IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BLASIUS INDUSTRIES, INC., et al.,

Plaintiffs,

vs.

ATLAS CORPORATION, et al.,

Defendants.

Civil Action Nos. 9520 and 9720

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Courtroom No. 2
Public Building
Wilmington, Delaware
Tuesday, March 15, 1988
10:15 a.m.

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BEFORE: HON. WILLIAM T. ALLEN, Chancellor.

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ARGUMENT ON PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

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APPEARANCES:

A. GILCHRIST SPARKS, III, ESQ.
Morris, Nichols, Arsht & Tunnell
for Plaintiffs

SAMUEL A. NOLEN, ESQ. and
CYNTHIA D. KAISER, ESQ.
Richards, Layton & Finger
for Defendants

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THE COURT: Good morning, ladies and gentlemen.

MR. NOLEN: Good morning, Your Honor.

MR. SPARKS: Good morning.

THE COURT: This is the time fixed for the presentation of a motion seeking a protective order by the plaintiffs in two actions that have now been consolidated, 9720 and 9522.

Mr. Sparks, are you ready to proceed?

MR. SPARKS: I am, Your Honor. And given Mr. Nolen's papers, which I gather Your Honor has had a chance to read --

THE COURT: Quickly, yes.

MR. SPARKS: (Continuing) -- the issue or issues before the Court have been significantly narrowed, as I see them, in that I think I need only address the reason that Mr. Nolen says he wants the discovery.

Basically, as I read Pages 4 and 5 of the letter, they argue that the defendants intend to raise a Unocal defense to plaintiffs' claim that the board packing following the December 30 consent was a manipulation of the corporate machinery under Schnell, and that is our claim. And they say they

intend to raise a Unocal defense and to show that that action was a reasonable defense to a perceived threat on the part of the board, and then they go on from there to suggest that somehow the testimony of the two principals of Blasius and the documents they seek to support the taking of that deposition would be reasonably calculated to lead to the discovery of admissible evidence with respect to that defense.

First, as a threshold matter, I am not aware of any authority which suggests that a Unocal analysis applies in response to something for which stockholders go out and seek votes or consents of other stockholders. In other words, the Unocal line of cases deals with those circumstances in which a board of directors may mount an economic or other type of defense to a perceived threat to the stockholders and the corporation arising from an outside source, but by definition something that a majority of stockholders vote to approve is not such threat in the sense that we are talking about the corporate franchise, which is the great safety valve that all of our cases look to. We are not talking --

THE COURT: How much stock did Mr. Pickens own in Unocal?

MR. SPARKS: In which -- oh, in Unocal? Approximately 10 percent, I think, Your Honor. My memory is not that good, but he owned, I believe, approximately 10 percent in that particular case.

But we are not talking about a Unocal case as a threshold matter. As I understand the Schnell line of cases, which is our offense, which is our case, we test the motive and purpose of the actions taken by the other side to determine whether they constitute a manipulation of the corporate machinery to maintain control. And I don't believe, and I know of no case that suggests that you may, in effect, secure the election process by claiming that the people who are running an election contest against you are bad people or have motives -- even if you argue they have a motive to harm the corporation if they got control, you cannot raise that kind of defense to a Court. You can raise it to the stockholders in contesting against the election, but you can't raise it to a court, for the same reason this Court, for example, has not allowed prospective breach of fiduciary duty counterclaims in Section 225 actions, for example.

We are talking in the manipulation of the corporate machinery to maintain yourself in control line of cases about things like moving meeting dates, changing bylaws in mid-stream; here, changing the composition of the board in mid-stream after, in effect, the announcement of an election contest by the filing of a written consent. That is our claim. And I don't believe that the Unocal defense is relevant at all; and therefore, the discovery isn't. But --

THE COURT: Well, I will tell you about that. I mean, I will react with you just for purposes of having a more or less open exchange here, because we don't have a whole lot of time to decide this issue.

MR. SPARKS: Right.

THE COURT: You may be correct about that. In one of those Insituform cases I sort of implied otherwise. I reviewed -- I think I reviewed a case by Chancellor Seitz, and I have forgotten what it is, American something or other case, and then that seemed to create a black letter rule with respect to taking board action to disenfranchise a majority shareholder down to a minority position, and

I reviewed a subsequent case by Chancellor Marvel to the same effect. The Marvel case I have forgotten, maybe Lunkenheimer.

MR. SPARKS: Those are the Condec-Lunkenheimer and the cases that deal with circumstances where you have a majority guy and dilute him down and take away his contractual right to control; yes, sir.

THE COURT: Right. And I then said that it may be that Unocal -- I said something about the implications for Unocal of that line of cases. Just because I say something in one context, I do it honestly, but I don't regard myself as really focusing on all these problems. And so I just call that to your attention as a case that may have some relevance to this question.

But more fundamentally, this is obviously a complex and important issue, and I am not going to decide this production motion -- I am not going to decide it on the way to deciding this discovery motion, because I don't have the time and it is an important issue.

MR. SPARKS: I anticipated that that might be Your Honor's reaction to the question, but I

didn't want to make my position known on that threshold issue. And, indeed, I had had the opportunity for two minutes after I got their papers and then ran over here to at least ask Mr. Hamermesh what it was that Your Honor had said in the Insituform case. And I think that is helpful but not relevant or not necessary to the determination of this motion, because if you go on to the next step and assume for purposes of argument and for purposes of Your Honor's ruling today that a Unocal defense were possible in this circumstance, I believe that Your Honor still must come to the conclusion that the particular discovery that is sought here, even if that were an available defense, is not reasonably calculated to lead to any admissible evidence with respect to even a Unocal defense. And I say that for really the reasons I will go into.

First, the defendants are wrong on the burden of proof issue. They suggest that it is our burden to come in and show in a Unocal type circumstance that the action that they took was reasonable in relation to the perceived threat. As Your Honor knows, Unocal says that is their burden. And, indeed, we have no intention of calling any

witnesses on that issue. We are going to seek to prove that based on the depositions that we have taken, based on the circumstances of when that particular --

THE COURT: Prove what?

MR. SPARKS: Prove, we are going to seek to prove that their act, the primary purpose of their action was or that their actions were a manipulation of the corporate machinery for the purpose of maintaining control and that the Unocal defense -- we will make the argument that the Unocal defense under these circumstances is irrelevant. And to the extent that Your Honor finds it is relevant, we will rely on the fact that it is their burden. And they will not have met their burden, we do not believe, after the Court has all the evidence of what they have done and has heard their witnesses on cross-examination.

But we will not be putting on any witnesses, because frankly, we have nothing to say about what their perceptions were. The fact of our consent solicitation is not in dispute. It is out there. They know what it was. We know what it was. And therefore, in our view, we are going to be then

trying their perceptions, motives, under a Schnell test, and if Your Honor thinks under a Unocal test also, then under a Unocal test, but out of the mouths and minds of their witnesses, not out of ours.

So, number one, they are not going to need this discovery to cross-examine any of our people on any of this, because we have nothing to say. And in our view of the case, anything we had to say wouldn't be relevant anyway. It would be speculation as to what was in their minds.

THE COURT: Well, let's pause on that for a second. I take it that the defendants say, "Listen, we are going to come -- we, the board, perceived a grave threat here that the plaintiff was seeking to enrich itself at the expense of the other shareholders, blah, blah, blah, and we acted reasonably, and these are our perceptions."

And so far you agree with that, that's the right way to analyze it.

MR. SPARKS: That is correct.

THE COURT: Then they go on to say, "Now, it must be relevant. If you are going to judge the reasonableness of our perceptions, it must be relevant to find out how accurate the perceptions

were."

MR. SPARKS: That is wrong.

THE COURT: "I.e., if we thought that there was a risk that Blasius' motivation was to sell off the airplane division or the cuff link division immediately, which is our crown jewel, and that motivated us, and in discovery we found -- it must be relevant to find out that, indeed, they did have a plan to sell the cuff link division." Now, what do you say to that?

MR. SPARKS: I say it is not relevant, and it is not relevant for the following reasons. And then I will get to the Newmont case, which they rely on and suggest argues for some different rule.

Let's assume that they took a defensive measure based on a perception that we were going to get control of the company and sell the cuff link division and they thought that was bad. And let's then say that they went into the company, they went in and took our people's discovery and found out that we did not truly have any intention to sell the cuff link division. Instead, we had papers all over the place that said cuff links are the crown jewel

and we are going to keep the cuff link division.

I cannot imagine under those circumstances that if they acted on their perception and it was based on something external that was reasonable, that this Court or any other Court would find them liable once they got in and found out that that perception was incorrect so long as their perception, which is all they had available and all any board under those circumstances would have available to it, was accurate.

And the flip side also ought to be the case, in fact, probably more strongly so. Let's assume that we had a plan to sell the cuff link division but we never told anybody, and they had no way of knowing that we planned to sell the cuff link division, and they took their defensive measure and then came in -- which obviously would have had to have been premised under those circumstances on something else that they perceived to be a problem because they had no way of knowing, let's posit no way of even suspecting that we were going to sell the cuff link division. And then they come in and take discovery and find out that we planned to sell the cuff link division.

There in testing the reasonableness, whether the actions they took were perceived to be reasonable in relation to the threat posed when they couldn't know of the threat, they could not possibly have acted with that motive and for those purposes, and that is just as irrelevant.

So either way, whatever undisclosed thoughts or plans that my clients may have had in this matter are not reasonably calculated to advance one iota the Court's inquiry as to whether, based on the state of facts that were known and knowable to these people at the time they acted, they acted reasonably. That is the inquiry, and that is the only logical inquiry. Either other inquiry makes no sense, and I know of no precedent for it.

Now, they cite and they say, well, that rule got changed somehow in Ivanhoe Partners vs. Newmont. But that is not right. What happened in Ivanhoe, if Your Honor will recall, was that we had Gold Fields, Pickens and Newmont. And Ivanhoe defended its actions both vis-a-vis Gold Fields and vis-a-vis Pickens on the grounds that it reasonably perceived there to be threats to it coming from both.

Mr. Pickens argued with respect to

the Gold Fields threat, because he was trying to knock out the Gold Fields-Newmont standstill agreement -- he argued that, one, Newmont's directors did not have a reasonable basis to perceive a threat, and two, he argued that there in fact and objectively was no threat. Now, the other parties met that proof or met that claim, disposed of -- they also argued that that wasn't really relevant, but they met the claim on the facts. And the Court found that they had met it on the facts and really never had to reach the question of whether or not it was relevant.

But beyond that, that situation is very different from the one that you have got here, because here the other side isn't going to be arguing that there was no threat objectively or reasonably perceived, because those two do reinforce each other, no threat for real and no basis for perceiving that there is any threat. Those two do and can, you know, add on to each other.

But as a logical matter, they are going to be arguing that there was a threat from us. They are not going to be arguing, as Mr. Pickens did, that there was no threat. They are going to be arguing that there was a threat and that they acted

upon it and that they acted upon it reasonably. And the only thing that can be relevant to that is all that they knew and acted upon. That's what they are going to come in and tell Your Honor. And Your Honor is going to review their analytical process and determine whether it was reasonable.

And they are going to come in and say, "Now, this is what we were told by our advisers, this is what we had in the public realm from Blasius, this is what whatever background checks we did on these people were, and we took all that together, laid it against our knowledge of the company and concluded that it was reasonable to take all this."

And some action, something, some other thing that Blasius might have planned or some detail that Blasius didn't disclose to the public cannot possibly be relevant, we submit, or reasonably calculated to lead to the discovery of admissible evidence with respect to any inquiry that the Court would have to make even if the Court gets over the first legal issue and finds that a Unocal defense has something to do with this case. And I think that's all that is really framed by the discovery motion.

THE COURT: Thank you.

MR. NOLEN: Your Honor, Mr. Sparks raises, I think, a very interest question, or perhaps it is an offer to make an undertaking which he hasn't communicated to me before. And obviously I would like a chance to talk to my client before either accepting or not accepting it. But I think what he is saying is that Blasius is willing to come into this court and not put on any witnesses to seek to show that we did not perceive a threat, we did not reasonably perceive a threat, we did not take action reasonable in relation to that threat.

Now, if that is his undertaking, I would like to talk with my client about that, because it may turn out that that will satisfy us on some of the discovery. And should that occur, you know, obviously we would talk with Mr. Sparks, but I think the orderly thing to do at this point would be to order the discovery to go forward, and then we would discuss on our side that possibility. And if it could be short-circuited, the parties can reach an agreement, then the discovery would be called off in whole or in part, depending on what the agreement was, but --

THE COURT: Well, you know, maybe we

should move up that pretrial meeting that we were talking about to focus on just how the trial will go forward with respect to these burden issues. I mean, it does seem pretty fundamental to what is going on how the parties' view and how the Court ultimately will view the initial burden of the plaintiff with respect to the Schnell case, the Schnell issue case that they bring. And if there is disagreement, maybe a pretrial ruling would be efficacious. On the other hand, defendant can say well, plaintiff can decide what it feels its burden is and try and meet it.

Anyway, I just raise it as a possibility. If you all feel as though it would be helpful to have some pretrial ruling on who has what burden, you know, I would consider an application of that kind.

MR. NOLEN: Okay. Leaving to one side the possibility of, in effect, a stipulation by plaintiffs that the Atlas board reasonably perceived a threat and took action reasonable in relation to that threat --

MR. SPARKS: Wait a minute.

THE COURT: Leaving aside that possibility, which is a safe thing to do.

MR. NOLEN: Leaving aside that possibility, which frankly was what I understood Mr. Sparks essentially to be saying.

THE COURT: No, no, he didn't say that. What I understood him to be saying was that in his reading of Unocal, you have a very limited burden -- the plaintiff initially has a limited burden, which is to say that a transaction of this kind, if it is one that the Unocal analysis applies to, has an inherent conflict quality. And just like a case in which the burden is thrown over to the defendants because of a self-dealing transaction, so in Unocal just showing that inherent conflict requires the defendant to -- and that's all the plaintiff has to show on that view -- requires the defendant to then come forward with something. And Unocal indicates, and I guess Newmont dilates a little bit on it, what the defendant has to come forward to show.

And if the defendant then comes forward and shows that or introduces enough evidence from which one can conclude that, presumably then, at that point, the plaintiff has a burden shifting back to rebut that and show that the business judgment

rule, the "presumption of business judgment rule" doesn't apply, which probably would be a rather difficult job for a plaintiff to do at that stage.

But I took it that that's what he was saying, that on the initial case they wouldn't be doing anything, but not necessarily saying that they would not do anything on a rebuttal case.

MR. NOLEN: I see. Well, if that is the position, then I doubt that would be of interest to our client. I thought he was talking about --

THE COURT: Let's talk about this. Mr. Sparks, what --

MR. SPARKS: Yes. What I am saying is that we do not intend to call the two people who are sought to be deposed here or, for that matter, any other fact witness for the purpose of testifying about what motivated the other side to take their action or, apart from the legal argument that we would make, whether their action was reasonable in relation to the perceived threat.

I can conceive of a possibility of some expert witness maybe on the restructuring as they knew it, but as far as putting on a fact witness either on opening or rebuttal, we would not intend to

do that, because we don't know and honestly don't know what they could say about these people's motives.

This is not a case where either side is contending that there were conversations or the like between any of these parties where one disclosed its motives to the other. I mean, I can conceive of that having happened, but that didn't happen here, and they haven't asked for the discovery for that purpose, and we are not going to put a witness for that purpose because no such discussions took place.

So while we are certainly not going to concede that it was reasonable in relation to the threat posed -- we are going to fight as hard as we can on that -- what we are going to do is show Your Honor their depositions, the cross-examination and the circumstances which arose in connection with how this all happened; namely, our consent going in on December 30 and out of the blue their putting two people on the board on December 31 in the face of an election contest.

And we will also take legal shots and attack the logic of their arguments. But we don't have any witnesses who are in that board room or who

can say anything about it. Those facts unfortunately are going to come as best we can pull them out of their heads. And that is what Your Honor is going to have to judge this on.

So my undertaking was that we aren't going to put on any lay witnesses for the purpose of coming in and testifying about our perception of whether what they did was reasonable, because frankly, we believe that our perception of what they did, of lay witnesses' perception of whether what they did is reasonable is irrelevant as a matter of evidence; and therefore, anything probing that is not reasonably calculated to lead to the discovery of admissible evidence.

THE COURT: Okay. I think that is pretty clear.

MR. NOLEN: What I don't hear Mr. Sparks saying is that he wouldn't be putting on any testimony with respect to whether there was a reasonable belief as to the existence of a threat. And he talks about lay witnesses and so forth, which only exacerbates my confusion as to what he really means, because I think it is altogether possible that he would come in and put on as a rebuttal witness Mr.

Delano, who, for instance, gave an affidavit in the federal case saying what a wonderful thing this restructuring is and here is why, and he would have Mr. Delano testify that this restructuring, in fact, would have been beneficial to the stockholders, it presented no threat to them, it would have done this, it would have done that, it was workable and so on and so forth, and therefore, they would argue from that testimony, the directors could not reasonably have perceived a threat to Atlas and its stockholders.

Now, if they are going to put on a witness that is going to say that, we are entitled to take discovery of that witness, and we are entitled to take discovery of Blasius as to the defense it is going to raise or the claims it is going to make in trying to make its case.

I mean, after all, under Unocal, and assuming for the moment that Unocal applies -- and I think it does -- once we make what is really in this case a very easy showing to make of reasonable investigation and good faith, and it is enhanced, as you will recall, under Unocal by the fact that this board is made up or at the time was made up of a vast

majority, I think it is six out of seven, independent directors, then it is their burden. It is their burden to show that we did not reasonably perceive a threat and that we did not --

THE COURT: Well, what about the element of reasonable in relationship to the threat posed?

