

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MESA PETROLEUM CO., a §
Delaware corporation, §
MESA ASSET CO., a §
Delaware corporation, §
MESA EASTERN, INC., a §
Delaware corporation, §
and MESA PARTNERS II, §
a Texas partnership, §

Plaintiffs, §

v. §

Civil Action No. 7997

UNOCAL CORPORATION, a §
Delaware corporation, §
WILLIAM F. BALLHAUS, §
CLAUDE S. BRINEGAR, RAY A. §
BURKE, ROBERT D. CAMPBELL, §
WILLIAM H. DOHENY, RICHARD §
K. EAMER, FRED L. HARTLEY, §
T.C. HENDERSON, DONALD P. §
JACOBS, WILLIAM S. McCONNOR, §
PETER O'MALLEY, RICHARD J. §
STEGMEIER and DONN B. TATUM, §

Defendants. §

CONFIDENTIAL
FILED UNDER SEAL

DEFENDANTS' ANSWERING BRIEF IN OPPOSITION
TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	iv
NATURE AND STAGE OF THE PROCEEDINGS	1
STATEMENT OF FACTS	3
A. The Parties.	3
B. Mesa's Acquisition of Unocal Stock.	4
C. Mesa's History Of Obtaining Selective Treatment Of Its Shares.	5
D. Mesa Launches A \$54 Two-Tier Tender Offer.	10
E. Unocal's Board Meets On April 13 And, After Determining That The Mesa Offer Is Grossly Inadequate, It Considers Defensive Actions.	15
F. The Board Meets Again On April 15 And Authorizes The Exchange Offer.	18
G. The Board Meets Again On April 22 And Determines To Waive, In Part, The Mesa Purchase Condition.	19
H. The Board Exercised Due Care in Its Deliberations.	21
I. The Outside Directors' Financial Interest In Excluding Mesa From the Exchange Offer.	23
J. Mesa's Response to the Partial Waiver of the Mesa Purchase Condition of Unocal's Exchange Offer.	24
ARGUMENT	26
I. UNOCAL'S SELECTIVE EXCHANGE OFFER IS A VALID DEFENSIVE TAKEOVER TECHNIQUE.	26
A. Does The Directors' Duty Of Care To The Corporation Extend To Protecting The Corporate Enterprise In Good Faith From Perceived Depredations Of Others, Including Persons Who May Own Stock In The Company?	26

TABLE OF CONTENTS (Continued)

	<u>Page</u>
B. Have One Or More Of The Plaintiffs, Their Affiliates, Or Persons Acting In Concert With Them, Either In Dealing With Unocal Or Others, Demonstrated A Pattern Of Conduct Sufficient To Justify A Reasonable Inference By Defendants That A Principal Objective Of The Plaintiffs Is To Achieve Selective Treatment For Themselves By The Repurchase Of Their Unocal Shares At A Substantial Price?	32
C. May The Directors Of Unocal In The Proper Exercise Of Business Judgment Employ The Exchange Offer To Protect The Corporation And Its Shareholders From Such Tactics?	34
D. If It Is Determined That The Purpose Of The Exchange Offer Was Not Illegal As A Matter Of Law, Have The Directors Of Unocal Carried Their Burden Of Showing That They Acted In Good Faith?	39
E. The Board Exercised Its Best Business Judgment In Valuing The Unocal Stock. That Value Is Within The Range Determined By Plaintiffs And Their Expert.	52
II. UNOCAL'S DIRECTORS EXERCISED DUE CARE IN DECIDING TO COMMENCE THE EXCHANGE OFFER.	58
A. Mesa Seriously Misstates The Record Concerning The Board's Deliberations.	58
B. The Board Acted Only After Soliciting And Receiving Adequate Information.	62
C. The Board Took Adequate Time To Consider And Reflect Upon The Information It Received.	68

TABLE OF CONTENTS (Continued)

	<u>Page</u>
III. UNOCAL'S DIRECTORS HAVE NOT BREACHED THEIR DUTY OF CARE AND HAVE NOT IMPROPERLY DELEGATED BOARD POWERS.	72
IV. UNOCAL'S EFFORTS TO DEFEAT A GROSSLY INADEQUATE OFFER DO NOT GIVE RISE TO A CLAIM FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE.	75
V. UNOCAL HAS NO OBLIGATION TO MESA BECAUSE OF THE BARE POSSIBILITY THAT MESA MIGHT BECOME THE MAJORITY SHAREHOLDER.	77
VI. PLAINTIFFS' CLAIMS OF CONVERSION OF PARTNERSHIP PROPERTY AND OF ITS RIGHTS AS A UNOCAL STOCKHOLDER ARE WITHOUT MERIT.	81
VII. THE EXCHANGE OFFER DOES NOT IMPERMISSIBLY INTERFERE WITH MESA'S PROXY SOLICITATION AND MESA HAS FAILED TO DEMONSTRATE A PROBABILITY OF SUCCESS ON THE CLAIM.	83
VIII. UNOCAL'S DIRECTORS HAVE NOT BREACHED THEIR DUTY OF COMPLETE CANDOR AND HAVE PROPERLY DISCLOSED ALL MATERIAL FACTS CONCERNING THE ORIGINAL OFFER TO PURCHASE.	85
IX. PLAINTIFFS HAVE FAILED TO SHOW THAT THEY WILL SUFFER ANY IRREPARABLE HARM IF THEY ARE EXCLUDED FROM THE EXCHANGE OFFER.	89
A. Mesa Will Suffer No Irreparable Harm Because It Will Continue Its Tender Offer for Unocal Irrespective Of Whether The Exchange Offer Excludes It.	91
B. Mesa's Exclusion From The Exchange Offer Cannot Constitute Irreparable Harm Since It Can Obtain Damages To Remedy Any Alleged Harm.	93
CONCLUSION	95

NATURE AND STAGE OF THE PROCEEDINGS

This action was commenced on April 12, 1985. On April 22, 1985 plaintiffs amended their complaint and sought preliminary relief challenging an exchange offer (the "Exchange Offer") whereby Unocal offered to exchange up to 87,200,000 of its shares for \$72 principal amount of debt securities. The Exchange Offer was conditioned on Mesa purchasing at least 64,000,000 shares in its tender offer. On April 23, 1985 Unocal announced that it was waiving this condition with respect to 50,000,000 shares and would purchase such shares regardless of whether Mesa purchased shares in its tender offer.

On April 23, 1985 Mesa moved for a temporary restraining order enjoining Unocal from making the Exchange Offer or soliciting tenders or buying shares pursuant to that offer. This motion was granted, and Unocal's application for an interlocutory appeal was denied as premature in view of this preliminary injunctive hearing scheduled to be held before this Court on May 8, 1985. This is the answering brief of the defendants in opposition to plaintiffs' motion for a preliminary injunction.

Accompanying this brief are the affidavits of each of the directors of Unocal, J. Douglas Griggs, Kenneth J. Nachbar, and the Second Affidavit of Peter Griggs Sachs. Affidavits are referred to herein in the form "Smith Aff.

" ____." The affidavits of Unocal's directors are referred to collectively as the "Director Affidavits." Deposition Testimony, relevant pages of which will be supplied to the Court, is cited in the form "Smith, Apr. 30, 63." Because many witnesses were deposed more than once, the name of the deponent, date of his testimony and page references are provided.

STATEMENT OF FACTSA. The Parties.

Plaintiffs (collectively, "Mesa") are controlled by T. Boone Pickens, Jr., a renowned corporate takeover artist. Pickens is President and Chairman of the Board of Directors of plaintiff Mesa Petroleum Co. and President of Mesa Asset Co. Mesa Asset Co. is the managing partner of plaintiff Mesa Partners II, a Texas general partnership. Plaintiff Mesa Eastern, Inc. is a wholly-owned subsidiary of Mesa Partners II.

Defendant Unocal Corporation ("Unocal") is a Delaware corporation engaged principally in petroleum, chemical, geothermal and metal operations. (Tassin Aff. Ex. N at 7). Unocal has approximately 174,000,000 shares of common stock outstanding, which are traded on the New York and other stock exchanges and are held by over 70,000 record stockholders. (Id. at 6-8). The individual defendants are 13 of the 14 members of Unocal's Board of Directors. (Complaint ¶ 7). Plaintiffs do not challenge the independence of the majority of the members of Unocal's Board, except by alleging that they receive customary directors' fees. (Complaint ¶¶ 7-9). The independent members of Unocal's Board, all of whom are highly successful businessmen and professionals, include:

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

tor of Northrop Corp. and Republic Automotive Parts, Inc.

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

-- William H. Doheny, a private investor

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

-- Donald P. Jacobs, Dean of the J. L. Kellogg Graduate School of Management of Northwestern University and a director of Commonwealth Edison, First Chicago Corp., First National Bank of Chicago, Galaxy Carpet Mills, Inc., Hartmarx Corp., Swift Independent Corp., and Universal Development Corp.

-- Peter O'Malley, President of the Los Angeles Dodgers and a director of Bank America Corp.

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

-- Lewis B. Harder, Chairman of the Board and Chief Executive Officer of International Mining Corp., Vice Chairman of Pacific Holding Corp. and a director of Bancroft Convertible Fund, Inc., Brascan Limited, Dunaher Corp., Flexi-Van Corp., Madison Fund, Inc., The Marmon Group, Inc., and Pittsburgh & West Virginia Railroad.

B. Mesa's Acquisition of Unocal Stock.

Mesa secretly began purchasing Unocal stock in October of 1984. On February 14, 1985, Mesa revealed that it had secretly acquired a total of 12,649,600 shares, or 7.3% of the outstanding shares of Unocal and stated that it had acquired the shares "solely for the purpose of invest-

ment." (Tassin Aff. Ex. A). This statement has subsequently been found to be false and misleading. By February 22, Mesa had acquired 9.7 percent of Unocal's shares. (Tassin Aff. Ex. B-C).

C. Mesa's History Of Obtaining Selective Treatment Of Its Shares.

Mesa is hardly new to the takeover game. As practiced by Mesa, that game usually results in the purchase of Mesa's stock interest by the target corporation on terms different than, or to the complete exclusion of, the target's public stockholders. In the past three years, Mesa has collected \$900 million from such selective payments reaping profits of over \$200 million.*

Mesa began its now-familiar pattern in June of 1982 when, as the owner of 4.1 million shares, of the stock of Cities Service Company, a corporation 20 times its size, it commenced a tender offer for that company. Two weeks later, it sold its shares back to Cities Service at \$55 per share, reaping a profit of approximately \$40 million. (Nachbar Aff. Ex. 18). Other stockholders were relegated to a proposed tender offer by Gulf Oil Company which was abandoned, after which the price of Cities Service stock plunged

* At his deposition, Pickens could not recall all of the details of many greenmail activities, and referred to the public record. (Pickens, May 3, 1960). That is discussed herein.

to \$30 per share. (Pickens, May 3, 157-59; Nachbar Aff. Ex. 19).

Several months later, Mesa commenced a tender offer for control of General American Oil Co. Only weeks after that, it sold its 1.9 million shares back to the company at a profit of approximately \$45 million, plus "expenses" of \$15 million (or almost \$8 per share). (Nachbar Aff. Ex. 14, 20, 21). Mesa agreed not to buy General American securities for five years. (Nachbar Aff. Ex. 22).

Mesa struck again in May 1983, when it acquired approximately 3% of the stock of Superior Oil Company and proposed a spinoff of certain of Superior's assets. In September 1983, it again sold its stock back to the company, this time for \$167 million, representing a premium over the market price. (Pickens, May 3, 176-77; Nachbar Aff. Ex. 23-26). Mesa reaped a profit of approximately \$32 million and agreed not to acquire shares of Superior for seven years (Nachbar Aff. Ex. 23, 25). Superior's public stockholders did not receive any of these payments. (Pickens, May 3, 176-77).

This familiar pattern was repeated again late last year when Mesa acquired approximately 13% of the outstanding stock of Phillips Petroleum Co., and announced that it would tender for an additional 8%. In December, Mesa sold its shares back to Phillips in a transaction which guaranteed Mesa at least \$53 in cash for its shares, representing a profit of approximately \$89 million plus \$25 million for

"expenses." (Pickens, May 3, 171; Nachbar Aff. Ex. 15, 27). In return for this payment Mesa agreed not to attempt to acquire control of Phillips for 15 years (Nachbar Aff. Ex. 9, 15). At the same time, the company proposed a recapitalization, later voted down by its stockholders, in which stockholders other than Pickens would get a package of cash and debt securities. At his deposition, Mr. Pickens read into the record sworn testimony by Phillips' Chairman to the effect that Mr. Pickens insisted that he get paid in cash, even though all other Phillips shareholders were to receive securities. (Pickens, May 3, 142).

So adept is Mesa at gaining the repurchase of its shares that it has now institutionalized the process. In November 1984, Mr. Pickens was given an \$18.6 million deferred bonus as part of a new program to compensate employees who contribute to the success of Mesa's "acquisition efforts." The deferred compensation is then "deemed" invested in Mesa's subsequent acquisition efforts. Pickens earns money under the plan whether or not the "acquisition effort" succeeds or ends in greenmail. Thus, he has already "earned" an additional award in connection with the Phillips tender offer, and his bonus monies are currently deemed invested in Unocal. (Stillwell, Apr. 30, 268-73; Tassin Aff. Ex. N at 12-14). In addition, Mesa's financing arrangements in connection with the Unocal raid all have provisions which permit his investors and lenders to share in any greenmail profits obtained (Nachbar Aff. Ex. 2), a fact

which in and of itself indicates that one of Mesa's goals is selective treatment.

Pickens' repeated pattern of acquiring stock in oil companies and causing management to repurchase it from him at a premium has led to widespread notoriety. In the past year, myriad articles identifying Pickens as a "green-mailer" have appeared in Barrons, The New York Times, Business Week, Forbes, Time, Newsweek, The Economist, The Financial Times, and The Christian Science Monitor. (Nachbar Aff. Ex. 7, 11, 12, 14-16, 28-30, 33). Indeed, Pickens was the subject of a Time magazine cover story in March, which stated that he had been widely identified as a greenmail artist. (Nachbar Aff. Ex. 4). Business Week and Forbes also had cover stories in March about Pickens and similar raiders. (Nachbar Aff. Ex. 5, 6). Pickens has also appeared frequently on television and news broadcasts, and was recently identified in the New York Times as "the man most often called a greenmailer by angry businessmen." (Nachbar Aff. Ex. 32).

Although Pickens now decries "greenmail" (Pickens, May 3, 138, PB 8-9, 62-63), this is a new-found religion. In 1983, in another proxy contest, Pickens declared, "I just work for one crowd; that's the Mesa stockholders." (Compl. Ex. A). More recently, Pickens stated, "I have no problem with greenmail artists myself. They don't bother me at all." (Nachbar Aff. Ex. 17). Pickens has lobbied strenuously against federal legislation to tax greenmail profits,

calling it "pointlessly punitive." (Nachbar Aff. Ex. 31). Moreover, whether labeled "greenmail" or not, Pickens certainly has repeatedly obtained selective treatment of his shares.

On the basis of Pickens' record, this Court and at least one other have preliminarily found that Mr. Pickens was seeking selective treatment for his stock or was otherwise proposing actions inimical to the interests of his fellow stockholders. Just two weeks ago, Judge Tashima found in Unocal Corporation v. T. Boone Pickens, Jr., et al., No. CV 85-2179-AWT (C.D. Cal., Apr. 26, 1985), slip op. at 13, that Mesa hoped to obtain a selective repurchase of its shares as a result of the very tender offer in issue in this case (emphasis added):

In summary, the Court finds with respect to Mesa II's intent that Mesa II from the outset intended to put Unocal "in play" and thereby either obtain control or "greenmail" the corporation in exchange for dropping its bid.

