting powers of such stock of such series, if any, and the designations, preferences and relative, participating, optional and other special rights ... ." (Emphasis added.)

This said to mirror the authority extended by 8 Del.C. § 151(a) which, among other things, permits a corporation to issue one or more series of stock which "may have such voting powers, full or limited ... and such designations, preferences and relative, participating, optional and other special rights ... as shall be stated and expressed in the certificate of incorporation or of any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to authority expressly vested in it by the provisions of its certificate of incorporation."

Thereafter § 151(g) provides that if a corporation desires to issue any shares of any series of stock, the voting powers and preferences of which have not been set forth in the certificate of incorporation but which shall have been established in a resolution adopted by the board of directors pursuant to authority expressly given by the certificate of incorporation, a certificate setting forth such resolution can be executed, acknowledged, filed, recorded and shall become effective pursuant to 8 Del.C. § 103.

Turning next to 8 Del.C. § 104, that section defines the term "certificate of incorporation," as used in Title 8, unless the context requires otherwise, as including:

> "... not only the original certificate of incorporation filed to create a corporation but also all other certificates ... or other instruments, howsoever designated, which are filed pursuant to ... [§]151 ... of this title, and which have the effect of amending or supplementing in some respect a corporation's original certificate of incorporation."

Finally, OSI points to 8 Del.C. § 245 which authorizes a corporation to integrate into a restated certificate of incorporation of the company, "all provisions of its certificate of incorporation which are then in effect and operative as a result of there having been theretofore filed with the Secretary of State 1 or more certificates or instruments pursuant to any of the sections referred to in § 104 of this title."

In summary, OSI is arguing that § 151(a) authorizes a board of directors, by resolution, to issue preferred stock and to set voting rights and preferences thereon as it sees fit as long as the certificate of incorporation permits the board to do so by resolution; that the certificate of incorporation of OSI permits its board to do so; that pursuant to § 151(g) this resolution can be certified and filed; that when so filed it falls within the definition of "certificate of incorporation" in § 104; and that as a consequence, by acquiring a restated certificate of incorporation under § 245, the resolution becomes a part of OSI's certificate of incorporation.

I am not persuaded by this reasoning at this point. In the first place, OSI's certificate of incorporation allows its directors, by resolution, to fix voting rights and preferences as to preferred stock only. There is some question as to whether the First Series Preferred is really preferred stock. It is entitled to a dividend only when the common stock is entitled to a dividend. The amount of its dividend must be the same as the common stock dividend. On dissolution, it receives only that amount received by the common stock. The only difference is that in either event the First Series Preferred is entitled to be paid this identical sum first. As to the dividend aspect, a corporation cannot validly declare a dividend without setting aside sufficient funds to pay all dividends so declared. <u>Wilmington Trust Co. v. Wilmington Trust Co.</u>, Del.Ch., 15 A.2d 665 (1940). As to dissolution rights, the funds to pay the First Series Preferred will have to be available by virtue of the fact that the amount per share is determined by dividing remaining net assets by the total number of First Series Preferred plus common shares. Thus any supposed preference as to dividends or liquidation rights seems illusory at best. If any preference is created, it would seem to lie almost entirely in the voting rights. In this regard, Starring v. American Hair & Felt Co., Del.Ch., 191 A.887 (1937) casts some doubt on the proposition that a stock can be classified as "special" or "preferred" under § 151 solely because it is given a favored voting position.

In the second place, OSI offers no authority in support of its unique interpretation of the foregoing statutes. Reduced to the simplest of terms, OSI is saying that where the certificate of incorporation gives the board of directors the same general powers given by § 151, then §151 is transformed into the statutory means whereby the board of directors can amend the certificate of incorporation by resolution so as to require a greater than majority vote by the shareholders to approve a merger. This logic, while not being persuasive on its face, is further weakened by the language of § 104 which includes within the definition of "certificate of incorporation" a certified copy of a resolution filed pursuant to § 151 provided it "have the effect of amending or supplementing in some respect a corporation's original certificate of incorporation."

Thus OSI is arguing that the directors resolution here amends and becomes part of the certificate of incorporation by virtue of § 104 when, in reality, § 104 holds that a certificate filed pursuant to § 151 is considered as part of the certificate of incorporation only if it amends or supplements the original certificate. This, to me, constitutes a gap in OSI's reasoning.

On the present record I am convinced that Telvest has demonstrated a likelihood that it will prevail on the merits on this point. It seems more logical to conclude that where the holders of the common stock are given the right to approve certain transactions by only the majority vote required by the various applicable statutes, that right cannot be changed short of an amendment to the certificate of incorporation approved by the stockholders pursuant to 8 Del.C. § 242. I am aware of no policy evident in the Delaware Corporation Law, and I have been referred to none, which would empower a board of directors to alter existing voting rights of shareholders for the supposed good of the shareholders without permitting the shareholders to be heard on the matter.

In addition, Telvest argues that the issuance of the Series Preferred Stock as a common stock dividend is illegal because it will not be distributed on a pro rata basis. This stems from the fact that those who hold shares other than in multiples of ten will receive the

First Series Preferred on the basis of "the next highest whole number of shares." Generally, a dividend must always be pro rata, equal, and without discrimination or preference. 11 Fletcher, Cyclopedia Corporations § 5352. OSI does not dispute the fact that some uneveness will result in the distribution of the stock dividend here. The explanations offered for this, i.e., that it is a matter for the business judgment of the board and that any increase in voting rights is slight, or de minimus, are also not persuasive at this point.

Finally, to the extent that OSI relies on the decisions in Kors v. Carey, Del.Ch. 158 A.2d 136 (1960); Cheff v. Mathes, Del.Supr., 199 A.2d 548 (1964); and Kaplan v. Goldsamt, Del.Ch., 380 A.2d 556 (1977), I agree with Telvest that such reliance is misplaced. Those cases dealt with the alleged waste of corporate funds used in purchasing the stock of a dissident faction so as to avoid what justifiably appeared to be a threat to the well-being of the corporation. Those cases do not purport to authorize management, without putting the matter to the shareholders, to superimpose new strictures on existing shareholder voting power on the theory that such action is needed to curtail a threat to corporate existence presented by a large concentration of stock in one shareholder.

If anything, and even assuming arguendo that it is legally proper for OSI's board to have taken the action challenged here, it would seem that such action would fall within the type of conduct deplored in Schnell v. Chris-Craft Industries, Inc., Del.Supr., 258 A.2d 437 (1971); Condec Corporation v. Lunkenheimer Company, Del.Ch., 230 A.2d 769 (1967); and Canada Southern Oils v. Manabi Exploration Co., Inc., Del.Ch., 96 A.2d 810 (1953). At least it would so appear on the present record.

Thus, I conclude that a preliminary injunction should issue enjoining the distribution of the Series Preferred Stock pending further order of the Court. The suggestion in West v. Sirian Lamp Co., Del.Ch., 42 A.2d 883 (1945) that all holders of illegally distributed stock would be necessary parties to an action to cancel it, when coupled with the recent decision of Shaffer v. Heitner, 433 U.S. 86(1977), convinces me that the immediate distribution proposed by OSI's board constitutes a real threat of irreparable injury to OSI. The suggestion that any harm could be avoided by printing a legend on the share certificates, stating that the legality of the First Series Preferred is currently in litigation and that the stock might later be held invalid, is a solution to which this Court should certainly give no sanction. I would hope that the reason is obvious.

The preliminary injunction will issue. Counsel for Telvest is directed to present a form of order. If counsel desire to be heard on the amount of the bond, they should so advise.