MR. NOLEN: Well, what he has said, what Mr. Sparks has said, as I understand it, is --

THE COURT: No, I am not talking about this case. And I guess I am talking about Newmont, since that was the last case that discussed all this. I mean, how does that element -- at one point the Supreme Court sort of goes through this articulation of the test and then goes on and sort of shortchanges it at the first point in think my opinion, as I remember it, the reasonable in relation to the threat posed element, but then it goes on through several pages of analysis into that question and concludes that it was reasonable and that, therefore, the burden shifts back.

Now, what you said is that the only thing you need to show to meet your burden is that good faith and reasonable investigation, and my

question is, is that right.

MR. NOLEN: Well --

THE COURT: Maybe we are being drug a little further into the substantive law than we should on this point.

MR. NOLEN: Well, we may be being dragged into the substantive law. I think that what the Supreme Court says in Unocal is that we have to show reasonable investigation and good faith, and then the Supreme Court goes on and says a further element is the element of balance. The action must be reasonable in relation to the threat posed.

In Unocal itself I don't think it -- I don't recall that it allocates the burden. Is it a burden of showing that it was reasonable or is it a burden of showing that it was unreasonable? I am not sure which it does, and I am not sure I can elucidate that for Your Honor right now.

In Newmont, of course, the Court I think very clearly, you know, heard the defense put on by the Newmont directors. They said, "Well, we thought there was a threat. We thought Gold Fields might go hostile." But then they went further and they said, "And, indeed, now through the discovery

process we have discovered that Joe Perella was urging them to go hostile, and we discovered that they had these unsigned resignations in a vault somewhere in New York, which we didn't know at the time, but, Your Honor, that just shows what a threat we faced. We thought there was that threat, and, indeed, it turns out there was that threat. There clearly was that threat. This is what they are saying. And this corroborates our perception, and it justifies our perception."

And the Court accepted that, because the Court itself relied on those facts in concluding that Gold Fields had, in fact, posed a threat.

So I read Ivanhoe quite differently from the way Mr. Sparks reads Ivanhoe. And I think if Your Honor reads it carefully, that my position will be found to be sound.

I remember quite vividly in the Supreme Court making the argument -- I didn't make the argument, but the argument being made in the briefs and in the oral argument that Vice Chancellor Jacobs erred in looking to these facts that the board did not know. And I remember equally vividly that that had no effect on the way the case came out in

the Supreme Court.

So I think where we stand at the moment is here. I think I have not heard any undertaking not to try to put on rebuttal evidence should the burden shift back, and thus I think that we are entitled to probe into their claims, the basis for their claims that we acted solely or primarily to entrench ourselves, this independent board. And I think we are entitled to probe into their claims in their own complaint that there is no proper corporate purpose for the action taken.

I think those matters are pretty plainly being pled to try to set up, you know, their burden under Unocal once it shifts back to them, as it will. If they are going to try to meet the burden under Unocal, we are entitled to examine into the facts that they are going to rely on. And I think we are entitled -- I didn't mean to interrupt Your Honor.

THE COURT: Well -- no. Go ahead, finish.

MR. NOLEN: And I think we are entitled to look at their own evaluations of their proposal. We were talking about the cuff link

division and so on and so forth, but I think it is useful to bear some of the facts here in mind.

Blasius is a company that needs cash immediately. It can't meet its current debt service obligations, and so its proposal here, its restructuring proposal, the thing the board was reacting to, is calculated to either sell or hock Atlas' assets so as to spin out a tremendous amount of cash immediately. And the parties have disagreed on whether it is even possible to spin out that much cash and so on and so forth.

But the board doesn't think that is the program that is right for Atlas. Atlas has long term investors and it has this short term investor, whose interest and whose need for immediate cash infusion is rather different from that of the normal stockholder. These are factors the board took into account, and they are factors that the Supreme Court has told us in Unocal, in Ivanhoe, that the board can take into account.

So I think we are going to be able to shift that burden.

THE COURT: But your argument sort of comes down to, as far as I can see, this phrase

"corroborates and justifies the perception." I mean, you certainly, if the directors were incorrect in perceiving a threat -- let me say it this way: If there was no threat when the directors perceived a threat, don't you agree there wouldn't be any liability for them if they were reasonable nevertheless in that perception?

MR. NOLEN: Well, yes. I think you have assumed that -- if you assume that they acted reasonably, then under the standard there wouldn't be any liability.

THE COURT: Yes. Now, if they were reasonable in perceiving a threat, whether they are correct or incorrect about somehow the objective existence of the threat really is irrelevant, isn't it?

MR. NOLEN: That certainly is what we argued in Ivanhoe. We lost on that issue.

THE COURT: Well, tell me how you lost on that issue. I mean, I know the Supreme Court may have referred to some things that got into the record one way or the other in support of its ultimate decision, but did the Supreme Court address the question that I am now asked to decide on this

motion?

MR. NOLEN: I think in a way it did. The Court of Chancery, the Vice Chancellor, had relied on this mass of evidence unknown to the board, and on appeal we contended that it was error for him to do so. Now, if it was error for him to do so, I should think the Supreme Court would have said so. But --

THE COURT: Unless they regarded it as harmless error.

MR. NOLEN: If they did, they certainly never said that.

THE COURT: Well, it would be harmless error if they had reached a conclusion that the board acted reasonably in light of its perception, and if it only corroborated the conclusion, it would be harmless error.

MR. NOLEN: Well, yes, perhaps it would be. That is something that the Supreme Court does not touch upon, but perhaps Your Honor is right.

THE COURT: Right.

MR. NOLEN: Now, in addition, I think Your Honor ought to look at this in really sort of the terms of a normal case. This is not an abnormal

case. But, you know, our discovery rules are intended, as Chief Justice Herrmann said way back in 1949 or when the rules were adopted in his article in the Federal Rules Decision, to eliminate the sporting theory of justice and to let both parties come to trial as prepared as can be on the facts through resort to discovery, through resort to the liberal discovery rules embodied in the Chancery rules.

Now, we are not going to be able to come to trial prepared to cross-examine Blasius' witness if we don't have discovery of those witnesses. We don't know what they are going to say. We don't even have their own internal documents. For all I know, there is a document in their files -- and we won't know this unless we get discovery -- there is a document in their files that says, "Well, we recognize that for long term stockholders our restructuring proposal is awful, but given our immediate need for cash, we are willing to go through with it anyway."

Now, if then they put on a witness that says, "Well, we presented no threat and here is why, here are the economics" and so forth, I think we are entitled to have that document and to use that

document to say, "Now, wait a minute, Mr. Witness," when he is on this stand, to say, "Wait a minute. In this document didn't you say thus and such? Isn't that inconsistent with the testimony that you are presenting to this Court?" I think we are entitled to that. And I think that's what the rules are directed toward.

The rules are directed toward getting as much information of a relevant nature as can be gotten so that the Court may have all the information and reach a decision on the information that the parties present to it.

Now, I mean, it sort of reminds me of the car accident case. You know, somebody says at trial, "I went through the light and it was green," but, you know, he may have had a document that he wrote to his insurance company or something saying actually the light was red. Well, the discovery rules are intended to let you get the document that says the light was red and to impeach him with his own document. That is what we are looking for here.

I think, as I have addressed it in our letter and as I am trying to address it through responding to Your Honor's questions here today, our

discovery is relevant on its face and that we are entitled to it.

And Blasius made a couple of arguments in its brief regarding a concession that it perceives us as having made that our discovery was irrelevant. Mr. Sparks has not raised that. I am content to let Your Honor decide that on the basis of the papers unless Your Honor would have questions about that subject.

THE COURT: No, I don't have any questions about that.

MR. NOLEN: Thank you.

MR. SPARKS: Your Honor, this has been helpful to me, frankly, because up until this morning I wasn't quite sure exactly how they viewed the issues. I think there is one circumstance where my client ought to submit to discovery, and I frankly cannot tell Your Honor after I have heard this what we would propose to do. But let me lob out a suggestion, if I may.

It seems to me, Your Honor, after hearing this that if we are going to put on a witness to show that our plan as publicly proposed, as distinguished from anything that never got into the

public realm and, therefore, they could not have known, could not be reasonably perceived as a threat -- we are going to put up a Mr. Delano or some expert or somebody to come to the Court and say this is what we publicly proposed, and they have testified that this was a threat for X number of reasons, and we want to rebut based on what was publicly proposed and what they knew that they should not have reasonably perceived that as a threat, then I think if we are going to put on that kind of witness, that I should let Mr. Nolen know -- or if we contemplate putting on that kind of a witness, that I should let Mr. Nolen know who it is and that he should be given an opportunity, albeit a limited one, to depose that person on that issue and to get any documents in our possession that might impeach that witness insofar as he would be testifying that the transaction as publicly proposed was not a threat.

I think if we proposed to do that, or to reserve the right to do that, that he is entitled to that limited discovery, which is very different from the discovery he seeks now. And I think I ought to be required, albeit not overnight, before March 17 or 18, which is the deposition dates that are

announced for these people, but within some fairly short period of time, such as by the end of this week, to let Mr. Nolen know whether, in our view of this case as we have now discussed it and now that we all know what the legal issues are, whether we intend to call such a person or would reserve the right to call such a person in rebuttal, because I think that is where it would most likely come up if it came up at all, identify that person and allow that deposition to be taken.

Apart from that I don't think that any discovery on the argument made here is appropriate. I think that really what the other side is getting at, and frankly, Your Honor, what is likely to be an ongoing struggle into undisclosed variations that might have developed, for example, on our plan or the like or internal calculations that we would not deem appropriate or necessary in rebuttal of their case to put on, is appropriate. It is their motives.

I also think that the position that Mr. Nolen took in his response that any -- you know, it really is sort of the world that existed on December 31 here that counts. It would probably even

be appropriate in terms of a restriction if we were to put on that sort of witness.

But I am trying to help the Court, because I think this does present a different kind of issue, and we have advanced the ball.

THE COURT: Well, the difficulty with your suggestion is that in implementing -- you know, I can easily foresee that your client will decide that, oh, well, of course we want to put on someone to show that the recapitalization is the most sensible thing in the world and that the inference from the fact that it is so sensible is that they were really motivated by some other desire, what could it be, and let's suggest entrenchment. And that is, I would guess, probably going to be, you know, an element of your case. And then Mr. Nolen says, "Well, I am entitled to cross-examine these people," and you admit that. But then where do you draw the line as to what is producible? You say, well, alternatives --

MR. SPARKS: One thing you draw the line at, one thing you clearly draw the line at is December 31. And the reason you do that is because you assume that we could have gotten into court, in

theory, the next day to have tried this thing. And in terms of people's fighting about what was reasonable with respect to the public plan upon which they acted, one ought to be basing all that on what was known or knowable at the time. And similarly, what was known or knowable by our people subsequently should be no more admissible than what was known or knowable on their part. So that would be one place where you would cut it off, which would also help Your Honor on the future plans and strategies problem, which always gets into these things.

But, I mean, what sprung me to come up here and say -- because I think it is only fair when you see something the other side has said that makes some sense to you, and something that Mr. Nolen said did impress me as being worthy of Your Honor's consideration. It would have bothered me if I were sitting in Your Honor's position -- is that I can't stand here, having just heard these arguments and not having heard them before, and tell Your Honor that it is not conceivable that as a rebuttal witness or perhaps even in my case in chief, if it just seemed to fit in that way, that I may not want to call somebody for the purpose of at least explaining to

the Court what the public perception, what the publicly announced actions that they acted upon were so that I could explain that to the Court in our way rather than what will certainly be their way, if they are good advocates.

And if I am going to call that person to explain what our proposal was, I mean, they have got to have a chance to cross-examine that person if I am going to call him, and they have got to have obviously fair discovery on what our proposal was and its reasonableness, if we are going to have to get into this Unocal thing, which as a matter of law, you know, I don't believe in, but we will have to do it if by that time we haven't eliminated it.

But that has nothing to do with -- it may have nothing to do with either of the two people that they have sought to depose, because that might not be either of those persons, or it may be one of those two people, in which case I ought to tell Mr. Nolen who that would be so he could cross-examine him.

But other than that, I just don't see either in reasonably calculated or relevance terms how the discovery he seeks for the purpose he seeks

it advances the ball one iota.

THE COURT: Mr. Nolen, what about this December 31 date? What is the defendants' position with respect to that?

MR. NOLEN: Your Honor, I don't think the December 31 date is appropriate. It makes no difference whether Blasius has a memorandum in its file dated December 30 or dated January 1 saying what I suggested before; namely, that this proposal would be very bad news for a long term stockholder, but since we need immediate cash, we will try to push this through for our own benefit and even though it would be a detriment to the remaining stockholders.

I think that the fact that Blasius committed that to writing on January 1 or on January 15 doesn't make it any less useful or any less relevant to this case than if it had been produced on December 30. And the reason that I don't think that a sharp line of distinction can be drawn is that that kind of information relates to an event that predated December 31. It relates to the restructuring proposal formulated and presented or advanced prior to December 31. So I don't think that date is --

THE COURT: Do you mean, for example,

there could be a memorandum of a meeting that occurred on the 29th that was created on the 2nd and if the whole subject -- if one accepts your theory of relevance to extend to corroborate, justifies the reasonableness of the board's action, then that memorandum would be relevant?

MR. NOLEN: That's correct; as would a memorandum sometime in January that says with respect to our proposal, our restructuring proposal which was advanced on December 7 or went in the consent or whatever, this is how we perceive it.

THE COURT: Okay. Well, give me five minutes and I will make a decision on this.

(Recess taken.)

THE COURT: Counsel, I thought your motions were very well presented and helped clarify the case to some extent for me and apparently for the parties as well.

The motion has to be decided immediately from my perspective and given the other demands on my time, and I think from the parties' perspective as well, as we have a tentative trial date scheduled for the middle of next month. Therefore, I am going to rule from the bench, and as

a consequence the decision may not have as much thoughtful consideration as it perhaps deserves, and certainly the articulation of it won't have the textured quality that written decisions tend to have.

I find in one sense the decision of this motion somewhat difficult because I am very much in sympathy with the view that Rule 26 requires a liberal approach to relevance. Mr. Nolen I think is correct in reminding us that the rules have put an end to a period in litigation in which a careful assessment of relevance was made in order to get discovery. The statement by Judge Latchum in one of the cases that was cited to me I think is a good statement of the current rule. That was the one he did in Chemise LaCoste vs. Alligator, I think. However, I don't think that the broad approach to discovery that Rule 26 contemplates relieves the Court from some supervisory role when a party seeks to limit discovery on the basis that the issues sought to be discovered into have no legal relevance whatsoever.

I am inclined to agree with the plaintiffs' view of the issue in the case or at least the issue that we have been focusing on this morning.

The argument was presented today, albeit Mr. Sparks reserved his position with respect to arguing later on the applicability of the Unocal approach -- the argument was presented today and it is being decided on the assumption that that approach will be relevant to a determination of the case ultimately.

Under that approach I believe that, putting questions of burden aside, the dispositive question is whether the board acted in good faith and reasonably when it took the action complained about, and that test incorporates as well an element of reasonableness in light of the threat posed.

I think that question necessarily focuses attention upon the action of the board at the time that it did act and more particularly focuses on what the board knew or perhaps should have known at that time, what advice it received and what, in fact, it sought to accomplish.

The principal justification, as I understand it, for the discovery sought would be that the documents or information within the control of the defendants may corroborate and justify the perceptions of the board at that time. I do think -- I don't mean to make rulings on the substantive law

here, but in trying to explain the basis for my decision I have to express what is in my mind with respect to the substantive law as well.

If the directors were reasonable in the perceptions that they had and the action that they took in light of those perceptions but they were incorrect, I don't think that they will have reliability. And if they were reasonable in what they did and saw and discovery shows that they were right about their perceptions, I don't think there is any need for corroboration. The real question is whether the board, knowing what it knew at the time, was well motivated and took appropriate action. Therefore, I don't think that discovery into the shareholders' plans or perceptions has legal relevance.

In reaching that conclusion in this hurried setting I do so believing that the Supreme Court has not specifically ruled upon this question in the Newmont case. As my questioning or dialogue with defendants' counsel suggests, my reaction at this moment is that the Supreme Court simply did not address the question or did not intend to address the question whether discovery into the plans of the

shareholder were relevant.

If the Court found that the directors in that case acted reasonably in all the circumstances and met the Unocal test, it would be harmless error, I think, for the lower court to have relied upon evidence of the intention of the shareholder.

However, I have some reservations in reaching this ruling, because I think that the shareholder is likely to present a witness who will attempt to portray the proposed recapitalization as so manifestly wise and sensible that no reasonable person could conclude otherwise than it did and therefore seek to raise an inference of some other or different motivation, and that will to some limited extent raise questions about the substance of their plans. I think the plaintiff has come forward here and acknowledged as much and has offered to make available any witness that it may have for discovery. I think that even though I am reaching the decision I am on this motion, further discovery of that kind would be relevant and permitted with or without plaintiffs' volunteering it.

The question really is how soon

should the plaintiff be required to identify such a witness and then what is the scope of appropriate discovery of that witness. Plaintiffs suggested that they would be in a position to do that by the end of this week, and having made that suggestion, I will adopt that. And unless it has some good reason why it can't meet that schedule, I will order the plaintiff to identify any witness or witnesses that it intends to call either in its case in chief or in its rebuttal case. Under standard trial procedures plaintiffs are not required to identify rebuttal witnesses, but in this case it seems pretty apparent that we all know that we are going to have to deal with this issue, so I don't think that is a burden on the plaintiff. And I will, frankly, just leave it to the parties to see if they can work out, then, the scope of proper discovery with respect to any such witness or witnesses.