Similarly, Vice Chancellor Walsh found in Edelman v. Phillips Petroleum Co., Del. Ch., C.A. No. 7899, Walsh, V.C. (Feb. 12, 1985), that Phillips' management and directors were clearly justified in their belief "that Mesa, whose principal, T. Boone Pickens, possessed impressive credentials as a corporate acquiror, did not have the best interest of Phillips and all its shareholders in mind" in proposing a two-tier takeover of Phillips. (Id., slip op. at 12). Given Pickens' history as a raider, Vice Chancellor

Walsh found that "the conduct of Phillips' management and directors during the period when it resisted the Mesa takeover effort is clearly the most defensible aspect of its reaction." (Id. at 11).

Unocal's Board was well aware of Mesa's reputation for seeking selective treatment for itself, and was specifically advised of that reputation by its investment banker. (Sachs, May 3, 137-39). Unocal's directors have testified about this belief (e.g., Harder, Apr. 30, 46; Director Affidavits), and a magazine article quoting Mr. Hartley as saying that he would not pay greenmail to Pickens was discussed at Unocal's April 1, 1985 Board meeting. (Eamer, Apr. 11, 97; Nachbar Aff. Ex. 34). In addition, Mr. Hartley testified before the Congress immediately prior to the announcement of Mesa's tender offer concerning greenmail, and recommended that special taxes be imposed on such payments. (Nachbar Aff. Ex. 31).

D. Mesa Launches A \$54 Two-Tier Tender Offer.

On March 27, 1985, Mesa announced that it had increased its holdings of Unocal stock to 23,700,000 shares, or 13.6%, and that it no longer held such shares for investment, but instead "may seek to obtain control of [Unocal] or to participate in the formulation, determination or direc-

tion of the basic business decisions of [Unocal]." Mesa also announced its intention to propose and to solicit proxies in favor of an adjournment of Unocal's 1985 Annual Meeting scheduled to be held on April 29, 1985. (Tassin Aff. Ex. D). Less than two weeks later, Mesa commenced a hostile two-tier tender offer for control of Unocal (the "Mesa Offer").

The Mesa Offer is for 64,000,000, or approximately 37%, of Unocal's outstanding shares, at \$54 per share in cash, to be followed by a "back-end" merger in which Unocal's remaining public shareholders would be squeezed out in exchange for unspecified securities purportedly worth \$54 per share. The Mesa Offer is financed primarily through the sale of debt securities commonly known as "junk bonds." Mesa's Offer to Purchase attempted to conceal that the securities to be received by Unocal shareholders in the back-end merger would be subordinated to \$2.4 billion of Mesa acquisition debt, and was found to be false and misleading. Unocal Corp. v. T. Boone Pickens, Jr., et al., No. CV85-2179-AWT (C.D. Cal., Apr. 26, 1985). Mesa has now issued a supplement disclosing that those securities will be highly subordinated and that the capitalization of the corporation surviving the merger would differ significantly from that of Unocal at present. (Williams Aff. Ex. I). The

Mesa Offer is also conditioned upon Mesa obtaining sufficient financing for the offer.*

Although Mesa sought to buy all of Unocal for only \$54 per share, Mesa, its investment advisor, and several independent analysts described by Mesa as "widely accepted", value Unocal stock at substantially higher prices. Mesa itself prepared a lengthy written analysis of the net asset value of Unocal (the "Mesa Analysis"). (Nachbar Aff. Ex. 1). The Mesa Analysis was prepared over the course of several months, revised at least twice, represented Mesa's "best judgment" concerning Unocal, and was intended for presentation to other corporate raiders such as Irwin Jacobs, Carl Lindner, and the so-called "Gulf Investors Group" (Mr. Pickens' partners in his tender offer for Gulf Oil) in the hope that they would join Mesa in acquiring Unocal. (Tassin 266-69, 335-36; Craig 22-27).

The Mesa Analysis opines that Unocal's net asset value is between \$49 and \$79 per share. As a hypothetical "assumed" number, the Mesa Analysis selects the arithmetic midpoint between those values, \$64 per share. (Nachbar Aff. Ex. 1 at 34). The only other valuation opinions contained in the Mesa analysis are those of John S. Herold, Inc. (\$74

* On May 2, 1985 Mesa announced that while it had obtained commitments for the required financing, it had not yet entered into definitive agreements relating to all such financing and that its offer remained conditioned on obtaining the required financing. (Williams Aff. Ex. I).

per share) and Donaldson, Lufkin & Jenrette (\$86 per share).
(Id.).

The Mesa Analysis was the only document concerning the value of Unocal provided to the Mesa directors before they voted to authorize the \$54 tender offer. (Batchelder, May 2, 262). The Mesa Board neither solicited nor received any independent opinion of the value of Unocal (Stillwell, Apr. 30, 158-59; Batchelder, May 2, 261), but did receive the views of Mesa's management as to the per share value of Unocal. As Mr. Stillwell, a director of Mesa, testified:

Q. Was a presentation given to the [Mesa] board, either by management or by an outside party, concerning the value of Unocal stock?

A. I believe that the -- that management presented -- made an oral presentation. I don't think there was a written presentation.

Q. Who made that presentation for management?

A. I believe Mr. Pickens and Mr. Batchelder.

Q. What did Mr. Pickens say?

A. It's my best recollection that either he or Mr. Batchelder, either Mr. Pickens or Mr. Batchelder stated that, based on their analysis, that Unocal was worth somewhere around \$64 a share. It was also pointed out that the John S. Herold service valued Unocal at, oh, I believe 73 or 74.

(Stillwell, Apr. 30, 145-46).

At the same time Mesa was announcing its \$54 tender offer, its investment advisor, Drexel Burnham, was

preparing as part of its normal business, to distribute to its customers, a report valuing Unocal at \$58 per share, and stating that Unocal's value would be 20%-25% higher (or \$69.44-\$72.34) upon liquidation. (Nachbar Aff. Ex. 3). That independent valuation of Unocal by Drexel was suppressed and never publicly distributed because Drexel was retained by Mesa. Now that Drexel is on the Mesa team, it is attempting to impeach its prior independent analysis, claiming that "such values are not truly representative of what Unocal could reasonably expect to realize." (Sorte Aff. ¶ 23, p. 13). Under these circumstances Drexel's unreleased valuation, prepared to be widely distributed to clients, is far more credible than Drexel's eleventh hour retraction prepared solely for this litigation. In addition, the day before Mr. Sorte signed his affidavit, he testified under oath that he had not even been asked to perform an evaluation of Unocal. (Sorte, May 2, 77-81). Neither Sorte nor his litigation valuation is credible and his affidavit should be disregarded.*

In light of all of the foregoing, plaintiffs cannot challenge the reasonableness of the conclusion reached by the Unocal board that Mesa's \$54 offer was inadequate. Indeed, in all of plaintiffs' 124 page brief, no such assertion is made.

* Unocal is moving to strike the Sorte Affidavit.

E. Unocal's Board Meets On April 13
And, After Determining That The
Mesa Offer Is Grossly Inadequate,
It Considers Defensive Actions.

On April 13, Unocal's Board of Directors met to consider the Company's financial condition and prospects, the terms of the Mesa Offer, and the financial effects of the Mesa Offer and the second-step transaction. (Eamer Aff. Ex. A at 1; Doheny, Apr. 11, 166, 167). All the directors were present except Donn Tatum, who was in Japan on business. (Id.).

This meeting lasted for nine and one-half hours, including informal discussions during a luncheon recess. (Doheny, Apr. 11, 167). During the meeting, the directors received detailed presentations from Delaware counsel concerning their obligations under Delaware law and California counsel concerning their obligations under the federal securities laws. (Eamer Aff. Ex. A at 2-3; Brinegar, Apr. 19, 119-122). The Board then received a lengthy and detailed presentation from Peter Sachs, a managing partner of Goldman, Sachs & Co., on behalf of Goldman, Sachs and Dillon Read & Co., Unocal's two independent financial advisors. (Eamer Aff. Ex. A at 3-9; O'Malley, Apr. 18, 90-95; Sachs Aff. ¶¶ 16-34).

Mr. Sachs described the valuation methodology used by Goldman, Sachs and Dillon Read and the assumptions underlying their opinions as to the fairness of the Mesa Offer.

Mr. Sachs expressed the opinion of both companies that the Mesa Offer was grossly inadequate and that the minimum cash value for 100% of Unocal's stock was in excess of \$60 per share. (Campbell, Apr. 30, 48, 50; Eamer, May 1, 78; Sachs Aff. ¶ 22). Mr. Sachs emphasized that this figure was not an estimate of value, but the minimum amount that could be expected from a sale or orderly liquidation. (Eamer Aff. Ex. A at 6; Sachs Aff. ¶ 22).

The Board discussed extensively the protection of Unocal's investor shareholders in light of the Mesa Offer. Mr. Sachs presented various alternative strategies available to protect Unocal's investor shareholders should the Board conclude that the two-step Mesa Offer was inadequate, one of which was a self-tender by Unocal. (Eamer Aff. Ex. A at 8; Sachs Aff. ¶¶ 24-25).

There was also a presentation concerning the price at which any such self-tender might be made. Goldman Sachs and Dillon Read advised the Board that the value of Unocal in an orderly liquidation would be \$70 to \$75 per share (Sachs Aff. ¶ 34; Campbell, Apr. 30, 48-50; O'Malley, Apr. 18, 99), and a variety of numbers within that range were discussed by the Board (Eamer, May 1, 94; Harder, Apr. 30, 89; Campbell, Apr. 30, 56-58). The investment bankers advised that a self-tender for 87,200,000 shares at this price would result in \$6.1 -6.5 million of additional debt. (Sachs Aff. ¶ 31).

Mr. Blamey then made an extensive presentation about the Company's ability to service the additional debt, including an explanation of slides he had prepared setting forth pro forma financial effects of a proposed issuance of \$7 billion of debt. (Sachs Aff. ¶ 33; Eamer, May 1, 86). These slides included pro formas based upon the price of oil increasing with inflation, decreasing by \$2 per barrel, and decreasing by \$4 per barrel. (Harder, Apr. 30, 56). Mr. Blamey concluded that Unocal could service such debt, and indeed could afford to pay up to \$80 per share for 49% of its stock (Sachs Aff. ¶ 33), although there would necessarily be a reduction of the company's capital budget. The directors inquired about this and satisfied themselves that the primary effect would be a reduction of exploratory drilling, and that the company would remain a viable entity. (Brinegar, Apr. 19, 169-72; Harder, Apr. 30, 55, 58).

Unocal's outside directors then met separately, with counsel and the investment bankers present. (Doheny, Apr. 11, 172; Jacobs, Apr. 17, 65-70). After further discussion and questioning of the investment bankers (Doheny, Apr. 11, 175), they agreed unanimously to advise the Board that it should reject the Mesa Offer as grossly inadequate. (Jacobs, Apr. 11, 68-70). The outside directors unanimously agreed to recommend to the Board that Unocal pursue a self-tender in order to give stockholders a fairly priced alternative to the Mesa Offer and, perhaps, defeat Mesa's inadequate offer. (Eamer Aff. Ex. A at 15).

The entire Board reconvened, received the advice of the outside directors, and unanimously adopted a resolution rejecting the Mesa Offer as grossly inadequate and recommending that stockholders reject it. (Id.). The sense of the Board was that Unocal should prepare a self-tender offer, but it was decided that this should be specifically considered at a future meeting, thereby affording the Board more time to consider this option. (Sachs Aff. ¶ 34).

F. The Board Meets Again On April 15
And Authorizes The Exchange Offer.

On April 15, the Board met again, with only Mr. Tatum absent. Sam Snyder, Assistant General Counsel of Unocal, and Philip Blamey, Vice President-Finance, made a detailed presentation to the Board of the proposed terms of a self-tender offer by Unocal. The Board considered prices between \$70 and \$80 per share, and, after extensive discussion, focused on a figure of \$72 per share. (Eamer Aff. Ex. A at 18). Mr. Sachs and Franklin Hobbs of Dillon, Read then advised the Board that such a price was within the range of values presented by them to the Board at the April 13 meeting and represented an appropriate value for Unocal stock. (Sachs Aff. ¶ 35; Hobbs Aff. ¶ 14).

The Board also discussed with its legal and financial advisors the terms of the debt securities to be issued (Jacobs, Apr. 17, 76-77), and determined that they should be adequately secured with a lien on Unocal's assets so that

the face value of the debt securities would be maintained. (Harder, Apr. 30, 76, 103, 119; Eamer, May 1, 24; Harder Aff. ¶ 7; Second Sachs Aff. ¶ 2). The Board discussed the restrictive covenants and asked questions about them (Harder, Apr. 30, 118; Eamer, May 1, 33), and ultimately concluded that they were necessary to protect the stockholders who would receive the securities (Harder, Apr. 30, 78). The Board relied on its investment bankers to establish appropriate terms for the securities to be issued in the Exchange Offer so that they would trade at \$72, but the value of the securities was discussed (Jacobs, Apr. 17, 76-77), and several Board members commented that the terms were reasonable from their knowledge and experience. (Hartley, Apr. 27, 130). The Board then unanimously adopted a resolution authorizing the self-tender Exchange Offer. (Eamer Aff. Ex. A at 18-22).

Pursuant to the Exchange Offer, if Mesa acquired 64,000,000 shares of Unocal stock through the Mesa Offer (the "Mesa purchase condition"), Unocal would purchase its remaining outstanding shares by exchanging, for each share, a package of senior secured notes in the aggregate principal amount of \$72.

G. The Board Meets Again On April 22
And Determines To Waive, In Part,
The Mesa Purchase Condition.

On April 22, the Board of Directors again met to review and discuss the status of the Mesa Offer and the

Exchange Offer. (Eamer Aff. Ex. B at 1). Again, all Board members were present except Mr. Tatum. (Id.). It was suggested that the Board waive the Mesa purchase condition as to 50,000,000 shares. Goldman, Sachs and Dillon, Read both strongly recommended this partial waiver to overcome a perceived concern on the part of stockholders that, if shares were tendered to Unocal, no shares might be purchased by either offeror. Sachs Aff. ¶ 41; Hobbs Aff. ¶ 15; Eamer Aff. ¶ 22. Counsel advised the Board that the exclusion of Mesa from the offer would be upheld under Delaware law only if it was done for what the directors reasonably believed to be a valid purpose. (Harder, Apr. 30, 87).

There followed a lengthy discussion, during which the directors focused again upon the purpose for excluding Mesa from the offer. (Eamer Aff. Ex. B at 2). It was pointed out that, if the Mesa exclusion were omitted, Unocal's objective of providing a \$72 alternative for all of its shareholders to the \$54 in subordinated securities offered by Mesa in its back-end merger would be thwarted. (Id.; Eamer Aff. ¶ 23; Sachs Aff. 44).^{*} Further, if Mesa were permitted to tender to Unocal, Mesa, would, in effect, be able to finance its inadequate \$54 tender offer with the proceeds from Unocal's \$72 offer. (Eamer Aff. ¶ 23; Sachs Aff. ¶ 44). It was concluded that the Mesa exclusion must remain. (Eamer Aff. Ex. B at 3).

* The financial effects of permitting Mesa to participate on the Exchange Offer are set forth in the Affidavit of J. Douglas Pitts filed herewith.