Now, is this a motion to compel discovery or motion for protective order? I have forgotten.

MR. SPARKS: It is a motion for protective order, Your Honor.

THE COURT: Right. I am hesitating

and considering whether or not it is efficient and fair to make a ruling with respect to this December 31 date. I think probably the fairer thing to do is not to rule on that at this time but to see if the parties can negotiate some compromise. It may be that I need not rule on it. Plaintiffs will obviously take the position that they have articulated here. Perhaps some middle ground between that and what defendants would like can be worked out once we know what witness or witnesses are going to be called, and so ruling on it right now would just limit one party perhaps unnecessarily.

Therefore, I will grant the motion for protective order and order that the discovery sought not be had on the grounds that it is not designed to lead to the discovery of relevant or admissible evidence.

Is there anything else, gentlemen?

MR. SPARKS: Your Honor, may we rely on the transcript for the Court's ruling rather than submitting a form of order?

THE COURT: Surely, unless -- Mr. Nolen, do you --

MR. NOLEN: No. I think that is

fine.

MR. SPARKS: Nothing else, Your Honor.

MR. NOLEN: This may be premature, but to the extent no witness is designated, I take it that the Court would be inclined to exclude at trial any evidence of documents, studies, testimony and the like based other than on information that the board had at the time it acted, because I think it would be inconsistent with Your Honor's ruling for the witness suddenly to pull out a study of some sort that we had not had access to and no ability to cross-examine with respect to.

THE COURT: Well, yes. I don't think I will rule on this at the moment. I think that it is helpful to try and work towards a resolution of these things by discussing them without necessarily getting hard and fast rulings. The plaintiffs will have difficulty and obviously when they resist discovery will have to keep one eye on what is going to happen at the trial, because they risk having things excluded from the trial. But I would be disinclined to enter an order of the kind that you are suggesting now because there may be things that

the board, in fact, didn't have but that any reasonable person in that position would have had.

And whether or not the shareholder, the plaintiff, has such things -- you know, just to imagine something, a government study about the industry. The board may not have focused upon it, but it may be out there for the world to see, and the plaintiff may take the position that what you knew or should have known at this time was relevant to how reasonable you were at the time that you acted. That is not a document that they have created and exists as a study in their files.

So with that sort of caveat in mind, I would pause before granting a motion of the kind, an order of the kind that you mention now.

But more generally and broadly, I agree that there are implications to restricting your discovery, and the implications may be that evidence is excluded. But probably that should wait either until the trial or a pretrial, when things are focused a little more finely than they are at this moment.

MR. NOLEN: Very well, Your Honor. I thought that might be premature but I thought I would

at least raise it.

THE COURT: All right. Court will stand in recess.

- - -

(Court adjourned at 11:40 a.m.)

- - -

CERTIFICATE

I, LORRAINE B. MARINO, Official Reporter for the Court of Chancery of the State of Delaware and Notary Public, do hereby certify that the foregoing pages numbered 2 through 47 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 15th day of March, 1988.

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

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BLASIUS INDUSTRIES, INC., et al.,	:	
	:	
Petitioners,	:	Consolidated Civil Action No. 9720
	:	
ATLAS CORPORATION, et al.,	:	
	:	
Respondents.	:	

PETITIONERS' PRETRIAL MEMORANDUM

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Introduction

This memorandum is submitted on behalf of Blasius Industries, Inc. ("Blasius") to set before the Court an outline of the facts that will be presented at trial and to detail the legal arguments which Blasius believes support its request for relief.

The Facts

Blasius Files a Schedule 13D and Tries to Begin a Dialogue

Beginning in July 1987, Blasius began purchasing shares of Atlas. On October 29, 1987, Blasius filed a Schedule 13D with the Securities and Exchange Commission (the "SEC") stating that Blasius, together with other members of its investing group, owned an aggregate of 9.1 percent of Atlas' common stock. In that Schedule 13D, Blasius stated that it intended to encourage Atlas' management to enhance stockholder values through a restructuring of the Company or other means. Immediately upon receipt of this Schedule 13D Atlas shifted into an entrenchment mode. On October 30, the day after Blasius filed its initial Schedule 13D, the diary entry of Richard Weaver, Atlas' recently elected President and CEO, states:

> 13D by Delano & Lubin came in today. Had long conversation w/MAH & Mark Golden [of Goldman, Sachs] on issue. All agree we must dilute these people down by acquisition of another Co. w/stock, or merger or something else. Matt is going to work on this. Matt negotiated w/Lubin & Delano before, said we must take them seriously. Discussed this

w/Edgar [Masinter] & ERF, Jr. or [Edward Farley].

(Masinter Ex. 1, Weaver diary entry for Oct. 30, 1987) (emphasis added). Thus, even before Blasius had made its restructuring proposal (it was first discussed with Atlas on December 2 and put in writing on December 7) or commenced its consent solicitation, Mr. Weaver had made up his mind and "agreed" with his investment banker that "we must dilute these people down."

At the time it filed its Schedule 13D, Blasius sought to meet with Mr. Weaver to discuss Blasius' ideas concerning the possible restructuring of Atlas (See Masinter Ex. 1, Weaver Diary entry for November 2, 1987). Claiming that he was unavailable, Mr. Weaver would not schedule a meeting with any Blasius representative until December 2, 1987, approximately one month after Blasius' request.

The Atlas Board Begins Its Self-Entrenchment

Atlas' 1987 annual meeting was held on November 4, 1987 in New York City. In its proxy materials Atlas management had proposed an amendment to the Atlas Certificate of Incorporation that would have prohibited Atlas stockholders from using the written consent procedure authorized by 8 Del. C. § 228. At that meeting, Atlas stockholders refused to approve management's proposal.

Blasius Continues Its Efforts to Begin a Dialogue

On December 2, 1987, Mr. Weaver finally met with Messrs.

Lubin and Delano of Blasius. They discussed the possibility of Atlas enhancing stockholder values by means of a restructuring program. Restructuring programs such as the one proposed by Blasius have become increasingly common in the past few years. Leveraged recapitalizations are a financial restructuring technique by which a company increases its leverage by incurring additional debt in order to distribute cash alone or cash and securities to its stockholders. This financial technique has been used to provide stockholders with immediate market value in excess of the stock market value of their shares before the leveraged recapitalization. Simply put, in a leveraged recapitalization stockholders ordinarily obtain a total package (cash, securities and the remaining "stub" common share) worth significantly more than the market price of their common stock before announcement of the recapitalization. See British Printing & Comm. Corp. v. Harcourt Brace Jovanovich, Inc., 664 F. Supp. 1519, 1529 (S.D.N.Y. 1987) (explaining that the challenged restructuring would permit stockholders to "realize" the value of their shares "in part immediately, more fully than they might otherwise").

On December 7, 1987 Blasius provided Atlas with a four page letter and three pages of exhibits setting forth in detail the terms of the subordinated debentures proposed to be issued in connection with a restructuring as well as the projected distributions to be made to stockholders. Thereafter, Blasius

attempted to arrange meetings with Mr. Weaver and/or his advisors to discuss their reactions to and comments on the Blasius restructuring proposal as set forth in the December 7, 1987 letter. Atlas refused all offers. Mr. Weaver admits that he declined Mr. Lubin's mid-December offer to sit down with Goldman, Sachs and go over the Blasius proposal (Weaver Dep. 57). He admits that he declined when Blasius "offered their help such as computer models, etcetra . . . ." (Masinter Ex. 1, Weaver diary entry for December 22, 1987; Weaver Dep. 107, Vol. 3). And he never reported to Atlas' financial advisors, Goldman, Sachs & Co. ("Goldman, Sachs") that representatives of Blasius had told him that if Atlas thought the restructuring proposal was "too onerous" or too "heavy," Blasius would be willing to consider a revision of its proposal in a manner designed to meet Atlas' concerns -- including a possible reduction in the amount of the proposed cash dividend or debentures. (Masinter Ex. 1, Weaver diary entry for December 22, 1987; Weaver Dep. 107-08, Vol. 3.)

Thus, in late December -- a time when Mr. Weaver says he was working closely with Goldman, Sachs to complete an analysis of the Blasius proposal in which Goldman, Sachs was going to look at the "numbers [Atlas] gave them and then plug in their understanding of Blasius' proposals" (Weaver Dep. 109, Vol. 3) -- Mr. Weaver chose not to tell Goldman, Sachs that the proponent of the proposal they were then modelling had said it was willing to

discuss modifications to try to deal with Atlas' problems or concerns.

Blasius Begins to Seek Atlas Stockholder Support through Written Consents

Blasius believed that Atlas was not responding forthrightly to its proposal. Accordingly, on December 30, 1987, Blasius caused Cede & Co. to deliver to Atlas a signed written consent calling for (1) the adoption of a precatory resolution recommending that Atlas' Board promptly develop and implement a restructuring program, (2) amendment of Atlas' By-Laws to, among other things, expand the size of the Board from 7 members to 15 and (3) the election of 8 Blasius nominees to fill the 8 newly created directorships. On the same day, Blasius commenced an action in this Court seeking a declaration that certain of Atlas' By-Laws, as amended by the Board on or about September 1, 1987, placed illegal restrictions upon the stockholders' right to take action by consent under 8 Del. C. § 228 and were inconsistent with the decision of the Delaware Supreme Court in Datapoint Corp. v. Plaza Securities Co., 496 A.2d 1031 (Del. 1985).

Atlas Acts to Thwart the Consent Process Without Due Care

On December 30, the very day Blasius delivered its consent Mr. Weaver "tried to arrange a conference call [meeting of the Atlas Board] to elect two new directors." (Masinter Ex. 1, Weaver diary entry for Dec. 30, 1987; Weaver Dep. 117, Vol. 3).

Mr. Weaver could not round up a quorum, however, and having unsuccessfully tried to shut down the consent process the very day he learned of it, he rescheduled the meeting for the following day.

On December 31, 1987, one day after Blasius delivered its consent to Atlas, less than two months after the November annual meeting and one week before a regularly scheduled Board meeting, Mr. Weaver convened a special meeting of the Atlas Board at which the Board purported to amend the By-Laws to increase the number of directors from 7 to 9 and to appoint John M. Devaney and Harry J. Winters, Jr. as new Board members.

The evidence reveals that when the Atlas Board met on December 31, 1987 and elected Messrs. Devaney and Winters it was consciously and intentionally acting to "prevent a rapid takeover of the board by Blasius." (Weaver Dep. 122, Vol. 3). The Board was acting, in the words of one director "to slow the Blasius process down." (Farley Dep. 14). As Director Farley testified, he understood that the Atlas board was "only authorized to go up to 15 members" and that by electing two new members the board would then have nine and therefore "if Blasius succeeded in its efforts, it would take some time to implement the takeover of the board, which I consider in the worst interest of the Atlas stockholder." Id. at 17. As Mr. Weaver, Atlas' President and CEO acknowledged, the board knew full well on December 31 when it acted to increase

its membership from 7 to 9 "that by doing so it was preventing a majority of the Atlas stockholders from acting by consent to elect the majority of the Atlas board." (Weaver Dep. 94). And Mr. Masinter, another director and the corporation's outside counsel, similarly testified:

> Q - Did you understand that by electing another director, you were preventing a majority of the Atlas stockholder from acting to elect a majority of the board?
>
> A - At that particular point in time, yes. Forever, no.

(Masinter Dep. 71). Although Mr. Weaver acknowledged that the stockholders "needed" to vote on the Blasius consent proposals (Weaver Dep. 98), he and his cohorts acted to prevent them from voting meaningfully.

Discovery shows that when it met on December 31, 1987 the Atlas board had little or no understanding of the Blasius proposal and its impact on Atlas. The record is clear that although Atlas had retained Goldman, Sachs to render financial advisory services months before Blasius surfaced, Goldman, Sachs made no written or oral presentation to the board at any time up to and including December 31, 1987. In fact, Mr. Weaver never asked Goldman, Sachs to be available for the December 31 board meeting (even though he himself spoke to them several times that day (Masinter Ex. 1, Weaver diary entry for December 31, 1987)) or

made any effort to tell his fellow board members what Goldman, Sachs was telling him.

Discovery also revealed that whatever conclusions Goldman, Sachs may have reached concerning the Blasius proposal were never transmitted to the board. In fact, neither Mr. Farley, the former chairman (Farley Dep. 36), nor Mr. Bongiovanni, the Chairman of the Audit Committee (Bongiovanni Dep. 8) recalled any discussion whatsoever before January 1, 1988 about Goldman, Sachs' view of the Blasius proposal. Mr. Farley testified that he never asked anyone for Goldman, Sachs' view and that he doesn't recall any other board member ever asking what, if any, view Goldman, Sachs had of the Blasius proposal (Farley Dep. 36-37).

Not only did the Board act without the direct or indirect advice of its investment banker, it never engaged in any meaningful discussion of the Blasius proposal before it entrenched itself on December 31. Worse, the Board failed to even understand much of what Blasius was suggesting. Mr. Weaver admitted that on December 31, four weeks after his meeting with Blasius, Atlas still "needed time to further evaluate their [Blasius'] proposal. My earlier conversations with Delano and Lubin said we were evaluating it. We did not understand a lot of it. We did not know [if] some of it was achievable and we were running the numbers." (Weaver Dep. 107) (emphasis added). As Messrs. Weaver and Masinter agreed in late December: "until we really see what

the numbers say in detail -- we can guess at what they say but until we really see what they say in detail, we really don't have a lot to discuss" (Weaver Dep. 93, Vol. 3).

Given the board's lack of information concerning the Blasius proposal, it is not surprising that they did not really discuss it on December 31. As Mr. Farley testified, he did not recall any specific discussion at the December 31 board meeting about the Blasius restructuring proposal (Farley Dep. 46). Further questionning revealed the complete lack of due care exercised by this Board.

> Q Do you recall any discussion in which Atlas' cash flow going forward was discussed? Again, we are now at the December 31 board meeting.
>
> A I don't recall a great discussion in depth of the Blasius proposal in that conversation. I have a recollection that there was mention of it by several of us, but not with great detail.
>
> Q Do you recall any discussion at the December 31 board meeting about whether Atlas could legally declare a dividend of the size called for in the Blasius proposal?
>
> A I have no recollection of any such discussion.
>
> Q Do you recall any discussion at the December 31 board meeting about restructuring plans that had been undertaken by other public companies?
>
> A I recall no such discussion. <u>The concentration at that meeting was on the question of electing two directors and other matters at that time were brought in extraneously</u>.

(Farley Dep. 46-48) (emphasis added).

Director Bongiovanni said he didn't recall any

discussion at the December 31 board meeting about the details or merits of the Blasius restructuring proposal. (Bongiovanni Dep. 26). And in response to the question "Do you recall any discussion at the December 31 board meeting about the impact on the stockholders if the Blasius restructuring proposal were enacted," he candidly responded: "No, that was not discussed." (Bongiovanni Dep. 27-28.)

The Blasius Response: A New Consent and a Supplemental Complaint

In response to Atlas' precipitous action, on January 7, 1988, Blasius amended and supplemented its previously filed complaint in this Court to seek declaratory, preliminary, and permanent injunctive relief that the purported appointment of Messrs. Devaney and Winters constituted an illegal manipulation of the corporate election machinery for the purpose of entrenching the Board under Schnell v. Chris-Craft Industries, Inc., 285 A.2d 437 (Del. 1971). On that same date, and also in response to the actions taken at the December 31, 1987 Board meeting, Blasius caused a new Consent to be delivered to Atlas.

Atlas Rejects the Blasius Proposals Without Explanation

On or about January 8, 1988, Blasius received a letter from Atlas dated January 6, 1988. The body of this letter states in its entirety:

> At its regular meeting today, the Board of Directors of Atlas Corporation reviewed and analyzed the Blasius Industries, Inc. December 7, 1987 proposal for the recapitalization of

Atlas. The Atlas Board concluded that the proposal is wholly unrealistic and that if implemented the end result would be the bankruptcy of Atlas.

Blasius Takes Its Consent to Atlas' Stockholders

On February 1, 1988, after obtaining clearance from the SEC, Blasius mailed to Atlas stockholders a Consent Statement setting forth its proposals and seeking adoption of the resolutions contained in the January 7, 1988 consent (the "Consent Statement"). The Consent Statement sought stockholder approval for a program to maximize the value of Atlas' common stock for all Atlas stockholders in the immediate future.

Proposal No. 1 is a non-binding resolution which, as the Consent Statement states on its very first page, is a means of "giving the Atlas Board a clear message that you, the owners of Atlas, want the Board to take action as soon as practicable to maximize the value of your shares." This precatory resolutions calls upon the Board to "RESTRUCTURE OR SELL by either . . . implementing the restructuring program" or selling the Company or substantially all of its assets at an aggregate price which the Board determines to be the most advantageous but not less than $50 per share."

Proposal 2 seeks consent to amend Atlas' by-laws to eliminate certain provisions purporting to restrict Atlas stockholders "in their efforts to take action by written consent to elect directors without a meeting, without prior notice and

without a vote" and, most importantly, to expand the Atlas Board to 15 directors.

Proposal 3 seeks the removal without cause of the two directors purportedly appointed to the Board on New Year's Eve without stockholder approval. The Consent Statement tells Atlas stockholders that the effectiveness of this proposal depends upon the outcome of the Court of Chancery action, stating that:

> [i]n the event Blasius is not successful in the Action in obtaining the removal of the directors purportedly appointed on New Year's Eve, to the extent the Consent seeks to remove Messrs. Devaney and Winters and any other Board members appointed without stockholder approval, it may be ineffective.