Exchange Offer. (Eamer Aff. Ex. B at 1). Again, all Board members were present except Mr. Tatum. (Id.). It was suggested that the Board waive the Mesa purchase condition as to 50,000,000 shares. Goldman, Sachs and Dillon, Read both strongly recommended this partial waiver to overcome a perceived concern on the part of stockholders that, if shares were tendered to Unocal, no shares might be purchased by either offeror. Sachs Aff. ¶ 41; Hobbs Aff. ¶ 15; Eamer Aff. ¶ 22. Counsel advised the Board that the exclusion of Mesa from the offer would be upheld under Delaware law only if it was done for what the directors reasonably believed to be a valid purpose. (Harder, Apr. 30, 87).

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* The financial effects of permitting Mesa to participate on the Exchange Offer are set forth in the Affidavit of J. Douglas Pitts filed herewith.

After further presentations by the investment bankers and a Unocal financial officer, and discussion of waiving the Mesa purchase condition with respect to various numbers of shares (Hartley, Apr. 27, 125), the Board adopted a resolution that Unocal waive the Mesa purchase condition with respect to 50,000,000 shares. (Eamer Aff. Ex. B at 3). This waiver was announced on April 23, and a written supplement to the Exchange Offer was filed with the Securities and Exchange Commission on April 24, 1985. (Second Coats Aff. Ex. D).

H. The Board Exercised Due Care in Its Deliberations.

Plaintiffs go to great pains to identify instances in which individual directors at their depositions did not recall specific discussions held at the Board meetings on April 13, 15 and 22, and misleadingly attempt through the highly selective citation of snippets of deposition testimony to create the impression that the Board acted hastily, without due consideration, and in an uninformed manner. Moreover, plaintiffs have deliberately ignored for strategic reasons the seven depositions of the individual defendants which Mesa took in the week following the April 13 Board meeting. Instead, they rely on depositions taken taken after the fact in which the same directors no longer recalled specific details of the Board meetings, and unfairly

imply that the Board merely rubber-stamped the Exchange Offer.

Any fair reading of the record contradicts plaintiffs' contentions. Despite plaintiffs' distortions, the undisputed fact remains that, in a situation in which Mesa's decision to launch a surprise tender on the fastest timetable permitted caused the Board to have to respond almost immediately (Eamer, May 1, 48), the Board met and conferred for over 12 hours, received extensive advice from independent lawyers, two independent investment bankers, and its in-house financial staff.

While plaintiffs try to create the impression that no meaningful discussions took place and no questions were ever asked, the testimony is squarely to the contrary: The investment bankers answered questions and made clarifications throughout the meeting (O'Malley, Apr. 18, 106-107), and there was particularly careful discussion and questioning concerning the \$70 to \$75 price (Campbell, Apr. 12, 57), and whether the company's assets could be sold for \$70 to \$80 per share. (Harder, Apr. 30, 89). The Board also discussed the Company's ability to service the debt to be incurred in the Exchange Offer (Hartley, Apr. 27, 87) and whether, if Mesa made its offer, there would be enough value left in the company to complete the Exchange Offer. (Eamer, Apr. 11, 81). There was also discussion concerning the securities to be offered in the Exchange Offer (Jacobs, Apr. 17, 76-77) and the fact that their issuance might cause

Unocal's bond rating to drop. (Hartley, Apr. 27, 94). Finally, there was specific discussion and questioning concerning the restrictive covenants in the indentures. (Campbell, Apr. 30, 89-90; Harder, Apr. 30, 77, 118).

As this record and the affidavits of Unocal's directors filed herewith make clear, there was extensive questioning and discussion at all of the Board meetings concerning the Exchange Offer.

I. The Outside Directors' Financial Interest In Excluding Mesa From the Exchange Offer

Plaintiffs' brief makes shrill allegations that Unocal's directors will "reap enormous financial rewards" if Mesa is excluded from the Exchange Offer (PB 38), that they could receive \$70,000,000 (PB 66), and that this profit from excluding Mesa may be \$2,236,194.

Of course, none of the directors will profit at all from Mesa's exclusion from the Exchange Offer unless the \$72 price is excessive. Plaintiffs fail utterly to make any such showing. Indeed, they do not even mention their own valuation of Unocal, which encompasses prices as high as \$79 per share.* See Argument I.E., infra. However, even if one were to assume -- contrary to fact -- that \$72 per share were excessive, and instead were to adopt Mesa's own valuation of \$64 per share (Nachbar Aff. Ex. 1 at 34), Unocal's

* Mr. Pickens testified on May 3 that the \$72 Exchange Offer is a "reasonable offer." (Pickens, May 3, 21).

outside directors other than Mr. Doheny would receive the following financial benefits from Mesa's exclusion from the Exchange Offer:

Name	Shares Owned	Shares Purchased Because of		Total "Benefit"***
		Mesa's Exclusion*		
Eamer	2,000	120		\$ 960
Ballhaus	2,000	120		\$ 960
O'Malley	5,500	330		\$2,640
Campbell	5,000	300		\$2,400
Harder	836	50		\$ 400
Jacobs	700	42		\$ 336
Tatum	2,000	120		\$ 960

Such amounts hardly qualify as "enormous financial rewards" and in fact are far less than the amount of customary directors' fees, the receipt of which does not constitute a disqualifying self-interest. E.g., Warshaw v. Calhoun, Del. Supr., 221 A.2d 487, 493 (1966).

J. Mesa's Response to the Partial
Waiver of the Mesa Purchase Condi-
tion of Unocal's Exchange Offer.

Mesa's immediate response to the partial waiver of the Mesa Purchase Condition was to sue to prevent Unocal

* Based on Exhibit A to the Affidavit of J. Douglas Pitts showing that, if 85% of the shares held by persons other than Mesa are tendered, Mesa's exclusion will decrease the proration factor from 39.2% to 33%, resulting in the purchase of an additional 6% of the shares tendered.

** The benefit here is the difference between the allegedly "excessive" price of \$72 and Mesa's \$64 price. These amounts should not be confused with the benefit to stockholders from protection against Mesa's inadequate junk bond back-end merger, where the benchmark is the difference in value between \$72 and the highly subordinated junk bonds to be issued by Mesa.

from proceeding with the Exchange Offer unless Mesa were permitted to participate. Significantly, however, Mesa has not challenged the Exchange Offer or Unocal's bona fides in making it. To the contrary, Pickens has praised the Exchange Offer as "the first time the Company has done anything for shareholders." (Second Coats Aff. Ex. 4). Pickens has admitted that he doesn't object to the \$72 offer (Pickens, May 3, 20), and that he considers the \$72 Exchange Offer, but for Mesa's exclusion, to be a "reasonable offer" (Pickens, May 3, 21). Accordingly, Pickens has told Unocal's stockholders to "Go ahead and tender your shares." (Id. at 21).

Mesa has also stated that it is firmly committed to their objectives of acquiring the Company and intend to pursue that objective whether or not the Company purchases Shares pursuant to the Company Offer. (Williams Aff. Ex. I). Similarly, David Batchelder, Chief Financial Officer of Mesa, made clear at his deposition that Mesa intends to proceed with its offer even if Unocal is permitted to proceed with the Exchange Offer and to exclude Mesa. (Batchelder, May 2, 394).

I. UNOCAL'S SELECTIVE EXCHANGE OFFER IS A
VALID DEFENSIVE TAKEOVER TECHNIQUE.

The Supreme Court, in its May 2, 1985 Order,
stated:

6) It is a well established principle of Delaware law that in the acquisition of its own stock a corporation may deal selectively with its shareholders provided the directors have not acted solely or primarily out of a desire to perpetuate themselves in office. Cheff v. Mathes, Del. Supr., 199 A.2d 548, 554 (1964); Bennett v. Propp, Del. Supr., 187 A.2d 405, 408 (1962); Martin v. American Potash & Chemical Corporation, Del. Supr., 92 A.2d 295, 302 (1952); Kaplan v. Goldsamt, Del. Ch., 380 A.2d 556, 568-569 (1977); Kors v. Carey, Del. Ch., 158 A.2d 136, 140-141 (1960). This right derives from the general powers conferred upon a Delaware corporation under 8 Del. C. § 160 to deal in its own stock.

In so doing, the Supreme Court by necessary implication rejected any reading of Fisher v. Moltz, Del. Ch., C.A. No. 6068, Hartnett, V.C. (Dec. 28, 1979), reargument denied, Del. Ch., C.A. No. 6068, Hartnett, V.C. (Feb. 21, 1980), which would establish a per se rule in the takeover context against selective stock repurchases which exclude the raider.*

* Fisher v. Moltz did not arise in the context of a management response to a hostile takeover attempt. Moreover, it was a case in which the Court found that there was no corporate purpose for a selective stock repurchase. As defendants' counsel stated at oral argument, and as the Supreme Court's Order suggests, Fisher "is just not this case at all." (4/26/85 Transcript, p. 47). Under these circumstances, the comments of the Vice Chancellor in Fisher with respect to

Characterizing the question of the validity of Unocal's selective exchange offer as a defensive technique as a "question of law of first instance in this State," the Supreme Court then directed that the parties address three particular questions to aid this Court in determining whether or not the purpose of the Exchange Offer was illegal as a matter of law:

a) Does the directors' duty of care to the corporation extend to protecting the corporate enterprise in good faith from perceived depredations of others, including persons who may own stock in the company?

b) Have one or more of the plaintiffs, their affiliates, or persons acting in concert with them, either in dealing with Unocal or others, demonstrated a pattern of conduct sufficient to justify a reasonable inference by defendants that a principal objective of the plaintiffs is to achieve selective treatment for themselves by the repurchase of their Unocal shares at a substantial premium?

c) If so, may the directors of Unocal in the proper exercise of business judgment employ the exchange offer to protect the corporation and its shareholders from such tactics?

Finally, the Supreme Court directed that, if it is determined that the purpose of Unocal's Exchange Offer was not

(Footnote continued from previous page)

fairness and to "unduly favoring one group over another" are dicta. Moreover, such concepts do not apply once a stockholder has taken a position adverse to the interests of the corporation and its stockholders. See, e.g., Kors v. Carey, Del. Ch., 158 A.2d 136, 141 (1960).

illegal as a matter of law, this Court should have the opportunity on the record to consider whether "the directors of Unocal carried their burden of showing that they acted in good faith."

Consistent with the Supreme Court's views as to those issues which this Court should have an opportunity to consider, we will respond in this argument to the specific questions posed in the Supreme Court's Order.

A. Does The Directors' Duty Of Care To The Corporation Extend To Protecting The Corporate Enterprise In Good Faith From Perceived Depredations Of Others, Including Persons Who May Own Stock In The Company?

As plaintiffs correctly "assume" (PB 61), the answer to this question is "yes." In a long series of cases the courts of this State have made it absolutely clear that directors have both the right and the duty to act to protect the corporation and its stockholders against persons, including those who own stock in the corporation, who seek to take action which is reasonably perceived by the directors to be contrary to the interests of the corporation and its stockholders.

In Martin v. American Potash And Chemical Corp., Del. Supr., 92 A.2d 295, 302 (1952), the Supreme Court refused to enjoin a selective purchase of stock designed "to eliminate a substantial number of shares held by a stockholder at odds with management policy," concluding that such

a purchase "was not, as a matter of law, illegal because of its purpose".

Citing Martin v. American Potash and Chemical Corp. and Hall v. Trans-Lux Daylight Picture Screen Corp., Del. Ch., 171 A. 226 (1934), this Court, in Kors v. Carey, Del. Ch., 158 A.2d 136 (1960), held that it was a proper corporate purpose for directors to expend corporate funds to purchase stock from a 16% stockholder who was seeking control of the corporation, id. at 139, and whose continuance as a stockholder "posed a serious threat to the welfare of the . . . corporation and its stockholders." Id. at 140. In so holding this Court recognized an exception to the precept relied upon by plaintiffs that directors owe a duty of fairness to all stockholders, stating that "directors, while bound to deal with stockholders as a class with scrupulous honesty, may in the exercise of their honest business judgment adopt a valid method of eliminating what appears to them a clear threat to the future of their business by any lawful means." Id. at 41 (emphasis added). Of course, as the Supreme Court has made abundantly clear in its May 2 Order, a selective purchase of stock is lawful, so long as it is not done solely or primarily out of a desire of management to perpetuate itself in office.

Again, in Cheff v. Mathes, Del. Supr., 199 A.2d 548 (1964), the Supreme Court, citing both Hall v. Trans-Lux Daylight Picture Screen Corp. and Kors v. Carey, held that

it was a proper corporate purpose for directors to expend corporate funds to protect the corporation from a stockholder whose control ambitions they reasonably believed to pose a threat to the continued existence of the corporation in its present form.

Even more recently, a series of decisions in this Court have reemphasized the propriety of corporate actions taken in good faith in response to a threat from stockholders whose actions were perceived to be contrary to the interests of the corporation and its other stockholders. See, e.g., Kaplan v. Goldsamt, Del. Ch., 380 A.2d 556, 569 (1977) ("the use of corporate funds to acquire the shares of a dissident stockholders' faction is a proper exercise of business judgment where it is done to eliminate what appears to be a clear threat to the future business or, the existing, successful business policy of a company"); Thompson v. ENSTAR Corp., Del. Ch., C.A. Nos. 7641, 7643, slip op. at 12, Hartnett, V.C. (June 20, 1984 revised July 5, 1984 and August 16, 1984) (applying the business judgment rule in upholding the decision of the target's board to agree to a front-end loaded, two-tier tender offer and a lock-up agreement in the midst of a proxy contest with a substantial stockholder who, with others, sought to purchase the target for a higher price); Edelman v. Phillips Petroleum Company, Del. Ch., C.A. No. 7099, slip op. at 7, Walsh, V.C. (Feb. 12, 1985) (holding that resistance to takeover efforts by

Mesa Petroleum Co., a 5% stockholder, was protected by the business judgment rule). Federal court cases applying Delaware law are to the same effect. See, e.g., Panter v. Marshall Field & Co., 646 F.2d 271, 298 (7th Cir. 1981) (recognizing "the duty of directors to evaluate proposed business combinations on their merits and oppose those detrimental to the well-being of the corporation even if that were at the expense of the short term interests of individual shareholders") (emphasis added). Accord Moran v. Household International, Inc., Del. Ch., C.A. No. 7730, Walsh, V.C., slip op. at 44 (Jan. 29, 1985) (appeal pending) (holding that "directors who have the responsibility for the governance of the corporation are entitled to formulate a takeover policy . . . even though the policy may not please all its shareholders").

Finally, by its holding in Pogostin v. Rice, Del. Supr., 480 A.2d 619 (1984), that a director decision to oppose a hostile takeover is subject to the operation of the business judgment rule, and the Court's citation with approval of cases such as Panter v. Marshall Field & Co., supra, the Supreme Court removed any doubt which could have existed as to the right and duty of directors to exercise their business judgment in responding to a tender offer. In short, the Delaware law is clear that the duty of directors extends to the protection of the corporation and its stockholders from actions taken by a stockholder which are rea-

sonably perceived to be contrary to the best interests of the corporation and the rest of its stockholders.

- B. Have One Or More Of The Plaintiffs, Their Affiliates, Or Persons Acting In Concert With Them, Either In Dealing With Unocal Or Others, Demonstrated A Pattern Of Conduct Sufficient To Justify A Reasonable Inference By Defendants That A Principal Objective Of The Plaintiffs Is To Achieve Selective Treatment For Themselves By The Repurchase Of Their Unocal Shares At A Substantial Price?