The Consent Statement goes on to tell Atlas stockholders that the question of their power to remove these directors poses "difficult issues of law" and that Blasius "cannot be sure how they will be resolved in the litigation."

Proposals 4 and 5 call for "[t]he election of the Blasius candidates as additional members of the Company's Board of Directors, the number to be elected depending on the outcome of certain legal proceedings and other events" including the now pending Chancery Court action. Proposal 4 proposes the election of eight Blasius nominees to the Board "[i]n the event that [Atlas'] Board consists of only seven members validly elected and serving." Alternatively, proposal 5 applies only "[i] the event that [Atlas] has more than seven directors validly elected and

serving," i.e., if Messrs. Winters and Devaney are insulated from removal without cause and their election is upheld by Delaware's Court of Chancery. Proposal 5 states that in such event, "Blasius will nominate the following persons for election to the Company's Board of Directors until the Board reaches a total membership of 15."

Atlas Opposes the Solicitation and Files Suit

On Friday, February 5, 1988, Atlas mailed its own message to its stockholders, a two page letter and 19 page "Opposition to Solicitation" (the "Opposition"). At or near the close of business on Friday, February 5, Atlas also filed an action in the United States District Court for the District of Delaware, complaining of a host of alleged omissions and misrepresentations in Blasius' Consent Statement.

After expedited briefing and oral argument, the district court denied Atlas' motion in a 24-page opinion issued on March 4, 1988. Atlas has appealed the United States court of Appeals for the Third Circuit. Oral argument on that appeal is now set for June 16, 1988.

Blasius Prepares and Sends a Supplemental Letter Detailing and Responding to Atlas' Claims

On February 11 Blasius mailed a Supplemental Letter to Atlas stockholders, together with a new consent card and return envelope permitting them to approve, disapprove or abstain from the Blasius proposals. The Supplemental Letter told Atlas

stockholders about Atlas' complaint, explained each of its allegations and responded to them one by one. It told stockholders that if they "determine, as a result of the information contained herein, or any other factor, to revoke your Consent, you may do so at any time" before delivery of the Consents.

After reviewing Blasius' December 7 letter, its Consent Statement and its Supplemental Letter, Atlas again sent a message to Atlas stockholders (the "Opposition Supplement").

The Consents Are Delivered and
the Parties Dispute the Result

On March 6, 1988, pursuant to 8 Del. C. § 228, Blasius made deliveries by hand, by certified mail, return receipt requested and by Express Mail to Atlas' principal place of business at 53 Nassau Street, Princeton, New Jersey, to its registered office at The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware, to its Secretary, Mr. Edgar M. Masinter and to its Assistance Secretary, respondent John M. Devaney, of signed, written consents. Blasius contends that these consents, together with other consents delivered to Atlas on or before that date, constitute the votes of a majority of the holders of outstanding Atlas stock entitled to vote as of January 7, 1988 in favor of the five proposals of Blasius.

By letter to Blasius dated March 8, 1988, Atlas stated that with respect to Proposals 3, 4 and 5 the Blasius consent

solicitation "has failed" and with respect to Proposal 3 the consents are "null and void." Atlas also contends that Atlas Stockholders have not given their approval to Proposal 1.

On March 17, Manufacturers Hanover Trust Company, the Inspector of Elections designated by Atlas, issued a Final Tally Report. On March 22, Manufacturers Hanover issued a Certification of Shareholder Vote which indicated that none of the five Blasius proposals received the required majority. However, the March 22 Certification qualified its conclusions and specifically recognized that the manner in which the inspectors tallied certain consents and consent revocations was inconsistent with the manner in which certain record holders had in fact voted. (Shapiro Ex. 1.) and the Manufacturers Hanover counters recognized that their methodology might well have been mistaken and resulted in consents that should have been counted for Blasius being ignored (Shapiro Dep. 56.)

As discussed infra, when the impact of Manufacturers Hanover's erroneous "netting out" and "zeroing out" is corrected and a recalculation based upon an acknowledged mathematical error is made, the calculations reveal that Blasius succeeded in obtaining a majority of the outstanding shares consenting in favor of all five proposals.

ARGUMENT

I.

THE ELECTION OF MESSRS. DEVANEY AND WINTERS BY THE ATLAS BOARD WAS AN INEQUITABLE MANIPULATION OF THE CORPORATE ELECTION MACHINERY

The evidence to be adduced at trial will show that on the afternoon of December 30, Blasius delivered a consent calling, inter alia, for the expansion of Atlas' Board from seven to fifteen members and the election of eight Blasius nominees to the new fifteen person Board. By the next morning, the Board had itself created two new directorships and filled them; the nascent contest for control of the Board was "out of business." Lerman v. Diagnostic Data, Inc., Del. Ch., 421 A.2d 906, 912 (1980). As a result of the Board's hasty action, only six new directorships could be created and filled by the stockholders. Thus, the stockholders were precluded from electing a majority of the Atlas Board. Blasius contends that this action was an inequitable manipulation of the corporate election machinery.

In order to prove a claim of inequitable manipulation, Blasius must show either (a) that the defendants wholly precluded it from undertaking an election contest or (b) that the defendants obstructed its efforts to undertake an election contest and that this obstruction was undertaken to perpetuate their control of the Board. The defendants then bear the burden of justifying their actions.

The landmark case establishing this claim is Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971). In Schnell, the company's by-laws set an annual meeting date of January 11, 1972. On October 16, 1971, a dissident stockholders committee made an SEC filing that announced its intent to wage a proxy fight. Two days later, the company's board "enlarged the scope" of a scheduled meeting to approve (pursuant to a newly amended provision of the Delaware Corporation Law) a by-law giving the board flexibility to determine a meeting date. Pursuant to that by-law, the board set a new meeting date for December 8, 1971 -- reducing by more than one month plaintiffs' opportunity to present their views. The dissidents complained that this advancement gave them "little chance" to wage a successful proxy fight. Id. at 439.

The Court of Chancery found that, despite its proferred justifications for the advancement, "'management has seized on a relatively new section of the Delaware Corporation Law for the purpose of cutting down on the amount of time which would otherwise have been available to plaintiffs and others for the waging of a proxy battle.'" Id. at 439 (quoting Del. Ch., 285 A.2d 430, 434 (1971)). The Supreme Court held that this inequitable purpose invalidated the board's otherwise lawful act:

> management has attempted to utilize the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office; and, to that end, for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise

> of their rights to undertake a proxy contest against management. These are inequitable purposes, contrary to established principles of corporate democracy.

285 A.2d at 439.

Following Schnell, the Court of Chancery in Lerman found that an incumbent board could not take action that, like Atlas' action, prevented minority stockholders from putting their slate of nominees before their fellow stockholders. There, plaintiff Lerman and other minority stockholders had filed a Schedule 14B in late March "giving notice of their intention to wage a proxy contest at the next annual meeting" of DDI, then set for the third Thursday of June. 421 A.2d at 909. Less than two weeks after this announcement, the DDI board amended the by-laws to allow it discretion in determining a meeting date, to require the submission of certain information on director candidates not nominated by management and to further require that this information "be submitted to the secretary of the corporation, in writing, 'not less than seventy days prior to any meeting of stockholders called for the election of directors.'" Id. at 909. The DDI board set no meeting date.

In July, the dissidents executed and delivered a demand for a stockholder list that DDI said "would be subsequently discussed." Id. at 911. On August 1, fully aware that Lerman intended to conduct a proxy contest, the board met and set the annual meeting date 63 days later, on October 3. Thus, it was

not posssible for Lerman -- or for any other DDI stockholder -- to comply with the by-laws' 70-day notice requirement. The court noted that this action "has had a terminal effect on the aspirations of Lerman and his group. If the board's action is permitted to stand, they, along with any other DDI shareholder who secretly might have been harboring similar intentions, are completely out of business." Id. at 912. Without ruling on the legality of the 70-day notice requirement, the court held that the board's action was invalid.

The equitable principles and heightened scrutiny articulated in Schnell and Lerman have been consistently applied and reaffirmed by the courts of this state. For example, in Giuricich v. Emtrol Corp., Del. Supr., 449 A.2d 232 (1982), the plaintiffs and defendants each owned 50 per cent of the stock of Emtrol, but because of a prior agreement executed when the defendants owned 80 per cent of the shares, the defendants controlled three out of five board positions. In order to preserve their control of the board after the plaintiffs became co-equal owners, the defendant board members did precisely what the Atlas Board did here: expand the board and appoint two new directors, thereby "diluting the plaintiffs' position . . ." and preserving their control of the Emtrol board. Id. at 235. Stockholder deadlock prevented the election of successor directors.

The Delaware Supreme Court disapproved of the defendants' conduct and stated that "careful judicial scrutiny will be given a situation in which the right to vote for the election of successor directors has been effectively frustrated and denied by the willful perpetuation of a shareholder-deadlock and the resulting entrenched board of directors." Id. (emphasis supplied). The defendants' actions did not withstand such scrutiny because they admitted their "purpose in perpetuating their control of the board of directors is to give the defendants the governing hand in forthcoming executive compensation contract negotiations with their 50-50 partners, the plaintiffs." Citing Schnell, the Delaware Supreme Court reiterated that "[t]he Courts of this State will not allow the wrongful subversion of corporate democracy by manipulation of the corporate machinery or by machinations under the cloak of Delaware law" and appointed a custodian to end the deadlock. Id. at 239.

More recently, in Aprahamian v. HBO & Co., Del. Ch., 531 A.2d 1204 (1987), dissident stockholders did much what Blasius did here; they nominated their own slate of directors for HBO's annual meeting and "proposed a program which would allegedly maximize the value of the corporation by the creation of a special committee which would propose transactions, including the possible sale of the corporation." Id. at 1205. The day before the scheduled meeting, the incumbent "directors

received information from their proxy solicitor that the election results were too close to call." In a transparent effort to avoid the results of the election and delay fulfillment of the stockholders' will, the board postponed the imminent annual meeting by five months. This move invalidated the proxies already solicited by the plaintiffs. Even though the prior annual meeting had been only seven months earlier and the delay itself would not be illegal, the court struck down the board's action. Vice Chancellor Hartnett wrote:

> The corporate election process, if it is to have any validity, must be conducted with scrupulous fairness and without any advantage being conferred or denied to any candidate or slate of candidates. In the interests of corporate democracy, those in charge of the election machinery of a corporation must be held to the highest standards in providing for and conducting corporate elections. The business judgment rule therefore does not confer any presumption of propriety on the acts of the directors in postponing the annual meeting. Quite to the contrary. When the election machinery appears, at least facially, to have been manipulated, those in charge of the election have the burden of pursuasion to justify their actions.
> Id. at 1206-07 (emphasis supplied).

Finally, in Phillips v. Insituform of North America, Del. Ch., C.A. No. 9173, Allen, C. (Aug. 27, 1987), this Court addressed three different actions, each taken to deprive a specific class of stockholders of its right to vote on the composition of the board and to diminish its full voting power -- and found each invalid. Of special significance here, the Court

addressed defendants' postponement of an annual meeting at which the only issue to be considered by the stockholders was "the election of directors and it was therefore [defendants'] own tenure in office that was of concern." Id. at 25. Citing Schnell, the court held that the failure to hold the meeting "at the barest minimum requires, in these circumstances, defendants to demonstrate that their action was necessary to protect an important corporate, as opposed to a personal interest." Id. The Court considered a series of by-law amendments "adopted as a second line of defense against the exercise of power under Section 228 by the B shareholders." Id. at 29. The by-laws resulted in a "loss of voting power", id. at 31, and were held to be "an inequitable exercise of the delegated power to adopt by-laws." Id. at 32. The Court found that the defendant board members' purpose -- elimination of "the supervisory power conferred on" the targeted stockholder class -- was not justified and invalidated the defendants' otherwise lawful acts. Id. at 17.

The rubric of "inequitable manipulation" covers more than interference with the annual election of directors; it covers any action that, like Atlas' action, affects the integrity of the corporate democratic process. For example, in Mesa Petroleum Co. v. Unocal Corp., Del. Ch., C.A. No. 7997, Berger, V.C. (Apr. 22, 1985), the Court of Chancery applied Lerman to an action that precluded stockholders from submitting proposals to

an adjourned annual meeting. In Mesa, the Unocal Board amended its by-laws on February 25, 1985 to require 30 days' notice prior to putting a stockholder-sponsored proposal to the annual meeting or to nominating a director. On March 28, Mesa gave notice of its proposal to adjourn the April 29 meeting, announced that it had "acquired 13.6 percent of the common stock of Unocal and that its purpose included possibly obtaining control of Unocal." Id. at 4. Mesa sought the adjournment "to allow Unocal's shareholders adequate time before voting on the election of directors to consider any plan Mesa might present to acquire Unocal or effectuate a restructuring or recapitalization of the company." Id.

On April 7, 22 days before the annual meeting, Unocal announced its "adjournment interpretation" which "explained that the timeliness of a shareholder proposal under the thirty day notice provision is determined by reference to the originally scheduled meeting date regardless of whether the meeting is adjourned." Id. at 5. Under this interpretation, Mesa -- and all other Unocal stockholders -- could not make any proposal, including one for a recapitalization or nomination of a director, at the adjourned meeting. Following Lerman, and noting that in that case "certain bylaw amendments were struck down without regard to defendants' motives because of the inequitable effect of those amendments" Id. at 11, the court, without reference to

the Unocal board's purpose in announcing this interpretation or to any entrenchment effect, held that "Unocal's failure to announce its interpretation of the bylaws until after the thirty day notice period had run was inequitable" and enjoined the application of the "adjournment interpretation." Id. at 14.

At trial, Blasius will demonstrate the manipulation of Atlas' corporate machinery and the resulting obstruction of Blasius' consent solicitation. On December 30, Blasius delivered its consent to resolutions to expand the size of the Board to fifteen members and elect a slate of eight candidates, which would result in a new Board majority. The Board responded by passing a by-law that expanded the Board to nine members and by electing Messrs. Devaney and Winters to those newly created directorships, thereby reducing the number of available seats to six. It therefore became impossible for the majority of Atlas stockholders to obtain majority representation on the Board by means of the consent solicitation.

The self-expansion of the Board nullified the December 30 consent and foreclosed the possibility that the majority of stockholders could elect a majority of the Board. Like the opposition's efforts in Lerman and Mesa, Blasius' attempt to gain control of the Board was put "out of business" by the Board's action. Thus, the Board's election of Messrs. Winters and Devaney is invalid even without reference to the Board's purpose.

But even if Blasius was not put entirely "out of business" because it could still hope to win minority Board representation, the Board-packing unquestionably "obstruct[ed] the legitimate efforts of dissident stockholders in the exercise of their rights to conduct a proxy contest against management." Schnell, 285 A.2d at 439. Under Schnell, such obstruction is invalid if its purpose is entrenchment. Blasius will show that the purpose of the incumbent directors was entrenchment of their control of the Board. The evidence at trial will show that the special Board meeting of December 31 was called solely because of and in response to the Blasius consent and its demand for a stockholder list. The sequence and timing of these events inescapably leads to the conclusion that they were taken in order to obstruct the Blasius consent solicitation and to perpetuate the incumbent directors' control of the Board.

Atlas will claim that the Board contemplated Mr. Winters' nomination at some point prior to December 30. It will further claim that it merely accelerated his nomination and that it did so to delay the Blasius consent solicitation and to prevent this Court, pursuant to Blasius' Datapoint challenge to its by-laws, from enjoining the contemplated board packing. The evidence will show that the Atlas Board had given no consideration to adding Mr. Devaney to the Atlas Board prior to delivery of the Blasius consent. This fact alone belies Atlas' claim that

all it did on December 31, 1987 was accelerate what it had planned for January 6, 1988. But even if Atlas proves that the Winters nomination -- though not the Devaney nomination -- was "shelf-ready," no pre-existing plan to nominate Mr. Winters could justify the acceleration of that nomination in light of the delivery of the Blasius consent. A similar argument was advanced in Frantz Manufacturing v. EAC Industries, Del. Supr., 501 A.2d 401 (1985), aff'g, Del. Ch., C.A. No. 8003, Walsh, V.C. (June 28, 1985), and was rejected by both the Court of Chancery and the Supreme Court.

In Frantz, the Frantz board of directors first considered creating an ESOP as part of a proposal for taking the company private in the summer of 1984. In February, 1985, the board authorized the officers to "do all things necessary and proper for funding" the ESOP. 501 A.2d at 405 n.3. EAC, which was at that time conducting "confidential negotiations with the holders of all of the large blocks of Frantz stock," later acquired 51 per cent of Frantz' outstanding shares. On Thursday, April 18, 1985, EAC delivered consents from this majority that elected one person to a vacancy on the board of directors and amended the by-laws. Frantz cancelled the board meeting scheduled for the next day; on Monday, April 22, Frantz then funded the already-approved ESOP. This action, if effective, diluted EAC's holdings below a majority.

The Court of Chancery found that "[w]hatever may have been the ESOP's original purpose at the time formulated, its funding on April 22, was primarily for the purpose of diluting EAC's majority control." Slip op. at 22.[1] The Supreme Court affirmed this finding and held that the action "constituted inequitable conduct" in violation of Schnell. Thus, even if Atlas can show that the Board had firm plans in place to elect Mr. Winters to a newly created directorship on January 6, 1988, that showing could not vitiate the Board's inequitable purpose when it accelerated his election solely because of the Blasius consent. The unavoidable inference is that both Mr. Devaney and Mr. Winters were elected to thwart the Blasius consent and to perpetuate the incumbent directors' control of the Board.

Other factors support this inference. Incumbent directors necessarily have an interest in continued control of the corporation they serve. Any distinction between "inside" and "outside" directors is not meaningful in this context and Atlas' claim that the Board was "independent" is irrelevant. See AC Acquisitions v. Anderson, Clayton & Co., Del. Ch., 519 A.2d 103,

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1. The "primary purpose" test of Frantz and other dilution cases does not apply to manipulation of the corporate election machinery in cases such as Schnell, Lerman, Mesa, Aprahamian and this case. See R.F. Balotti and J. Finkelstein, 1 The Delaware General Corporation Law, § 4.6 at 94.3 (distinguishing primary purpose test from "the well-established principle under Delaware law that the subversion of corporate democracy by manipulation of the corporate election machinery will not be countenanced and that 'special scrutiny' will be applied" to those cases).

115 (1986) ("the entrenchment effect of the Company Transaction creates a species of director interest even on the part of outside directors"); Packer v. Yampol, Del. Ch., C.A. No. 8432, Jacobs, V.C. (Apr. 18, 1986) (incumbents benefit from "increased likelihood of . . . continued incumbency"); Aprahamian, 531 A.2d at 1208 (incumbent board members have a "personal interest" in outcome of board election, even if interest is not financial). Cf. Good v. Texaco, Del. Ch., C.A. No. 7501, Brown, C. (May 14, 1984) (directors "interested" in transaction giving them "right to control 25% of the vote which will be needed to vote them, or any of their number, out of office").

Moreover, Atlas itself has conceded -- if a statement of the obvious can be called a concession -- that the current board benefits from its continued control of the Board and from any action that would prevent a change in control of the Board. In the October, 1987 proxy statement mailed to Atlas stockholders, the Atlas Board sponsored a charter amendment to eliminate the § 228 procedure. It acknowledged that this proposal "could discourage efforts to change control of the Board" and disclosed that "[a]ccordingly, the directors may benefit . . . and there may be an inherent conflict of interest in the" Board's proposal to prohibit consent solicitation.[2]

The evidence will also show that four of the seven

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2. Atlas stockholders affirmed their right to act by consent pursuant to 8 Del. C. § 228 by rejecting the Board's proposal.

directors who approved of the board-packing were in fact "closely related" to Atlas. Frantz Manufacturing Co. v. EAC Industries, 501 A.2d at 403. In Frantz, the court found that the following directors were "closely related" to the corporation: one who, like Mr. Weaver, was the company's president and chief executive officer; another who, like Mr. Farley, was the company's former president and chairman; another who, like Mr. Masinter, was a partner in a law firm retained by the company; and finally, two directors who, like Mr. Clinchy, were former long-term employees of the company. 501 A.2d at 403 n.3.

Finally, Atlas' own assertions regarding the Board's justifications for electing Messrs. Winters and Devaney are nothing more than entrenchment in sheep's clothing. Atlas has stated that the expansion of the board and the election of Messrs. Devaney and Winters were intended "for the quite proper purpose of forestalling Blasius from hastily gaining a majority of the board and pushing through its so-called 'restructuring' proposal . . . ." (Letter to the Honorable William T. Allen, March 15, 1988). This stated purpose -- even assuming that Atlas can prove it -- is far from "proper."

Atlas will claim that it intended two kinds of delay. First, Atlas will claim it sought to delay the consent procedure itself so that the stockholders could "hear both sides of the story. This supposed intent is belied by the fact that three and

a half months after the delivery of the December 30 consent, after a full-blown consent contest, after the stockholders have considered and reconsidered the multiple mailings sent to them by Blasius and the Atlas Board, after Blasius' disclosures have been found complete and accurate by the Federal district court and after Blasius delivered (what we will prove to be) the signed written consents of a majority of Atlas stockholders in support of each of Blasius' proposals, Atlas has not rescinded the action supposedly taken in order to buy time for stockholder consideration. It is one thing to foster meaningful debate in the election process. It is another to do what Atlas did: predetermine the result.

The suggestion that the Atlas board was compelled to act on December 31 or risk foreclosing debate is completely undercut by the unequivocal testimony of director Masinter, a senior partner in the Simpson, Thacher law firm. Mr. Masinter was asked the following questions and gave the following answers:

> Q. Was there discussion at the December 31 board meeting that if the board waited until January 6 to act to elect new directors, that Blasius might obtain consents from a majority of the stockholders in the interim electing a majority of the board and thereby prevent the board from expanding itself?
>
> A. There was not discussion only because we were -- that was mentioned -- only because we were satisfied that Blasius could not do that.
>
> Q. Could you tell me the discussion there was about why Blasius could not do that?
>
> A. Because we knew how much stock Blasius had <u>and we could</u>

see no conceivable way that they could comply with the proxy solicitation rules within the time frame that was necessary to get the additional shares to get them to 50 percent.

Q. Was that statement that you have just made discussed at the December 31 board meeting?

A. It wasn't discussed. It was a statement.

Q. You made such a statement?

A. Yes.

Masinter Dep. 85-86 (emphasis added). Thus, Atlas cannot defend its ill conceived, hasty and uninformed actions of December 31, 1987 by contending that it had no choice but to act at that time. In fact, the deposition testimony shows that the real reason the board acted on December 31 -- instead of waiting to hear from Goldman, Sachs at the previously scheduled face to face January 6, 1988 meeting -- was Mr. Masinter's concern that if the board did not act immediately, then Blasius might obtain an order from this Court preventing Atlas from increasing the size of its board. (See Masinter Dep. 67; Masinter Ex. 1, Weaver diary entry for December 30, 1987 saying "Edgar said they did not have a stay on Director number, so can elect tomorrow"). Fear of this Court's considered judgment hardly justifies ill conceived, hasty action.

In addition, Atlas' stated purpose of "slowing" the consent process down is nothing more than an illegal attempt to frustrate the Section 228 consent procedure.[3] The Delaware

Supreme Court rebuffed a similar effort to build delay into the consent procedure by means of a by-law in Datapoint Corp. v. Plaza Securities Co., Del. Supr., 496 A.2d 1031, 1036 (1985), where the court noted that "the purpose of the delay provisions of Datapoint's bylaw is to give management an opportunity to distribute 'opposing solicitation material'. . . . Such a result can only be found to be 'repugnant to the statute' [i.e., § 228], which the bylaw is intended to serve, not master." 496 A.2d at 1036. (emphasis in original).

The Delaware Supreme Court has reaffirmed this reasoning in its recently-issued opinion in Allen v. Prime Computer, Inc., Del. Supr., No. 26, Moore, J. (Apr. 8, 1988). "A by-law whose real purpose is delay of shareholder action is per

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3. Blasius originally commenced this suit in order to challenge certain Atlas by-laws put into place on or about September 1, 1987 purporting to restrict the consent solicitation procedure by (i) requiring stockholders to provide Atlas with advance written notice of their intent to utilize the consent solicitation process; (ii) permitting the board to set a record date after receipt of such notice; (iii) delaying the effectiveness of action taken by consent by at least 59 days; and (iv) requiring 60 days advance notice of intent to nominate persons for election as directors by means of the consent procedure. See Am. & Supp. Complt. ¶ 19. Blasius alleged that these provisions were in blatant violation of Datapoint Corp. v. Plaza Securities, Inc., Del. Supr., 496 A.2d 1031 (1985). On January 6, 1988, Atlas amended its by-laws to remove all but the last of these challenged restrictions. Atlas has chosen not to enforce that last restriction, which we maintain is invalid under Datapoint as well as under this Court's more recent decision in Prime Computer, Inc. v. Allen, Del. Ch., C.A. No. 9557, Allen, C., aff'd, Del. Supr., No. 26, Moore, J. (Apr. 8, 1988).

se unreasonable." Slip op. at 8. If, as Blasius maintains and as Datapoint and Prime Computer teach, Atlas could not legally fulfill its intent to build delay into the statutory consent procedure by passage of a prospective by-law amendment, it surely could not "arrogate to itself" the power to achieve the same result by hastily packing the board in response to Blasius' signed and delivered written consent.[4] Prime Computer, Inc. v. Allen, Del. Ch., C.A. No. 9557, Allen, C., slip op. at 16 (Jan. 25), aff'd, Del. Supr., No. 26, Moore, J. (Apr. 8, 1988).

Atlas will also claim that it intended to slow the process of achieving majority board representation for a majority of stockholders. Atlas will claim that this intended delay is "consistent" with Atlas' corporate structure, which provides for a staggered board. But what Atlas characterizes as "delaying" the expression of stockholder will differs only semantically from thwarting that will. Atlas' Board-packing scheme will thwart the stockholders' ability to elect a majority of their Board for ten full months -- and possibly longer.[5]

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4. Blasius will show that at the November, 1987 annual meeting, Atlas management proposed an amendment to the Atlas Certificate of Incorporation that would have prohibited Atlas stockholders from using the written consent procedure authorized by 8 Del. C. § 228. Blasius will further show that at that meeting, Atlas stockholders refused to approve management's proposal.

5. Atlas last held an annual meeting on November 4, 1987. Pursuant to Section 3 of Atlas' by-laws, the next annual meeting may be held on the first Wednesday of November, i.e., November 2, 1988. Pursuant to 8 Del. C. § 211, the meeting may legally be held as late as December 4, 1988. Thus, when they packed the Board on December 31, 1987 the incumbents guaranteed themselves

Intent to maintain control "only" until the next annual election is no less intent to maintain control. As Vice Chancellor Brown noted in Lerman, corporate conduct will not be upheld "if that conduct was both inequitable (in the sense of being unnecessary under the circumstances) and had the accompanying dual effect of thwarting shareholder opposition and perpetuating management in office." 421 A.2d at 914.

Atlas' stated purpose, be it delaying the consent procedure, delaying the achievement of majority board representation or acting before this Court could prohibit it from doing so, is either invalid or a transparent subterfuge for entrenchment. The evidence at trial will show that the Board's purpose in electing Messrs. Winters and Devaney was entrenchment.

II.

THE ELECTION OF MESSRS. DEVANEY AND WINTERS BY THE ATLAS BOARD VIOLATES THE BOARD'S DUTIES UNDER UNOCAL CORP. V. MESA PETROLEUM CO.

As a separate ground for relief, Blasius contends that the election of Messrs. Devaney and Winters violates the Board's duties under Unocal Corp. v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946 (1985). Unocal defines the boundaries of permissible action taken by an incumbent board in a struggle for corporate control. The case places upon the defendants the burden of

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almost a full year of continued control.

proving (a) that they rationally and reasonably believed that a threatened takeover posed a danger to corporate policy and effectiveness and (b) that the defensive measures adopted were reasonable in relation to the threat posed. Ivanhoe Partners v. Newmont Mining Corp., Del. Supr., 535 A.2d 1334, 1341 (1987). Atlas will be unable to show either that the board "rationally and reasonably" perceived a threat from Blasius' consent or that depriving the majority of stockholders of their right and opportunity to elect the majority of the board was reasonable in relation to any threat that Atlas may have perceived. Moreover, even if the Atlas defendants meet their dual burden -- though we do not believe they can -- their action is still invalid because, as the evidence will show, their primary purpose was entrenchment. Unocal, 493 A.2d at 958; Newmont Mining, 533 A.2d at 1345.

A. The Blasius Consent Could Not Rationally or Reasonably Have Been Perceived as Posing A Threat to Atlas Corporate Policy or Effectiveness

The Blasius consent posed no "threat" to Atlas and Atlas could not have reasonably thought that it did. First, the Restructuring Proposal itself is entirely non-coercive. Next, there can be no threat from putting a non-coercive proposal to the stockholders for their vote because of Delaware's long-standing recognition of the stockholders' right to initiate and vote in proxy and consent contests.

1. The Precatory Resolution Setting Forth Blasius' Restructuring Proposal is Not Coercive

In Unocal, the Delaware Supreme Court found that T. Boone Pickens' "grossly inadequate two-tier tender offer coupled with the threat of greenmail" could legitimately be viewed by the Mesa board as a threat to corporate policy and effectiveness. 493 A.2d at 956. In reaching this holding, the court relied heavily upon the coercive effect two-tier tender offers have upon stockholders. "It is now well recognized that such offers are a classic coercive measure designed to stampede shareholders into tendering at the first tier, even if the price is inadequate, out of fear of what they will receive at the back end of the transaction." Id. at 956. In Newmont Mining, the court addressed whether another two-tier partial tender offer by Mr. Pickens constituted a "threat." The Newmont board

> specifically recognized that Mr. Pickens, who controls Ivanhoe, had been involved in several attempts to acquire and break-up other corporations, resulting in the payment of "greenmail" or severe restructuring of the target companies. The series of Ivanhoe maneuvers, including the secret acquisition of shares, the "bear hug" letter, the coercive partial tender offer and the inadequate bid were all viewed by the defendants as classic elements of Mr. Pickens' typical modus operandi. Thus, the Newmont board could properly conclude that the Ivanhoe tender offer was not in the shareholders' best interests or those of their company.

535 A.2d at 1342 (citations omitted). Similarly, the Newmont board could properly conclude that it was threatened by another

stockholder, Gold Fields, which was in a position to "acquire control of the company, thus leaving the remaining shareholders without protection on the 'back end.'" Id.

Atlas will be unable to show that it could reasonably perceive Blasius' delivered consent to pose a threat of any kind, no less one of the magnitude posed by Mr. Pickens and his inadequate, coercive two-tier tender offers. The precatory resolution proposing a restructuring of Atlas offers no incentive or disincentive to cloud a stockholder's view of his or her economic self-interest. There is no "front end" or "back end" to the transaction; rather, if the restructuring program is implemented, each and every stockholder will receive the same package of cash and subordinated debentures (and retain the same "stub") for each share held.

Economic self-interest varies from stockholder to stockholder. In AC Acquisitions v. Anderson, Clayton & Co., 519 A.2d 103, 112 (1986), this Court noted that the factors that a rational shareholder might consider "given an opportunity to effectively choose . . . are distinctive functions of each individual decision-maker." The Court recognized the myriad considerations each stockholder might weigh: "liquidity preference, degree of aversion to risk, alternative investment opportunities and even desire or disinterest in seeking the continuation of a distinctive [corporate] entity." Id.

Because economic self-interest varies for each stockholder, the Atlas Board is in no position to do what it has done here: attempt to substitute its own evaluation of what is in the stockholders' best interests for their own freely-determined choice. Stockholders considering the restructuring proposal are faced with one issue: whether the package of cash, subordinated debentures and remaining "stub" share is worth more to them than the shares they now hold. If they prefer that Atlas not be restructured along the lines of the Blasius proposal, there is no risk in voting their true preference. If that preference does not carry the day, it is only because a majority of their fellow stockholders disagree with them -- the essence of corporate democracy.

2. The Stockholders' Exercise of Their Right to Corporate Franchise Poses No Legally Cognizable Threat to Atlas

Stockholder democracy is one of the driving forces of the Delaware General Corporation Law. Schnell, Lerman and their progeny recognize this policy by enforcing in equity the stockholders' right to challenge an incumbent board by means of a proxy contest. Because of the judicially-protected policy of stockholder democracy, an attempt, such as Blasius', to put a non-coercive question to the stockholders is not and cannot be a "threat" for the purposes of Unocal, even in a "takeover" context.

The case law gives ample recognition to this policy. Lerman itself recognizes that the stockholders' right to conduct a proxy contest must be protected even if management abridges that right unintentionally.[6] Board actions that directly constrain the stockholders' right to advocate and vote for dissident candidates and proposals -- such as disturbing planned meeting dates and imposing notice requirements -- are held to an exacting standard of "scrupulous fairness" and not to the more limited scrutiny of the business judgment rule. See Aprahamian v. HBO & Co., Del. Ch., 531 A.2d 1204 (1987) (holding that business judgment rule did not apply to willful perpetuation of stockholder deadlock).

For example, in Moran v. Household International, Inc., Del. Ch., 490 A.2d 1059, aff'd, Del. Supr., 500 A.2d 1346 (1985), the court demonstrated its concern for corporate franchise when it addressed the "potential restriction on proxy contests" of Household's poison pill. 490 A.2d at 1079. Citing Schnell, Lerman and Giuricich, the court's analysis began by noting that "[t]he subversion of corporate democracy by manipulation of corporate machinery will not be countenanced under Delaware law. Special scrutiny will be given a situation in which directors,

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6 In Lerman, because the board's setting of the meeting date did not merely infringe the plaintiffs' right to conduct a proxy contest but put them "out of business," the court did not look to whether the board's action was "designedly inequitable or not." 421 A.2d at 912.

bent upon entrenchment, use their authority to restrict the ability of shareholders to replace them." Id. at 1080 (citations omitted). The court then contrasted these corporate manipulation cases with cases where the corporate franchise was not directly affected: transactions such as self-tender offers which "may indirectly narrow the voting pool" and super majority provisions, "which may restrict the scope of shareholder approval." Id. at 1080 (emphasis supplied). The court then held that:

> while the Rights Plan does deter the formation of proxy contests of a certain magnitude it does not limit the voting power of individual shares. On the evidence presented it is highly conjectural to assume that a particular effort to assert shareholder views in the election of directors or revisions of corporate policy will be frustrated by the proxy feature of the Plan.

Id. (emphasis supplied). Accordingly, the court held that the proxy limiting aspect of the Rights Plan was "defensible apart from its incidental consequence of limiting the proxy activity of those opposed to the Board's present policies." Id. (emphasis supplied). Thus, before upholding the poison pill, the Court of Chancery (later affirmed by the Supreme Court) required that its "effect upon proxy contests . . . be minimal." 500 A.2d at 1355.