Once again, the answer to this question is "yes". As Judge Tashima held in Unocal Corporation v. T. Boone Pickens, Jr., No. CV 85-2179 AWT, slip op. at 11 (C.D. Cal, April 26, 1985), the prior practices of parties are relevant in determining their intent, and the "unique reputation of Mesa II and its principals and their past conduct cannot be disregarded." After considering the track record of Mesa and its affiliates, Judge Tashima concluded (slip op. at 13):

In summary, the Court finds with respect to Mesa II's intent that Mesa II from the outset intended to put Unocal "in play" and thereby either obtain control or "greenmail" the corporation in exchange for dropping its bid.

The same evidence placed before Judge Tashima is now before this Court and can only lead to the same conclusion that there was ample reason for Unocal's directors to

infer that, notwithstanding plaintiffs' denials,* one of their principal objectives is to achieve selective treatment for themselves at the expense of Unocal's other stockholders.

Wholly apart from the prior takeover conduct of Mesa and those affiliated with it, this case comes before the Court as perhaps the only instance in takeover history in which a raider has conceded that its offer is inadequate. Defendants have placed before the Court Mesa's own documents and statements showing that, in Mesa's efforts to attract "junk bond" investors, it has placed a "conservative" value upon Unocal of \$64 per share and has referred them to values as high as \$86 per share. Second Coats Aff. Ex. A. That Mesa is offering only \$54 per share is entirely consistent with Mr. Picken's own statement that "I work for just one crowd; that's the Mesa stockholders."

The record is clear that Mesa is not acting in the interests of Unocal or its stockholders, but rather in its own self interest. Unlike an offeror who seeks to gain control so as to develop a business for the interest of all, here Mesa seeks to capture for itself at the expense of all other stockholders one hundred percent of the values which

* Plaintiffs' representations as to their intention not to seek greenmail (see PB 62) are entitled to no weight whatsoever. As Judge Tashima found, Mesa's so-called "investment intent" vis-a-vis Unocal was not bona fide. Moreover, Mesa is already the subject of a consent decree arising out of its falsely stated "investment intent" in the Gulf takeover.

it concedes are already present in Unocal.* Were its coercive two tier tender offer to succeed, Mesa would end up with all of Unocal's value above \$54 per share totally at the expense of Unocal's other stockholders. Thus, apart from any desire Mesa may have to be greenmailed, it is clear that, vis-a-vis the rest of Unocal's stockholders, Mesa also seeks selective treatment of itself by its concededly inadequate tender offer.

C. May The Directors Of Unocal In The Proper Exercise Of Business Judgment Employ The Exchange Offer To Protect The Corporation And Its Shareholders From Such Tactics?

Again, the answer to this question is "yes." The record establishes that plaintiffs seek to gain a selective

* Mesa, through its investment banker, seeks to defend its inadequate offer by asserting that it represents a premium over market, asserting that "[t]he best estimate of the value of a company as a going concern is the price at which its shares trade in the market." (Sorte Aff. ¶¶ 13-17). This analysis is incorrect as a matter of law. As the Supreme Court held in Smith v. Van Gorkom, Del. Supr., 488 A.2d 858 (1985):

A substantial premium may provide one reason to recommend a merger, but in the absence of other sound valuation information, the fact of a premium alone does not provide an adequate basis upon which to assess the fairness of an offering price. Here, the judgment reached as to the adequacy of the premium was based on a comparison between the historically depressed Trans Union market price and the amount of the Pritzker offer. Using market price as a basis for concluding that the premium adequately reflected the true value of the Company was a clearly faulty, indeed fallacious, premise, as the defendants' own evidence demonstrates.

advantage for themselves, either by forcing Unocal to buy their stock at a premium or by proceeding with their coercive* and concededly inadequate two-tier tender offer. In such circumstances, a board of directors is entitled to act to protect its remaining stockholders, who are the potential victims of such tactics. See cases cited in Argument IA, supra; Pogostin v. Rice, supra.

As held recently by one court in upholding a target's repurchase of over 50 percent of its shares to defeat an offer found to be inadequate, "once the Board determines that it believes the unfriendly offer is not adequate for its shareholders, then I think it has the obligation to take such actions as it feels necessary to protect the rights of shareholders." Carter Hawley Hale Stores, Inc. v. The Limited, Inc., C.A. No. 84-2200-AWT (C.D. Cal., Apr. 17, 1984), transcript at 78-79. See also Pogo Producing Co. v. Northwest Industries, Inc., supra (applying Delaware law in upholding a target's self-tender for 25 percent of its shares to defeat a hostile tender offer).

The record in this case not only shows that the directors of Unocal believed that Mesa's hostile takeover would be contrary to the best interests of Unocal and its other stockholders, but also that the structuring of the

* In Moran v. Household International, Inc., supra, Vice Chancellor Walsh held that "the coercive nature of [two-tier] tender offers because of the risk that some shareholders will be "frozen out" of any premium once control is achieved is well documented." Slip op. at 43.

Exchange Offer to exclude Mesa was reasonably designed for the valid purposes of either defeating the Mesa Offer or, should that offer nonetheless succeed, placing \$72 of senior debt in the hands of Unocal's stockholders in lieu of the highly subordinated debt valued by Mesa at \$54 per share which stockholders would be forced to receive in Mesa's back-end transaction.* To permit Mesa to tender into the Exchange Offer would undermine both of these purposes and impair the offer's effectiveness as a defense to Mesa's hostile acquisition program. First, if Unocal were required to pay Mesa the equivalent of \$72 per share to purchase Unocal stock from Mesa, it would effectively subsidize Mesa's continuing effort to buy stock in its coercive two-tier tender offer at the wholly inadequate price of \$54 per share. Second, every one of Mesa's shares purchased in the Exchange Offer would displace a share held by the public and represent one share of a public stockholder that would

* Plaintiffs nowhere in their brief challenge the bona fides of the second of these two purposes. Their attack on the bona fides of the first purpose -- that of defeating the inadequate Mesa Offer -- is premised solely upon a claim that Paragraph 42 of the April 25 Affidavit of Peter Griggs Sachs admits that Mesa's exclusion from the Exchange Offer is not necessary to defeat the Mesa Offer. (PB 50, 52). What Mr. Sachs stated in that paragraph was his belief that, even if Mesa were permitted to tender into the Exchange Offer, the Offer would be fully subscribed. He nowhere stated in that paragraph or elsewhere that the exclusion of Mesa was unnecessary or unimportant to the goal of defeating the inadequate Mesa Offer. To the contrary, it was Mr. Sachs' view that "the provision of the Unocal offer excluding the Unocal shares owned by Mesa bidders was important to protect the interests of Unocal public shareholders." (Sachs Aff. ¶ 28).

remain subject to the inadequate and coercive Mesa Offer. (See Pitts Aff. ¶¶ 3-6; Sachs Aff. ¶¶ 27-29). On the other hand, the exclusion of Mesa from the Exchange Offer would not prevent Mesa from pursuing its bid for control of Unocal, provided it is willing to pay what those assets are worth. (See Sachs Aff. ¶ 30). Moreover, contrary to the argument of plaintiffs' counsel at the April 26 temporary restraining order hearing, to permit the Exchange Offer to go forward while excluding Mesa will not spell the end of takeovers. Given the restraints imposed by the requirement that directors not jeopardize creditors in responding to a takeover bid, such a selective tender offer defense is only feasible where, as here, the offer against which it is directed is grossly inadequate.

Notwithstanding that the purposes for excluding Mesa from the Exchange Offer are demonstrably related to the valid purpose of protecting Unocal's shareholders from the selfish and hostile action of a predator stockholder, this Court, in its April 29 opinion, held that such action was illegal since, unlike the situation which applies in the case of greenmail, no benefit would accrue to the raider as a result of the Exchange Offer. Respectfully, this ruling, if allowed to stand, would turn the Delaware law on its head. There is no basis in the Delaware law for imposing a requirement that action taken to fend off a stockholder which by its own action has placed itself in a category which is hostile to the interests of the corporation and all

of its other stockholders must benefit that stockholder. See Kors v. Carey, supra (holding that, notwithstanding the normal duty of directors to deal with "stockholders as a class with scrupulous honesty, they may "adopt a valid method of eliminating what appears to them a clear threat to the future of their business by any lawful means"). To the contrary, it is clear that directors may expend corporate funds to defend the interests of a corporation and its stockholders in circumstances which result in no benefit whatsoever to a stockholder pursuing actions contrary to the corporate interest.

In Hall v. Trans-Lux Daylight Picture Screen Corp., Del. Supr., 171 A. 226 (1934), which was relied upon by the courts in both Kors v. Carey and Cheff v. Mathes, this Court held that incumbent directors could cause the corporation to bear the expense of a proxy contest against dissident stockholders who supported a merger which the incumbent directors considered to be unfair. See also Hibbert v. Hollywood Park, Inc., Del. Supr., 457 A.2d 339 (1983). Obviously, no benefit whatsoever accrued to the dissidents in this circumstance. Similarly, in Edelman v. Phillips, supra, this Court recently held that the action of Phillips in suing Mesa (and obviously expending corporate funds to do so) was "a proper exercise of managerial judgment as part of an overall effort to resist a potentially destructive tender offer," even though the litigation proved to be unsuccessful.

ful. Slip op. at 12. Once again, it can hardly be said that litigation against a hostile offeror benefits it.

There is no reason to create a new and, contrary rule of law when the defensive technique selected by directors to defend the interests of a corporation and its stockholders is an exchange offer which excludes an offeror which itself seeks selective treatment by deceptive and coercive tactics. Indeed, it is difficult to believe that under these circumstances this Court could adopt a rule of law establishing greenmail, which rewards the offeror at the expense of other stockholders, as the only form of permitted selective stock repurchase in a hostile takeover context. To do so would send a shocking message to directors of Delaware corporations seeking to resist raiders such as Mesa who attempt by coercive tactics to wrest from shareholders at bargain basement prices the values inherent in their stock. This Court should not undercut the good faith efforts of Unocal's board of directors to take a stand against an offeror whose tactics and concededly inadequate tender offer they have reasonably concluded to be contrary to the interests of all other stockholders.

D. If It Is Determined That The Purpose Of The Exchange Offer Was Not Illegal As A Matter Of Law, Have The Directors Of Unocal Carried Their Burden Of Showing That They Acted In Good Faith?

Once again, the answer to this question is "yes."
In Martin v. American Potash & Chemical Corp., supra, 92

A.2d at 302, the Supreme Court held that while a selective stock repurchase was not, as a matter of law, illegal because of its purpose of eliminating a substantial number of shares held by a stockholder at odds with management policy, a question of fact remained as to the issue of "good faith," i.e., whether two directors, whose votes were necessary for a quorum, acted for selfish reasons to protect their position and salaries, rather than in the corporate interest.

Cheff v. Mathes, supra, which is the most recent selective repurchase case to come before the Supreme Court, also addresses the "good faith" issue:

Under the provisions of 8 Del.C. § 160, a corporation is granted statutory power to purchase and sell shares of its own stock. Such a right, as embodied in the statute, has long been recognized in this State. See In re International Radiator Co., 10 Del.Ch. 358, 92 A. 255. The charge here is not one of violation of statute, but the allegation is that the true motives behind such purchases were improperly centered upon perpetuation of control. In an analogous field, courts have sustained the use of proxy funds to inform stockholders of management's views upon the policy questions inherent in an election to a board of directors, but have not sanctioned the use of corporate funds to advance the selfish desires of directors to perpetuate themselves in office. See Hall v. Trans-Lux Daylight Picture Screen Corp., 20 Del.Ch. 78, 171 A. 226. Similarly, if the actions of the board were motivated by a sincere belief that the buying out of the dissident stockholder was necessary to maintain what the board believed to be proper business practices, the board will not be held liable for such deci-

sion, even though hindsight indicates the decision was not the wisest course. See Kors v. Carey, Del.Ch., 158 A.2d 136. On the other hand, if the board has acted solely or primarily because of the desire to perpetuate themselves in office, the use of corporate funds for such purposes is improper. See Bennett v. Propp, Del., 187 A.2d 405, and Yasik v. Wachtel, 25 Del.Ch. 247, 17 A.2d 309.

In addition, Cheff makes clear that the only issue as which directors who resist a threat from a hostile stockholder by means of a selective stock repurchase have the burden of proving is that their predominant motivation in doing so was to protect stockholders. The Supreme Court quoted this Court's statement in Bennett v. Propp, supra, and adopted its holding that "the burden should be on the directors to justify such a purchase as one primarily in the corporate interest." Id. at 554 (emphasis added). The Court in Cheff concluded by summarizing its burden of proof discussion as follows:

The question then presented is whether or not defendants satisfied the burden of proof of showing reasonable grounds to believe a danger to corporate policy and effectiveness existed by the presence of Maremont stock ownership. It is important to remember that the directors satisfy their burden by showing good faith and reasonable investigation; the directors will not be penalized for an honest mistake of judgment, if the judgment appeared reasonable at the time it was made.

199 A.2d at 548.

Finally, just three months ago, this Court interpreted the burden of proof holding in Cheff v. Mathes as follows:

Household is not required, however, to demonstrate the intrinsic fairness of the Plan. The Cheff standard requires the defendant directors to show that their adoption of the Plan was "reasonable at the time" (199 A.2d at 555). The burden thus placed may be viewed as the burden of going forward on a showing of reasonableness rather than a burden of persuasion. Because of the protection afforded directors by the business judgment rule the latter burden does not shift and remains with the plaintiffs.

Moran v. Household Int'l, Inc., supra, slip op. at 37 (emphasis added).

Thus, under Bennett, Cheff, and Moran, the burden of proof imposed upon the directors of Unocal is limited to showing that they had a reasonable and informed belief that the Mesa Offer was not in the interests of Unocal and its stockholders, and that such belief, rather than selfish reasons, was the primary motivating force behind their decision to make the Exchange Offer and exclude Mesa from it. Once that burden is met, the decisions made by directors in effectuating the Exchange Offer, including the value and terms of the securities to be offered, are protected by the business judgment rule.

Plaintiffs' assertion (PB 65) that, by reason of the exclusion of Mesa, defendants have the burden of showing that the Exchange Offer is intrinsically fair to all Unocal stockholders, including the Partnership, is incorrect as a matter of law. First, it ignores the holdings in Bennett, Cheff and Moran which limit the directors' burden to that of showing that their primary motivation in authorizing a

selective exchange offer was the protection of corporate and stockholder interests.*

Second, to the extent it is premised upon a self-dealing theory arising from the decision of Unocal's directors to tender into the Exchange Offer (PB 66-69), it ignores that very line of cases which the Supreme Court directed that the parties consider at paragraph (6) of its May 2 Order. Under our law, questions of director interest are not determined dogmatically based upon mechanical rules. Instead, as this Court held in Smith v. Good Music Station, Inc., Del. Ch.; 129 A.2d 242, 246 (1957) (cited with approval in Cheff), "[W]e must therefore look to the reason for the rule in order to test its applicability to 'new' situations." Here, plaintiffs make a technical argument that there is self-dealing because Mesa has been excluded from the Exchange Offer. In making this argument, plaintiffs once again ignore cases such as Kors v. Carey, supra, Hall v. Trans-Lux Daylight Picture Screen Corp.,

* Plaintiffs base large portions of their argument on this point on dicta from British and American Trustee and Finance Corp. v. Couper. Portions of that 1894 House of Lords case, upholding a selective stock repurchase under the Companies Acts of 1867 and 1877, were quoted in Martin v. American Potash, supra, which in turn was decided twelve years prior to the Supreme Court's decision in Cheff v. Mathes. While there is mention in British and American Trustee and Finance Corp. v. Couper of a need on the part of a plaintiff challenging a selective repurchase to show something inequitable or unfair, like Fisher v. Moltz this case did not arise in the context of a hostile takeover and therefore is inapposite. Plaintiffs' reliance on this ancient dicta to escape the holdings in Kors and Cheff indicates that they are simply grasping at straws.

supra, and Edelman v. Phillips Petroleum Company, supra, which in the context of a perceived threat to corporate interests from a stockholder/raider suspend any requirement that the raider benefit from corporate action, and instead permit directors to take action which is contrary to the selfish interests of the predator stockholder. So long as Mesa's predatory conduct continues, it is deemed under this line of cases to have placed itself in a different category than Unocal's 76,000 other stockholders. Since Mesa has no right to receive the benefit of the Exchange Offer, its exclusion cannot form the basis for a claim of self-dealing or for the placing of an intrinsic fairness burden on defendants with respect to any aspect of that offer.

There can be no dispute in this case as to the reasonableness of defendants' beliefs that Mesa sought selective treatment for itself or that its offer is inadequate. See Argument I.B., supra. Similarly, the record conclusively demonstrates that the directors of Unocal acted on an informed basis in determining that the Mesa Offer was inadequate and not in the interests of Unocal's stockholders and in selecting the Exchange Offer, with its exclusion of Mesa, as an appropriate defensive technique. See Argument II, infra. Finally, on the record presented defendants have met their burden of showing that their actions in authorizing the Exchange Offer were primarily motivated by a desire to protect stockholders from Mesa and its inadequate offer, either by causing the Mesa Offer to be abandoned or

by giving stockholders \$72 in senior debt securities in lieu of the \$54 in highly subordinated debt to be provided in the coercive second step of the Mesa Offer. Furthermore, plaintiffs have not rebutted defendants' showing that the exclusion of Mesa was designed to further those purposes.

The fact that Unocal's directors were primarily motivated in authorizing the Exchange Offer by a desire to protect Unocal and its stockholders from the obvious threat posed by Mesa, rather than for personal reasons, is fully supported by both the direct and circumstantial evidence.

First, the stated purpose of the Exchange Offer is to defeat the Mesa Offer, which Unocal's directors believe to be inadequate and inimical to the interests of Unocal and its stockholders. The sworn affidavits of each and every director involved in the decision affirm that this was the purpose of the Exchange Offer. Moreover, despite having taken the depositions of Unocal's directors, plaintiffs have uncovered no direct evidence of any other purpose on the part of Unocal's Board.

Second, plaintiffs contend that "[t]here has been no evidence" that the Board acted to protect Unocal and its stockholders "from a man with a 'bad' business reputation or from policy proposals with which they disagreed." (PB 27, 90). The record plainly contradicts this contention. For example, Donald P. Jacobs testified on April 17 that he was aware that "Mesa had in the past acquired stock of other

companies and sought to take action which was not in the interests of the stockholders of those companies." (Jacobs Aff. ¶ 9). Defendant Fred L. Hartley testified on April 27, 1985 that he thought an acquisition of Unocal by Mr. Pickens would be "destructive" to the company (Hartley, Apr. 27, 113; see also Nachbar Aff. Ex. 34). On April 30, defendant Louis B. Harder testified that "I am of the opinion that [Pickens'] policies would be very bad for all other shareholders." (Harder, Apr. 30, 97). This testimony, all given before the Supreme Court's Order, cannot be dismissed as "afterthoughts." (PB 92).

Third, a majority of Unocal's directors have no offices or salaries at stake. It is undisputed that eight of Unocal's fourteen directors are outside directors who receive from the Company only customary directors' fees. (PB 9). There has been no allegation that these directors are dominated or controlled by management.

Fourth, the Exchange Offer, including its selective feature, was created and recommended by Unocal's investment bankers as a response to the inadequate Mesa Offer. Sachs Aff. ¶¶ 24-26; Hobbs Aff. ¶ 14; Eamer Aff. Ex. A. It clearly was not initiated by Unocal's Board.

Fifth, the structure of the Exchange Offer is not entrenching. If shares are purchased under the Exchange Offer, it will increase Mesa's percentage ownership of Unocal, giving Mesa a greater voice in Unocal's affairs, making it easier for Mesa to wage a proxy contest, and

bringing it closer to its stated goal of gaining control over Unocal.

Sixth, the Exchange Offer was first discussed by the Board five days after announcement of Mesa's offer, and was authorized two days after that. This timing makes clear that the Exchange Offer was undertaken in response to the Mesa Offer, and not as part of some preconceived plan to benefit Unocal's directors.

Seventh, Unocal's directors were specifically advised by Delaware counsel present at the April 13-15 board meeting that their personal interest should play no role in their decision on how to respond to the Mesa Offer. (Eamer Aff. Ex. A, p. 2).

Eighth, the independent directors of Unocal conferred separately from the inside directors and independently determined that the Mesa Offer was inadequate. (Eamer Aff. Ex. A, p. 14).

Against this array of evidence, plaintiffs seek to establish bias on the part of the Board by alleging that they are participating in the Exchange Offer, and thereby benefitting financially from Mesa's exclusion, and that the exercise date of stock options held by certain inside directors has been accelerated.

The defendants' decisions to tender their shares in the Exchange Offer cannot possibly be viewed as their sole or primary motivation in approving the Exchange Offer. First, the subject matter of tendering by the directors did

not even come up until after the offer was approved. (Harder Aff. ¶ 14; Eamer Aff. Ex. A, P. 22). Moreover, the directors had been cautioned that their decision as to what response should be made to the Mesa Offer could not be premised upon personal interests (Eamer Aff. Ex. A, p. 2), and were advised by counsel that it would be appropriate for them to tender their shares to demonstrate support for the Exchange Offer which they were recommending to the other stockholders. (Eamer Aff. Ex. A p. 22). There is also no evidence that any of the directors considered the \$72 price to be paid in the Exchange Offer to be a windfall. To the contrary, there is repeated testimony that the directors independently valued Unocal at \$70 to \$80 per share (e.g., Hartley, Apr. 27, 61; Harder, Apr. 30, 41, 52) or relied on the investment bankers' view that \$70 to \$75 was an appropriate price to pay for the stock. E.g., Campbell, Apr. 30, 40-43. Moreover, even if one were to assume, contrary to fact, that \$72 is an excessive price, the outside directors (other than Mr. Doheny), who met independently and recommended the Exchange Offer concept to the Board, could at best receive a de minimus benefit from the Exchange Offer.

Nor does the acceleration of certain stock options and the listing of restrictions on incentive compensation stock render this a self-dealing transaction. The actions were approved on April 29, long after the decisions were made with respect to the Exchange Offer, by a committee com-

posed solely of non-employee directors who held no options or incentive compensation stock.* See Second Eamer Aff. ¶¶ 13-16.

The directors' purpose in making a selective purchase of its shares bears a startling similarity to the directors' purpose in Cheff v. Mathes, supra. There, the trial court held that facts established that the selective purchase was undertaken to perpetuate management's control. The Supreme Court reversed, holding that nine factors established that the directors had a proper purpose in selective stock repurchases. (199 A.2d at 556). All but one of those factors are present here:

-- Maremont (the raider) had deceived Cheff (the President of the target, Holland Furnace) with respect to his original intention in purchasing Holland stock.

Here, of course, Mesa has been adjudged to have deceived Unocal and its stockholders about its intentions.

* Mesa can hardly complain about acceleration of stock options, since Pickens was granted options for 6 million Mesa shares, later reduced to 4.8 million shares as the result of a stockholder suit in this Court, which become immediately exercisable on any change of control of Mesa (Pickens, May 3, 154, 168-69; see Moses v. Pickens, Del. Ch., C.A. No. 6242, Hartnett, V.C. (1982)). It is therefore not surprising that Pickens has testified "I have no problems in any deals where management wants to accelerate options, because I think they are entitled to them." (Pickens, May 3, 165).

- Maremont subsequently increased his purchases of Holland stock.

Here, Mesa's interest in Unocal almost doubled between February 14 and March 27.

- Maremont had given Cheff some reason to believe that he intended to alter the business practices of Holland.

Here, Mesa's advocacy of maximizing short term value is both well known and contrary to Unocal's longstanding policy of long-term growth. (Hartley, Apr. 27, 143-144; 148).*

- The directors had good reason to believe that Maremont's threat had engendered unrest among employees.

Here, there has been testimony that such unrest has occurred or is likely. (Harder, Apr. 30, 645-46).

- The board received advice of the raider's past depredations.

Here, the Board was well aware of Pickens' lengthy and unenviable track record.

- An independent investment banker recommended the selective repurchase.

* Unocal's shares have increased in value approximately 17-fold since 1960 (Hartley, Apr. 27, 144).

Here, two independent investment bankers recommended the Exchange Offer.

- The board had received competent advice that the company was overcapitalized.

Here, the board was advised that the Mesa Offer was inadequate and that the company's stated stockholders' equity of \$5.1 billion was understated by approximately \$3 billion.

- The members of the board reported to the other directors of the alleged poor reputation of the raider.

Here, Pickens' poor reputation is a matter of public record, and the directors were well aware of it.

The only factor which the Supreme Court considered in Cheff that is not present here is that Maremont demanded a place on the board. While Pickens has not yet done that, he is presently conducting a proxy contest to adjourn Unocal's annual meeting so that he may present stockholders with additional proposals, including nominations to the board of directors.

Plaintiffs' purported distinction of Cheff is essentially that "there is a dramatically different equitable effect" from buying out a raider as opposed to making a selective purchase which excludes the raider. (PB 58-59). This "distinction" is no more than a refrain of plaintiffs'

now discredited argument that selective purchases are permitted under Delaware law only where the stockholder threatening the company receives some "benefit." See Mesa v. Unocal, Del. Supr., No. 7997, 1985, Moore, J. (May 3, 1985) (Order). As in Cheff, the record makes clear that the Board authorized the selected purchase which plaintiffs attack for a proper corporate purpose and in good faith.

E. The Board Exercised Its Best Business Judgment In Valuing The Unocal Stock. That Value Is Within The Range Determined By Plaintiffs And Their Expert.

As discussed in the Statement of Facts and hereafter in Argument II, the Board met for an extended period, considered the advice of its investment bankers and others and determined to proceed with the Exchange Offer with securities designed by Unocal's investment bankers to trade at \$72 per share. The two investment bankers independently concluded that \$72 was within the range of values that may fairly be assigned to Unocal's stock; several of the directors had come to similar judgments based on their familiarity with the company.

Mesa's range of values for Unocal presently runs as high as \$79, and ran as high as \$81 last February. The only two independent analyses cited by Mesa to its potential partners value Unocal at \$74 and \$86. Mr. Pickens himself recently responded to the issue at a press conference as follows:

"What do you think Unocal's worth per share?"

. . .

"Oh, I just go from the John S. Herold number on it and I believe it's something just under \$80 a share."

(Pickens, May 3, 125). And, just a few weeks ago, he gave a similar response to a meeting of Unocal stockholders:

"Isn't the company valued at higher than \$72 as far as you know?"

. . .

"John S. Herold's figure is \$73 per share, recognized authority."

(Pickens, May 3, 126-27).

The evidence is thus overwhelming that \$72 is a fair value for Unocal stock. Defendants have met their burden of establishing that the decision to authorize the Exchange Offer was made in good faith and on an informed basis; their decision as to the value to be paid in the Exchange Offer is protected by the business judgment rule, see Cheff v. Mathes, supra, and must be respected by this Court unless "no person of ordinary, sound business judgment would deem it [i.e., Unocal stock] worth what the corporation has paid." Saxe v. Brady, Del. Ch., 184 A.2d 602, 610 (1962). The record as to price not only satisfies this test, but also any reasonable test of fairness.

When Mesa prepared its investment brochures in the fall of 1984 for circulation to potential partners to be included in its attack on Unocal, it included three esti-

mates of "Net Asset Value" -- a low of 49, a high of 79, and an "assumed" (the arithmetic average) of 64. It also included the John S. Herold appraisal of \$74 and the Donaldson, Lufkin and Jenrette value of \$86. (Nachbar Aff. Ex. 1). These investment brochures were revised from time to time and used by Mesa to induce others to join with Mesa in buying Unocal stock. However, it was not until Unocal launched its \$72 Exchange Offer and litigation had commenced that Mesa suddenly tried to back away from the share values it had vouched for and circulated from October 1984 to April 1985.

On April 2, 1985, Drexel Burnham completed preparation of an investment analysis of Unocal for circulation to its clients. That report was prepared in the normal course of business before Drexel had been retained by Mesa, and presumably represents Drexel's independent judgment of the value of Unocal shares, uncolored by association with Mesa. That analysis places a value of \$57.87 per share as a "takeover price" and states that "the asset valuation would probably be about 20-25% higher" "if one could take apart Unocal and sell properties at optimum levels." (Nachbar Aff. Ex. 3 at 2). The Drexel range is thus \$57.87 per share to \$72.34 per share. The Drexel analysis also includes and relies on the Herold appraisal of \$73.90 per share.

The Drexel Burnham report never saw the light of day, however, for on April 2, the day on which the report was to be released for circulation, Drexel was contacted by

Mesa and requested to raise \$3 billion to finance their attack on Unocal. Drexel promptly killed the Unocal analysis. (Sorte, May 2, 49).

On April 8, 1985, the day Mesa announced its tender offer at \$54 per share, Drexel began circulating its "Confidential Memorandum Regarding Proposed Financing Of A Tender Offer" to its junk bond clients in an effort to raise financing for Mesa's \$54 cash tender offer. That private placement memorandum includes and relies on the Mesa net asset valuations of \$49 to \$79 per share. (Nachbar Aff.)

On May 3, 1985, John Sorte, a Managing Director of Drexel, was deposed in this action in preparation for the May 8 preliminary injunction hearing. Sorte testified that he had not been requested to render an opinion as to the fairness of the Exchange Offer price. (Sorte, May 2, 77). However, on May 4, 1985, Sorte signed a 25-page affidavit in which he concludes that "utilizing liquidation value [utilized in Drexel's April 2 report to clients] as a proxy or measurement of 'fair market value' is without justification," "not truly representative of what Unocal could reasonably expect to realize" and that "we are of the opinion that Unocal is worth between \$53 and \$63 per share" based on a premium to market analysis. (Sorte Aff. ¶¶ 13-17, 22, 23).

We find Mr. Sorte's deposition testimony incredible in view of the May 4 affidavit, and we find the

affidavit suspect in view of the April 2 Drexel analysis prepared for its clients which represented that Unocal could realize \$72.34 per share on liquidation and the April 8 private placement memorandum containing values up to \$79 per share and utilized by Drexel to induce people to invest \$3 billion for the purchase of Unocal stock. In addition, as the Supreme Court held in Smith v. Van Gorkom, supra, using premium over market price to determine true value of a company's stock in an acquisition context is "clearly faulty." Since Sorte testified that he was not preparing any such valuation of Unocal, we were deprived of the opportunity of exploring the reasons, if any, for these dramatic shifts in position. However, we submit that Drexel's valuations prepared in the normal course of business before Drexel became involved in the litigation are more credible than Mr. Sorte's eleventh hour Affidavit, dropped over the transom Sunday night. The Affidavit is best explained by the fact that Drexel stands to collect \$60 million in fees for its efforts here, plus a share of any greenmail Pickens would obtain were Unocal to repurchase Mesa's shares at a premium in a Pickens' type selective repurchase. (Tassin Aff. Ex. N at 17-18).