The Henley Group, Inc. v. Santa Fe Southern Pacific Corporation, Del. Ch., C.A. No. 9569, Jacobs, V.C. (Mar. 11, 1988), provides an example of how these longstanding principles may come into play in a post-Unocal regime. Henley, a holder of 15.7 per cent of Santa Fe stock, disclosed in a Schedule 13D

filed on October 19, 1987 that it sought to

> maximize shareholder values. Specifically, Henley stated that it was considering a plan to obtain representation on the Board or to acquire control of Santa Fe, and that its plan could include "making a tender offer for some or all of the outstanding shares, soliciting proxies, or proposing a business combination with [Santa Fe]."

Slip op. at 8. In addition, O & Y, which owned about 6 per cent of Santa Fe, also showed an interest in acquiring the company. Santa Fe took several defensive measures. On December 8, 1987 the Santa Fe board amended its rights plan so that it would be triggered if holders of 20 per cent (rather than the original 50 per cent) of its stock came to "any agreement, arrangement or understanding . . . for the purpose of . . . voting securities of the Company." Id. at 5 n.5 (emphasis in opinion). The "clearly predictable effect" of this move was "to impede the ability of Henley and O & Y (or any other substantial stockholder) to conduct a joint proxy contest." Id. at 13. On January 25 and 26, 1988, the Santa Fe board also adopted a restructuring plan and issued a $5 payment-in-kind ("PIK") debenture with restrictions that would deter a highly-leveraged restructuring or acquisition.

After Henley brought suit seeking a declaration that the poison pill would not be triggered by discussions or agreements with other stockholders concerning voting, the Santa Fe board "carved out" an exception so that joint proxy solicitation would not trigger the poison pill. Henley continued

to challenge the reduction of the flip-in trigger to 20 per cent on the ground that action "suppressing the free exercise of proxy contest rights" was "per se unreasonable" under Unocal. Slip op. at 26. Citing Lerman and Aprahamian, the court agreed that it would view "darkly" an antitakeover action such as that taken by Atlas: one where, "in the midst of a proxy contest, the incumbent directors took measures that would assure the defeat of a dissident director slate or otherwise render a proxy contest futile." Slip op. at 28. But because the carve-out provision negated any claim of irreparable harm, the court did not address whether the proxy-inhibiting effect of the Santa Fe Rights Plan rose to that level.

Henley also argued that the PIK debentures were invalid under Unocal because "its sole intent was to wage a proxy contest which, as a matter of law, cannot constitute a threat under Unocal." Id. at 37. The court found this argument inapplicable to the case before it because Henley, unlike Blasius, "was considering, indeed might commence, a hostile tender offer." Id. at 37. In this case, of course, Blasius was not considering commencing a tender offer and, more importantly, never disclosed any intent to commence a tender offer. Under these circumstances, the Board's action in quashing the exercise of Blasius' right to initiate an election contest and Atlas stockholders' right to vote in that contest is manifestly unreasonable.

In Phillips v. Insituform of North America, Inc., Del. Ch., C.A. No. 9173, Allen, C. (Aug. 27, 1987), this Court revisited the dilution and "inequitable manipulation" lines of cases in light of Unocal. In considering, for example, the issuance of new shares for the purpose of diluting the holdings of a majority stockholder, the Court found "whether our law creates an unyielding prohibition to the issuance of stock for the primary purpose of depriving a controlling shareholder of control or whether, as Unocal suggest to my mind, such an extraordinary step might be justified in some circumstances, the issuance" of shares by the Insituform board was "an unjustified and invalid corporate act." Slip op. at 24.

Similarly, the Court need not determine whether there is an absolute prohibition against actions limiting a proxy contest in order to decide this case. The Court need only determine that, in light of continuing judicial solicitude for the stockholders' right to conduct and vote in a proxy contest, and in light of the non-coercive nature of the Blasius resolutions, Blasius' consent was no threat to Atlas -- and was certainly notthe kind of threat that would justify disenfranchisment of its own stockholders.

As a final note, we observe that there can be no "threat," as Atlas seems to believe, from the process chosen by Blasius to put this resolution to the stockholders: creation of

new directorships by means of a consent solicitation. First, stockholders unquestionably possess the right to create new directorships and fill them. As this Court stated in DiEleuterio v. Cavaliers of Delaware, Del. Ch., C.A. No. 8801, Allen C. (Feb. 9, 1987) "[t]he solicitude that this court has exhibited for more than fifty years for stockholder power to create new board positions when, in the judgment of the corporation's stockholders, the welfare of the enterprise requires such action, has not diminished. . . ." Slip op. at 21 (holding that stockholders' consent solicitation to create new directorship was valid and effective). Moreover, as we argued in Point I, supra, the consent procedure is authorized by statute and may be restricted or delayed only by charter amendment -- an approach which Atlas stockholders have themselves rejected. For all of these reasons, it was neither reasonable nor rational for the Board to believe that Blasius' non-coercive restructuring proposal, its precatory resolution, or its slate of nominees constituted a "threat" when Blasius simply sought to put its proposals to Atlas' stockholders.

B. Packing the Board Was Not a Reasonable Response to Any "Threat" Atlas Could Have Perceived

Atlas will be unable to show that the restructuring proposal has a coercive aspect. Blasius' restructuring proposal thus resembles the "non-coercive" all-cash tender for all shares

of Anderson, Clayton that this Court considered in AC Acquisitions v. Anderson, Clayton & Co., Del. Ch., 519 A.2d 103, 112 (1986). As this Court then said (in words that could now be used to describe the Blasius precatory resolution), that non-coercive "offer poses a 'threat' of any kind (other than a threat to the incumbency of the Board) only in a special sense and on the assumption that a majority of the Company's shareholders might prefer an alternative. . . . " 519 A.2d at 113. This Court went on to hold that, based on such an assumption, it was not reasonable for the Anderson, Clayton board to devise a response "so as to preclude as a practical matter shareholders from accepting" the all-cash offer.

Atlas' response to the Blasius consent -- packing the board and thereby preventing a majority of stockholders from electing a majority of the Board committed to investigating a restructuring program -- is an unreasonable response to such a minimal "threat." The law is clear that where the only "threat" is that a majority of stockholders might prefer that Atlas not be restructured along the lines proposed in Blasius' precatory resolution, a response that precludes the stockholders from considering, endorsing and ultimately implementing that resolution is not reasonable.

The analysis of Anderson, Clayton is persuasive precedent. In Anderson, Clayton a non-coercive tender offer was made

for all shares of the company. The only "threat" was that a majority of Anderson, Clayton stockholders might prefer to maintain an equity interest in the company. The Anderson, Clayton board responded by creating an alternative "Company Transaction." The Court endorsed the company's intent to let the stockholders choose what was in their own economic self-interest and found that "[t]he creation of such an alternative, with no other justification, serves a valid corporate purpose." 519 A.2d at 512. Nonetheless, the Court found that the Company Transaction was coercive in the sense that "an Anderson, Clayton stockholder, acting with economic rationality, has no effective choice as between the contending offers as presently constituted"; such a stockholder would be forced to tender into the Company Transaction." Id. at 114. The Court held that "a defensive step that. . . effectively preclude[s] a rational shareholder from accepting" a non-coercive offer cannot "be deemed reasonable in relation to any minimal threat posed to stockholders by such offer." Id. Because packing the board precludes Atlas stockholders from effectively choosing the option offered by the Blasius proposal, it is, under Anderson, Clayton, an unreasonable response to the Blasius consent. Atlas has thus violated the fiduciary duties set forth by Unocal.

III.

A MAJORITY OF ATLAS' STOCKHOLDERS HAVE THE RIGHT TO REMOVE BOARD-ELECTED DIRECTORS

Removal of directors by stockholders is governed by § 141(k) of the General Corporation Law which provides in pertinent part:

> Any director or the entire board of directors may be removed with or without cause, by the holders of a majority of shares then entitled to vote at an election of directors, except as follows:
>
> (1) Unless the certificate of incorporation otherwise provides, in the case of a corporation whose board is classified as provided in subsection (d) of this section, shareholders may effect such removal only for cause; 8 Del. C. 141(k)

Section 141(k) makes clear that the holders of a majority of shares entitled to vote are empowered to remove directors with or without cause, while subsection (1) of § 141(k) limits the applicability of that general rule. The issue here is (a) whether the limitation on stockholder power found in subsection (1) of § 141(k) extends to directors who have not been elected by stockholders as well as to directors who have been so elected and (b) if it does whether the language and history of Atlas Certificate of Incorporation Article VI "otherwise provides." We acknowledge at the outset that a reading of § 141(k) as it relates to § 141(d) might support Atlas' contention that § 141(k) protects all directors on a staggered board regardless of how elected. But

we submit that such a reading is (1) not the only plausible reading, (2) inconsistent with basic premises of Delaware law regarding the ability of stockholders to elect and remove directors -- an inconsistency highlighted by the context in which these directors were board chosen on December 31, 1987, (3) entirely inconsistent with the arguments and explanation offered to Atlas' stockholders in 1975 when they voted to create a staggered board, and (4) therefore inconsistent with Atlas' own certificate of incorporation.

Section 141 of the Delaware General Corporation Law was originally enacted in 1967 and regulates, inter alia, the composition of the board of directors, its qualifications and powers, committees and classes of directors. Section 141(d) authorizes up to three classes of directors and specifies the duration of the terms each class shall serve. Section 141(k)(1) states that "[u]nless the certificate of incorporation otherwise provides, in the case of a corporation whose board is classified as provided in subsection (d) of this section, shareholders may effect such removal only for cause[.]"

Section 141(k) was enacted in 1974 (effective date July 1, 1974) and has remained unchanged since its original enactment. Before 1974, Delaware had no specific statute governing the circumstances or procedure by which directors could be removed, and the provision was modelled largely after Section 39 of the

Model Business Corporation Act.[7] The provision of § 141(k) regarding removal for cause only of classified directors "unless the certificate of incorporation otherwise provides," has been viewed by at least one authority as the result of the Delaware legislature's "misreading" the decision in Essential Enterprises Corp. v. Automatic Steel Products, Inc., 159 A.2d 288 (Del. Ch. 1960).[8] Arsht and Black rely on Everett v. Transnation Dev. Corp., 267 A.2d 627 (Del. Ch. 1970) (where the Delaware Court of Chancery upheld removal without cause of a director removed pursuant to a by-law providing for such removal by holders of a majority of the stock where that by-law was adopted after the 1967 amendment), for their conclusion that even the Delaware courts themselves no longer follow Essential Enterprises. And they note that "Essential Enterprises does not suggest that a statutory provision authorizing staggered terms for directors lasting more than one year cannot be applied consistently with another statutory provision authorizing removal without cause."[9]

In light of this ambiguous legislative history we urge that Section 141(k) be interpreted to apply only to stockholder-elected directors. Such a reading would be entirely consistent with the purposes of § 141(k) and the contrary reading -- that

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7. R. Franklin Balotti and Jesse A. Finkelstein, The Delaware Law of Corporations and Business Reorganizations, § 141 at 77.
8. Arsht and Black, The Delaware General Corporation Law: Recent Amendments," 30 Bus. Law 1021, 1024-25 (1975).
9. Arsht and Black, supra note 5, at 1024-25.

urged by Atlas -- is inconsistent with a basic premise of Delaware corporate law "that since the stockholders are the owners of the corporation, the right of removal should turn not on the propriety of a director's conduct but on the bare question whether stockholders want to retain him as their representative." Arsht & Black, The Delaware General Corporation Law: Recent Amendments, 30 Bus. Law. 1021, 1024 (1975). In sum, § 141(k) should be interpreted narrowly to protect stockholder rights, not to eliminate them.

But, even if § 141(k) is read to apply to director elected members of a staggered board, unless the certificate otherwise provides, we believe that the language and history of Article VII of Atlas' certificate should be construed to otherwise so provide with respect to board elected directors only and thereby permit stockholders to remove board-elected directors without cause and stockholder-elected directors with cause. Article VII as adopted provides that "Directors elected by the holders of Common Stock may not be removed without cause." The clear specific language of Article VII limits the protection to only those directors elected by the holders of common stock. Clearly, the plain meaning of Article VII fails to support Atlas' contention that Article VII protects Board-elected directors from removal without cause.

Furthermore, the proxy materials which led to the

adoption of Article VII (sent to Atlas stockholders on or about October 15, 1975), belie Atlas' present interpretation of Article VII. In urging a vote "for" the proposed amendment creating a staggered board, Atlas three times told its stockholders that directors elected by common stockholders could only be removed for cause. Nowhere did they tell their stockholders that directors elected by other directors could not be removed without cause. In the notice for the 1975 proxy statement, Atlas told stockholders they were meeting "[t]o consider and vote upon a proposal to amend the Certificate of Incorporation in order to divide the directors elected by the holders of Common Stock into three classes, to provide that the total number of directors shall not be less than six nor more than fifteen, to prohibit removal of directors elected by the holders of Common Stock without cause. . . ." (1975 Proxy Notice at 1) (emphasis supplied). In the proxy statement itself, the Board recommended to its stockholders that they vote to amend the Atlas Certificate of Incorporation to include what is now Article VII and explained that "[v]acancies and newly created directorships resulting from any increase in the authorized number of directors could be filled by a majority of the directors then in office." After stating that directors could create new directorships and fill them, the proxy statement makes no mention that those Board-elected directors cannot be removed without cause. Rather, it goes on to explain that:

> The proposed amendment also provides that the total number of directors shall not be less than six nor more than fifteen, that directors elected by the holders of Common Stock may not be removed without cause. . . .

(1975 Proxy Statement at 2) (emphasis supplied). Finally, in explaining to its stockholders the anti-takeover effect of Article VII, Atlas reiterated that it was directors elected by holders of common stock who could not be removed without cause. As the proxy materials state:

> classifying the directors elected by the holders of Common Stock and prohibiting the removal of such directors without cause would make it more difficult for any such person or entity to take over management of the Corporation.

(1975 Proxy Statement at 3) (emphasis supplied). There can be no doubt that (1) "such directors" refers to "directors elected by the holders of Common Stock," (2) such directors may only be removed for cause and therefore (3) it is only directors elected by holders of common stock who may only be removed for cause. The proxy statement makes no reference whatsoever to the "fact" that directors elected by the Board also may only be removed for cause.

In light of the complete candor Delaware requires of a company communicating with its stockholders, we ask the Court to consider why the proxy statement three times states that only directors elected by common stockholders can be removed for cause but never once mentions that this same principle protects board-elected directors? The answer, we submit, is that Atlas did not

disclose such a result because it did not intend it. Mere oversight could not have caused the 1975 proxy scriveners to spell out that the Board could fill newly created directorships, and then fail to state that a vote for a staggered board would give the incumbent board power to appoint new members who could not be removed by the stockholders without cause.

In the face of this "legislative history" surrounding the adoption of Article VII we contend that Atlas' certificate "otherwise provides" that as to board elected directors, their removal without cause is permitted.

To explain away these inconsistencies in Article VII, Atlas has argued that the key language of Article VII "appears in a specific context relating to the rights and powers of preferred stock in the event of dividend arrearages on the stock." Atlas further contends that Article VII was "clearly intended only to protect the common stockholders' rights to continued representation on the board should the right to a board majority pass to the preferred stockholders." This strained reading fails for two reasons. First, the discussion in the Notice and on pages 2 and 3 of the 1975 proxy concerning the prohibition against removal without cause of "directors elected by the holders of Common Stock," demonstrates that this clause was never intended to "protect" common stockholders against preferred stockholders. None of the language in the proxy materials relates to a "specific

context" of preferred stock rights in the event of a dividend arrearage.

Second, the supposed threat to continued board representation for common stockholders in the event of a dividend arrearage does not exist. Atlas' Certificate of Incorporation at Article IV paragraph VI(c) provides that "[i]f at any time dividends on the Preferred Stock shall be unpaid in an amount equal to two full years' dividends thereon, the holders of the Preferred Stock, voting separately as a class, shall be entitled to elect the smallest number of directors necessary to constitute a majority of the Board of Directors as then constituted, and the holders of the Common Stock, voting separately as a class, shall be entitled to elect the remaining directors." Thus, if the Board is "unclassified and the preferred stockholders have the right to elect a board majority (voting as a class) those preferred holders have no right to remove the directors elected by the common stockholders (voting as a class) with or without cause. See also 8 Del. C. § 141(k)(2) (the final sentence of which codifies this rule). In sum, Atlas' explanation of the key language in Article VII is inconsistent with its own proxy material and incorrect as a matter of law.

Atlas also relies upon the "underlying purpose of the staggered board provision. . . ." But unless that "underlying purpose" is to transfer the power to elect board members from the

stockholders to the board itself, Atlas' argument must fail. Permitting directors to pack a board is hardly what the legislature had in mind in enacting § 141(k).

IV.