We submit that the Sorte affidavit is entitled to no weight whatsoever. The overwhelming credible evidence from Unocal, Mesa, and even Drexel demonstrates that Unocal stock has a value ranging up to \$79 or more. The Unocal Exchange Offer at \$72 per share is well within that range.

As the Board minutes, Mr. Sachs' affidavit and deposition, and the depositions and affidavits of the directors establish, Goldman Sachs and Dillon Read, independently analyzed Unocal and its assets over a two month period. They independently determined that \$70 to \$75 per share "could reasonably be expected to be received by a selling stockholder under certain reasonable assumptions," and that even higher aggregate per share proceeds might be realized in an orderly liquidation of Unocal under a Section 337 plan of complete liquidation. (Sachs Aff. ¶ 2). Their due diligence efforts were reported to, and discussed with, the Board at length. The Board then determined to go forward with the Exchange Offer at \$72 per share, within the range determined by the investment bankers to be the appropriate value for Unocal stock. (Sachs Aff. ¶ 35; Sachs, May 3, 16-141; Eamer Aff. Ex. A, p. 18; Directors Affidavits).

There is no question but that \$72 is a reasonable and indeed fair value for Unocal stock and that it was arrived at only after careful deliberation and based on the advice of independent experts.

II. UNOCAL'S DIRECTORS EXERCISED DUE CARE IN
DECIDING TO COMMENCE THE EXCHANGE OFFER.

A. Mesa Seriously Misstates The Record
Concerning The Board's Delibera-
tions.

After arguing on several previous occasions that the Board craftily and meticulously devised the Exchange Offer to inflict punitive harm on Mesa, Mesa now switches gears effortlessly to claim instead that the Board blundered in ignorance in its "hasty" adoption of its offer. For almost 40 pages, Mesa purports to demonstrate this by selectively quoting, misquoting, and mischaracterizing the deposition testimony of a small minority of directors and then failing to submit much of that testimony to the Court for its review.

While it will obviously not be possible to respond to each of the numerous misleading and inaccurate references to the directors' deposition testimony, it is imperative that the Court be given some examples of Mesa's briefing tactics:

1. Mesa states that "it is apparent that the \$72 per share value placed upon the stock by the defendants and their investment bankers is derived by 'blending' the \$72 per share offer for 49% of the company with the \$54 per share Partnership offer for 51% of the company." (PB 33-34, citing Eamer, May 1, at 93). But when one turns to the

testimony Mesa is presumably relying upon for this assertion, one reads as follows:

Q. Was your decision to approve the offer to purchase based in any way on the blended price of the offer of Mesa and the offer of Unocal?

A. None whatsoever.

(Eamer, May 1, 93).

2. Mesa claims that Mr. Brinegar testified that the restrictive covenants were "simply" not discussed. (PB 24). In fact, Mr. Brinegar testified as follow:

Q. What restrictive covenants were discussed at the April 13 meeting?

A. The general concept that these debentures would be secured against the assets of Union Oil Company of California and provide adequate security to their holders so that it would be difficult to put other debt against those assets to endanger the security.

Q. So as I understand it, the restrictive covenants were designed to protect the holders of the debt once the debt was issued?

A. Yes.

* * *

Q. Were the specific terms ever discussed with the Board at any of those three meetings?

A. Specific terms of what?

Q. Of the restrictive covenants, such as restrictions on application of assets, that type of thing; what the restrictions were?

A. They were described in general terms at the meeting on the 15th, but I don't recall the list.

(Brinegar, Apr. 26, 53-54).

3. Mesa asserts that Mr. Sachs testified that he did not advise Unocal that it could service the debt issued in the Exchange Offer. (PB 19). In fact, Mr. Sachs testified that "Our [Dillon's and Goldman's] views as to the company's ability to service the debt and what procedures it might follow to be assured of that were generally discussed at that meeting, while we were present, and it was done in the context of Mr. Blamey's overall presentation." (Sachs, May 3, 114). As the minutes make clear, "Mr. Sachs and Mr. Hobbs stated that based on the review of the Company's assets and operations by their firms, they both concurred in Mr. Blamey's presentation and analysis [concerning the adequacy of the Company's cash flow to service and retire the new debt]." (Eamer Aff. Ex. A; See Second Sachs Aff. ¶ 7).

4. Mesa selectively cites the minutes to claim that Mr. Blamey only promised that the Company had cash flow to get through 1985 (PB 19), totally ignoring the next paragraph wherein Mr. Blamey concludes that the new debt would be retired by 1991, even if the price of oil immediately dropped \$2 per barrel and then fell by \$4 per barrel. (Eamer Aff. Ex. A, p. 17).

5. Mesa suggests that no questions were asked of the investment bankers as to how the securities would be structured so as to sell at \$72. (PB 76, citing Ballhaus, May 2, 136). Mr. Ballhaus actually said the contrary:

Q. You said you asked a question about the \$72 figure?

A. Oh, I just asked the investment bankers how they arrived at the \$72 once we decided \$72, how did they arrive at the proper market value of the debt instruments that would be given to the shareholders for their shares at \$72. And they answered.

(Ballhaus, May 2, 76).

Presumably, Mesa succumbs to such tactics because the record does not support Mesa's position. First, Mesa does not take issue with Unocal's determination that the Mesa \$54 two-step offer was inadequate and not in the best interests of shareholders. Indeed, Mesa's brief scarcely mentions the Mesa Offer. Second, notwithstanding Mesa's selective excerpting, the record establishes without question that the Board acted in an informed and deliberate manner in concluding that the Exchange Offer was the optimal strategy for either defeating the Mesa Offer or minimizing its detrimental effects. If the Board minutes themselves and the affidavits previously submitted by Messrs. Eamer and Sachs did not already conclusively establish that (which we submit they did*), the additional affidavits we now submit

* Minutes of meetings of boards of directors are, as a matter of law, presumptively the valid and accurate report of the events of the meeting. Young v. Janas, Del. Ch., 103 A.2d 299, 303 (1954); Phoenix Finance Corp. v. Iowa-Wisconsin Bridge Co., Del. Super., 16 A.2d 789, 794 (1940). Plaintiffs do not attack this presumption and actually cite the minutes extensively. Moreover, as a matter of logic, minutes prepared almost immediately following very lengthy meetings based on contemporaneous notes taken by non-participants in the meeting are clearly the evidence most likely to fully and accurately reflect the events of the meeting.

from the remainder of the Board members foreclose dispute on this issue. There is simply no basis in this record for the Court to conclude that the actions of this Board, which had the assistance of two investment banking firms, three law firms, and in-house legal and financial advisors, and which met on two different occasions for a total of some twelve hours to hear their advice and to debate the issues raised by Mesa and its Offer and consider responses thereto, were somehow grossly negligent. Smith v. Van Gorkom, Del. Supr., 488 A.2d 858, 873 (1985).

B. The Board Acted Only After Soliciting
And Receiving Adequate Information.

For plaintiffs to succeed in removing the Board's action from the parameters of the business judgment rule, they must show that the Board "acted so far without information that they can be said to have passed an unintelligent and unadvised judgment." Gimbel v. Signal Companies, Inc., Del. Ch., 316 A.2d 599, 615, aff'd, Del. Supr., 316 A.2d 619 (1974); Aronson v. Lewis, Del. Supr., 473 A.2d 805, 812 (1984); Smith v. Van Gorkom, supra, 488 A.2d at 883, n.25. Mesa's efforts fall far short of the mark; the facts are that the Board acted carefully and deliberately, and fully considered its obligations and responsibilities under Delaware law. (Eamer Aff. ¶¶ 4-23). The Board had the benefit of extensive and intensive analyses of the Mesa and Exchange Offers. Its members solicited and considered "all material

information reasonably available to them." Aronson v. Lewis, supra, 473 A.2d at 812. (Eamer Aff. ¶¶ 5-8; Harder Aff. ¶ 11).

First, Unocal's Board compares favorably to that of any publicly held corporation. The eight outside directors, who constitute a majority, include six men who have served as Chairman of the Board, President or Chief Executive Officer of major corporations. The Board also includes the Dean of a prestigious graduate school of management. Moreover, all of the Board members are familiar with Unocal's operations and prospects. Between them, the members have a total of 162 years' experience on the Unocal Board; their average tenure is over eleven years. During that time, Unocal has prospered greatly.

When the Board first learned that Mesa was purchasing Unocal stock, it retained Goldman, Sachs and Dillon, Read to conduct separate, independent valuation studies. Unocal hired two independent financial advisors because it considered the question before it to be an important matter and wanted to be sure that its opinions were soundly based. In response to a question as to why Unocal used two investment advisors, director Campbell stated, "I used to fly airplanes, and I like twin-engine airplanes better than single-engine. I feel the same thing when it comes to a requirement of this type." (Campbell, Apr. 30, 113). The two firms were chosen because of their excellent reputation

for high-quality work. (Campbell, Apr. 30, 113; Ballhaus, May 2, 139).

Before rejecting the Mesa Offer as inadequate and authorizing the Exchange Offer, the minutes demonstrate that the Board requested and received expert advice:

(i) from two independent investment banking firms with respect to the \$72 per share price (Eamer Aff. Ex. A, p. 9),

(ii) from three law firms and experienced in-house counsel concerning its duties and responsibilities under Delaware and federal law (Eamer Aff. Ex. A, pp. 1-3), and

(iii) from Unocal's Vice President of Finance concerning Unocal's operations and prospects (Eamer Aff. Ex. A, pp. 12-14).

The deposition testimony fully supports the minutes:

Q. What was said to you about the adequacy of the offer?

A. First, the bankers independently as represented by Mr. Sachs and Mr. Hobbs described the process by which they had been studying Unocal's operations in order to get an opinion of what the offer might be or, rather, what a fair value might be. They described a process that is outlined in slides that are in the exhibit.

* * *

THE WITNESS: They said they felt their assignment was to pass on the adequacy or inadequacy of the \$54. They would review the process by which they

determined a range of values and indicate whether or not that range of values was substantially above the offer that was before us.

In their professional opinion, they concluded, after having described the process they had gone through, the total of the values was substantially in excess of \$54 and in their professional opinion, they would recommend to the Board [that] this offer [sh]ould be rejected as grossly inadequate.

(Brinegar, Apr. 19, 129, 134). Similarly, Mr. Harder recalls that he personally valued Unocal shares at \$70 to \$80 per share, that there was discussion at the meeting to that effect (Harder, Apr. 30, 41, 52, 80, 89), and that the Board received the advice of Delaware counsel relating to the directors' duty to be informed prior to making any decision in response to the Mesa Offer. (Harder, Apr. 30, 87, 89).

The investment bankers explained to the directors at some length the methodology they employed in determining that the liquidation value of Unocal was a minimum of \$60 per share and that in such a disposition or sale, Unocal shareholders could reasonably expect to receive \$70 to \$75 per share. (Eamer Aff. Ex. A, p. 9; Sachs Aff. ¶ 32; Brinegar, Apr. 26, 39: "Mr. Sachs went through it rather carefully covering what each term meant and describing what he believed were the conclusions that should be drawn from this."). Documents explaining this methodology were shown to all of the directors during the meeting on the 13th in the form of slides projected on a large screen. (Brinegar,

Apr. 26, 55-56). As the minutes, the affidavits, and the depositions reflect, the directors actively participated in the discussion and asked a great many questions of the financial advisors and lawyers. (Eamer Aff. Ex. A; Brinegar, Apr. 26, 74). Indeed, it would be difficult to conceive of meetings lasting some twelve hours that did not involve detailed discussion and examination of the issues.

The record is clear that, based on all of this advice, the Board reached an informed judgment that Unocal stock was worth between \$70 and \$75 per share. (Jacobs, May 3, 35; Ballhaus, May 2, 16; see Brinegar, Apr. 26, 74-75: "[The bankers'] conclusion was, which they said to the Board 'We will stake our professional integrity . . . on this, it's in the range of 70 to \$75 a share'").

Similarly, before approving the Exchange Offer, the Board requested the lawyers and bankers to structure the debt securities to ensure as nearly as possible that they would trade at par when issued. (Brinegar, Apr. 26, 118). The Board was advised that that had been done. (Sachs May 3, 103-104). The terms of the restrictive covenants were explained and discussed, and the directors asked questions on this subject as well. (Eamer Aff. ¶ 12; Harder, Apr. 30, 77, 103, 118; Eamer, May 1, 21, 24, 37, 38). The purpose of the restrictive covenants was clearly stated by Mr. Brinegar:

Q. Were the restrictions designed . . . to accomplish any other purpose than to protect the holders of the debt?

A. No.

(Brinegar, Apr. 26, 54; see id. 103, 118; Harder, Apr. 30, 119; Sachs, May 3, 141).*

All of this conclusively establishes that the Board's judgments were informed and reached only after careful deliberation. Directors are expressly authorized to rely upon the reports of officers in exercising their business judgment. 8 Del. C. § 141(e). And it is well established that, in matters involving legal or financial intricacies, directors are entitled to rely upon the informed advice and opinions of investment bankers and attorneys. See, e.g., Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981); Treadway Companies, Inc. v. Care Corp., 638 F.2d 357, 383-84; Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690 (2d Cir. 1980); Horwitz v. Southwest Forest Industries, CV-R-84-467-ECR, slip op. at 9 (D. Nev., Mar. 20, 1985); Buffalo Forge Co. v. Ogden Corp., 555 F. Supp. 892, 904-905 (W.D.N.Y. 1983).

* Contrary to plaintiffs' assertions (PB 35-39), the terms of the Unocal debt securities are not commercially unreasonable. See Second Sachs Aff. ¶¶ 4-6. The restrictive covenants were not designed to prevent Mesa from acquiring or operating Unocal, but rather to protect the credit backing of the securities. Second Sachs Aff. ¶ 4. Moreover, there is no prohibiting in the restrictive covenants against merger and no limitation on the occurrence of debt which could be subordinate to the securities. (Sachs ¶ 5). Significantly, the securities are also immediately callable (Sachs ¶ 5; Sachs, May 3, 67-68).

Mesa now criticizes individual Board members because they could not recall specific matters from three meetings lasting fourteen hours over a ten-day period. Their attacks on these directors come with especially poor grace from Mesa, whose officers and directors demonstrated a remarkable lack of memory or understanding of Mesa's "investment" in Unocal. Unocal v. T. Boone Pickens, Jr., supra. In any event, directors are not expected to know all of the particulars and intricacies of defensive tactics, Moran, supra, slip op. at 42-43, and they need not "read in haec verba every contract or legal document" which they approve. Smith v. Van Gorkom, supra, 488 A.2d at 883n. Directors satisfy their duty of care where, as here, they receive descriptions of the essentials of any proposed course of action, conduct extensive discussions with their legal and financial advisers to receive a full and candid evaluation of the proposal's strengths and limitations, and receive knowledgeable critiques of the proposed course of action. See generally Smith v. Van Gorkom, supra; Household, supra, slip op. at 43. There is no question that the Unocal Board members did so.

C. The Board Took Adequate Time To
Consider And Reflect Upon The
Information It Received.

In considering the Mesa Offer and potential responses to it, the Board acted deliberately to ensure that "it has sufficient opportunity to acquire knowledge concern-

ing the problem before acting." Moran v. Household International Inc., Del. Ch., C.A. No. 7730, Walsh, V.C. (Jan. 29, 1985), slip op. at 32, citing Kaplan v. Goldsamt, Del. Ch., 380 A.2d 556, 568 (1977). After the Mesa Offer was announced, the Board waited five days before meeting, thus allowing adequate time for reflection upon the details of the offer. The Board met for 9-1/2 hours to consider the Mesa Offer.

The Board then adjourned before deciding what steps should be taken to oppose the Mesa Offer or ameliorate its detrimental effects on Unocal and its shareholders. Only after meeting for two additional hours on April 15, a full week after the announcement of the Mesa Offer, did the Board decide to commence the Exchange Offer. The Board thus met for more time over a longer period, and was infinitely better informed before deciding to launch its offer than the Mesa Board, which, despite the absence of the need for prompt action present here, allegedly met only briefly by telephone on Easter Sunday before launching the Mesa Offer. (Batchelder, May 2, 354-59; Stillwell, Apr. 30, 160-66).

What makes Mesa's attack on the alleged "haste" of Unocal's painstaking and thorough planning all the more incredible is the fact that Unocal's review, which was clearly sufficient to withstand scrutiny even in ordinary circumstances, was done in response to an unsolicited tender offer scheduled to close in the minimum time period permitted under federal law. Under such conditions, Delaware

courts have recognized that the Board may only have a limited opportunity to evaluate alternatives. See Bennett v. Propp, supra, 187 A.2d 405; Moran v. Household International, Inc., supra, slip op. at 34.

In an awkward attempt to stuff the facts of this case into the Van Gorkom decision, Mesa suggests that the Unocal Board meetings and the meeting at issue in Van Gorkom "are virtually indistinguishable." (PB 71). Mesa's comparison only serves to highlight the distinctions. At the April 13 Unocal meeting, the Board received a lengthy presentation by Delaware counsel on the ruling in Van Gorkom and the duties Delaware law imposes on directors. They were advised to be certain that they had received sufficient information with which to make an informed decision and not to permit their personal interests to play any role in their deliberations. The directors actively pursued those issues with Delaware counsel at the meeting and an extensive discussion ensued. (Eamer Aff. Ex. A, pp. 1-2). As Mr. Brinegar testified:

Q. Can you tell us what the lawyers told you about your legal obligations?

A. Our first obligation was to our shareholders, that as a Board we had the responsibility to consider everything in careful detail and take no hasty actions and to make sure that we listened carefully to our lawyers.

(Brinegar, April 19, 119).

In Van Gorkom, by contrast, the board approved the sale of all of the assets of the company at a price set by a single inside director. The board acted on the basis of a twenty minute presentation, without receiving any opinion from investment bankers concerning the value of the company and without learning of the analysis by which the deal price had been determined. Here, the Board authorized the Exchange Offer after meeting 12 hours over two days, receiving numerous expert opinions and presentations, all of which is before the Court.

This case also stands in stark contrast to Weinberger v. United Financial Corp. of California, Del. Ch., C.A. No. 5915 (Oct. 13, 1983), where the Board voted to accept a tender offer "without any meaningful" discussion, without even gathering to meet together, and without consulting with either management or the firm's investment bankers to determine whether the maximum price had been obtained for the shareholders.

Rather, this case is analogous to a case recently before this Court, Edelman v. Phillips Petroleum Co., Del. Ch., C.A. No. 7899, Walsh, V.C. (Feb. 12, 1985), where the Court found that the directors acted with due care in approving a recapitalization plan after first consulting with its investment banking firms and outside counsel.

III. UNOCAL'S DIRECTORS HAVE NOT BREACHED
THEIR DUTY OF CARE AND HAVE NOT IMPROPERLY
DELEGATED BOARD POWERS.

As discussed above, Unocal's directors engaged in extensive discussion among themselves, with their lawyers, and with their financial advisors prior to deciding to adopt the Exchange Offer. As an outcome of this consideration, the Board enacted lengthy and detailed resolutions, which were recorded in the minutes. (Eamer Aff. Ex. A, pp. 18-22). In these resolutions, the Board provided the essential terms of the Exchange Offer and directed its implementation. One of the resolutions adopted was as follows:

RESOLVED FURTHER, That the proper officers of the Company be and they hereby are authorized and directed to execute and deliver on behalf of the Company to First Interstate Bank of California, as Trustee, an indenture setting forth the terms and conditions of and providing for the issuance of the securities to be exchanged for shares of Common Stock pursuant to the Company Offer and providing for the pledge to the Trustee of all of the outstanding common stock of Union Oil Company of California and setting forth such covenants restricting the future actions of the Company and its subsidiaries as such officers may deem appropriate for the protection of the holders of such securities and containing such other terms, conditions, and provisions as such officers may deem necessary or appropriate,
.

Eamer Aff. Ex. A, pp. 18-19.

Prior to adopting this resolution, the Board discussed the purpose of the restrictive covenants and understood that they would be designed solely for the pur-

pose of protecting the holders of the Unocal debt. (Brinegar, Apr. 26, 54, 103, 118; Harder, Apr. 30, 119; Eamer, May 1, 24; Harder Aff. ¶ 7). In fact, they were designed by the investment bankers of the Board's directive for that limited purpose. (Second Sachs Aff. ¶ 4). Under these circumstances, the limited delegation of authority authorized by this resolution is consistent with Delaware law, which provides that the affairs of a corporation are to be managed "by or under the direction of" the board of directors. 8 Del. C. § 141(a).

Mesa's assertion that this Court's decision in Clarke Memorial College v. Monaghan Land Company, Del. Ch., 257 A.2d 234 (1969), is applicable to the facts of this case is unfounded. In Clarke, a group constituting a majority of shareholders transferred their voting rights to trustees who passed a resolution authorizing the directors to sell substantially all of the company's assets "upon such terms and conditions, and for such consideration, as the Directors deem expedient and for the best interests of the corporation" (Id. at 237). Clarke College, a member of the majority group, challenged a resolution of the Board in which it authorized the President and Secretary to make the sale "upon such terms and conditions as they deem for the best interests of the Company and its shareholders" (Id.). This Court ruled that the Board's action constituted an invalid delegation of authority conferred on the Board by the shareholders because the directors did not even consider

the matter or issue guidelines but merely passed responsibility to the two officers. (Id. at 241). That is not this case. Accordingly, Clarke is inapposite.

Here, the Board's resolution followed an informed discussion by the Board with respect to the nature of the debt covenants and terms, with a view to the protection of debtholders. "The duties of directors are administrative, and relate to supervision, direction, and control, the details of the business being delegated to inferior officers, agents, and employees." Cahall v. Lofland, 12 Del. Ch. 299, 307, 114 A. 224, 229 (Del. Ch. 1921), aff'd, 13 Del. Ch. 384, 118 A. 1 (Del. Supr. 1922). The Board's limited grant of authority to include covenants in the indenture designed solely to achieve the Board's objective did not constitute an improper delegation of authority.

IV. UNOCAL'S EFFORTS TO DEFEAT A GROSSLY INADEQUATE OFFER DO NOT GIVE RISE TO A CLAIM FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE.

Mesa contends that the Exchange Offer unlawfully interferes with Mesa's right to acquire Unocal on the theory that the Exchange Offer amounts to tortious interference with a prospective economic advantage.* This bootstrap argument, which necessarily assumes that Mesa's Exchange Offer is unlawful, is utterly without merit.

Mesa has no legally cognizable right to acquire Unocal at its admittedly inadequate price of \$54 per share, or at any other price. Just as stockholders have no right to receive a takeover premium since their stock ownership is subject to takeover defensive tactics pursued by directors in good faith, see Moran v. Household International, Inc., supra, slip op. at 20-21, so too any right of an offeror to complete its offer for stock of a Delaware corporation must be qualified by the same power given to directors under Delaware law. See, e.g., Panter v. Marshall Field & Co., supra, 646 F.2d 271; Carter Hawley Hale Stores, Inc. v. The Limited, Inc., supra, C.A. No. 84-2200-AWT (C.D. Cal. Apr.

* Although Mesa claims that Unocal is also tortiously interfering with Unocal's public shareholders' right to accept Mesa's inadequate offer, and thus receive an economic advantage, Mesa does not contend that it is suing either as a class representative, or derivatively, and therefore cannot represent other shareholders. Bokat v. Getty Oil Co., Del. Supr., 262 A.2d 246, 249 (1970). Indeed its interests are adverse to the other shareholders.

25, 1980). Mesa can cite no authority whatever for the novel proposition that simply because it states an alleged intention to acquire Unocal it has somehow acquired a legal right to consummate that acquisition.

Indeed, as Judge Tashima held, Mesa has not advanced any argument "that it has a legally protectible right to acquire Unocal at any stated value." (Unocal Corp. v. Pickens, et al., No. CV 85-2179 AWT (C.D. Cal. May 1, 1985), slip op. at 6.

Further, Mesa has made no showing that the Exchange Offer will prevent Mesa from acquiring Unocal. The Exchange Offer is for 49 percent of the outstanding shares; Mesa already owns 13.6 percent of those shares and its competing two-step offer is for the remaining 37 percent. Thus even if Unocal's offer is fully subscribed, Mesa still has the opportunity to acquire all of the remaining shares. In fact, Mesa has announced its intention to acquire Unocal whether or not it is permitted to participate in the Exchange Offer. As Judge Tashima also observed, "Mesa's acquisition efforts will be aided [by the Exchange Offer], since its 13.6 percent share of Unocal common will increase to 19 percent of shares outstanding after" the Exchange Offer is completed. (Unocal Corp. v. Pickens, et al., supra, slip op. at 6).

In short, there is no legal or factual predicate for Mesa's novel tortious interference claim.

V. UNOCAL HAS NO OBLIGATION TO MESA BECAUSE
OF THE BARE POSSIBILITY THAT MESA MIGHT
BECOME THE MAJORITY SHAREHOLDER.

Plaintiffs' contention that the defendants have breached their fiduciary duties to the prospective majority owner of Unocal's shares by approving the Exchange Offer is totally unfounded. Mesa is not the majority stockholder of Unocal, and there is no assurance that it ever will be. It is now only a minority shareholder making an inadequate tender offer. Ignoring this fact, Mesa contends that Delaware law prohibits the directors of a corporation from taking action contrary to its wishes. That is not the law.

Once the Board determined in good faith that the Mesa Offer was grossly inadequate and not in the best interests of the stockholders, it was then obligated to protect the company and its stockholders. See cases cited in Argument I.A., supra.

Nonetheless, Mesa would have this Court hold that anyone tendering for majority control of a Delaware corporation automatically acquires some legally cognizable right to complete its acquisition, and that any attempt by the directors in the exercise of their business judgment to oppose that hostile takeover is an infringement of this right.

The law is to the contrary, as this Court found recently in Moran v. Household International, Inc., supra:

[D]ecision[s] of a target board to oppose a tender offer, or invite a third party to make another offer . . . have been consistently approved under the

business judgment rule. . . . Indeed, the directors who have the responsibility for the governance of the corporation are entitled to formulate a takeover policy, whether it be to meet a specific threat or a general prospective one, even though that policy may not please all its shareholders.

Id. at 44.

Even were this Court permitted to assume that Mesa will succeed in its offer and that the last 37,200,000 shares in the Exchange Offer will be purchased after Mesa becomes a majority stockholder, Mesa's contention that such a purchase would result in a breach of duty to it is squarely contradicted by recent Delaware law. In Weinberger v. UOP, Inc., Del. Supr., 457 A.2d 701, 709 (1983), the Supreme Court emphasized the duty of directors of a subsidiary to act to protect the interests of the minority from the interests of a majority stockholder pursuing its own interests in a cash-out merger. In Weinberger, the Supreme Court encouraged directors of the subsidiary corporations to deal at "arm's length" with the parent (457 A.2d at 710, 709n), and suggests the use of an independent negotiating committee to achieve this result (457 A.2d at 709n). Obviously, if Mesa's theory were correct that directors of a subsidiary must obey the wishes of a majority shareholder intent upon acquiring the stock of the minority, the entire negotiation committee procedure established in Weinberger would be a sham.

Moreover, as this Court recently held in American International Rent A Car, Inc. v. Cross, Del. Ch., C.A. No. 7583, Berger, V.C. (May 9, 1984), the Board may act contrary to the wishes of even a majority of its stockholders if it has a proper business reason for doing so:

Nor am I persuaded that it is a per se breach of fiduciary duty for the Board to act in a manner which it may believe is contrary to the wishes of a majority of the company's stockholders. If the Board has such a belief it would be expected that the stockholders' opposing views be given due consideration by the Board. However, I do not believe that stockholder opposition automatically overrides the other factors that the Board considers in exercising its business judgment.

Defendants have already shown that the Exchange Offer was undertaken for a proper purpose.

Plaintiffs rely entirely upon the pre-Weinberger Order entered in Martin Marietta Corp. v. The Bendix Corp., Del. Supr., No. 298, 1982, Quillen, J. (Sept. 21, 1982), which, under the unique facts of that case, referred to a "moral duty" under Maryland, not Delaware, law. Plaintiffs read far too much into this case. The facts there were indeed unique: Bendix and Martin Marietta tendered for each other. Bendix acquired 51% of Martin Marietta, but due to peculiarities of Maryland law, could not exercise its control over Martin Marietta for 11 days. However, Martin Marietta became the majority stockholder of Bendix, and exercised control over it in the interim. To prevent this from occurring, Bendix asked its stockholders to approve an

amendment to its own charter to prevent action by written consent. Martin Marietta sought "equitable" relief to preclude a meeting, on the grounds that Bendix was asking its stockholders to act too hastily. The Court of Chancery found that Martin Marietta had dictated the timetable, and that frustrating Bendix' ability to exercise control might perpetuate Martin Marietta's directors in office. Accordingly, it refused to enjoin the meeting. The Supreme Court affirmed, holding only that Martin Marietta was not entitled in the circumstances to seek equitable relief.

The clear weight of Delaware authority is that a Board has an obligation to act to prevent a hostile tender offeror from obtaining control when that is not in the best interests of the company. Unocal's Board has made that determination based on overwhelming evidence. Unocal certainly has no obligation to freeze its assets based on the bare assertion that Mesa intends to become the majority shareholder, or to refrain from taking action which will protect its minority stockholders should Mesa's coercive two-tier offer succeed. See generally Moran v. Household Int'l, Inc., supra.

VI. PLAINTIFFS' CLAIMS OF CONVERSION OF
PARTNERSHIP PROPERTY AND OF ITS RIGHTS
AS A UNOCAL STOCKHOLDER ARE WITHOUT
MERIT.

Plaintiffs claim that the Unocal proposal represents an alleged scheme for "conversion" of plaintiffs' property. This claim is so patently absurd that plaintiffs fail to cite a single case in support of their position. Plaintiffs' theory is that there is a conversion of Mesa's assets because the Exchange Offer eliminates Mesa's "right and ability" to effectuate a back-end merger at a "fair" price. The claim is, in reality, a restatement of Mesa's argument that it has some alleged "right" to become the majority shareholder, in the guise of a claim for conversion. The claim is without merit.

Plaintiffs fail to articulate any basis for their assertion of a right to "money" to be paid out by Unocal in exchange for its stock. Ownership of a company's common stock is not, and has never been held to constitute, a direct overriding, personal claim of the shareholder on a company's assets and future proceeds. Indeed, common stockholders have no direct claim on the "money" value of a company's assets unless dividends are declared. As the Court held in Bird v. Wilmington Society of Fine Arts, et al., Del. Supr., 43 A.2d 476, 483 (1945), "The owner of the shares of stock in a company is not the owner of the corporation's property."