THIS COURT CAN AND SHOULD DETERMINE THAT THE INSPECTORS OF ELECTION INCORRECTLY TALLIED CONSENT MATERIALS

A. The Tallying Process.

On March 6, 1988, Blasius Industries, Inc. ("Blasius") delivered, pursuant to 8 Del. C. § 228, written consents of the stockholders of Atlas Corporation ("Atlas") representing the vote of a majority of the outstanding voting stock of Atlas. Thereafter, representatives of Blasius and Atlas met at the offices of Manufacturers Hanover Trust Company ("Manufacturers Hanover"), the inspector of election appointed by Atlas, to review the written consents and consent revocations delivered to the Company as of March 6. On March 17, Manufacturers Hanover issued a Final Tally Report (Shapiro Ex. 2), the results of which were confirmed by a March 22 Certification of the Stockholder Vote (the "March 22 Certification," Shapiro Ex. 2). As noted in the March 22 Certification, the number of shares entitled to vote as of January 7, 1988 -- the record date for the Blasius consent solicitation -- was 2,972,585 shares, of which a majority would be 1,486,293. According to the March 22 Certification as adjusted

pursuant to the correction of a mathematical error acknowledged during the April 25, 1988 testimony of one of the inspectors (Shapiro Dep. 81-88), the following number of unrevoked consents were voted in favor of the following items for which Blasius solicited stockholder consents:

The adoption of a non-binding resolution requesting and recommending the implementation of a restructuring program or, in the alternative, the sale of the corporation or substantially all of its assets for no less than $50 per share of common stock of Atlas	1,444,807
The amendment of the by-laws of Atlas to, among other things, increase the size of Atlas' board from seven to fifteen members	1,443,464
The removal without cause of directors Devaney and Winters	1,446,209
The election of eight new directors of Atlas Corporation	1,442,023
The election of up to seven directors of Atlas in the event Atlas has more than seven directors validly elected and serving at the time the written consents were delivered	1,441,234

According to the March 22 Certification, as well as the April 25 adjusted tally, none of the five Blasius proposals received the required majority (i.e., at least 1,486,293) to pass, and thus none were effective.

However, the March 22 Certification specifically

recognized that the manner in which the inspectors tallied certain consents and consent revocations was inconsistent with the manner in which certain record holders had in fact voted. Specifically, the inspectors noted that on March 10, 1988, a representative of the Independent Elections Corporation of America ("IECA") (an organization that votes proxies for various banks and brokers) advised the inspectors in a phone call that, prior to delivering separate white Blasius consent cards and blue Atlas consent revocation cards, IECA had matched consent and consent revocation cards received from beneficial owners, and executed white cards and blue cards containing the results of this matching and netting out.

As the testimony from IECA and non-IECA institutions made clear, the institutions voted only the last-dated card received from each beneficial owner. They tallied last dated consents for the Blasius proposal received on white cards on one master white Blasius card, last dated revocations received on blue Atlas cards (including revocations which were never preceded by consents and thus revoked nothing) on one master blue card and last dated consents voted on blue cards[10] on the same master blue Atlas card as well. Thus, the final, same dated master white and

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10. Record holders could consent to the Blasius proposals on either the white Blasius card or to the blue Atlas cards. In indicating the number of shares consenting to the Blasius proposals on the blue Atlas cards, IECA and the institutions generally marked these shares as consenting to Blasius or voting "against" Atlas.

blue cards submitted by IECA and non-IECA institutions reflected only unrevoked consents (cast on white and blue cards by beneficial owners). The master blue cards also tallied last dated revocations which had already been given effect by being matched with and revoking earlier dated consents and which were merely tallied on the master blue card but were clearly not intended to revoke unrelated consents shown on the master white card (or the same blue card).

The process followed by the institution of matching consents and counting only the last dated one received from beneficial owners is normal practice in counting proxies and consents. As Mr. Shapiro of Manufacturers Hanover explained:

> Q. So if there was a later dated blue card from the same owner, you would not count the white card, is that correct?
>
> A. We would put it aside
>
> Q. Why did you put it aside?
>
> A. Because we were not going to count it. Well, assuming that the blue card was valid. It was valid in other ways.
>
> Q. In you experience, was it normal practice, when counting in a proxy contest or consent solicitation, to try to match the white cards or the yes and the no votes from the same record owners?
>
> A. Yes.
>
> Q. And you did that to make sure -- why did you do that, tell me again?
>
> A. To determine that in the event that more than one card was received from the same individual, that we were clear which direction -- which way they were voting.

Q. You had never -- am I correct, that you had never been involved in the counting of cards in a contest in which you had not done that?

A. That's correct.

Shapiro Dep. 24-25.

As the note to the March 22 Certification makes clear, the inspectors did not consider IECA's advice in tallying votes. More important, they ignored their own experience and methodology and assumed that no other institution did the matching of cards and voting of only the last dated consent that Mr. Shapiro had employed every time he had counted cards in a contest. Instead of using their common sense and concluding that the institutions used the same matching methodology they did, on an institution-by-institution basis, Manufacturers Hanover looked at the "for" votes marked on each institution's blue Atlas revocation cards (indicating a vote "for" revocation) and subtracted this number from the total number of consents for Blasius contained on both the institution's white Blasius consent card and blue Atlas cards -- even though IECA had informed them that this was not the way cards it had submitted were to be tallied and even though it would only be appropriate to do that if the institution sending in the cards had not matched cards by beneficial owners and voted only the latest dated card.

Where the total number of consents for each institution exceeded the number of revocations or "for" votes on the

institution's blue card, the inspectors "netted out" the revocations from the total number of consents and counted only excess number of consents in its final tally for Blasius. See, e.g., Shapiro Dep. 90-91. The inspectors referred to this process as "netting-out". Where, however, the number of "for" votes or revocations on an institution's blue card exceeded the total number of consents for that institution, the inspectors did not count any of the consents from that institution in the final tally. See, e.g., Shapiro Dep. 91-92. The inspectors referred to this latter process as "zeroing-out" of consents. The March 22 Certification recognizes that the effect of this "netting out" and "zeroing-out" process was either to reduce the total number of white Blasius consents by the blue Atlas revocations or, for some institutions, to totally eliminate the tally of any white or blue Blasius consents because the blue Atlas revocations exceeded the consents which had been submitted.

The inspectors, though, were sensitive to the implications of the telephonic advice received from IECA and the questionable nature of what they were doing. Nevertheless they disregarded all contrary evidence apparently because they were advised to maintain "the consistency of the approach" even though they knew that in doing so they could be "making a mistake and that people were losing votes that should otherwise be counted" (Shapiro Dep. at 55-56, 61). Indeed precisely because of their

uneasiness, the inspectors "felt that [they] had to acknowledge that there were inconsistencies with the methodology that [they] followed, and [they] decided that [they] should present what those possible inconsistencies were with totals" (Shapiro Dep. at 60). Thus, the March 22 Certification -- what the inspectors deemed a "qualified" report (Shapiro Dep. at 61) -- has attached to it as Exhibit A a chart labeled "Institutional Reductions Resulting From Netting." According to that chart and the inspectors' own alternative tabulation method, a reversal of the "netting out" or "zeroing-out" method employed by the inspectors with respect to both IECA-voted consents and non-IECA consents (i.e., those voted directly by various banks, brokers and institutions) has the effect of adding from between nearly 57,000 to nearly 60,000 additional votes to the number received by Blasius for Proposals 1 through 5. If the netting out is reversed, and using the numbers the inspectors themselves have used, all five Blasius proposals received more than a majority of the stockholder consent required to pass.

B. The "Netting Out" And "Zeroing-Out" Method Is Wholly Irrational

On the face of the cards, it should have been apparent that the "netting-out" or "zeroing-out" method was incorrect. Both "netting out" and "zeroing out" are predicated upon the assumption that revocations on the blue Atlas cards "matched," or

represented the same shares as, consents on the while Blasius cards. But for a number of reasons, all clearly visible to the inspectors, that assumption was wrong.

First, for eighteen institutions, the number of revocations on the blue cards exceeded the revocations on the white cards. But how could there be more revocations of consents than consents, if the two represent the same shares. Second, for virtually all of these institutions the sum of the shares represented on the blue and white cards was less than the number of shares which each institution was entitled to vote. Looking at the face of the cards, there is no reason to suspect that any shares appeared on both a blue and a white card. Thus, there was no reason to assume that any shares had been voted twice, and no necessity to "net out" or "zero out." Third, as noted earlier, the inspectors knew that hundreds of individual stockholders had submitted blue Atlas revocation cards which did not revoke any previously delivered consent. In fact, nine boxes of such unmatched revocations were in the inspectors' possession. The inspectors properly did not "net out" those "revocations" from the overall tally in favor of the Blasius proposals, yet they surely knew that similar unmatched revocations were received from broker and institutional holders and were reflected on the blue Atlas cards received from them. Yet, by assuming that all of the revocations were matched with all of the consents on the white

cards, the inspectors assumed contrary to all reality, that the institutions had not received any "unmatched" revocations.

Based on the nine boxes of unmatched individual stockholder revocations in their possession as well as the illogic of the simultaneous voting and revocation of the same shares called for under their "netting out" method, the inspectors could have -- and should have -- found that the institutional revocations marked on the blue Atlas revocation cards executed by each institution represented different shares from those on the white Blasius consent cards.

The inspectors of election are entitled under Delaware law to construe and tally proxies (and written consents) submitted to them in a fashion which furthers the general Delaware policy of enfranchisement of shares. See Schott v. Climax Molybdenum Company, Del. Ch., 154 A.2d 221 at 223 (1959). In doing so, the inspectors are to rely primarily on the consents themselves as well as the regular books and records of the corporation, Williams v. Sterling Oil of Oklahoma, Inc., Del. Supr., 273 A.2d 264, 265 (1971), and are to use their experience and common sense in making judgments regarding the voting of proxies so as to avoid "arbitrary or unfair" results. Balotti, Finkelstein & Williams, Meetings of Stockholders 10.6 at p. 220 (1987 ed.). Here, however, the inspectors did not follow a common sense interpretation of the cards before them. While it has been held

that inspectors should not adduce and weigh extrinsic evidence as a means of resolving facially inconsistent proxies, it is not inconsistent with this rule for inspectors to receive and consider affidavits of employees of a brokerage house to explain how to resolve a broker overvote and to understand the procedures utilized by the institutional clerical record owners or authorized agent of the nominal depository record owner. Williams v. Sterling Oil of Oklahoma, Inc., supra at 264.

In all events, the inspectors could and under Williams should have taken into account the call received from IECA in determining how to handle the troublesome "netting-out" and "zeroing-out" issue rather than knowingly disenfranchising record stockholders for the sake of "consistency" in their methodology. Using available information, common sense, experience and judgment designed to promote enfranchisement, the inspectors should not have -- yet did -- reduce the institutional consent votes by unmatched institutional revocations, depriving Blasius of the margin of victory needed to win. The inspectors' knowing determination to disenfranchise a substantial and pivotal number of consents was erroneous and should be corrected by this Court as a part of its election review function.

C. The "Netting-Out" And "Zeroing-Out" Method Is Inconsistent With The Evidence Properly Before This Court.

Assuming, arguendo, that the inspectors' function is so limited or ministerial that they had no discretion to determine that "netting out" or "zeroing-out" was logically inappropriate, this Court is not bound by that determination and -- particularly in a situation where the inspectors have specifically invited review of the "netting out" and "zeroing-out" method -- has the plenary power to review the inspectors' determinations de novo to assure that record owners' votes were tallied correctly. Thus in Levin v. Metro-Goldwyn Mayer Inc., Del. Ch., 221 A.2d 499, 503-504 (1966), the court considered a board resolution and affidavits of directors of a registered owner of stock which "clearly establish[ed] the intent of such persons . . . to vote [the registered owners'] stock in favor of management's resolution. And in Investment Associates v. Standard Power and Light Corp., Del. Ch., 48 A.2d 501, 511 (1946), aff'd, Del. Supr., 51 A.2d 572 (1947), the Court viewed the testimony of an inspector of election who, as the inspectors have here, "tacitly conceded that a calculation error had been made, performed an independent calculation based on the evidence before it and determined that an error resulting in "an under-estimated total of votes cast for management had occurred." In re Election of Directors, Del. Ch., 102 A. 787, 788 (1917) (an inspectors finding that record owner

had no right to vote because its stock had been transferred was reversed on grounds that no transfer of record owner's stock had in fact occurred, the stocklist of company being in error in that regard); McLain v. Lanova Corporation, Del. Ch., 39 A.2d, 209, 211-12 (1944) (Court overturned inspectors' rejection of proxies signed in partnerships name on the grounds the record owner held no beneficial interest in stock and thus could not vote without directions from beneficial holders, finding evidence of beneficial owner authority irrelevant since record owner is, under Delaware law, authorized to vote the stock and record owner did so within scope of authority he possessed); In re Giant Portland Cement Co., Del. Ch., 21 A.2d 697, 701-702 (1941).

In this case, the record created by the inspectors in their March 22 Certification, the inspectors own consistent practices as well as the deposition testimony of IECA and all non-IECA brokers or institutions to whom the "netting out" method was applied, leaves no room for doubt that when the institutional record holders executed same-dated white Blasius consent and blue Atlas consent revocation cards they had already matched and "netted" consents and revocations obtained from beneficial owners, and thus the revocations submitted on blue Atlas cards represented only consents of beneficial holders whose last dated card was a "revoke" and whose revoke was unrelated to any consents being voted for Blasius on the white and blue cards and therefor could

not revoke those consents. Based on this review then, results of the alternative method of tallying the consents offered by the inspectors themselves should be accepted by the Court and the Blasius proposals found to have been adopted.

D. This Court Should Not Consider Evidence Purportedly Showing That Record Owners Failed To Accurately Tabulate And Incorporate Into The Consents And Revocations Delivered To The Inspectors Voting Instructions Received From Beneficial Owners.

While it is appropriate for this Court to assure itself that the inspectors of election tallied proxies received from record owners in a manner designed to accurately reflect the intentions of such holders and to enfranchise rather than disenfranchise the shares held by them, it is not appropriate in this summary proceeding for the Court to go behind the record vote to determine the intentions of beneficial owners or second guess the record holders' voting determination which was made based on communications received from their respective beneficial owners.

It is a bedrock of our corporate law that beneficial owners run the risk, when stock is held through record owners, that mistakes which could impair their voting rights may occur. American Hardware Corp. v. Savage Arms Corp., Del. Supr., 136 A.2d 690, 692 (1957) ("if an owner of stock chooses to register his shares in the name of a nominee, he takes the risks attendant upon such an arrangement, including the risk that he may not receive notice of corporate proceedings, or be able to obtain a proxy from

his nominee."); McLain v. Lanova Corp., Del. Ch., 39 A.2d 209, 211 (1944) (Court indicated that beneficial owners of street name shares are deemed to know that only the broker (or its nominee), whichever is the record holder, can vote the stock and stated that the way for a beneficial owner to protect his rights is to obtain a proxy from the record holder.). As the Delaware Supreme Court has recently stated, mistakes committed by record holders which adversely affect those who have chosen to hold only as beneficial owners are matters between the record and beneficial holders, the latter of whom can pursue whatever recourse is available against record holders for such mistakes. See, e.g., Enstar Corporation v. Senouf, Del. Supr., 535,A.2d 1351, 1354-55 (1987). And specifically in the context of a review of the validity of consents delivered to the company under 228, this Court has repeatedly held that action under 228 is to be strictly construed to limit voting power to record owners "as opposed to non-record owners claiming various beneficial interests and voting rights." Grynberg v. Burke, Del. Ch., Cons. C.A. Nos. 5198, 6480, Brown, V.C. (Aug. 13, 1981), slip op at 14-15; Olson v. Buffington, Del. Ch., C.A. No. 8042, Berger, V.C. (July 2, 1985) (recognizing the "Grynberg requirement that consents be executed by stockholders of record . . ." in rejecting consents voted by brokerage houses without authorization from the record-holder stock depository); Freeman v. Fabiniak, Del. Ch., C.A. No. 8035, Hartnett, V.C. (Aug.

15, 1985) slip op. at 14-15 ("only persons whose names appear on the stock ledger as stockholders or hold proxies from listed stockholders are qualified to act by written consent" and consents executed by purported beneficial stockholders are not to be considered in a 225 proceeding since beneficial owners have recourse against record owners to guarantee themselves the right to vote).

Absent a showing that beneficial owners have been, in the first instance, purposefully deprived of the chance to vote by record holders acting for their own benefit, there is no precedent which requires this Court to review extrinsic evidence received from beneficial owners to alter or correct purported mistakes in proxies submitted by record holders. In re Canal Construction Co., Del. Ch., 182 A. 545 (1936), for example, it was appropriate, due to the blatant fraud involved, for this Court to disregard votes cast by an administrator of a closed estate (who had already distributed shares to beneficial owners) who had the estate reopened for the sole purpose of voting stock in which he had no ownership interest but which was merely listed in his name in order to tip the balance in a control battle. Similarly, where the record owner knowingly votes in a manner inconsistent with or hostile to the interests of the beneficial owners, and also in his self interest, the vote may be disregarded once evidence is adduced. See Freeman v. Fabiniak, Del. Ch., C.A. No. 8035, supra,

slip op. at 19-20. But this Court should not, in the absence of a showing that beneficial stockholders have been actively defrauded or cheated out of the right to vote, permit a proxy or consent contestant to inject into consent review proceedings the question of whether a record owner has accurately followed the instructions of a beneficial owner in voting, just as this Court will not consider claims leveled by third parties involving mechanical defects in notice of corporate proceedings to the beneficial owners or the inability of a beneficial owner to obtain a proxy. See American Hardware Corp. v. Savage Arms Corp., Del. Supr., 136 A.2d 690, 692-93 (1957); Williams v. Sterling Oil of Oklahoma, Inc., Del. Ch., 267 A.2d 630, 634 (1970), rev'd on other grounds, Del. Supr., 273 A.2d 264 (1971).[11]

This Court has repeatedly recognized that Section 225 proceedings are summary in nature. Bossier v. Connell, Del. Ch., C.A. No. 8624, slip op. at 2 (Nov. 12, 1986); Folk, supra, 225.3 at p. 522. The historical reluctance of this Court to inject itself into the beneficial-record owner relationship is consistent with the narrow review this Court makes of the corporate election

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11. And as the Delaware Supreme Court has noted, while a beneficial owner may insist that a record owner vote in accordance with his wishes, if the beneficial owner does not himself assert his rights by making his views known but instead remains "silent and inert" equity will not come to his aid. Bay Newfoundland Co. v. Wilson & Co., Del. Supr., 37 A.2d 59, 63 (1944). See also In re Giant Portland Cement Co., Del. Ch. 21 A.2d 697, 703 (1941) (in the absence of an objection raised by a beneficial owner to the record owner's voting, consent is presumed).

process. And there are pragmatic reasons for not inviting a second guessing of the relationship of record and beneficial owners. As stated by the Delaware Supreme Court in Olivetti Underwood Corp. v. Jacques Coe & Co., Del. Supr., 217 A.2d 683 (1966):

> The corporation is entitled to confine itself to dealing with registered stock holders in intracorporate affairs such as mergers; it should avoid becoming involved in the affairs of registered stockholders vis-a-vis beneficial owners; and in so doing, in the best interests of all stock holders, the corporation should avoid becoming involved in the expensive and time consuming trial of such collateral issues in merger appraisal proceedings.