As a matter of law, a valid claim for conversion necessitates a showing that there has been an "unauthorized

transfer or disposal" of specific property (or a property interest) belonging to an identifiable person "to one who is not entitled" to that property. W. Prosser, Law of Torts 87 (4th ed. 1971). See also Mastellone v. Argo Oil Corp., Del. Supr., 82 A.2d 379, 383 (1951); Van Dyke v. Pennsylvania R. Co., Del. Supr., 86 A.2d 346, 352 (1952) ("Conversion in the broad sense consists of an act of willful interference with any chattel without lawful justification, whereby any person entitled thereto is deprived of the possession of it.") (emphasis added); Drug, Inc. v. Hunt, Del. Supr., 168 A. 87, 93-94 (1933).

Following plaintiffs' logic, any debt duly entered into on behalf of a company by its officers or directors would constitute conversion whenever a shareholder happened to disagree. Such a rule would obviously wreak havoc on corporate contracts and would mean that a shareholder could launch capricious attacks on management and directors whenever it disagreed with a management decision. Moreover, even if there could be a claim of conversion arising as a result of Mesa's exclusion from the Exchange Offer, the interference with property rights would be with "lawful justification," Kors v. Carey, supra, and Mesa has failed to show that the \$72 debt to be exchanged for Unocal stock is unreasonable or unfair in any event.

Plaintiffs' claim that the Exchange Offer amounts to conversion is totally without merit.

VII. THE EXCHANGE OFFER DOES NOT IMPERMISSIBLY
INTERFERE WITH MESA'S PROXY SOLICITATION
AND MESA HAS FAILED TO DEMONSTRATE A
PROBABILITY OF SUCCESS ON THE CLAIM.

Mesa's request that the Court enjoin the Exchange Offer on the ground that it improperly interferes with Mesa's proxy solicitation is totally without merit. Mesa's claim is predicated on the assumption that it is improper for a contestant in a proxy contest to engage in other activity, such as a tender offer, while a proxy contest is in progress. There is no law supporting such a proposition. Indeed, it was Mesa which launched the first tender offer on April 8, while the proxy contest was underway. Mesa's tender offer failed to disclose material facts and contained materially false and misleading statements and omissions. Unocal Corp. v. T. Boone Pickens, et al., No. CV 85-2179 AWT (C.D. Cal. April 26, 1985). Given the rule of law suggested by Mesa, it was the Mesa Offer which was improper, not Unocal's response thereto.

In any event, there has been no adverse effect on Mesa's proxy solicitation resulting from the Exchange Offer. Mr. Tassin, who verified the complaint herein, has testified in his deposition that he is unaware of any shareholder who changed his proxy as a result of the Exchange Offer. (Tassin, May 1, 549). Mr. Tassin further testified that he is unaware of a single Unocal shareholder who cast his vote

in favor of Unocal as a result of the Exchange Offer. (Tassin, May 1, 549). As Mr. John C. Gavin, Executive Vice President of D. F. King & Co., testified:

While it is my belief that certain stockholders may either vote for management or fail to vote altogether on the adjournment proposals by reason of the recent statements by Mr. Pickens endorsing Unocal's action as "the first time the company has done anything for shareholders," in my opinion it is extremely doubtful that shareholders will be persuaded to return proxies either for or against management or Mesa based on the fact that the Unocal offer is unavailable to Mesa. This is particularly true since Mesa has indicated its intention to continue its offer and since stockholders who wish to take advantage of Unocal's offer but who also support Mesa's position are free to tender to Unocal . . . and at the same time show their support for Mesa by voting those shares for Mesa

(Gavin Aff.).

The Exchange Offer should not be enjoined on the ground that it interferes with Mesa's proxy solicitation. Mesa's claim is without basis in the law and any nexus between Mesa's exclusive from the Exchange Offer and Mesa's proxy solicitation is highly speculative.

VIII. UNOCAL'S DIRECTORS HAVE NOT BREACHED THEIR DUTY OF COMPLETE CANDOR AND HAVE PROPERLY DISCLOSED ALL MATERIAL FACTS CONCERNING THE ORIGINAL OFFER TO PURCHASE.

Mesa contends that Unocal has failed to disclose facts material to the Exchange Offer. Such a contention is frivolous. Mesa has no standing to raise its purported disclosure claims since it is not suing derivatively or as part of a class. Nor can Mesa suggest that it has been misled in any regard. In addition, Mesa has urged Unocal stockholders to tender to the Exchange Offer. (Batchelder, May 2, 394). As a result, Mesa can hardly claim that the Exchange Offer is deceptive, and it strains credulity that Mesa can claim it is damaged as a result of a tender offer into which it recommends Unocal stockholders tender their shares.

In any case, Unocal has met its duty of full and complete disclosure of all material information which is needed by a shareholder to make an informed decision. Lynch v. Vickers Energy Corp., Del. Supr., 383 A.2d 278, 281 (1977).

In Michelson v. Duncan, Del. Supr., 407 A.2d 211 (1979), the Supreme Court set forth categories of "information" which management is not obligated to disclose:

[I]t was not error... for management to fail to inform the shareholders of the items enumerated [characterizations of management's actions]... it would have been wholly... unreasonable for management to be required to have made such declarations in [its] proxy materials. Such statements (a) were not factual

assertions; (b) in some respects were not factually correct; (c) were inconsistent with management's position; or (d) called for legal conclusions.

Id. at 222.

Mesa contends that the Board should have disclosed that it adopted the Exchange Offer "without adequate information" and that the effect on Unocal's operations of the restrictive covenants was somehow not considered. (PB 112-114). As discussed in detail in Argument II, supra, these allegations are erroneous and, moreover, are precisely the type of non-factual characterizations of management's actions that need not be made by Unocal under Michelson. (See also Second Sachs Aff.).

Mesa also asserts that Unocal should have informed stockholders of "their rights under Delaware law and under Unocal's Certificate of Incorporation in any second step transaction," and of "the purportedly questionable legal validity" of the selective aspect of the Exchange Offer. (PB 114, 118). These claims are also without merit. Unocal is under no obligation to disclose legal conclusions, or give general legal advice. Fisher v. United Technologies Corp., et al., Del. Ch., C.A. No. 5847, Hartnett, V.C., slip op. at 4-5 (May 12, 1981); Michelson v. Duncan, supra; Tuckman v. Aerosonic Corp., supra. At any rate, the exclusion of Mesa is not illegal.

Mesa further alleges that Unocal should have engaged in speculation as to the potential effects of the

withdrawal of the Mesa offer on the value of Unocal stock. (PB 115). Unocal is not required to speculate as to the effect of a possible withdrawal or alteration of the Mesa Offer, or to assure shareholders of any particular outcome, when past experience in these matters dictates that no such assurance is reliable. (See Sachs, May 3, 65-66). Mere speculation need not be disclosed. Tuckman v. Aerosonic Corp., Del. Supr., C.A. No. 4094, Hartnett, V.C. (May 20, 1982), slip op. at 27.

Mesa also claims misrepresentation relating to the fairness opinions attached to the Offer to Purchase (PB 116). Mesa's disagreement with these opinions does not constitute a violation of Unocal's duty of candor, since the opinions are printed in full "allowing the stockholder to draw his own conclusions as to their credibility." Fischer v. United Technologies Corp., et al., supra, slip op. at 9 (rejecting a claim almost identical to Mesa's).

Finally, Mesa suggests that Unocal failed to reveal that, if its Exchange Offer achieved its purpose, it was possible that no shares would be purchased (PB 117). Unocal's Original Offer to Purchase clearly stated as one of its purposes the frustration of the Mesa Offer:

The Company Offer is also intended to make it more difficult for Mesa Bidders to complete the Mesa Offer, which the Board of Directors of the Company unanimously views as grossly inadequate and detrimental to the best interests of the Company and its shareholders.

Original Offer at 7. The Original Offer to Purchase also stated that "[i]f, as a result of the Company Offer or otherwise, Mesa Bidders terminate the Mesa Offer . . . the Company will have the right to terminate the Company Offer without accepting any Shares for exchange." Original Offer, cover page. The Original Offer to Purchase thereby plainly indicated that there was a possibility that no shares would be accepted for exchange.

Mesa's alleged claims of nondisclosure are much ado about nothing.

IX. PLAINTIFFS HAVE FAILED TO SHOW THAT THEY
WILL SUFFER ANY IRREPARABLE HARM IF THEY
ARE EXCLUDED FROM THE EXCHANGE OFFER.

It is a fundamental prerequisite for the entry of preliminary injunctive relief that plaintiffs' demonstrate they will suffer imminent irreparable injury. E.g., Sandler v. Schenley Industries, Inc., supra, 79 A.2d at 610; Allied Chemical & Dye Corp. v. Steel & Tube Co. of America, supra. Thus, "[a]n injunction, being the 'strong arm of equity,' should never be granted except in a clear case of irreparable injury and with full conviction on the part of the court of its urgent necessity." State v. Delaware State Education Ass'n, Del. Ch., 326 A.2d 868, 872 (1974).

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

Mesa advances but two arguments for the proposition that it will suffer irreparable injury unless the Exchange Offer is enjoined -- that it will lose the unique opportunity to acquire Unocal and that the Exchange Offer may impede its proxy solicitation. Mesa's proxy argument is frivolous and is treated in Section VII above. Nothing in the Exchange Offer will impede Mesa's solicitation and the affidavit of Mesa's proxy solicitor is sheer speculation entitled to no weight.

Mesa offers no evidence that it will suffer irreparable injury if the Exchange Offer proceeds, but rests instead on the bare allegation that its purpose of acquiring Unocal will be frustrated. That is precisely the record which Mesa presented to Judge Tashima in California and which he found totally inadequate to support a finding of irreparable injury. Judge Tashima addressed these very contentions and found that Mesa had failed to make a showing that it would suffer irreparable harm if the Exchange Offer went forward:

Even assuming that Unocal's purpose in making the Offer is to frustrate Mesa II's takeover bid, not a single fact (other than the purpose itself) is set forth from which irreparable harm could be inferred. And while it is equally true that if Mesa is prevented from completing its acquisition of Unocal, it will have been deprived of an unique opportunity, again, there is not a single fact stated or found from which it can be inferred that the Offer will or may have that effect. The most that can be inferred is that the Offer, if completed will reduce the value of the

acquired company. Mesa II has made no argument that it has legally protectible right to acquire Unocal at any stated value. Although the prize may be reduced in value by completion of the Offer, it can be argued that rather than preventing acquisition by Mesa II, Mesa II's acquisition efforts will be aided, since its 13.6 percent share of Unocal common will increase to 19 percent of shares outstanding after exchange of approximately 30 percent of the now outstanding non-Mesa II shares for debt securities. In short, I cannot agree that any basis exists upon which a finding of irreparable harm can be predicated.

Unocal Corporation v. T. Boone Pickens, et al., supra, May 1, 1985, slip op. at pp. 5-6.

Here, as in California, Mesa has advanced no support for the novel proposition that it has a legally cognizable right to acquire Unocal at any stated value or at all.

A. Mesa Will Suffer No Irreparable Harm Because It Will Continue Its Tender Offer for Unocal Irrespective Of Whether The Exchange Offer Excludes It.

Several of Mesa's witnesses have testified that Mesa will acquire all of Unocal's stock whether or not it is excluded from the Exchange Offer. (Tassin, May 1, 536-37; Batchelder, May 2, 394). Thus, there is absolutely no evidence in the record that the exclusion of Mesa will have any effect on Mesa's tender offer.

In addition, Mesa has no right to acquire Unocal as it exists today. It is well settled law that a raider

has no right to a particular corporate balance sheet. Whitaker Corp. v. Edgar, 535 F. Supp. 933 (N.D. Ill. 1982); GM Sub Corp. v. Liggett Group, Inc., C.A. No. 6155 (Apr. 25, 1980), slip op. at 3; Treadway Companies, Inc. v. Care Corp., 638 F.2d 357, 382-3 (2d Cir. 1980); Crouse-Hinds Co. v. Internorth, Inc., 634 F.2d 690, 701-04 (2d Cir. 1980). Any other rule of law would permit a raider to prevent management from performing its obligation to manage the affairs of the company during the pendency of a tender offer.

Thus, in GM Sub Corporation v. Liggett Group, Inc., supra, the raider sought to enjoin the target corporation from selling an asset to a third party for an adequate price. The court noted that the sale of the asset did not provide any guarantee that control of the target would not change, also the situation here, and held:

Thus, at this stage, the record can be construed as an application by GM Sub to freeze the assets of Liggett to those as they existed as of the time the tender offer was announced so that GM Sub will be guaranteed the opportunity to acquire the complete package it sought rather than one of equal or greater value, but in a different form. So stated, I am not aware at this time of any precedent that would support such an application. Ibid. at p. 5.

The record establishes that Unocal's Exchange Offer merely changes equity for equivalent debt. An independent appraiser relied upon by Mesa set the value of Unocal's shares at \$74. Mesa's current investment banker, Drexel, Burnham, prepared within the last month an analysis

of Unocal for distribution to its customers which indicated that the liquidation value of Unocal was from \$69.45 to \$72.34 per share. Mesa's own internal determination of the value of Unocal stock ranged as high as \$79 per share.

Unocal's financial advisors, Goldman, Sachs and Dillon, Read, both independently determined that values in the range of \$70-75 were appropriate. In short, the overwhelming weight of the evidence is that the Exchange Offer is for a fair price. Thus, if Mesa acquires Unocal it will obtain at least equal value.

Moreover, as found by Judge Tashima, Mesa would actually be aided by the consummation of the Exchange Offer because its percentage ownership of Unocal will be increased, from 13.6 percent to 19 percent. Thus, on this record Mesa actually will be in a better position to obtain control if the Exchange Offer closes.*

B. Mesa's Exclusion From The Exchange Offer Cannot Constitute Irreparable Harm Since It Can Obtain Damages To Remedy Any Alleged Harm.

The Exchange Offer cannot prevent Mesa from acquiring Unocal if, as Mesa represents, that is its objective and if Mesa is willing to accept net assets with a value more consistent with the consideration promised in the Mesa Offer. Indeed, as a buyer of stock, Mesa lacks stand-

* Indeed, as shown by the Pitts Affidavit, Unocal's shareholders stand to be harmed in the event Mesa is permitted to participate in the Unocal Offer.

ing to challenge the Exchange Offer. If, on the other hand, Mesa abandons its intention to acquire Unocal and becomes a seller of stock, its injury, if any, from wrongful exclusion is fully compensable in money damages.

As a matter of law, where monetary damages after a final determination on the merits afford adequate relief, irreparable injury cannot be shown. Bayard v. Martin, 101 A.2d at 334 (1953); FMC Corp. v. R. P. Scherer Corp., Del. Ch., C.A. No. 6889, Longobardi, V.C. (Aug. 6, 1982), slip op. at 12; Kahn v. Household Acquisition Corp., Del. Ch., C.A. No. 6293, Brown, V.C. (Dec. 12, 1980), slip op. at 9; High On Injunctions § 68 (4th Ed. 1905).

Even if plaintiffs were ultimately able to demonstrate on final hearing that Unocal unduly discriminated against them and that they suffered economic injury as a result of being excluded, such damages could easily be quantified. There is no question that Unocal is financially able to respond to such an award. (First Sachs Aff. ¶¶ 33, 48; Eamer Aff. Ex. A, pp. 12-13 and 17, indicating a surplus asset value of approximately \$2 billion after the full 87,000,000 share Exchange Offer). Plaintiffs have no evidence to the contrary. On this record, irreparable injury cannot be established.

CONCLUSION

For the reasons stated herein and in the affidavits filed herewith, the relief requested by plaintiffs should be denied in all respects.

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