217 A.2d at 686 (emphasis added). See Salt Dome Oil Corp. v. Shenck, Del. Supr., 41 A.2d 583 (1945). Accordingly, the court in Olivetti held that the surviving corporation of a merger could not require brokers who were registered owners of stock in the merged corporation to prove that they were duly authorized by the beneficial owners to seek appraisal. The practical reasons stated in Olivetti -- the time, expense, delay and inevitable uncertainty of determining how the different parties viewed the relationship -- apply with even greater force to this Court's examination of proxies and written consents in a summary proceeding under Section 225. Williams v. Sterling Oil of Oklahoma, Inc., Del. Ch., 267 A.2d 630, 634-35 (1970), rev'd on other grounds, Del. Supr., 273 A.2d 264 (1971).

In this light, an examination of communications between record holders and beneficial holders or of the "intentions" of beneficial holders is inappropriate. While Blasius in this case restricted its depositions to those necessary to confirm the recognized problem of the inspectors' use of the "net-out" and "zero-out" methods, Atlas in response has taken over 30 depositions, in most of which it sought to obtain testimony from beneficial owners -- after the voting process had been completed -- to ascertain how they intended to vote weeks after their consents (or revocations) were submitted to record owners for tallying and voting. To consider evidence of this nature would mean the Court would no longer decide elections based upon established objective criteria developed in our case law but would be in the position of determining, based on statements made after a vote had been announced, how stockholders intended to vote. As former Chancellor Brown noted in Tamco Enterprises v. City Investing Co., Del. Ch., C.A. No. 7866, Brown, C., in declining to receive evidence which would facilitate "getting behind" the broker vote to determine how beneficial owners in fact intended to vote:

> We would have to take on about seventeen more judges . . . if we opened up that door and counted every time there is a challenge of that nature that could only be worked out by the Court.

(Excerpt of transcript of Dec. 21, 1984 hearing attached in

Appendix). Moreover, the Court found that injecting itself into the relationship between record and beneficial owners was unnecessary, unauthorized and a poor precedent with serious adverse implications for this Court:

> I understand your third application would be to, in effect, allow investigation of all of the proxies to go forward to, in effect, allow your forces to doublecheck everything or to bring the inspectors of election back, as the case may be, and let you see what you can find. And again, I understand that to be a position which is being advocated without the benefit of any authority that says specifically that can be done. And I am not aware of it. And it seems to me that it does have a rather vast potential. If either side under these conditions in a proxy contest can simply come in and the Court can say because there have been some errors found that, therefore, means that there probably are other errors that haven't been found and, therefore, we should bring up the whole thing to see what you can find, it seems to me that is a rather vast remedy to offer, and I can see that, as maybe has been suggested, would become an automatic thing to do by every party defeated in a proxy contest, because they would have nothing to lose. And in the meantime, while the search is going on to see if anything can be turned up, the action that was taken at the vote is hereby held up, and certainly in the corporate world where votes quite often are for the authorization to do things involving a lot of money and a lot of time and things of that nature, it seems to me that is getting into a bad precedent to establish particularly where there is, as I understand it based on what I have heard this morning, no existing precedent that would imply that should be done.

(Transcript at 50-51, emphasis added). Thus, in denying the request for broad post-election discovery of beneficial

stockholders the Court held:

> [W]ith regard to the request included in the application, as I perceive it, to be permitted to continue further discovery so that, in effect, Tamco as a shareholder of City Investing, unhappy with the result of the election, could thereby use the processes of the Court and the authority of the Court to inquire into the proxies and the beneficial ownerships, all the things that go with them, for the purpose of attempting to ascertain other bases for asking the vote to be set aside, I think that that is something which there is no authority for. And because of the drastic precedent that that would set, among other things, I would decline that part of the application, too.

(Transcript at 65-66, emphasis added).

And just how much of a quagmire with "vast potential" for problems this would be is perhaps best illustrated by the results of defendants' attempt -- over the objections of IECA -- to review every consent or consent revocation submitted by beneficial owners to IECA in this solicitation. On April 27, 1988 Justice Miller of the New York Supreme Court for New York County ruled that:

> IECA shall produce copies of all ballots for viewing by counsel for Atlas and its Delaware adversary within three (3) days after entry of this order at the offices of IECA, after IECA has redacted the names, addresses and signatures of objecting beneficial owners of Atlas stock. Atlas and its Delaware adversary shall select an independent auditor within the aforementioned three day period who would review all of the ballots for any irregularities when viewed by counsel in redacted form, and who then would prepare a complete tabulation of consents and revocations for the Delaware action. The independent auditor

> shall neither copy or remove any ballots or revocations from the premises of IECA, nor disclose to any party the names of any objecting beneficial owners of Atlas stock.

With an independent auditor now acting as a second-tier inspector of election preparing a second report once Atlas makes challenges to beneficial owner -- not record owner -- consents, not only has this election review sharply departed from the 228 mandate of considering only record ownership but Chancellor Brown's prediction has come to pass; new tiers of election review, challenge, delay and expense have crept into the normally summary proceedings designed to promptly resolve election disputes in Delaware.

It has not been, nor should it be, this Court's function to permit proxy or consent contestants the right to raise questions about the manner in which beneficial stockholders' instructions are adhered to by record owners when the beneficial owners themselves have not alleged that they have been cheated or defrauded of the opportunity to vote in the first instance. If such a course is permitted, this Court will be inundated with lengthy and complex election review applications which will be all but summary in nature, and we will run the unacceptable policy risk that corporate elections will be decided based upon the shifting sands of post-election testimony by beneficial owners as to their "intention" rather than upon the objective evidence of votes or consents executed as of a specific date by record holders.

V.

THE SIXTY-DAY PERIOD DURING WHICH CONSENTS SOLICITED IN CONNECTION WITH BLASIUS' JANUARY 7, 1988 CONSENT DID NOT EXPIRE ON OR BEFORE FEBRUARY 28, 1988 AND HAD NOT EXPIRED WHEN CONSENTS WERE DELIVERED ON MARCH 6, 1988.

On December 30, 1987, Cede & Co., as stockholder of record for 10,000 shares of Atlas stock beneficially owned by Blasius, executed and delivered to Atlas, at Blasius' direction, a written consent (the "December 30 consent") to the following stockholder actions:

1. The adoption of a precatory resolution advocating the restructuring of Atlas;

2. The amendment of the by-laws of Atlas to expand the board of directors from nine to fifteen which directorships may be filled by stockholder written consent;

3. The elimination in its entirety of Atlas' consent-regulating by-law; and

4. The election of eight new directors to the expanded Atlas board.

As detailed, supra, in response to the delivery of this consent to Atlas, the Atlas board met on December 31 and purported to expand itself from seven to nine directors, adding defendants Devaney and Winters. In direct response to Atlas' New Year's Eve expansion of the board, at Blasius' direction, Cede & Co. as the

record owner of 1,000 shares of Atlas stock owned by Blasius, executed a new consent which was delivered on January 7, 1988 to Atlas (the "January 7 consent"). This written consent gave approval to the elimination of Atlas' consent regulating by-law, the expansion of the board to fifteen directors, the adoption of a precatory resolution advocating the restructuring or sale of Atlas at a value to the stockholders of no less than $50 a share, the removal without cause of defendants Devaney and Winters and the election of either eight or, should the removal of Devaney and Winters not be accomplished, six directors to the Atlas board.

Blasius disseminated its Consent Statement on February 1, 1988 soliciting written consents from stockholders in support of its January 7 consent. The December 30 Consent was mentioned only as an historical artifact. See Consent Statement at 5, 7. The Consent Statement unequivocally stated the "unrevoked written consents of the holders of at least a majority of the class of common stock outstanding and entitled to vote on January 7, 1988, the record date for determining stockholders entitled to express Consent to the actions proposed by Blasius in this solicitation (the "Consent Record Date") must be obtained in order to effect the resolutions contained in the Consent." Consent Statement at 3. On March 6, 1988, Blasius delivered to Atlas written consents of stockholders, which when added to consents previously delivered to Atlas constituted more than a

majority of the outstanding voting stock of Atlas, consenting to the proposals contained in the January 7 Consent.

In a March 7, 1988 letter from Richard Weaver, President of Atlas, to Michael Lubin, CEO of Blasius, Atlas -- for the first time -- took the position that certain proposals contained in the January 7 consent could not have been validly adopted. The stated reason was that certain proposals were duplicative of proposals contained in the December 30 consent, i.e., the expansion of the board to fifteen members, the election of six or eight additional directors and the elimination of consent-regulating by-laws[12] and, thus, under § Del. C. § 228 (c) (which requires that a sufficient number of written consents to take the action referred to in the consent have to be delivered to the company within sixty days of the date of the first consent) the time for acting -- or 60 days from December 30 -- had expired on or before February 28, 1988. In their March 21 answer to the complaint filed in this consolidated action, Atlas raised this argument as its fourth affirmative defense.

A. The December 30 Consent Is Not Relevant For Purposes Of Computing The 60-Day Time Limit Contained In Section 228(c).

Section 228(c), as amended in 1987, provides in relevant

12. The only two deemed non-duplicative were the removal without cause of defendants Devaney and Winters and the adoption of the precatory resolution.

part that "no written consent shall be effective to take the corporate action referred to therein unless, within sixty days of the earliest dated consent delivered in the manner required by this Section to the corporation, written consents signed by a sufficient number of holders or members to take action are delivered to the corporation. . . ." A simple comparison of the form of written consent delivered to Atlas by Blasius on January 7 and subsequently solicited from the public by Blasius with the December 30 form of consent makes it clear that they are materially different. Blasius never solicited with respect to the December 30 consent and does not rely on that consent for purposes of adopting the proposals contained in the January 7 consent. The December 30 consent is different than the one which the inspectors and the Court have been asked to tabulate and it is simply irrelevant that the 60-day period with respect to that form of consent expired before the March 6 date when the balance of the January 7 consents were delivered to Blasius. Further, it is apparent from the Blasius consent statement that Blasius had effectively abandoned the December 30 consent.

Defendants apparently contend that the Court should focus on the phrase "effective to take the corporate action referred to therein," i.e., in the written consent, and should hold that, once action is proposed in any consent delivered to the Company, it must be taken by majority consent within 60 days;

otherwise,it can never be taken by written consent. In other words, the logical ramification of defendants' view is that since certain "corporation action [was] referred to" in the December 30 consent -- the 60 days passed without consents of a majority of the stockholders being delivered on these issues -- neither Blasius nor any other stockholder can ever effectuate that action -- board expansion to fifteen members, election of additional directors and the elimination of the consent-regulating by-law -- by written consent. This reading of § 228(c) is obviously nonsensical and also flies in the face of the clearly apparent fact that Blasius did not pursue the December 30 consent, but instead was forced to abandon it by reason of defendants' inequitable board-packing scheme.

B. Atlas Cannot Now Challenge The Adoption Of Proposals Contained In Both The December 30 and January 7 Consents.

On January 7, 1988 Atlas' Secretary -- Edgar Masinter -- wrote to Michael Lubin, Blasius' Chairman. Masinter told Lubin that Atlas had been prepared to provide Blasius with the stocklist materials Blasius requested on December 30 (along with the consent it delivered that day to Atlas) but that Atlas was no longer willing to do so because it had received a consent on January 7 that "differs in material respects" from the purpose for seeking a stocklist contained in Blasius' December 30 demand letter, which

was a solicitation of consents for December 30 consent.

On February 1, Blasius told Atlas' stockholders the following in its consent statement:

> If Blasius receives executed consents (the "Consents") from the holders of a majority of the Atlas shares by March 7, 1988, and those Consents are not revoked, Atlas stockholders will have given the Atlas board of directors a clear directive to maximize the value of Atlas stock now and provided the mechanism to accomplish the task. (emphasis added)

(Consent Statement at 1). Immediately after this statement, Blasius listed the proposals for which it was seeking stockholder consents, namely, those contained in the January 7 consent delivered after the New Year's Eve expansion of the board. (Consent Statement at 1, 3-4, 5-6). The Consent Statement also included the following statement:

> All Consents, regardless of when dated, will expire unless valid, unrevoked consents constituting a majority of the outstanding shares are delivered to the Company on or before March 7, 1988 (sixty days from the Consent Record Date). (emphasis added)

(Consent Statement at 24).

On February 5, 1988, Atlas sued Blasius in the Federal District Court for the District of Delaware alleging violations of Section 14(a) of the 1934 Act. Though Atlas contended, among other things, that Blasius had misstated the Delaware law relating to the ability of stockholders to remove a member of a staggered board without cause pursuant to 8 Del. C. § 141(k), Atlas did not

once suggest in any paper submitted to Judge Longobardi that Blasius had mischaracterized the Delaware law when it stated in its materials that the consents it was soliciting could validly be delivered until March 7, 1988. (Consent Statement at 24). To the contrary, Atlas' counsel repeatedly acknowledged that the consents Blasius was soliciting would expire, under § 228(c), after February 28. In the February 8 office conference with Judge Longobardi in which Atlas' counsel presented their motion to expedite proceedings, Atlas' counsel noted:

> [Scheduling] is also urgent, because as the consent statement itself reflects in the opening paragraph, the consent is only good, or the statements that they are seeking are only good through March 7. So that we seek an adjudication during the pendency of this consent solicitation.

(February 8 Transcript at 4) (emphasis added). During the March 1 oral argument before Judge Longobardi -- one day after the sixty-day period for effectiveness of consents expired under Atlas' current theory -- Atlas' counsel stated:

> One of the fundamental disingenuous statements, I think, in the papers submitted by Blasius is the suggestion that there will be a 25-day period from the time of the corrective disclosure until March 7, the final day in which the consent can be effective.

(Transcript of March 1 Argument at 9) (emphasis added). And on March 4, 1988, Judge Longobardi issued an opinion denying Atlas' application for a Section 14(a) preliminary injunction in which he relied upon the fact -- theretofore conceded by Atlas -- that the

consents solicited by Blasius had not yet expired. (March 4, 1988 Opinion at 22). In short, not until the election review process was underway and the inspectors had informed both sides of the preliminary tally did Atlas choose to raise its § 228(c) argument for the first time.

Estoppel arises where a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment. See Triplex Shoe Co. v. Rice & Hutchins, Del. Supr., 152 A. 342, 349 (1930) (if a party fails to object to stock being voted improperly, he will be prevented from challenging the vote); Wolf v. Globe Liquors Co., Del. Supr., 103 A.2d 774, 776 (1954), Wilson v. American Ins. Co., Del. Supr., 209 A.2d 902, 904 (1965); Kojro v. Sikorski, Del. Supr., 267 A.2d 603, 607 (1976); Mabon, Nugent & Co., et al. v. Texas American Energy Corp., et al., Del. Ch., C.A. No. 8578, Berger, V.C. (Jan. 27, 1988) (slip op. at 9-10). The related concept of laches bars a party, who with knowledge of an impending action, delays in challenging that transaction and sits by in silence, causing others to change their position. See Federal United v. Havender, Del. Supr., 11 A.2d 331 (1940); Elster v. American Airline, Inc., Del. Ch., 128 A.2d 801 (1957); Skouras v. Admiralty Enterprises, Inc., Del. Ch., 377 A.2d 16 (1971). Even if Atlas is correct that the sixty-day period for acting on Proposals 2, 4 and 5 did expire on or before February 28, (and

Blasius contends it did not), Blasius and all of the other stockholders of Atlas were misled by Atlas into believing that they had until at least March 7 to execute and deliver to the Company consents in favor of all five Blasius proposals.

It was not until after February 28 that Atlas choose to raise its § 228(c) argument, thereby precluding its own stockholders from executing their submissions of consents. If Atlas' view of § 228(c) is correct, Atlas consciously permitted Blasius to solicit and Atlas stockholders to vote in a meaningless fashion by not challenging Blasius' disclosure as to when the § 228(c) sixty-day period expired. Blasius and Atlas stockholders' having relied on Atlas' silence in this regard, and in light of Atlas' duty to see that its stockholders are properly informed, an estoppel arises which prevents Atlas from now asserting its § 228(c) consent expiration argument. See Haveg Corporation v. Guyer, Del. Supr., 226 A.2d 231, 234 (1967); Kojro v. Sikorski, supra at 607; Wolf v. Globe Liquors Co., supra at 776. Elster v. American Airline, Inc., supra; Federal United Corp. v. Havender, supra.

CONCLUSION

For the reasons stated above it is respectfully requested that the Court declare that:

(1) the election of Messrs. Devaney and Winters to the Atlas Board was improper as a matter of law and that election is null and void; or

(2) the Atlas stockholders have the power to remove Board elected directors without cause; and

(3) Blasius received consents from a majority of the shares eligible to vote as of January 7, 1988 for each of its five proposals.

Dated: April 29, 1988

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